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THE SOUTHEASTERN REPORTER VOLUME 75

(138 Ga. 173)

DUKE v. HUFFMAN et al.
(Supreme Court of Georgia. May 16, 1912.)

(Syllabus by the Court.)

1. DEEDS (§ 132*)—CONSTRUCTION—ESTATE CONVEYED.

Where a man conveyed property to his daughter for life, with remainder "to her children, or the representatives of children, living at the time of her death, and if she shall die without children, or the representatives of children, then living, said property is conveyed to her brother or brothers, and their children surviving," and where at the time of the making of the deed the grantor had two sons, both of whom died before the death of the life tenant, but each left children who survived her, upon her death without leaving children or representatives of children the children of her deceased brothers took the property per capita; there being nothing in the deed to indicate a different intention.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 366, 367, 372, 373; Dec. Dig. § 132.*]

(Additional Syllabus by Editorial Staff.)

2. DEEDS (§ 132*)—CONSTRUCTION—PARTIES—"SURVIVING."

In a deed to the grantor's daughter for life, with remainder to her children or their representatives living at her death, or if she should die without children then to her brother or brothers and their children surviving, the word "surviving" refers to surviving the life tenant, and not surviving their respective parents.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 366, 367, 372, 373; Dec. Dig. § 132.*]

For other definitions, see Words and Phrases, vol. 8, pp. 6825-6832.]

Error from Superior Court, Jones County; Jas. B. Park, Judge.

Action by Mattie Huffman and others against N. L. Duke. Judgment for plaintiffs, and defendant brings error. Affirmed.

Mattie Huffman and others filed their petition for partition of certain real estate, naming Mrs. Nannie L. Duke as defendant. The case was submitted to the presiding judge on an agreed statement of facts, in substance as follows: In 1872, Thad G. Holt, Sr., executed a "deed of conveyance to my wife, Nancy, and to my daughter, Ellen, to the property hereinafter described, on the considerations and with the reservations and conditions and limitations herein set forth." It recited a consideration of love and affec-

tion for his wife and daughter and a desire to save them the expense, trouble, and annoyance of administering on his estate after his death. It conveyed to his wife a house and lot where he resided, a farm containing 1,300 acres, another lot containing 90 acres, and certain personalty. It declared: "The above property is conveyed to and shall be for the sole and separate use of my said wife, Nancy, for and during her natural life, with the power of disposition by gift or will, to either or all of our children, in such proportions as she may deem proper." He conveyed to his daughter a plantation containing 600 acres and certain shares of stock. The deed then contained the following: "This property is conveyed to my daughter, deed shall be held for her sole and separate use for and during her natural life, and after death, to her children, or the representatives of children, living at the time of her death, and if she shall die without children, or the representatives of children, then living, said property is conveyed to her brother or brothers, and their children surviving. So likewise if my wife shall die without having disposed, by gift or will, of the property conveyed to her, the same is hereby conveyed to our children and the representatives of our children, in equal parts, then living." The grantor reserved to himself a use for life and a right to change the investment, if he should deem it best. Finally he constituted himself trustee for his wife and daughter. At the time of the making of the deed, the grantor had living his daughter, Ellen, and two sons, Allen and Thad, Jr. They died during the lifetime of the daughter. Allen left six children, who are still living. Thad Jr., left one child, now Mrs. Nannie L. Duke. When the deed was executed, Allen had two children. Four others were born to him thereafter. Nannie L. Duke was living when the deed was made. The grantor's daughter Ellen, died without children or representatives of children. The presiding judge held that the children of the deceased brothers of the grantor's daughter took per capita and not per stirpes, and that the land should be sold and the proceeds distributed accordingly. Mrs. Duke excepted.

Johnson & Johnson, of Gray, for plaintiff in error. West & Dasher, of Macon, for defendants in error.

LUMPKIN, J. (after stating the facts as above). [1] A man made a deed, by one clause of which he conveyed certain property to his daughter for life, and after her death, to her children, or the representatives of children, living at the time of her death; "and if she shall die without children, or representatives of children, then living, said property is conveyed to her brother or brothers, and their children surviving." The daughter died without leaving children or representatives of children. Her two brothers died before she died. One of them left six children; the other left one child. All of them are still in life. The question is whether, under the deed, they took the property per stirpes or per capita. In 30 Am. & Eng. Enc. Law (2d Ed.) 727, it is declared that: "Under a gift to 'children and grandchildren,' or to A. and the children of B., or to the children of several persons, whether it be to the children of A. and B., or to the children of A. and the children of B., or to A. and B. and their children, or to a class and their children, all take per capita in the absence of an intention to the contrary on the face of the will." This is quoted, as correctly stating the general rule, in *Almand v. Whitaker*, 113 Ga. 889, 890, 39 S. E. 295, though it is added that the presumption in favor of the per capita distribution yields readily in favor of any indication of a contrary intent. It was held that a will which gave property to named "children" of A., to named "heirs" of B., and to C., with provision for an "equal division," fell within such general rule, and, in the absence of anything to indicate a contrary intention on the part of the testator, gave the property to the beneficiaries per capita and not per stirpes. See, also, 2 *Jarman on Wills* (6th Ed., by Sweet and Sanger) 1711 et seq.

It would be unprofitable to discuss the numerous cases which have dealt with the question of whether a deed or will contemplated a distribution per capita or per stirpes. It will be found that often there was some peculiarity in the language or context which showed the intention of the grantor or testator, or that words of a different import from those employed in the deed now under consideration were used. The decision in *MacLean v. Williams*, 116 Ga. 257, 42 S. E. 485, 59 L. R. A. 125, was cited by counsel for the plaintiff in error as controlling in the present case. There the testatrix directed that two-thirds of the residue of her estate should "be distributed in equal shares to such persons in life at the time of my decease who would then be the heirs at law of my deceased husband had he survived me, and that the other one-third be distributed in equal shares to my own heirs at law then in life." It was held that the

distribution provided for among the heirs at law of the testatrix should be per stirpes and not per capita. There are two lines of authority where the word "heirs" is employed. One class of decisions holds that, as it is necessary to look to the statute of distributions in order to ascertain who are the heirs, in the absence of any words indicating a contrary intention, the law presumes the intention to be that they take as heirs would by the rules of descent. Some decisions hold that the use of such words as "in equal shares" will not alone suffice to control this presumption. Other authorities hold that, when the objects of a grantor's or testator's bounty have been determined by referring to the statute of distributions, the method of division is not to be determined with reference to that statute, but by the terms of the will itself. But decisions dealing with gifts to heirs have no application to the present case; nor are cases applicable, in which the words indicate a purpose to substitute certain persons or a certain class of persons in lieu of an ancestor, should he die before the time of distribution arrives, or when he was dead when the deed or will was made.

[2] In the deed before us, in case of the death of the grantor's daughter without leaving children or the representatives of children, the property was conveyed "to her brother or brothers, and their children surviving." It was contended that the word "surviving" meant children surviving their respective parents. We think that the word "surviving" refers to surviving the life tenant. This construction is more in accord with the spirit of the Civil Code 1910, § 3680. The daughter of the testator having died without leaving children, or representatives of children, this conveyance stood as one to her brother or brothers, and their children surviving her. A conveyance to a person, whether designated by name or description, and his children, creates a tenancy in common; so likewise of a conveyance to two persons and their children. Suppose that both of the brothers of the grantor's daughter had survived her; the conveyance would have been to them and their children surviving. This would have created a tenancy in common; each taking per capita. Had one brother survived, the conveyance would have been to him "and their children surviving," not the children of the deceased brother alone. In that event, there would have been a tenancy in common between the surviving brother and the surviving children of both brothers. As both brothers died before the death of the grantor's daughter, the conveyance was to "their children surviving." This, under the general rule above stated, conveyed the property to the children of both brothers per capita, and not per stirpes, unless there is something in the deed to show a contrary intent.

It was urged that a general testamentary scheme of substitution or representation ap-

peared, and that this was applicable to the children of the brothers of the life tenant, though the language used in regard to them was different from that employed elsewhere in the deed. In this view we cannot concur. Throughout the deed the grantor dealt with his sons and their children in a different manner from that employed in regard to his wife and daughter. He gave the sons nothing absolutely. He gave to his wife a considerable amount of land and personal property, for life, and empowered her to make a disposition thereof, by gift or will, to either or all of the children of herself and the grantor, in such proportions as she might deem proper. Thus she could discriminate among the children, or exclude one or more of them. It was provided that, if she should die without having exercised such power, the property conveyed to her "is hereby conveyed to our children, and the representatives of our children, in equal parts, then living." The word "representatives" was evidently not used as meaning administrators or executors, but those taking by representation or succession under deceased children, and persons who would stand in their stead. The grantor conveyed land and personalty to his daughter for life, and in that connection also provided for a remainder "to her children, or the representatives of children, living at the time of her death," and with a limitation over if she should die "without children, or the representatives of children, then living." The language thus employed shows that the grantor used words of representation wherever he intended for the descendants of a deceased child to stand instead of their parent and take per stirpes. But when he came to deal with the sons and their children, he abandoned this method of expression, and provided that, if his daughter should die without leaving children or representatives of children, "said property is conveyed to her brother or brothers, and their children surviving." Upon the happening of the contingency thus contemplated, the conveyance operated as one to the children of the grantor's sons; both sons being dead, and all their children surviving. A conveyance to the children of the grantor's two sons, with nothing to indicate a contrary intent, conveyed the property to them per capita.

It was contended that the use of the words "so likewise," in dealing with the contingency that the grantor's wife might die without exercising the power of disposition conferred upon her, showed an intent that the words of representation should apply to the clause of the deed now being considered. But the use of the words of representation in one case and not in the other tends to negative the idea that the grantor intended to make similar provisions in the two cases.

Judgment affirmed. All the Justices concur.

(133 Ga. 200)

HELMKEN v. FLOOD et al.

(Supreme Court of Georgia. May 16, 1912.)

(Syllabus by the Court.)

1. FRAUDULENT CONVEYANCES (§ 261*) — REMEDIES OF CREDITORS—PLEADING.

An equitable petition filed against a tenant, who is alleged to have vacated the leased premises after fraudulently conveying "all of the personal property" and "all of her real estate" to certain near relatives of the tenant for the purpose of preventing the collection of the rent out of the property so transferred, is not demurrable because the "insolvency" of the tenant is not alleged in terms by the use of the words "insolvent," or "insolvency."

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Cent. Dig. § 775; Dec. Dig. § 261.*]

2. LANDLORD AND TENANT (§ 221*)—ACTIONS FOR RENT—CONDITIONS PRECEDENT — DEMAND.

Where a contract of lease has been breached by the tenant because of nonpayment of rent and abandonment of the leased premises, and no provision is made in the lease contract for a demand to be made on the tenant for the rent before an action can be brought for its recovery, it is not necessary to make such demand prior to the filing of such suit.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. § 875; Dec. Dig. § 221.*]

3. ACTION (§ 46*)—JOINDER OF CAUSES—LEGAL AND EQUITABLE CAUSES.

Since the uniform procedure act of 1887, a landlord may proceed in one action to obtain a judgment for rent alleged to be due, and for the equitable relief of having canceled conveyances fraudulently made for the purpose of defeating the collection of such rent.

[Ed. Note.—For other cases, see *Action*, Cent. Dig. §§ 449-468; Dec. Dig. § 46.*]

Error from Superior Court, Chatham County; W. G. Charlton, Judge.

Action by Mrs. Mary Helmken against Mrs. Ellen M. Flood and others. Judgment for defendants, and plaintiff brings error. Reversed.

Oliver & Oliver, of Savannah, for plaintiff in error. D. C. Barrow, of Savannah, for defendants in error.

HILL, J. Mrs. Mary Helmken filed her equitable petition against Mrs. Ellen M. Flood, Mrs. Lavina Flood, and Mrs. Ellen M. Flood, as trustee for Margaret Flood, alleging that Mrs. Ellen M. Flood was indebted to her in the sum of \$610 for rent, by virtue of a certain lease contract, a copy of which was attached to the petition. It was also alleged that, in order to conceal her property and to remove it beyond reach of petitioner's claim for rent, Ellen M. Flood made two fraudulent conveyances, one to her daughter-in-law, Mrs. Lavina Flood, conveying to her all of the grantor's personal property, and the other to herself as trustee for her 12 year old daughter, Margaret Flood, conveying all of the grantor's real estate, with the stipulation that, upon the latter becoming of age, or marrying, the property should revert to the said Ellen M. Flood. A consideration of

\$100 was alleged in the case of the personal property, and "love and affection and one dollar" as the consideration for the deed to the real estate. It was alleged that there was no real consideration in either case, and that the title to the property was still in the debtor. Knowledge of the fraudulent intent was alleged in the transferees of the real and personal property, who were made parties to the suit. The petition prayed judgment in the sum of \$610 for rent, and also the cancellation of the alleged fraudulent conveyances in order to subject the property to the payment of the debt, if found due. The defendant filed a general demurrer to the petition, which was sustained by the court, and the plaintiff excepted.

[1] Did the petition set forth a cause of action? It is insisted by the defendants in error that it does not, for the reasons: (a) That there is no allegation in the petition that Ellen M. Flood, against whom judgment was prayed, was insolvent. (b) That there is no allegation that demand was ever made upon Mrs. Ellen M. Flood for payment of the sum claimed, and that she refused to pay the rent due.

While it is true that no allegation of insolvency on the part of the debtor was alleged in so many words, it is alleged that the debtor fraudulently conveyed *all* of her personal property to her daughter-in-law, and *all* of her real estate to herself as trustee for her daughter. If these allegations are true (and the demurrer admits them to be true), it is difficult to perceive how a person without real or personal property could be solvent, or otherwise than insolvent, and how a debtor could be made to respond to a judgment against her for her debts. Insolvency is "the condition of a person who is insolvent, or unable to pay his debts." 2 Blackstone, 285, 471; Bouvier's Law Dict. title "Insolvent." We think the allegations of the petition were equivalent to an allegation in terms that the debtor was insolvent.

[2] B. Our law declares that "no demand is necessary to the commencement of an action except in such cases as the law of the contract prescribes." Civil Code 1910, § 5512. The law does not provide for a demand in the case of rent. And the contract in this case does not prescribe for any demand before an action shall be commenced for the collection of rent. But it is insisted that a demand in this case is necessary, for the reason that Mrs. Flood, the debtor, could not know what was the amount of her indebtedness for rent due Mrs. Helmken, because the debtor could not know whether the premises had been re-leased and rent collected therefor. It is hardly conceivable that a tenant who had rented certain premises at a specified sum for a term of years did not know the amount of rent due her landlord, or could not ascertain the amount due upon the slightest inquiry, especially if any disposition to

pay the same was manifested. At any rate, we know of no law in a case like this which requires a demand to be made before suit is brought.

[3] Counsel for the defendant in error cite, among other authorities, Civil Code 1910, § 5495, which is as follows: "Creditors without a lien cannot, as a general rule, enjoin their debtors from disposing of property, nor obtain injunction or other extraordinary relief in equity." In the case of Booth v. Mohr, 122 Ga. 333, 50 S. E. 173, it was held: "Since the uniform procedure act of 1887 (Civil Code 1895, § 4937), creditors in one action may attack a sale made by their common debtor, as fraudulent, and obtain judgment against the debtor for their several demands." See, to the same effect, the cases of De Lacy v. Hurst, 83 Ga. 223, 9 S. E. 1052; Stillwell v. Savannah Grocery Co., 88 Ga. 144, 13 S. E. 963. Since the uniform procedure act of 1887, and the decisions of this court construing that act, it seems well settled that one who has legal and equitable rights may proceed in one suit to seek both legal and equitable relief. The present is such a case, and we think the petition set forth a legal and equitable cause for relief, and should not, therefore, have been dismissed on demurrer.

Judgment reversed. All the Justices concur.

(138 Ga. 195)

ZACHRY et al. v. MAYOR AND COUNCIL OF TOWN OF HARLEM et al.

(Supreme Court of Georgia. May 16, 1912.)

(Syllabus by the Court.)

1. STATUTES (§ 64*)—REQUISITES AND VALIDITY—EFFECT OF PARTIAL INVALIDITY.

A portion of a statute held to be unconstitutional cannot operate to ingraft by implication into the valid part thereof a grant of power to exercise the right of eminent domain, not conferred by the latter standing alone.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 58-66, 195; Dec. Dig. § 64.*]

2. EMINENT DOMAIN (§ 9*)—EXTENT OF POWER—MUNICIPAL CHARTER.

A power in a municipal charter "to lay off, to open and lay out such new streets in said town as the public interest may require," without any express authority being given to take private property for such purposes, or any provisions which would imply the grant of a power of condemnation, gives to the municipality no right to condemn private property for the purpose of opening a new street.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 27-34; Dec. Dig. § 9.*]

Error from Superior Court, Columbia County; H. C. Hammond, Judge.

Action by J. J. Zachry and others against the Mayor and Council of Town of Harlem and others. Judgment for defendants, and plaintiffs bring error. Reversed.

Hamilton Phinzy, of Augusta, for plaintiffs in error. Jno. T. West, of Thomson, for defendants in error.

HILL, J. The municipal authorities of the town of Harlem sought to condemn a strip of land through the property of Zachry and others (hereinafter called the plaintiffs) for the establishment of a new street, and the latter petitioned to enjoin against the proceedings. Upon the hearing, the court refused an interlocutory injunction, and the plaintiffs excepted. The town of Harlem claimed that the right to condemn was conferred by its charter, approved August 6, 1906 (Acts 1906, p. 797). The sole question at issue, as conceded by counsel for the defendants in error, is whether the municipality has authority under this charter to condemn property for the purpose of opening up a new street. In section 7 the power is given "to lay off, to open and lay out such new streets in said town as the public interest may require; to widen and straighten or otherwise change the streets, lanes, alleys, or sidewalks in said town." Section 32 provides: "And whenever the mayor and council shall exercise the power to lay out and open, to widen, straighten or otherwise change the streets and alleys in said town given by this act, they shall appoint two freeholders, and the owner or owners of the lots fronting on said streets or alleys shall, on five days' notice, appoint two freeholders, who shall proceed to assess the damage sustained or the advantage derived by the owner or owners of said lots in consequence of the opening, widening, straightening, or otherwise changing said streets and alleys." This language is followed by provisions for the appointment of an umpire in case the assessors cannot agree; for an appeal by either party from their award; and for the enforcement by execution of the final award in cases where it is against the lot owner. Upon the foregoing provisions of the charter depends the right of the municipality to condemn property for the purposes named. It is contended on behalf of the town that, even though section 32 be held to be invalid, the general powers given it by section 7, which have been quoted above, by necessary implication confer upon it the power of condemnation. And it is further insisted that although section 32 be invalid as a method of procedure, it is so far operative as to aid in construing the powers intended to be conferred by section 7, and that, so applied, it is clearly shown that in section 7 the Legislature impliedly gave the town the right to condemn land for the purpose of opening a new street. We consider first the contention last stated.

[1] Section 32 must be held to be invalid. At the time it was enacted in 1906, there was in existence the general law of 1894 (now embodied in Civil Code 1910, §§ 5206-5246), providing a uniform method of procedure to be used by all persons or corporations when taking or damaging private property for public uses. Section 32 is an attempt to enact a special law on the same

subject, and is repugnant to article 1, § 4, par. 1, of the Constitution of Georgia. Civil Code 1910, § 6391. Can this invalid section of the charter aid in the construction of what power the Legislature intended to confer on the municipality by granting it authority to open new streets, etc., in section 7, and add to the powers there enumerated an implied right to condemn property? In Cooley's Const. Lim. (7th Ed.) pp. 259, 260, it is said: "When a statute is adjudged to be unconstitutional, it is as if it had never been. Rights cannot be built up under it; it constitutes a protection to no one who has acted under it, and no one can be punished for having refused obedience to it before the decision was made. And what is true of an act void in toto is true also as to any part of an act which is found to be unconstitutional, and which, consequently, is to be regarded as having never been at any time possessed of any legal force." Certainly to incorporate into the legal portion of a statute a power derived by implication from an invalid portion thereof would be to give legal force and effect to the latter. Whether the illegal part can be used for any purpose of construction (for instance, to resolve an ambiguity and to make clear an intent already existing in the legal part of the statute but imperfectly expressed) is not in question and need not be considered. Here it is sought to give additional meaning and effect, by implication, to words in the valid part which do not of themselves carry evidence of the intent sought to be supplied. In *State v. Insurance Co. of North America*, 71 Neb. 320, 99 N. W. 36, 100 N. W. 405, 102 N. W. 1022, 106 N. W. 767, it was held: "Where a part of an act is unconstitutional, because contravening some provisions of the fundamental law, the language found in the invalid portion of the act can have no legal force or effect for any purpose whatever." In that case it was also specifically ruled that the portion of the act held to be invalid could not by implication operate to repeal an existing act, or any portion thereof. And see *Green v. Hutchinson*, 128 Ga. 379 (2), 57 S. E. 353. We are of the opinion that the language in section 32 cannot operate to confer any grant of authority to condemn land for the purpose of opening a street, by reading an implication from that section into the construction of the powers conferred by section 7 on the town of Harlem.

[2] Stripping the charter of this invalid section, the present case is controlled by the decisions in *Brunswick, etc., R. Co. v. Waycross*, 94 Ga. 102, 21 S. E. 145, and *Georgia Railroad Co. v. Union Point*, 119 Ga. 809, 47 S. E. 183. These authorities hold, in effect, that the grant to a municipality of the power to lay out, open, widen, straighten, or otherwise change streets in the city, without any express grant of the power of condemnation, or provisions in the charter

from which an intent to grant this power is necessarily implied, contemplates the acquisition of the property necessary for such purposes by contract, and there is no authority to take it by condemnation proceedings. And this principle is recognized in *Stone v. Newborn*, 127 Ga. 422, 56 S. E. 516; *Georgia Railroad v. Decatur*, 129 Ga. 505, 59 S. E. 217. The only case in seeming conflict with the foregoing is that of *Trustees of Atlanta University v. Atlanta*, 93 Ga. 468, 21 S. E. 74. This apparent conflict arises from the fact that the holding is broadly stated in the first headnote, to the effect that, under a grant of power to the city of Atlanta, "to open, lay out, widen, straighten, or to otherwise change streets, alleys, and squares in said city," the corporate authorities may condemn property for public use. But in the opinion (at pages 476 and 477 of 93 Ga., at page 75 of 21 S. E.) it is made to appear that section 60 of the charter, in which the words above quoted appear, contained also the provision that, "whenever the said mayor and general council shall exercise the power above delegated," they shall proceed in a named manner to assess damages, etc. This was prior to the general law of 1894, hereinbefore referred to, and the constitutionality of such provisions was not in question. And, continuing, the court said: "Subsequent amendments of the charter, while they vary somewhat the details of the procedure, do not restrict the power of condemnation itself." One of these amendments, approved December 24, 1886 (Acts 1886, p. 239, § 4), made provision that, "whenever it is proposed that any property be taken for public use," it should be optional with the city to decline to take it if the price fixed, or the award made, was deemed by the general counsel to be unreasonable. And another amendment, approved December 27, 1890 (Acts 1890-91, vol. 2, p. 446), changing the method of arriving at an award when the city shall desire or may be taking steps to open streets, etc., had the following title: "An act to amend 'an act establishing a new charter for the city of Atlanta,' approved February 28, 1874, and the several acts amendatory thereto, so as to provide for a more perfect method of condemning private property for opening or widening streets, lanes, and alleys in said city, and for other purposes." From the foregoing it will appear that the decision in *Trustees v. Atlanta*, supra, was made when construing a general power to open, lay out, etc., streets, considered in connection with additional charter provisions which indicated that it was intended to give the municipality the right to exercise the powers granted, by compelling the property owner to part with his land when needed by the municipality; and the decision was not founded solely on the charter provisions quoted in the first head-

note. Whenever the question has depended upon whether a general charter power to lay out, open, widen, or change municipal highways, standing alone, by implication gave the municipality the right to condemn property for such purposes, the decisions have uniformly adhered to the doctrine that such naked powers conferred no such right, but contemplated the acquirement by contract of whatever property was needed for the purposes referred to. As we have pointed out above, the charter of the town of Harlem, with respect to the powers in reference to streets conferred upon it by section 7, must be construed as though the invalid provisions of section 32 had never been enacted, and so construed with that section stricken does not confer on that municipality any power to condemn private property for the purposes of opening a new street.

The court below erred in refusing to grant the plaintiffs the injunction for which they prayed.

Judgment reversed. All the Justices concur.

(128 Ga. 186)

KELLEY BROS. v. STOVALL.

(Supreme Court of Georgia. May 18, 1912.)

(Syllabus by the Court.)

EXECUTION (§ 196*)—CLAIMS BY THIRD PERSONS—QUESTIONS OF LAW OR FACT.

On the trial of a claim case, where the issue is the bona fides of a transfer of property by the defendant in execution to the claimant, and there are circumstances which, if not satisfactorily explained, may be regarded as badges of fraud, it is for the jury, and not the judge, to pass upon such issues.

[Ed. Note.—For other cases, see Execution, Cent. Dig. § 576; Dec. Dig. § 196.*]

Error from Superior Court, Fulton County; Geo. L. Bell, Judge.

A *fi. fa.* in favor of Kelley Bros., for the use of Kelley Bros. Company, was levied against M. E. and C. C. Stovall, and a claim was filed by Beulah W. Stovall. Judgment for claimant, and plaintiffs in *fi. fa.* bring error. Reversed.

Jas. L. Key, of Atlanta, for plaintiffs in error. D. K. Johnston and J. D. Kilpatrick, both of Atlanta, for defendant in error.

EVANS, P. J. A *fi. fa.* in favor of Kelley Bros., for the use of Kelley Bros. Company, against M. E. and C. C. Stovall, was levied on certain real estate as the property of the defendants, and a claim was filed by Beulah W. Stovall. On the trial of the claim case it appeared that the defendants in *fi. fa.* were husband and wife, and began doing a grocery business in 1906, making during this year a report to a commercial agency, showing that they were partners, and listed the property levied on as a firm asset. The suit out of which the *fi. fa.* issued was filed

on January 23, 1908. To this suit a plea of no partnership was filed by M. E. Stovall, and the jury found against the plea. On December 28, 1907, C. C. Stovall, on a consideration of love and affection, conveyed to his wife, M. E. Stovall, a half undivided interest in the property; and on January 25, 1908, Mattie E. Stovall deeded the property to the claimant. The plaintiff's debt was in existence at the time of these conveyances. The property was returned for taxes in 1907 by C. C. and M. E. Stovall as a firm asset, and returned by the claimant in 1908. The application of C. C. Stovall for homestead, dated January 9, 1909, showing 25 creditors and an indebtedness of \$671.17, and assets in the nature of a stock of goods in the amount of \$799.90, was introduced in evidence; also a petition in bankruptcy filed against the firm on February 2, 1908. The receiver appointed in this proceeding testified that he found the defendants, Mattie E. and C. C. Stovall, in possession, and that he made demand on Mrs. Stovall for the money and notes, the proceeds of the sale of the land, and she denied that she had either. Beulah W. Stovall claimed to have bought the property through her husband, Sam C. Stovall, the brother of C. C. Stovall, on March 1, 1907; the consideration being \$3,000 in cash and the assumption of a \$1,400 mortgage on the property. Claimant had never been on the property when she bought it, received no bond for title when she made the first payment of \$1,500, and gave no notes for the balance of the purchase money. No time was agreed upon for the payment of the balance of the purchase price. Defendants in *fi. fa.* remained in possession of the property until March 10, 1908. The final payment of \$500 was made on January 25, 1908, the date of the execution of the deed.

We think that the court should have allowed the jury to pass on the evidence as to bona fides of the transfer of the property by the defendants in *fi. fa.* to the claimant. The negotiation of the transfer of the property was between two brothers, one of whom was joint defendant with his wife, for whom he was acting, and the other was the husband of the claimant. The sale of the property was proposed over the telephone, and the price agreed upon, and most of it paid, without other inspection than seeing it from the outside. The claimant agreed to pay \$3,000 and assume an incumbrance of \$1,400. Of this sum the claimant contends that she paid \$1,500 March 1, 1907, and \$1,000 on September 2, 1907, without taking bond for title or other writing evidencing the sale. The defendants in *fi. fa.* remained in possession of the property about a year without the payment of rent, but only paid the interest on the \$1,400. "On the trial of the right of property under our claim laws, the possession of the defend-

ant in execution after an absolute sale of the property levied on is prima facie evidence of fraud." *Carter v. Stanfield*, 8 Ga. 49. The sufficiency of the explanation of such possession is for the jury's determination. Intermediate the time when the claimant contends she purchased the property from C. C. Stovall and his wife and paid them \$2,500, and the time of the last payment and the making of the conveyance C. C. Stovall made a voluntary conveyance of his share in the property to his wife. About the time of this conveyance the creditor was threatening suit, and the suit was actually filed within about three weeks. Mrs. Mattie Stovall and C. C. Stovall were jointly sued, and she defended on the ground that she was not a partner in the firm, which issue was determined against her. What was the purpose of making this voluntary deed does not appear. It is not explained. The claimant and the defendants were positive that all the money was paid to Mrs. Mattie Stovall, and none to C. C. Stovall. We think the jury should have been permitted to pass upon the bona fides of the transfer of the property by the defendant in *fi. fa.* to the claimant.

Judgment reversed. All the Justices concur.

(133 Ga. 232)

SISTRUNK v. MANGUM, Sheriff.

(Supreme Court of Georgia. April 12, 1912.)

(Syllabus by the Court.)

APPEAL AND ERROR (§ 511*)—RECORD—MATTERS TO BE SHOWN—TIME OF PRESENTATION OF BILL OF EXCEPTIONS.

Where a judgment of the court refusing to grant a mandamus absolute was rendered in term on December 14, 1911, and the bill of exceptions assigning error thereon was certified on January 5, 1912, and there is nothing in the bill of exceptions, or the entries thereon, or the record, showing that the bill of exceptions was presented to the judge within 20 days from the date of the decision complained of, the Supreme Court is without jurisdiction to entertain the writ of error and it must be dismissed. *Thompson v. McGhee*, 93 Ga. 254, 19 S. E. 32; *Holder v. Jelks*, 116 Ga. 134, 42 S. E. 400; *Crawford v. Goodwin*, 128 Ga. 134 (1), 57 S. E. 240, and cases cited; *Curtis v. Town of Mansfield*, 132 Ga. 444, 64 S. E. 327, and cases cited.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2319-2321; Dec. Dig. § 511.*]

Error from Superior Court, Fulton County; J. T. Pendleton, Judge.

Action by J. E. Sistrunk for mandamus to C. W. Mangum, Sheriff. Judgment for defendant, and plaintiff brings error. Dismissed.

J. E. Sistrunk, of Atlanta, in pro. per. Daley & Chambers, of Atlanta, for defendant in error.

FISH, C. J. Writ of error dismissed. All the Justices concur.

(133 Ga. 229)

SWIFT v. NEVIUS.

(Supreme Court of Georgia. May 16, 1912.)

*(Syllabus by the Court.)***1. DISMISSAL OF WRIT OF ERROR — MOTION DENIED.**

The motion to dismiss the writ of error was without merit.

2. EJECTMENT (§ 69*)—PLEADING — SUFFICIENCY.

To an action of ejectment the defendant filed an equitable plea, disclaiming title to a half interest, and asserting an equitable title to the other half interest. In brief he alleged that he became possessed of information as to a valuable source of water supply which could be purchased, located near a city and suitable for use in furnishing water thereto; that he entered into an agreement with a person in a distant state, who had no information as to these facts, by which it was agreed that such person (a lessor of the fictitious plaintiff) should furnish money to pay for the expenses of negotiation for the property and other incidental expenses, and to pay the purchase money, if the land could be procured, the defendant furnishing the information which he had and agreeing to perform certain services; that it was agreed they should each own a half interest, if the purchase was made; that he fully complied with his contract, and the property was bought, but, for certain purposes of exploitation through an engineering company, the title was made to the other party to the agreement; that the defendant took possession and managed the property for the benefit of himself and such party; and that another lessor of the plaintiff, who apparently took a deed from the party making such agreement with the defendant, did so with full knowledge of the facts. A decree establishing the equitable right of the defendant was prayed. *Held*, that such equitable plea was not subject to general demurrer.

(a) The special demurrers were not passed on by the presiding judge.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. §§ 181-189; Dec. Dig. § 69.*]

Error from Superior Court, Harris County; S. P. Gilbert, Judge.

Action of ejectment on the demise of Franklin Nevius against C. W. Swift. Judgment for plaintiff, and defendant brings error. Reversed.

An action of ejectment in the common-law form was brought against Charles W. Swift; demises being laid from J. C. Reid, J. A. Reid, William C. McFarland, and Franklin Nevius. The defendant filed equitable pleading, of which it is only necessary to set out the following parts: Defendant discovered that certain property near Columbus, known as the Blue Spring property, and for which this suit is brought, had on it a fine supply of water, which could be carried to Columbus by the gravity system, and furnished to the public. The property was also valuable as an investment, aside from this. While defendant was in New York, he received a letter informing him of the existence of a lack of adequate water supply in Columbus, and of a serious condition resulting therefrom. He mentioned this letter to J. B. McFarland, and also remarked that he believed

he knew of sources of water which were desirable for furnishing water to that place. This led to other conversations and negotiations between him and McFarland, and it was finally agreed that the defendant should go to Georgia, in order to negotiate for the purchase of the Blue Spring place; that McFarland should defray the expenses of the trip and all other expenses incident to the negotiation and purchase, and should furnish the purchase money; and that, if the purchase were made, they should be co-owners, with equal interests, and the written option and deed should be made accordingly. Defendant went to Columbus and obtained a written option to buy the land, which was made in the name of himself and McFarland. He also performed all the services which he had agreed to do. Various transactions were set out in detail. Among other things, in order to obtain a sufficient supply of water for municipal purposes, it developed that it would also be necessary to obtain what was called in the pleading the "Barnes Creek" watershed; and an option was obtained on it by the defendant, and ratified by McFarland. Deeds were made in escrow. When they were taken up, defendant agreed that the one to the Blue Spring place might be changed so as to be put in the name of McFarland, for no other purpose than as a matter of convenience in handling the property by him and by an engineering company, through which it was to be exploited, and for the use and benefit of defendant as to a half interest. Since the taking and record of the deeds to the two properties, defendant has been in the peaceable and undisturbed possession of his one-half interest, and caring for the whole property in the interest of himself and McFarland. It was agreed between them that they would not try to make any profit by renting the land, but only have a caretaker occupy the dwelling house, and have a small amount of cultivation done, to occupy the persons living on the land. No mesne profits have accrued, and the time and attention which the defendant has devoted to this has caused him loss much exceeding in value the taxes which have been paid. Certain lessors of the plaintiff were former owners before these transactions occurred. Nevius, if a grantee from McFarland, is such with full notice of all the facts. Defendant prayed for a decree establishing his interest. By amendment he prayed for partition, and for a sale of the land for that purpose. On general demurrer the court dismissed the defendant's equitable plea, and a verdict and judgment were rendered against him. He excepted.

G. Y. Tigner, Hatcher & Hatcher, and Chas. J. Swift, all of Columbus, for plaintiff in error. Slade & Swift and A. W. Cozart, all of Columbus, for defendant in error.

LUMPKIN, J. (after stating the facts as above). An action of ejectment was brought against C. W. Swift, upon the demises of W. C. McFarland, Frank Nevius, and others. The defendant filed an equitable defense as to an undivided half interest in the land, and this was later amended. The plaintiff filed general and special demurrers to the answer as amended. The court sustained the general demurrer, and upon the making out of a prima facie case by the plaintiff, and the failure of the defendant to introduce any evidence, directed a verdict for the plaintiff, and a judgment was entered accordingly. The defendant excepted, and specifically assigned error on the sustaining of the demurrer to his equitable defense.

[1] 1. A motion to dismiss the writ of error was made; but, under the ruling in *Lyndon v. Georgia Ry., etc., Co.*, 129 Ga. 853, 58 S. E. 1047, it is overruled.

[2] 2. The essence of the equitable defense, as to the Blue Ridge place, is that the defendant and McFarland entered into an agreement to buy the property together. McFarland was to put up the money for expenses and for the purchase price, if the land was obtained. Swift, the defendant, gave certain valuable information which he had acquired as to the location, water supply, etc., and was to negotiate for the purchase, and perform certain other services. He fully complied with his agreement, and thus in effect paid his part of the purchase price. For convenience in exploiting the property in connection with a plan to furnish water to the city of Columbus, in which a certain engineering company was to take a part, the deed was taken in the name of McFarland, by agreement between him and the defendant, and for the benefit of both. The defendant took possession of the property, and has managed it in accordance with the agreement between him and McFarland on that subject. If Nevius, a lessor of the fictitious plaintiff, has taken a conveyance from McFarland, he has done so with full knowledge of the facts. If these facts are true, as the demurrer admits them to be, an implied trust exists in favor of the defendant as to a half interest in the Blue Spring property. Civil Code 1910, § 3739. This is not an effort to set up an express trust by parol; nor is the defense subject to the objection that it is an effort to enforce a parol promise contemporaneous with the making of a deed. That there are many vague and indefinite allegations contained in the defendant's pleadings is undoubtedly true, as contended by counsel for the plaintiff. But enough clearly and distinctly appears to save the case from dismissal on general demurrer; and the judge of the trial court did not pass on the special demurrer, of which there were some 40 or 50 grounds.

In reference to what was referred to as

the Barnes Creek watershed, the allegations of the equitable plea were entirely too indefinite for this court to determine whether the defendant has any equitable right as to it or not. But if not, this did not authorize the dismissal of the entire equitable defense on general demurrer; the action of ejectment having been brought to recover the Blue Spring place, and the defendant having set up an equitable right as to it, as above indicated.

Judgment reversed. All the Justices concur.

(11 Ga. App. 265)

BOYNTON v. STATE. (No. 4,186.)

(Court of Appeals of Georgia. June 5, 1912.)

(*Syllabus by the Court.*)

CRIMINAL LAW (§ 1158*)—TRIAL—QUESTIONS OF FACT—CREDIBILITY OF WITNESSES.

No question of law is raised by the record. The county court judge tried the accused without the intervention of a jury, and the credibility of the witnesses was for his determination. The evidence supports the finding.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 3061-3066, 3070, 3071, 3074; Dec. Dig. § 1158.*]

Error from Superior Court, Henry County; R. T. Daniel, Judge.

Will Boynton was convicted of crime, and brings error. Affirmed.

P. H. Brewster, Jr., of Jacksonville, Fla., and Munday & Cornwell, of Atlanta, for plaintiff in error. J. W. Wise, Sol. Gen., of Fayetteville, for the State.

HILL, C. J. Judgment affirmed.

(11 Ga. App. 245)

ATLANTA WOODENWARE CO. v. FRANKLIN & RIDLEY. (No. 4,081.)

(Court of Appeals of Georgia. June 5, 1912.)

(*Syllabus by the Court.*)

CERTIORARI (§ 61*)—PROCEEDINGS FOR TRANSFER OF CAUSE—NOTICE—WAIVER.

While the statute requires in express terms that the plaintiff in certiorari shall cause written notice to be given to the opposite party, his agent or attorney, of the sanction of the writ of the certiorari and also of the time and place of hearing at least 10 days before the sitting of the court to which the same is returnable, and that in default of such notice, unless prevented by unavoidable cause, the certiorari shall be dismissed (Civ. Code 1910, § 5190), and while it has been repeatedly ruled by the Supreme Court and this court that this mandatory requirement as to notice must be obeyed, or there must appear in the record a written waiver of this notice, or the certiorari will be dismissed (*McConnell v. Folsom*, 4 Ga. App. 535, 61 S. E. 1051, and citations), yet where it appears from the record that the defendant in certiorari filed exceptions to the answer of the magistrate, and that these exceptions were heard and overruled by the judge of the superior court, it is too late to raise the question of want of the statutory notice. The defendant in certiorari hav-

ing actually appeared in the case in the superior court, and filed exceptions to the answer of the magistrate, and having invoked a hearing on these exceptions, it would be trifling with the court for him subsequently to be allowed, when his exceptions had been overruled, to complain that he had not received the notice required by the statute.

[Ed. Note.—For other cases, see *Certiorari*, Cent. Dig. §§ 168, 169; Dec. Dig. § 61.*]

Error from Superior Court, Pulaski County; J. H. Martin, Judge.

Action between the Atlanta Woodenware Company and Franklin & Ridley. From the judgment, the Atlanta Woodenware Company brings error. Reversed.

Marion Turner, of Hawkinsville, for plaintiff in error. W. L. & Warren Grice, for defendants in error.

HILL, C. J. Judgment reversed.

(11 Ga. App. 268)

ROBERTS v. CITY OF COVINGTON.

(No. 4,191.)

(Court of Appeals of Georgia. June 5, 1912.)

(*Syllabus by the Court.*)

INTOXICATING LIQUORS (§ 236*)—UNLAWFUL SALE—EVIDENCE.

The evidence raised a suspicion that the accused may have been guilty, but was wholly insufficient to justify his conviction.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. §§ 300-322; Dec. Dig. § 236.*]

Error from Superior Court, Newton County; L. S. Roan, Judge.

Marsh Roberts was convicted of an illegal sale of liquors in violation of an ordinance of the City of Covington, and brings error. Reversed.

A. L. Loyd, of Covington, for plaintiff in error. C. C. King, of Covington, for defendant in error.

POTTLE, J. The accused was convicted in a municipal court of having intoxicating liquor for the purpose of unlawful sale. The city marshal testified that the accused was "believed to be a blind tiger of the worst kind," and he had been trying for two years to catch the accused with enough liquor to justify his arrest. Finally one night the accused stopped his buggy near a barber shop, got out of the buggy, and went into the shop. During his absence the marshal went to the buggy and found in it, under an oilcloth, one gallon bottle filled with whisky, and another gallon bottle with about a quart in it. The arrest of the accused followed. The chief of police testified that he had frequently made unsuccessful efforts to catch the accused selling whisky. It seems that the accused was permitted to testify. He denied having the whisky for the purpose of selling it, claimed that he had gotten it out of the express office

some time before, and that he and some other persons had consumed about three quarts of the whisky from one of the bottles. This is all of the evidence.

The accused may have been, and probably was, a "traveling blind tiger"; but it takes something more to convict than suspicion or the "belief" of the city marshal that the accused had the whisky for an unlawful purpose. The police were overzealous and sprang the trap too soon. The next time, with the exercise of a little more patience, they may bag the game. The prohibition law encourages generosity. One may give, but not sell, his neighbor whisky. Many cities have passed ordinances designed to discourage the possession of whisky for the purpose of sale. Frequently the unlawful purpose can be shown only circumstantially; but, when an actual sale or attempt to sell cannot be shown, the circumstances proved must be so inconsistent with innocence as to exclude every other reasonable hypothesis than guilt. They were not strong enough in this case.

Judgment reversed.

(11 Ga. App. 234)

SOUTHERN RY. CO. v. GORDON.

(No. 3,918.)

(Court of Appeals of Georgia. June 5, 1912.)

(*Syllabus by the Court.*)

EVIDENCE (§ 407*)—BILL OF LADING—CONSTRUCTION.

This case is fully controlled by the decision of this court in *Atlantic Coast Line R. Co. v. Cohn & Co.*, 6 Ga. App. 572, 65 S. E. 355, and the request made to review and overrule the decision is denied.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 1826-1828, 1841; Dec. Dig. § 407.*]

Error from Superior Court, Floyd County; J. W. Maddox, Judge.

Action by M. Gordon against the Southern Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

See, also, 9 Ga. App. 469, 71 S. E. 763.

Maddox, McCamy & Shumate, of Dalton, and Geo. A. H. Harris & Son, of Rome, for plaintiff in error. Eubanks & Mebane, of Rome, for defendant in error.

HILL, C. J. Judgment affirmed.

(11 Ga. App. 261)

FRAZIER v. STATE. (No. 4,160.)

(Court of Appeals of Georgia. June 5, 1912.)

(*Syllabus by the Court.*)

CRIMINAL LAW (§ 252*)—INTOXICATING LIQUORS (§ 198*)—ACCUSATION—AFFIDAVIT—VARIANCE.

Where the act creating a city court provides that all criminal accusations filed therein shall be founded upon affidavits, such an accusation cannot be broader than the affidavit, nor charge an offense different from that de-

scribed in the affidavit. It follows that, where an affidavit charged the unlawful sale of intoxicating liquors, a count in an accusation founded thereon which charged the accused with keeping intoxicating liquors on hand at his place of business should have been quashed on demurrer.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 526-536; Dec. Dig. § 252;* Intoxicating Liquors, Cent. Dig. § 218; Dec. Dig. § 193.*]

Error from City Court of Americus; J. A. Hixon, Judge.

H. D. Frazier was convicted of violating the liquor law, and brings error. Reversed.

C. R. Winchester and J. B. Hudson, both of Americus, for plaintiff in error. Zach Childers, Sol., of Americus, for the State.

POTTLE, J. The act creating the city court of Americus provides that "defendants in criminal cases in said city court of Americus may be tried on written accusation setting forth plainly the offense charged, founded on affidavit made by the prosecutor," and that, upon such affidavit and accusation being filed in the office of the clerk of the city court, it shall be the duty of the judge to issue a warrant for the arrest and apprehension of the defendant. Acts 1900, p. 100, § 30. An affidavit was made and filed, charging the plaintiff in error with the offense of selling intoxicating liquors, and upon this affidavit an accusation was drawn, containing two counts. The first count charged the sale of intoxicating liquors, and the second count charged that the accused kept on hand intoxicating liquors at his place of business. On arraignment the accused moved to quash the accusation, upon the ground that it was broader than the affidavit upon which it was founded, in that in the second count the accused was charged with keeping intoxicating liquors on hand at his place of business, and the affidavit charged only the sale of intoxicating liquors. The motion to quash was overruled, and exceptions pendente lite were duly certified and filed, complaining of this ruling. The accused was convicted both of selling whisky and of keeping it on hand at his place of business. His motion for new trial was overruled, and a writ of error has been sued out to this court, complaining of this judgment and also assigning error upon the exceptions pendente lite.

An affidavit which charges the accused generally with the commission of a misdemeanor at a certain time and in a certain county is sufficient to support an accusation charging the accused with the commission of any misdemeanor. Williams v. State, 107 Ga. 693, 33 S. E. 641. But the accusation cannot be broader than the affidavit, and, where the affidavit charges a specific misdemeanor, the accusation must conform to the affidavit. So strictly has this rule been applied by the Supreme Court, that in Blake v. State, 112 Ga. 537, 37 S. E. 870, in which

the affidavit charged the accused with the offense of selling whisky, it was held that an accusation founded thereon and charging generally the sale of intoxicating liquors should have been quashed on demurrer. In Glass v. State, 119 Ga. 299, 46 S. E. 435, the affidavit charged the offense of gaming, and it was held that this affidavit was sufficient foundation for an accusation charging any form of gaming. In the opinion the court said that, if the affidavit had charged the defendant with playing "seven up," he could not have been put on trial for playing any other game, or for gaming generally. Unless the act creating the city court requires it, an accusation need not be founded upon any precedent affidavit at all. Davis v. State, 11 Ga. App. —, 74 S. E. 442. But where the act provides, as does the act creating the city court of Americus, that the accusation shall be founded upon an affidavit, the accusation cannot be broader than the affidavit nor charge a different offense from that described in the affidavit. The court should have sustained the motion to quash the second count in the accusation. As everything else occurring on the trial was nugatory, it is not necessary to pass upon any of the other assignments of error. Judgment reversed.

(11 Ga. App. 245)

ALLEN v. STATE. (No. 4,068.)

(Court of Appeals of Georgia. June 5, 1912.)

(Syllabus by the Court.)

1. INTOXICATING LIQUORS (§ 236*) — CRIMINAL PROSECUTIONS—SUFFICIENCY OF EVIDENCE.

The possession of an internal revenue special tax receipt for the retail or wholesale of spirituous, malt, or intoxicating liquors is, by the terms of the statute, only prima facie evidence of the guilt of one on trial for the unlawful sale of such liquors.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. §§ 300-322; Dec. Dig. § 236.*]

2. INTOXICATING LIQUORS (§ 236*) — CRIMINAL PROSECUTIONS—PRESUMPTIONS—REBUTTAL.

In the present case, the inference of guilt, arising from the possession of such an internal revenue special tax receipt, was completely rebutted by the uncontradicted testimony of the only witness in the case that the accused had not in fact sold any intoxicating liquors, and that he was induced by an internal revenue officer of the United States government to take out a revenue license after he had come into the possession of a quantity of whisky which, according to the uncontradicted evidence, was ordered for himself and a number of others, and was delivered to the accused by a common carrier; the accused acting solely as agent for the buyer, and in no sense as agent for the seller, of the liquors.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. §§ 300-322; Dec. Dig. § 236.*]

3. SUFFICIENCY OF EVIDENCE.

The verdict, being without evidence to support it, was contrary to law, and the court erred in refusing a new trial.

Error from City Court of Newnan; W. A. Post, Judge.

John Allen was convicted of violating the liquor law, and brings error. Reversed.

W. G. Post, of Newnan, for plaintiff in error. W. L. Stallings, Sol. Gen., of Newnan, for the State.

RUSSELL, J. Judgment reversed.

(11 Ga. App. 265)

HICKS v. STATE. (No. 4,179.)
(Court of Appeals of Georgia. June 5, 1912.)

(Syllabus by the Court.)

CRIMINAL LAW (§ 424*) — EVIDENCE — ACTS AND DECLARATIONS OF CONSPIRATORS.

The rule of evidence is elementary that acts and declarations of a co-offender or conspirator are admissible against the others only when made and done during the pendency of the criminal enterprise and in furtherance of its object, and that any subsequent declaration or conduct of a joint offender or conspirator is admissible only against himself, and, as against others, must be rejected as a narrative merely of past occurrences.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1002-1010; Dec. Dig. § 424.*]

Error from Superior Court, Douglas County; Price Edwards, Judge.

H. L. Hicks was convicted of burglary, and brings error. Reversed.

J. S. James, of Atlanta, for plaintiff in error. J. R. Hutcheson, Sol. Gen., and W. T. Roberts, both of Douglasville, for the State.

HILL, C. J. The plaintiff in error, a negro boy, 15 years of age, was convicted of the offense of burglary, and was sentenced to seven years in the penitentiary. His motion for a new trial was overruled, and he brings error. The transcript of the record is very confusing and involved, and this court has found some difficulty in gathering from its careful perusal what actually occurred on the trial. In so far as we have been able to determine from this record, there is only one error which is of such serious character as to require the grant of another trial. The evidence against the accused consisted of several slight circumstances indicative of guilt, and, standing alone, would probably not have been sufficient to have produced conviction in the mind of the jury beyond a reasonable doubt. In this state of the evidence the court permitted, over the objection of the attorney for the accused, declarations made by an alleged accomplice subsequently to the commission of the offense—a narrative merely of past occurrences. This accomplice had entered a plea of guilty to the offense of burglary charged against the accused, himself, and another, and was in jail when the prosecutor had a conversation with him relative to the offense; and in this conversation the ac-

complice stated to the prosecutor the particulars of the commission of the offense, declaring that the accused participated therein, and giving in detail the acts and conduct of the accused in its commission. The accused was not present when this statement was made to the prosecutor. On the trial, this accomplice testified in behalf of the accused, denying that he was present at the commission of the offense or had participated therein. The presiding judge stated that these subsequent declarations were admitted for the purpose of impeachment; but it does not appear that any foundation was laid for their introduction for this purpose.

This testimony was clearly inadmissible as evidence against the accused. "A confession of one joint offender or conspirator made after the enterprise is ended, is admissible only against himself." Pen. Code 1910, § 1035. This is but a codification of a well-settled rule of law. *Reid v. State*, 20 Ga. 681; 1 Greenleaf on Evidence (16th Ed.) § 184(a).

Another occurrence which the record shows took place at the trial, while not in itself sufficient to warrant the grant of a new trial, induces us all the more readily to grant another trial, because it probably may have resulted in injustice to the accused. After the evidence had been closed and the argument begun, the state asked permission to reopen the case for the purpose of introducing another witness. This witness testified that on the night of the alleged burglary he had seen the accused and this accomplice together. The attorney for the accused objected to the reopening of the case, but, of course, this was a matter in the discretion of the court. After this witness had testified, the attorney for the accused then asked the court to postpone the trial for a short time, in order that he might have an opportunity of sending for a witness, whom he named and located, by whom he could rebut the testimony of this new witness. The court refused to give him the time. While, as above indicated, this is a matter in the discretion of the court, yet where the witness thus introduced at this stage of the trial proved an additional fact which was damaging to the accused, and the accused stated that he could not have anticipated the evidence of this additional fact, and that he had a witness by whom he could rebut this evidence, naming and locating the witness, it would seem that the ends of justice required that the presiding judge should give to the accused a reasonable time to secure the presence of the witness for that purpose. We have said this much, not in criticism of the action of the learned trial judge, but because, in our opinion, the weak and inconclusive character of the evidence against the accused entitled him to the fullest opportunity to explain the incriminating circum-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key Ne. Series & Rep'r Indexes

stances. We grant a new trial in the case solely because of the admission of the subsequent declarations of the accomplice in the absence of the accused, which were simply a narrative of past occurrences, and which must have been hurtful to the accused.

Judgment reversed.

(11 Ga. App. 236)

LOUISVILLE & N. R. CO. et al. v.
CHIVERS. (No. 3,989.)

(Court of Appeals of Georgia. June 5, 1912.)

(Syllabus by the Court.)

CARRIERS (§ 277*)—TREATMENT OF PASSENGER—MISTAKE OF CONDUCTOR.

The law requires of a carrier of passengers, not only extraordinary care and diligence, in conveying passengers safely to the agreed destination, but also kind, considerate, and decorous treatment of passengers by employes of the carrier while the relationship of passenger and carrier continues, and any violation of this rule by which a passenger is humiliated or mortified or wounded in his feelings is tortious conduct, for which the carrier is liable in damages.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1082-1084; Dec. Dig. § 277.*]

Error from City Court of Madison; K. S. Anderson, Judge.

Action by Annie Chivers against the Louisville & Nashville Railroad Company and others. Judgment for plaintiff, and defendants bring error. Affirmed.

Jos. B. & Bryan Cumming, of Augusta, and E. W. Butler, of Madison, for plaintiffs in error. M. C. Few, of Madison, for defendant in error.

HILL, C. J. Miss Annie Chivers recovered a verdict against the Louisville & Nashville Railroad Company and the Atlantic Coast Line Railroad Company for \$100, as damages for the alleged tortious act of the conductor of the companies, based upon the following facts: Plaintiff got on a train of defendants at Buckhead, for the purpose of going to Atlanta. Before getting on the train, she went to the ticket agent at Buckhead and asked him for a ticket to Atlanta, and he replied that her father had already bought her ticket to Atlanta. After the train left Buckhead, and before reaching Madison, the conductor in charge of the train took up her ticket for Atlanta. After leaving Madison the conductor approached her and asked her why she did not get off the train at Madison. She told him that her ticket was for Atlanta. He replied that her ticket was for Madison, and that she would either have to get off the train or pay fare. "I knew my ticket was for Atlanta, having looked at it when my father gave it to me; but, as the conductor demanded fare and stated that he would put me off unless I paid it, rather than be humiliated, I paid him fare to Atlanta. I asked him to look and see if he had not taken up my ticket,

for I had given it to him, and to see if it was not from Buckhead to Atlanta. He did not look, but stood me down that the ticket was only to Madison. He kept demanding that I pay the fare or get off the train. Everybody in the car saw and heard what was going on, and I saw that we were attracting attention. The car was full of people. After I had paid him the fare, the conductor approached me before we reached Atlanta, and wanted me to take back the money which I had paid him, and said he had found the ticket that I had given him, and he refunded me the money. His demand that I pay him fare was made in the ordinary tone of voice, but the passengers on the train heard him. His manner to me was respectful, and my complaint is that he demanded fare from me, first stating that my ticket read to Madison. He mortified me by stating that my ticket was to Madison and demanding that I pay my fare or he would put me off. It made the impression upon the passengers who heard the conversation that I was trying to beat my way. When he refunded me the money, he apologized and stated that he had found my ticket." This is substantially the testimony upon which the verdict was based, and it was insisted by counsel for the railroad company that it is insufficient to show any liability.

The rule of law governing the case is well settled. It is unquestionably the duty of the railroad company to protect a passenger against insult or injury from the conductor of the train upon which the passenger is riding. Any conduct of the conductor which reasonably and ordinarily tends to humiliate a passenger or subject him to mortification gives to the latter a right of action against the company. *Cole v. Atlanta & West Point Railroad Co.*, 102 Ga. 474, 31 S. E. 107, and many cases there cited. As tersely expressed in the case of *Head v. Georgia Pacific Ry. Co.*: "Wounding a man's feelings is as much actual damage as breaking his limbs. The difference is that one is internal and the other external; one mental, the other physical." A carrier obligates itself to carry its passengers safely and properly, and to treat them respectfully, and if it intrusts the performance of this duty to servants, the law holds it responsible for the manner in which they execute the trust. As stated by Judge Thompson: "The law implies in the contract of carriage, not merely an agreement on the part of the carrier to use the high degree of care already described (extraordinary care), to the end of conveying the passenger safely to the agreed destination, but also an agreement for kind, considerate, respectful, and decorous treatment to the passenger at the hands of the carrier's own servants." 3 Thompson's Commentaries on the Law of Negligence, § 3185. And as expressed by this court in *Wolfe v. Georgia*

Ry. & Electric Co., 2 Ga. App. 499, 58 S. E. 899: "A common carrier is responsible for the proper treatment of its passengers, and is bound to protect them from insult as well as from physical injury."

The rule of law being thus well settled—and we think wisely and properly settled—the only question is whether the conduct of the conductor in the present case amounted to a violation of this rule. We think that the statement of the conductor that the plaintiff did not hold a ticket which entitled her to transportation to Atlanta, notwithstanding her assertion that she did have such ticket and had given it to the conductor, his refusal to examine his tickets to see if her statement was not the truth, and his assumption that it was not the truth, and his demand for fare, under the threat of putting her off the train, was calculated to humiliate and mortify her, since the conversation took place in the hearing and presence of other passengers. It makes no substantial difference, except on the question of aggravation, that the manner of the conductor was respectful. The conduct of the conductor, with reasonable inferences therefrom, had necessarily a tendency to embarrass and humiliate the young lady passenger, and his conduct was at the peril of the company, and it turned out that his conduct was wholly unauthorized by the facts. Neither did the fact that when he discovered his mistake he offered to refund the money, and did refund it and apologize for his mistake, repair the wrong he had already perpetrated against the passenger in wounding negligently and unnecessarily her feelings.

It is insisted that the conductor simply made a mistake. This may be true; but it was a mistake due to his own negligence, and was a mistake for which he and his employer were responsible. We think the verdict of the jury was fully authorized and was conservative in amount, and that the bill of exceptions in the case contained no merit.

Judgment affirmed.

(11 Ga. App. 262)

PHILLIPS v. STATE. (No. 4,163.)

(Court of Appeals of Georgia. June 5, 1912.)

(Syllabus by the Court.)

1. HOMICIDE (§ 116*)—JUSTIFICATION—SELF-DEFENSE—THREATS.

While provocation by mere words, threats, or menaces will not reduce the crime of assault with intent to murder to the statutory offense of shooting at another, yet, if such words, threats, or menaces were sufficient to arouse a reasonable fear on the part of the accused that his life was in danger, and he shot under the influence of this fear, the shooting would be justifiable.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 158-163; Dec. Dig. § 116.*]

2. CRIMINAL LAW (§§ 770, 828*)—TRIAL—INSTRUCTIONS—REQUESTS.

In the absence of a timely written request, the trial judge is not bound to charge the jury upon a theory of law presented solely by the statement of the accused. But, if he does charge upon such a theory, he should give the law fully and fairly, both for the state and for the accused.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1806, 2007; Dec. Dig. §§ 770, 828.*]

3. HOMICIDE (§ 300*)—INSTRUCTIONS—JUSTIFICATION.

In the present case, it was error, requiring the granting of a new trial, to charge the jury that words, threats, menaces, or contemptuous gestures will in no case free the person killing from the guilt and crime of murder, without adding the qualification that it was for the jury to say whether the use of such words, threats, menaces, or contemptuous gestures by the person shot was sufficient to arouse a reasonable fear on the part of the accused that her life was in danger.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 614-632; Dec. Dig. § 300.*]

Error from Superior Court, Floyd County: J. W. Maddox, Judge.

Zella Phillips was convicted of shooting at another, and brings error. Reversed.

Ennis & Shaw, of Rome, for plaintiff in error. John W. Bale, Sol. Gen., of La Fayette, and Eubanks & Mebane, of Rome, for the State.

POTTLE, J. [1] The accused was placed on trial for the offense of assault with intent to murder, and was convicted of the statutory offense of shooting at another, and, upon the recommendation of the jury, was sentenced as for a misdemeanor. The evidence was amply sufficient to authorize the verdict. Complaint is made of the following instructions to the jury: "Provocation by words, threats, menaces, or contemptuous gestures shall in no case be sufficient to free the person killing from the guilt and crime of murder." The assignment of error upon this charge is that the jury were not instructed, either in connection with this charge or elsewhere, that they might consider whether or not the words, threats, menaces, or contemptuous gestures were sufficient, under the circumstances surrounding the shooting, to arouse a reasonable fear on the part of the accused that his life was in danger, and that she shot while under the influence of that fear. In no case where the accused relies upon provocation arising from the use by the person assaulted of words, threats, menaces, or contemptuous gestures, if the defense of reasonable fear is involved in the case under the evidence, should the trial judge charge broadly the language of the statute to the effect that in no case will provocation by words, threats, menaces, or contemptuous gestures be sufficient to free the person killing from the crime and guilt of murder, with-

out adding the qualification that if, however, such words, threats, menaces, or contemptuous gestures were used, and were sufficient, under all the circumstances of the case, to arouse a reasonable fear on the part of the accused that his life was in danger, and if he shot while under the influence of such fear, he would be justifiable. The mere use of words, threats, menaces, or contemptuous gestures will never be sufficient to reduce a crime from murder to manslaughter, or from assault with intent to murder to shooting at another, or stabbing, as the case may be, yet they are sometimes sufficient to justify the fear of a reasonable man that his life is in danger, and therefore authorize his acquittal. *Cumming v. State*, 99 Ga. 662, 27 S. E. 177; *Rossi v. State*, 7 Ga. App. 732, 68 S. E. 56; *Landrum v. State*, 9 Ga. App. 115, 70 S. E. 353.

[2. 3] Counsel for the state, while conceding the correctness of this general proposition, contend that in the present case it is no cause for ordering a new trial, for the reason that the defense of reasonable fear arose alone under the prisoner's statement, and that, as there was no written request for the instruction, the failure to qualify the charge is no cause for a new trial. Of course, it is well settled, under numerous decisions of this court and of the Supreme Court, that the judge is not bound, in the absence of written request, to charge upon a theory of defense arising solely from the prisoner's statement; but in the present case there was no evidence of any menaces or threats used by the person assaulted, and this contention likewise arose solely from the prisoner's statement. In other words, under the statement of the accused, the person assaulted used menaces and threats which may have aroused a reasonable fear on the part of the accused that her life was in danger. The judge, therefore, was not bound to charge the jury at all upon the subject of provocation by words, threats, menaces, or contemptuous gestures, nor was he bound to charge upon the doctrine of reasonable fears; but, if he did charge in favor of the state upon facts which arose only from the prisoner's statement, it was manifestly unfair to the accused to fail to give the qualification in her favor which the law, as applied to her statement, demanded. In other words, the proposition may be stated broadly that, while the trial judge is not bound to charge upon a theory presented solely by the prisoner's statement, in the absence of timely written request so to do, yet, if he does so, he must charge the law correctly and give the accused the benefit of that theory of the law which her statement demands. Under this view of the matter, the principle decided in the cases above cited is controlling and a new trial should be granted.

Judgment reversed.

(11 Ga. App. 235)

PATTERSON v. BANK OF LENOX.
(No. 3,944.)

(Court of Appeals of Georgia. June 5, 1912.)

(Syllabus by the Court.)

HUSBAND AND WIFE (§ 87*)—LIABILITY OF MARRIED WOMAN—SURETY ON NOTE.

This was a suit against several defendants, as alleged makers of a promissory note. The defense relied upon by plaintiff in error was that the note was not binding upon her, for the reason that she was only a surety, and was a married woman at the time she signed the note as such. *Held*, the evidence demanded a finding in favor of this plea, and the verdict against plaintiff in error was unauthorized. Civil Code 1910, § 3007.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. §§ 346-353; Dec. Dig. § 87.*]

Error from City Court of Nashville; W. C. Lankford, Judge.

Action by the Bank of Lenox against Mollie Patterson and others. Judgment for plaintiff, and defendant Mollie Patterson brings error. Reversed.

See, also, 8 Ga. App. 492, 70 S. E. 77.

Alexander & Gary, of Nashville, for plaintiff in error. Knight, Chastain & Gaskins, of Nashville, and J. Z. Jackson, of Adel, for defendant in error.

HILL, C. J. Judgment reversed.

(11 Ga. App. 242)

MACON RY. & LIGHT CO. v. CASTOPULON.
(No. 4,057.)

(Court of Appeals of Georgia. June 5, 1912.)

(Syllabus by the Court.)

1. CARRIERS (§ 347*)—INJURIES TO PASSENGERS—QUESTIONS FOR JURY—CONTRIBUTORY NEGLIGENCE.

It is not contributory negligence per se for a person to alight from a moving street car; but the question whether the person alighting was guilty of contributory negligence would depend upon the rate of speed, the place, and other circumstances.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 1346-1397, 1402; Dec. Dig. § 347.*]

2. CARRIERS (§§ 347, 320*)—INJURIES TO PASSENGERS—QUESTIONS FOR JURY—CONTRIBUTORY NEGLIGENCE.

The evidence in the present case is not clear as to whether the plaintiff was injured while attempting to alight from a car that was actually moving, or whether, while he was in the act of alighting, the car suddenly moved and threw him to the ground. In either event, the question of his contributory negligence, and that of the negligence of the defendant company, were questions exclusively for the determination of the jury; and the evidence is sufficient to support the verdict for the plaintiff.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 1346-1397, 1402, 1118, 1126, 1149, 1153, 1160, 1167, 1179, 1190, 1217, 1233, 1244, 1248, 1315-1325; Dec. Dig. §§ 347, 320.*]

Error from City Court of Macon; Robt. Hodgers, Judge.

Action by George Castopulon against the Macon Railway & Light Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Ellis & Jordan, of Macon, for plaintiff in error. Napier & Maynard, of Macon, for defendant in error.

HILL, C. J. The plaintiff recovered a verdict for \$400 for personal injuries received by him while alighting from a street car in the city of Macon. The defendant made a motion for a new trial, based upon the general grounds, which was overruled, and the case is before this court solely on questions of fact.

The evidence in behalf of the plaintiff shows that he boarded the defendant's street car for the purpose of going to Crump's Park, a pleasure resort near Macon. He asked the conductor if that car was going to Crump's Park, and the conductor told him it was not; that he would have to take a Vineville car; and he replied that he would get off, and the conductor said: "All right. Get out and catch the Vineville car." He put his foot on the ground. The car was going, and it threw him down, and his arm was broken by the fall. The evidence is not clear as to whether the car was moving when the plaintiff attempted to alight, and whether his foot coming in contact with the ground threw him, or whether while he was in the act of alighting from the car the car moved immediately, and the motion threw him down. It is insisted on the part of the railway company that the only reasonable inference to be drawn from the evidence of the plaintiff is that he attempted to get off the car as it was actually moving; and that in doing so he was guilty of such contributory negligence as would bar his right to recover. It may be stated that the only evidence as to the manner in which the injury occurred was that of the plaintiff himself. The only witness for the defendant was the conductor, who testified positively that no such incident occurred as was narrated by the plaintiff.

[1, 2] The question was exclusively for the determination of the jury. A careful examination of the plaintiff's evidence raises a reasonable inference that he may have been injured by the sudden motion of the car while he was attempting to alight therefrom. But it may be conceded that the car was actually moving when he attempted to alight, and yet this fact would not be per se such negligence as would prevent a recovery. The earlier cases in many instances recognized the principle of negligence per se in alighting from a moving train, but modern authority to a great extent has supplanted that doctrine with broader views upon the question; and it is now generally held, and especially by the courts of this state, that it is not contributory negligence per se for a person to alight from a moving street car, but

the question of whether the person so alighting was guilty of contributory negligence depends upon the rate of speed, the place, and other circumstances. In the case of *Myrick v. Macon Ry. & Light Co.*, 6 Ga. App. 38, 64 S. E. 296, this court quotes with approval the statement of Judge Thompson, in his Commentaries on the Law of Negligence (volume 3, § 2878), that "the weight of modern authority seems to sustain the view that an attempt by the passenger to alight from a railway train while it is passing a place at which it should stop to enable him to alight, or at which it has failed to stop a reasonable time to permit him to leave it, will not, as a matter of law, be considered a negligent act, unless the attending circumstances so clearly show that he acted imprudently or rashly that reasonable minds could fairly arrive at no other conclusion; and that the question whether the act of the passenger in so attempting to alight from the train was negligent (that is, whether he exercised for his safety that degree of care and caution which a person of ordinary prudence would be expected, under like circumstances, to exercise) must ordinarily be submitted to the jury." See, also, 3 Hutch. on Carriers (3d Ed.) § 1179.

We think that this construction of the rule applies more clearly to attempts to alight from moving street cars than from cars propelled by steam; and the fact that, in attempting to alight from a moving street car, the passenger was encouraged to do so by the direction of the conductor in charge would be a strong circumstance supporting the view that the act did not amount to negligence. Certainly, under the facts in this case, the question was clearly one of fact, to be determined exclusively by the jury, and it is equally clear that the conclusion at which the jury arrived is not unsupported by the evidence or reasonable inferences therefrom.

Judgment affirmed.

(159 N. C. 306)

PENN v. WESTERN UNION TELEGRAPH CO.

(Supreme Court of North Carolina. May 28, 1912.)

1. TELEGRAPHS AND TELEPHONES (§ 68*)—TELEGRAMS — NEGLIGENT TRANSMISSION — DAMAGES.

In a proper case, substantial damages for mental anguish are recoverable for negligent failure to deliver or correctly transmit a telegram, independent of bodily or pecuniary injury.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. §§ 69, 70; Dec. Dig. § 68.*]

2. TELEGRAPHS AND TELEPHONES (§ 58*)—TELEGRAMS — NEGLIGENT TRANSMISSION — DAMAGES.

Recovery for mental anguish, caused by negligent failure to deliver or correctly transmit a telegram, may be had by the sender, the

addressee, or a beneficiary known to be such by the company.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. § 37; Dec. Dig. § 56.*]

**3. TELEGRAPHS AND TELEPHONES (§ 59*)—
TELEGRAMS — NEGLIGENT TRANSMISSION —
ACTIONS.**

Action in contract or tort lies for breach of a telegraph company's duties to deliver and correctly transmit telegrams.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. § 48; Dec. Dig. § 59.*]

**4. TELEGRAPHS AND TELEPHONES (§ 67*)—
TELEGRAMS — NEGLIGENT TRANSMISSION —
DAMAGES.**

The damages recoverable for negligent delay in delivering a death message are those naturally resulting from the wrong.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. §§ 64-68; Dec. Dig. § 67.*]

**5. TELEGRAPHS AND TELEPHONES (§ 38*)—
TELEGRAMS — NEGLIGENT TRANSMISSION.**

Reasonable regulations of a telegraph company for transmission of messages, not excusing negligence, may be shown to defeat liability for delaying delivery of a telegram, whether the action be in contract or tort.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. § 83; Dec. Dig. § 38.*]

Brown, J., dissenting.

Appeal from Superior Court, Forsyth County; Lyon, Judge.

Action by Lizzie Penn against the Western Union Telegraph Company. Judgment for plaintiff, and defendant appeals. Affirmed.

The evidence tended to show that on the morning of July 3, 1911, at 8 a. m., a message was delivered to defendant company by Herbert Penn, at Roanoke, Va., addressed to plaintiff at Winston-Salem, N. C., announcing the death of a child of Herbert Penn and grandchild of plaintiff, and that same was duly and properly transmitted by defendant to its office at Winston-Salem, and there defendant negligently failed to deliver it to plaintiff, whose place of residence was well known, and she only had notice that such a message was in the Winston office through a postal card from defendant's agent, delivered on the morning of July 5th; and by reason of such negligence and wrong on the part of defendant company and its agent plaintiff was prevented from going to Roanoke and being with her son in the time of his bereavement, and from attending the funeral of her grandchild, etc. Defendant, denying negligence, alleged, further, that the contract for transmission and delivery of the message was made in Roanoke, Va., and plaintiff's cause of action, if she had any, arose in that state, and that, by the law of that state, substantial damages for mental anguish could not be awarded in such an action; and the jury rendered the following verdict:

"First. Did the defendant negligently fail to deliver the message, as alleged in the complaint? Answer: Yes.

"Second. If so, did the acts and omissions constituting negligence occur in the state of North Carolina? Answer: Yes.

"Third. If the message had been delivered in a reasonable time, could and would the plaintiff have gone to Roanoke to be present at the funeral, as alleged in the complaint? Answer: Yes.

"Fourth. Under the law of the state of Virginia, can damages for mental suffering, independent of any injury to person or estate, be recovered against a telegraph company for negligent failure to deliver a message, or for negligent delay in the delivery of a message, although the telegraph company is advised of the character of the message? Answer: No.

"Fifth. What damage, if any, has the plaintiff sustained on account of mental anguish caused by the negligence of the defendant? Answer: \$200."

The court, having declined to enter judgment on verdict for defendant, gave judgment thereon for plaintiff, and defendant excepted and appealed.

Geo. H. Fearons and Manly, Hendren & Womble, for appellant. John M. Robinson and W. Reade Johnson, for appellee.

HOKE, J. (after stating the facts as above). [1, 2] It is well-established doctrine in this state that, under given circumstances, substantial damages for mental anguish may be awarded for wrongful and negligent failure to deliver or correctly transmit a telegraphic message, and this independent of bodily or pecuniary injury. The authorities are also to the effect that such recovery may be had by the sender or the addressee of the message or the beneficiary whose interest in its proper delivery has been sufficiently made known to the company. *Christman v. Telegraph Co.*, 74 S. E. 325, present term; *Kivett v. Telegraph Co.*, 156 N. C. 296, 72 S. E. 388; *Woods v. Telegraph Co.*, 148 N. C. 1, 61 S. E. 653, 128 Am. St. Rep. 581; *Dayvis v. Telegraph Co.*, 139 N. C. 80, 51 S. E. 898; *Cranford v. Telegraph Co.*, 138 N. C. 162, 50 S. E. 585; *Green v. Telegraph Co.*, 136 N. C. 489, 49 S. E. 165, 67 L. R. A. 985, 103 Am. St. Rep. 955, 1 Ann. Cas. 349; *Williams v. Telegraph Co.*, 136 N. C. 82, 48 S. E. 559, 1 Ann. Cas. 359; *Bright v. Telegraph Co.*, 132 N. C. 317, 43 S. E. 841; *Kennon v. Telegraph Co.*, 126 N. C. 232, 35 S. E. 468; *Young v. Telegraph Co.*, 107 N. C. 370, 11 S. E. 1044, 9 L. R. A. 669, 22 Am. St. Rep. 883.

[3] A perusal of the numerous cases on the subject will disclose that this position, allowing recovery for mental anguish, not only obtains with us as a rule of interpretation and adjustment of the rights of the parties growing out of the contract between them, but it has become, also, a part of our public policy, adopted and recognized as necessary to enforce the proper performance of duties incumbent on these companies as pub-

lic service corporations. Crosswell on Law of Electricity, § 634. From this it has been said to follow that, in a certain class of injuries involving a breach of these duties, an action may lie either in contract or in tort, a position upheld here as a general principle in reference to corporations of this character. *Carmichael v. Telephone Co.*, 157 N. C. 21, 72 S. E. 619; *Peanut Co. v. Railroad*, 155 N. C. 148, 71 S. E. 71, and authorities cited, more especially the concurring opinions of Associate Justice Allen, and applied directly to telegraph companies in several well-considered decisions in this state; *Cordell v. Telegraph Co.*, 149 N. C. 402, 63 S. E. 71, 22 L. R. A. (N. S.) 540; *Green v. Telegraph Co.*, 136 N. C. 506, 49 S. E. 171, 1 Ann. Cas. 358; *Cogdell v. Telegraph Co.*, 135 N. C. 431, 47 S. E. 490; *Landle v. Telegraph Co.*, 124 N. C. 528, 32 S. E. 886, and sustained in numerous cases elsewhere by courts of recognized authority; *McGehee v. Telegraph Co.*, 169 Ala. 109, 53 South. 205; *Gray v. Telegraph Co.*, 108 Tenn. 39, 64 S. W. 1063, 56 L. R. A. 301, 91 Am. St. Rep. 706; *Mentzer v. Telegraph Co.*, 93 Iowa, 752, 62 N. W. 1, 28 L. R. A. 72, 57 Am. St. Rep. 294; *McLeod v. Telephone Co.*, 52 Or. 22, 94 Pac. 568, 95 Pac. 1009, 15 L. R. A. (N. S.) 810, 18 L. R. A. (N. S.) 954, 16 Ann. Cas. 1239; *Baily v. Western Union*, 227 Pa. 522, 76 Atl. 736, 19 Ann. Cas. 895; *Stewart & Co. v. Postal Telegraph Co.*, 131 Ga. 31, 61 S. E. 1045, 18 L. R. A. (N. S.) 692, 127 Am. St. Rep. 205; *Telegraph Co. v. Schriver et al.*, 141 Fed. 538, 72 C. C. A. 596, 4 L. R. A. (N. S.) 678; *Thompson's Law of Electricity*, § 424.

[4] In the present case, the verdict has established an action in tort arising by reason of negligent default on the part of defendant company within the state of North Carolina, and the damages have been properly awarded which have naturally resulted from the wrong; that is, such as were reasonably probable under the circumstances existent at the time, and according to the law of the jurisdiction, statutory or otherwise, where same occurred. *Young v. Western Union*, 107 N. C. 370, 11 S. E. 1044, 9 L. R. A. 669, 22 Am. St. Rep. 883; *Peanut Co. v. Railroad*, supra; *Gray v. Telegraph Co.*, supra; *Hughes v. Telegraph Co.*, 72 S. C. 516, 52 S. E. 107; *Harrison v. Telegraph Co.*, 71 S. C. 386, 51 S. E. 119; *Gentle v. Telegraph Co.*, 82 Ark. 96, 100 S. W. 742; *Western Union v. James*, 162 U. S. 650, 16 Sup. Ct. 934, 40 L. Ed. 1105; *Hale on Damages*, p. 50; *Jones, Tel. & Tel. Cos.* § 518.

It is objected for defendant that the court, in numerous decisions, has said that the rules which obtain in awarding damages for breach of contract were properly applicable to cases of this character, and has repeatedly referred to *Hadley v. Baxendale* as the controlling authority on the subject. In many of these cases, the action was brought for breach of the contract, and the position

as stated was in strictness correct. In others, the rules established or declared in *Hadley v. Baxendale* were applied, because they afforded a very safe guide to a correct estimate of damages, and because, on the facts as presented, there was no call for making discrimination in the two kinds of action. In so far as mental anguish is concerned, except in cases where punitive damages are sought and allowable, and except as to the time when the relevant circumstances are to be noted and considered, the amount is very much the same, whether the recovery is had in contract or in tort. In the one case, those damages are allowed which were in the reasonable contemplation of the parties when the contract was made, and in the other the consequential losses resulting from the tort, and which were natural and probable at the time the tort was committed. *Hale on Damages*, p. 48.

Speaking to these principles and their practical application in *Scott and Jarnagan's Law of Telegraphy*, it is said: "But when the contract between the parties does not show they had in contemplation this wider range in the estimate of damages (in contract) the measure of damages seems to be substantially the same in either kind of action. The true rule for estimating damages in actions *ex contractu* may be stated thus: The defendant is liable only for such damages as may fairly and substantially be considered as arising naturally, i. e., according to the usual course of things—from the breach of the contract, or—and here is where the measure of damages takes the wider range—for whatever damages may fairly be supposed to have been within the contemplation of the parties. The rule in actions *ex delicto* is that the damages to be recovered must be the natural and proximate consequence of the act complained of. This is the rule when no malice, fraud, oppression, or evil intent intervenes. The damages which may be considered as arising naturally, according to the usual course of things, from the breach of the contract are substantially the same as damages which are the natural and proximate consequences of the wrong complained of." And in *Jones on Telegraph and Telephone Companies*, § 518, the author, while saying that, under some circumstances, the recovery in tort may take a wider range, is in support of the proposition that the amount of damages are usually the same.

It was in deference to this view, that, under all ordinary conditions, the damages to be awarded for mental anguish are practically one and the same, whether the action be in contract or in tort, that the court has thus far allowed the rules in *Hadley v. Baxendale* to prevail; but it was never intended, in cases requiring that the distinctions between the two classes of actions be observed, that when a tort was clearly established and committed within this jurisdic-

tion that the usual rules for awarding damages in actions of that character should be modified or ignored. Thus, in *Dayvis v. Telegraph Co.*, supra, the court, in speaking to this position, said: "In awarding damages for mental anguish, however, when the right thereto has been established, the decisions of this court have thus far uniformly applied the law governing cases of breach of contract." And in *Williams v. Telegraph Co.*, 136 N. C. 84, 48 S. E. 560, 1 Ann. Cas. 359, Associate Justice Walker, delivering the opinion, said: "In order to ascertain the damages which a plaintiff, who sues for a breach of contract, is entitled to recover, the rule laid down in *Hadley v. Baxendale* has generally been adopted as the one which will give the complaining party a fair and reasonable recompense for any loss he may have sustained, or for any injury he may have suffered." The opinions giving indication that when the action is for a tort, and under some conditions, the rules applied are not necessarily exclusive; and those which ordinarily obtain in actions of tort might, in proper cases, be applied.

Pursuing this same objection, there were several decisions called to our attention which, it is claimed, are in express denial of plaintiff's right to recover to the present verdict, notably, *Hancock's Case*, 137 N. C. 497, 49 S. E. 952, 69 L. R. A. 403, *Hall's Case*, 139 N. C. 369, 52 S. E. 50, *Bryan's Case*, 133 N. C. 603, 45 S. E. 938, and *Johnson's Case*, 144 N. C. 410, 57 S. E. 122, 10 L. R. A. (N. S.) 256, 119 Am. St. Rep. 961, and the doctrine of stare decisis is earnestly invoked in support of defendant's position. In *Hancock's Case*, supra, the action was by the sender, and was brought upon the contract; and it does not definitely appear that the default occurred in this state. In *Hall's Case*, supra, the right to recover for mental anguish was left as an open question, to be determined on the facts as they should be ultimately made to appear. In *Bryan's Case*, the action was upon breach of the contract, and recovery was sustained on the express ground that the contract was made in this state. In *Johnson's Case*, 144 N. C. 410, 57 S. E. 122, 10 L. R. A. (N. S.) 256, 119 Am. St. Rep. 961, the language of opinion is much broader, and seems to be an authority sustaining defendant's position; but a perusal of the case will clearly disclose that the learned judge was treating it throughout as an action for breach of the contract; and the decision was made to rest on *Bryan's Case* and other decisions applying the familiar principle that, in actions for breach of contract, when same originates in one state and is to be partly performed there, the laws of such state are ordinarily allowed as controlling on the question of interpretation and adjustment of the rights of the parties. These cases, then, when properly understood, do not, in our opinion, call for or permit an application of the doctrine of stare decisis.

In *Mason v. Nelson*, 148 N. C. 509, 62 S. E. 631, 18 L. R. A. (N. S.) 1221, 128 Am. St. Rep. 635, speaking of this doctrine of stare decisis and its proper application, the court said: "We are not insensible to the great importance of the doctrine of stare decisis, a doctrine of recognized value in all countries whose jurisprudence, like our own, is founded so largely on precedents. We know that the courts in such countries, as a general rule, will adhere to a decision found to be erroneous, when it has been acquiesced in for a great length of time, so as to become accepted law, constituting a rule of property. And there are other conditions, restricted in their nature, where the doctrine may be properly applied; but none of them require or permit that a court should adhere to a decision, found to be clearly erroneous, which affects injuriously a general business law, and under the circumstances indicated here. As it has been well said, 'Where vital and important public or private rights are concerned, and the decisions regarding them are to have a direct and permanent influence upon all future time, it becomes the duty, as well as the right, of the court to consider them carefully, and to allow no previous error to continue, if it can be corrected. The foundation of the rule of stare decisis was promulgated on the ground of public policy; and it would be a grievous mistake to allow more harm than good to come from it.' 26 Am. & Eng. (2d Ed.) p. 184"—and the important and valuable case of *Hill v. Railroad*, 143 N. C. 539, 55 S. E. 854, 9 L. R. A. (N. S.) 606, is an illustration of the same view.

Recurring to the position sustained by these authorities, and more especially to the citation from 26 A. & E., supra, even if the doctrine of stare decisis was presented, it should not be allowed to prevail where a tort involving a breach of public duty, occurring within this state, has been clearly established and damages awarded on a principle recognized as necessary to enforce proper performance of such duties in this and all other cases of like kind.

It is also contended that if this proceeding and the principle upon which it rests are upheld that many persons could institute actions for the same breach of duty; that recoveries would be unduly multiplied and, in many instances, grave injustice done; but there would seem to be no good reason for this apprehension. As we have endeavored to show, in the large number of cases, the amount of damages to be awarded for mental anguish is practically the same, whether the action is on tort or contract. Where a tort is established, the consequential damages are only those which are natural and probable under the circumstances existent, or as they reasonably appeared, at the time the same occurred, and, applying the principle, when recovery for mental anguish is had in tort, the damages are properly con-

fined to the parties to the contract, or to those whose interest, as beneficiaries of the message, has been sufficiently disclosed to the company. It is only as to those persons that such damages could be reasonably held either probable or natural.

[5] It is further insisted that the regulations of the company, requiring presentation of claims of this kind within 60 days, would be annulled; but, to our minds, no such result follows. These regulations, to the extent that they are reasonable, and not in excuse for negligence, have been upheld with us by express decision; and we see no reason why they should not be allowed to prevail, whether the action is in contract or tort. *Forney v. Telegraph Co.*, 152 N. C. 494, 67 S. E. 1011; *Sherrill v. Telegraph Co.*, 109 N. C. 527, 14 S. E. 94. We are aware that there are decisions to the contrary in other jurisdictions, more especially in respect to the addressee of the message; but they are not in accord with the principles established here. We were referred by counsel to the case of *Cannaday v. Railroad*, 143 N. C. 439, 55 S. E. 836, 8 L. R. A. (N. S.) 939, 118 Am. St. Rep. 821, as authority in contravention of our present ruling; but that was a case where the contract and all the facts relevant to plaintiff's cause of action had their origin and existence in another state, and the case has no application to the facts appearing in this record; and in two cases from the United States Supreme Court, to which we were cited, *Primrose v. Telegraph Co.*, 154 U. S. 1, 14 Sup. Ct. 1098, 38 L. Ed. 883, and *Western Union v. Hall*, 124 U. S. 444, 8 Sup. Ct. 577, 31 L. Ed. 479, the actions were considered and dealt with as for breach of the contract. In the present case, a tort, committed in this state, having been established by the verdict, we are of opinion that the damages have been awarded on correct principles, and the judgment in plaintiff's favor must be therefore affirmed.

Affirmed.

CLARK, C. J. (concurring). When a message is sent from a point in this state to a point in another state, recovery can be had for mental anguish resulting from the breach of contract of prompt delivery. This is in accordance with the law of the place of contract. *Bryan v. Telegraph Co.*, 133 N. C. 603, 45 S. E. 938, and numerous cases since. When the message is sent from another state into this state, and there is a failure to deliver promptly after the arrival of the message in this state, the party in interest is entitled to recover damages for the breach of the public duty which has occurred here. Such damages are to be measured according to the public policy of this state, where the breach of duty has occurred. Hence mental anguish can be allowed when it has been caused by reason of such breach of duty.

The first cases in this state in which men-

tal anguish was allowed were cases in which the message had been sent from a point out of the state to a point in the state. *Young v. Telegraph Co.*, 107 N. C. 371, 11 S. E. 1044, 9 L. R. A. 669, 22 Am. St. Rep. 883, was a case where the message was sent from Greenville, S. C., to the plaintiff at New Bern, N. C. In *Thompson v. Telegraph Co.*, 107 N. C. 449, 12 S. E. 427, the message was sent from Danville, Va., to Milton, N. C. These were the first two cases in which recovery was had for mental anguish.

There have been numerous cases since, in which mental anguish has been recovered, where the message was sent from a point outside of the state to a point in the state. Among them are *Sherrill v. Telegraph Co.*, 109 N. C. 529, 14 S. E. 94; s. c., 116 N. C. 656, 21 S. E. 400; s. c., 117 N. C. 354, 23 S. E. 277; *Lewis v. Telegraph Co.*, 117 N. C. 436, 23 S. E. 319; *Lyne v. Telegraph Co.*, 123 N. C. 130, 31 S. E. 350; *Higdon v. Telegraph Co.*, 132 N. C. 726, 44 S. E. 558; *Williams v. Telegraph Co.*, 136 N. C. 82, 48 S. E. 559, 1 Ann. Cas. 359; *Hall v. Telegraph Co.*, 139 N. C. 370, 52 S. E. 50; *Whitten v. Telegraph Co.*, 141 N. C. 361, 54 S. E. 289; *Woods v. Telegraph Co.*, 148 N. C. 9, 61 S. E. 653, 128 Am. St. Rep. 581; *Marquette v. Telegraph Co.*, 153 N. C. 156, 69 S. E. 73; *Sherrill v. Telegraph Co.*, 155 N. C. 251, 71 S. E. 830. At this term, in *Alexander v. Telegraph Co.*, 74 S. E. 449, mental anguish was allowed in a case where the message was sent from Norfolk, Va., to a point in this state.

The only case contrary to the above was *Johnson v. Telegraph Co.*, 144 N. C. 410, 57 S. E. 122, 10 L. R. A. (N. S.) 256, 119 Am. St. Rep. 961, which has not been followed since. In *Jones on Telegraphs*, § 598, it is said: "Under the rulings of the courts in those states which permit a recovery of damages for mental anguish or suffering, such damages may be recovered for the negligent transmission or delivery of a message sent into these states from those which refuse to allow such damages. *Gray v. Telegraph Co.*, 108 Tenn. 39 [64 S. W. 1063], 56 L. R. A. 301, 91 Am. St. Rep. 706; *Telegraph Co. v. Blake*, 29 Tex. Civ. App. 224 [68 S. W. 526]. The same rule applies where the messages are sent from those states which permit to those which do not permit such recovery, when the action is brought in the former state. So, also, damages may be recovered where the message is sent, although it is to be delivered in a state which does not allow a recovery of such damages. *Bryan v. Telegraph Co.*, 133 N. C. 603 [45 S. E. 938]; *Telegraph Co. v. Waller*, 96 Tex. 589 [74 S. W. 751, 97 Am. St. Rep. 936]; *Telegraph Co. v. Cooper*, 29 Tex. Civ. App. 591 [69 S. W. 427]. But if both the states from and to which the message is sent refuse to allow damages for mental suffering, such damages cannot be recovered, although the suit is brought in a state which does allow such

damages, and is one through which the company has a line. *Thomas v. Telegraph Co.*, 25 Tex. Civ. App. 398 [61 S. W. 501]. It seems that the statutes in those states (and, we may add, decisions) permitting a recovery of such damages raise the duty of these companies above that assumed in the contract of sending, and base their reasons upon the fact that a public duty has been violated for which damages may be recovered, either at the place of sending or receiving." The author cites to sustain the view that this is a breach of public duty. *Thomp. Elec.* § 427. This ground of recovery has always been recognized in this state. *Woods v. Telegraph Co.*, 148 N. C. 9, 61 S. E. 653, 128 Am. St. Rep. 581.

In 2 Joyce, Tel. § 812c, it is said: "Under a South Carolina case, if a mistake occurs at the office in a state from which the telegram is sent, recovery may be had therein by the addressee for mental anguish, where it is a ground for recovery in such state; and it need not be shown that there has been a change in the common law of the state to which the message is sent. *Walker v. Telegraph Co.*, 75 S. C. 512 [56 S. E. 38]. It is also determined in that state that, although the telegram is received for transmission in another state, yet, if there was failure to deliver in South Carolina, an action was maintainable there for the resulting mental suffering."

If there is breach of public duty, and damages for mental anguish are recoverable therefor, it logically follows that when the action is brought in this state such damages are recoverable, whether the message originated or was received here. And, for the very reason that permits either the sender, sendee, or beneficiary of a message to recover upon showing injury to himself from a breach of such duty, this state has allowed damages for mental suffering, irrespective of whether the message was originated here or was received here. The sole case to the contrary is *Johnson v. Telegraph Co.*, 144 N. C. 410, 57 S. E. 122, 10 L. R. A. (N. S.) 256, 119 Am. St. Rep. 961, which is opposed to the numerous cases above cited, and in which the first paragraph in the headnotes requires us to overrule what is stated in the second headnote.

WALKER, J. (concurring in result). I agree with the majority of the court that damages are recoverable by plaintiff, the sendee of the message, in this state, to whom it was addressed by the sender at Roanoke, Va., although it appears that damages for mental anguish are not recoverable by the law of the latter state; but I cannot assent to the position that this decision is in harmony with *Johnson v. Telegraph Co.*, 144 N. C. 410, 57 S. E. 122, 10 L. R. A. (N. S.) 256, 119 Am. St. Rep. 961; for I must think

that the two cases are in irreconcilable conflict, at least in principle. In the *Johnson Case*, the suit was brought by the sendee, who was in this state, and the message originated in Virginia, where damages for mental anguish were not recoverable. The same principle, in my opinion, must necessarily govern both cases. In *Bryan v. Telegraph Co.*, 133 N. C. 603, 45 S. E. 938, the sendee, who lived in South Carolina, where damages for mental anguish are not recoverable, was allowed to recover, but not for the reasons stated in support of the opinion of the court in this case.

BROWN, J. (dissenting). I am of opinion that this case is governed wholly by the decision in *Bryan's Case*, 133 N. C. 603, 45 S. E. 938, and *Johnson's Case*, 144 N. C. 410, 57 S. E. 122, 10 L. R. A. (N. S.) 256, 119 Am. St. Rep. 961. *Bryan's Case* was decided in 1903, and the opinion written by Clark, C. J. It has been cited and approved in 11 cases, which are cited in the notes to the report of the case. The *Johnson Case* was decided solely upon the authority of the *Bryan Case*, and by a unanimous court, and it was so understood by every member of this court, including the author of the opinion in the *Bryan Case*.

In *Bryan's Case* and in *Johnson's Case* following, it is held that "the liability of a telegraph company for damages for mental anguish, for negligence in transmitting telegraph messages from its office in one state to that of another for delivery, is determined by the laws of the state in which the message was received for transmission."

In *Bryan's Case*, which has been followed without deviation since its decision, the Chief Justice says: "A case exactly in point is *Reed v. Telegraph Co.* [135 Mo. 661, 37 S. W. 904], 34 L. R. A. 492 [58 Am. St. Rep. 609], which holds that, if a telegraph message is delivered to the company in one state, to be by it transmitted to a place in another state, the validity and interpretation of the contract, as well as its liability thereunder, is to be determined by the laws of the former state. The contract was made at Mooresville, in this state; it is a North Carolina contract, and damages for its breach are to be assessed according to the liability attaching to such contract under our laws."

It is to be noted that at the time that decision was rendered the laws of South Carolina did not permit a recovery upon the ground of mental anguish; and the sendee of the message, who lived in South Carolina, was permitted to come into this state and bring action in its courts, in order to recover damages for mental anguish. Now that the defendant company relies upon the very same principle announced in that case for its protection, the case is practically ignored. "It is a poor rule that does not work both ways."

(158 N. C. 489)

STATE v. WATKINS.

(Supreme Court of North Carolina. May 28, 1912.)

1. HOMICIDE (§ 273*)—TRIAL—QUESTIONS FOR JURY.

In a prosecution for homicide, where the evidence whether it was justifiable or not was sharply conflicting, the question was for the jury.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 566; Dec. Dig. § 273.*]

2. HOMICIDE (§ 203*) — EVIDENCE — DYING DECLARATIONS—ADMISSIBILITY.

Surrounding circumstances may be sufficient to show consciousness of approaching death and lay the foundation for a dying declaration, so that where it appeared that deceased asked if he was in any danger of dying, and said that otherwise he did not wish his people to know his condition, and the doctor said he did not have one chance in a hundred of living, but that they ought to operate, but would not operate without his consent, and deceased consented to communicate with his people and to the operation, the circumstances sufficiently show a sense of impending death to warrant the admission of dying declarations.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 430-437; Dec. Dig. § 203.*]

3. HOMICIDE (§ 221*)—EVIDENCE — DYING DECLARATIONS.

Because of necessity, dying declarations are admitted in homicide cases without the sanction of an oath, but they are only admitted as evidence and are not conclusive.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 463, 464; Dec. Dig. § 221.*]

4. HOMICIDE (§ 204*)—EVIDENCE — DYING DECLARATIONS.

To be admissible, a dying declaration need not be in immediate proximity to death, being competent where there is an impending sense of dissolution.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 438; Dec. Dig. § 204.*]

5. HOMICIDE (§ 215*)—EVIDENCE — DYING DECLARATIONS—CONCLUSIONS.

Where the deceased stated that they had killed him and asked who shot him, and, on being told that an officer shot him, asked why he did so, saying that he did nothing to be shot for, those declarations are admissible, not being incompetent as an expression of opinion.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 451-456; Dec. Dig. § 215.*]

6. HOMICIDE (§ 340*)—APPEAL — HARMLESS ERROR.

In a prosecution for homicide, where the court erroneously charged that, if the jury found that the accused's conduct was as testified by a witness, they should find him guilty of murder in the second degree, and the jury found accused guilty of only manslaughter, the charge was not prejudicial.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 716-717, 720; Dec. Dig. § 340.*]

7. CRIMINAL LAW (§ 783*)—TRIAL—INSTRUCTIONS.

While the court cannot single out a witness or witnesses and charge the jury that if they believe those witnesses to render a certain verdict, the court may charge that if they believe a state of facts as deposed by certain witnesses then their verdict should be a conviction or acquittal as the case may be.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1734, 1735, 1872-1876; Dec. Dig. § 783.*]

8. HOMICIDE (§ 116*)—SELF-DEFENSE—REASONABLE CAUSE FOR APPREHENSION.

Where self-defense is urged in a prosecution for homicide, the prisoner's conduct must be judged by the facts and circumstances as they appeared to him at the time; the reasonableness of his apprehension of death or great bodily injury being a question for the jury to decide in view of the facts and circumstances, and not solely a matter for the accused to decide.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 158-163; Dec. Dig. § 116.*]

9. CRIMINAL LAW (§ 829*)—TRIAL—INSTRUCTIONS.

The refusal of requested instructions, where covered by the charges given, is not erroneous.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2011; Dec. Dig. § 829.*]

10. CRIMINAL LAW (§ 1178*) — APPEAL — WAIVER OF ERROR.

Under Supreme Court rule 34 (140 N. C. 666, 66 S. E. ix), exceptions not urged in accused's brief on appeal are waived.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3011-3013; Dec. Dig. § 1178.*]

11. CRIMINAL LAW (§ 923*)—TRIAL—OBJECTIONS.

A motion to set aside the verdict on the ground of disqualification of a juror should be made at the earliest opportunity, and where accused has taken the chances for a favorable verdict, the entertaining of such a motion rests in the sound discretion of the trial court.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2219-2237; Dec. Dig. § 923.*]

12. CRIMINAL LAW (§ 923*)—APPEAL—ABUSE OF DISCRETION OF TRIAL COURT.

Where, in a prosecution for homicide, before the jury had retired, accused learned that one of the jurors had expressed an opinion before he entered the box, the denial of his motion to set aside the conviction is not an abuse of discretion, where the juror testified that not only was he not prejudiced, but he aided in reducing the verdict from murder in the second degree to manslaughter.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2225-2237; Dec. Dig. § 923.*]

Appeal from Superior Court, Buncombe County; Webb, Judge.

F. C. Watkins was convicted of manslaughter, and he appeals. Affirmed.

J. D. Murphy, A. T. Morrison, and Craig, Martin & Thomason, for appellant. The Attorney General and T. H. Calvert, Asst. Atty. Gen. for the State.

CLARK, C. J. [1] The prisoner was indicted for the murder of John Hill Bunting. There was a verdict of manslaughter. The deceased, Bunting, was shot in his room at the Black Mountain Hotel by the prisoner about an hour after midnight on August 6, 1909, and died next day in the hospital at Asheville. The prisoner was an officer and went to the room in which were Bunting and one Collins, having been sent for, upon the information that they were noisy and disorderly and disturbing the inmates of the hotel thereby. According to the evidence

of the state, when the prisoner reached the room, Bunting and Collins were not aggressive and offered no resistance, and the shooting under the circumstances was entirely unnecessary and could not be justified as an act of self-defense or otherwise. According to the evidence for the prisoner, who testified in his own behalf, he acted under apprehension that he would be assaulted and was in immediate danger and under reasonable apprehension thereof, though no weapons were found in the possession of either Bunting or Collins. The conflict of testimony upon this point was a matter for the jury.

[2] The first exception is to the admission of the dying declarations of Bunting. He stated to the nurse that they "had killed him." He asked if he was in any danger of dying, and said that if he was not he did not wish his people to know his condition. The doctor told him that he was suffering from a severe internal hemorrhage; that he did not have "more than one chance in a hundred of living"; that they would have to cut open his abdomen, and were not willing to do so without his consent; and that he had better communicate with his people. Thereupon he asked Dr. Hilliard to send a telegram to them. The deceased, who had been quiet, then opened his eyes and said, "Who shot me?" Dr. Landress answered, "The officer at Black Mountain shot you," to which the deceased replied: "Why did he shoot me? I have done nothing to be shot for." Dr. Fletcher also testified as to the critical condition of the deceased at that moment, who "knew his condition" and was about to be put upon the operating table, and who died that night. Surrounding circumstances are sufficient to show consciousness of approaching death and to lay the foundation for a dying declaration. *State v. Bagley*, 73 S. E. 995, and *State v. Laughter*, 74 S. E. 913, at this term.

In *Wigmore, Evl. § 1442*, it is said: "In ascertaining this consciousness of approaching death, recourse should naturally be had to all the attending circumstances. It has been contended that only the statements of the declarant could be considered for this purpose; or, less broadly, that the nature of the injury alone could not be sufficient, i. e., in effect, that the declarant must have shown in some way, by conduct or language, that he knew he was going to die. This, however, is without good reason. We may avail ourselves of any means of inferring the existence of such knowledge; and if in a given case the nature of the wound is such that the declarant must have realized his situation, our object is sufficiently attained. * * * No rule can here be laid down. The circumstances of each case will show whether the requisite consciousness existed; and it is poor policy to disturb the ruling of the trial judge upon the meaning of these circumstances."

The evidence in this case shows that the deceased said that he did not wish his friends to know his condition unless he was in danger of dying; the physicians told him that he must be operated on; that he had but one chance in a hundred to live; that he should communicate with his friends; he immediately sent off a message showing his belief in what had been said to him; he was immediately lifted upon the operating table and died that night; and, indeed, the above declaration seemed to have been the last remark that he made. It is impossible to escape the conclusion upon this evidence that the declaration was made under a sense of impending death.

[3] The deceased had already stated that they had killed him, and he must have known, even independently of the physicians' statements, from the attendant circumstances, that his condition was desperate, and when the physicians told him that he had but one chance in a hundred to live, and he should wire his family, he understood their meaning, and at once sent the dispatch. The dying declarations of the deceased, under these circumstances, are taken, without the sanctity of an oath, because of necessity. Such declarations are, however, only admitted as evidence and are not conclusive. The jury are to weigh them like any other evidence and give them such weight only as they think proper.

[4] Though it seems that those were the last words that the deceased spoke, the admissibility of such declarations does not depend upon the immediate proximity of death, for they are competent where there is the impending sense of dissolution, though death may be much longer off than in this case. In *State v. Peace*, 46 N. C. 255, the declarations were admitted though the deceased did not die for two days thereafter, and there have been cases where such declarations were admitted when the death occurred after a still longer lapse of time. *State v. Mills*, 91 N. C. 581.

On the other hand, it is not necessary that the deceased should have expressly declared that he was about to die when, as here, the attending circumstances, as for instance the remark of the physician of his desperate condition and his acting upon this suggestion to send off the dispatch, show that his critical condition was known to him.

In *Greenleaf, Ev. (16th Ed.) § 158*, it is said that, while it is essential that the deceased was under the sense of impending death, it is not necessary that he should so state at the time. "It is enough, if it satisfactorily appears, in any mode, that the declarations were made under that sanction; whether it be directly proved by the express language of the declarant, or be inferred from his evident danger, or the opinion of the medical or other attendants, stated to him, or from his conduct or the circumstances in the case, all of which are resort-

ed to in order to ascertain the state of the declarant's mind."

The rule for the admission of such testimony is also thus laid down in Taylor, Ev. § 648, and approved (State v. Mills, 91 N. C. 594): "(1) At the time the declarations were made the declarant should have been in actual danger of death. (2) He should have a full apprehension of his danger. (3) Death should have ensued."

[5] Nor is the language used: "Why did he shoot me? I have done nothing to be shot for"—incompetent as the expression of an opinion. It was the statement of a fact. If it was doubtful which it was, it should have been admitted, and the court should have been requested to instruct the jury to consider what the deceased meant as a matter affecting the weight to be given to the statement. In State v. Mills, 91 N. C. 594, the dying man stated that Eaton Mills had shot him. The witness asked, "What for?" to which the deceased replied, "Nothing." That reply is almost identical with the declaration here in evidence.

In Darby v. Ga., 79 Ga. 63, 3 S. E. 663, the deceased said that "the prisoner had cut him, and that he had done nothing to cause it." The court held that this was not a conclusion, but a fact, and that the declaration was competent. In White v. State, 100 Ga. 659, 28 S. E. 423, the dying declaration that the accused "shot me for nothing, without any cause," was held not the statement of conclusion, but rather a fact, and was competent. These two cases were cited and approved on this point in McMillan v. State, 128 Ga. 25, 57 S. E. 309.

[6, 7] The court charged the jury that, if they found that the prisoner "went into this room that night, and that his conduct and action were such as testified to by Collins and under the circumstances as testified by him (the court recapitulating the evidence), then the court charges you that it is your duty to find the defendant guilty of murder in the second degree." The prisoner was acquitted of murder in the second degree, and therefore this language, even if erroneous, was not prejudicial, but in State v. Rollins, 113 N. C. 734, 18 S. E. 398, it is held that such language was not erroneous. The court said: "The court cannot single out a witness or witnesses and charge the jury that if they believe those witnesses to find so and so. State v. Rogers, 93 N. C. 523, and cases there cited. But there is no impropriety in saying to the jury that if they believe a certain state of facts, as deposed to by certain witnesses, then the law applicable is so and so, when the court, as in this case, calls to their attention the opposite state of facts as deposed to by other witnesses, and instructs as to the law applicable thereto. This directs the jury's attention, not to the credibility of such witnesses, but to a certain hypothesis or state of facts, and the reference to the witnesses is simply inci-

dental to refresh them as to the evidence tending to show a particular state of facts."

[8] Exception 3 cannot be sustained, for the instruction asked was correctly given in the charge as follows: "If the defendant reasonably believed that he was about to suffer death or serious bodily harm, and shot to protect himself, he would not be guilty, and the jury should return a verdict of not guilty, and the jury need not be satisfied of these facts beyond a reasonable doubt, or by the greater weight of the evidence, but simply satisfied. The prisoner's conduct must be judged by the facts and circumstances as they appeared to him at the time he shot, and the jury, under the evidence, should ascertain whether he had at the time a reasonable apprehension that he was about to lose his life or receive great bodily harm. The reasonableness of his apprehension is for the jury to pass upon; but the jury must form their conclusion from the facts and circumstances as they appeared to the prisoner at the time he shot." The able counsel for the defendant insisted that the reasonableness of the apprehension was to be judged by the prisoner himself and not by the jury. The charge as given is strictly in accordance with the precedents and the reason of the thing. If the reasonableness of the apprehension of the prisoner must be decided by him conclusively, and not by the jury, upon consideration of the attendant circumstances, then the result depends upon his nerves, or rather upon his own statement as to them, and not upon the reasonableness of the apprehension under which the prisoner took the life of a fellow being. In short, a brave man, under such circumstances, would be guilty, and a coward justifiable. Such cannot be the law.

[9] Exceptions 6, 7, and 8 cannot be sustained, for the court gave the instructions asked even more strongly than requested. The court repeatedly charged that if the officer acted in self-defense as testified to by himself and witnesses, he could not be convicted. The same is true as to exception 10.

Nor can exception 16 be sustained. If the prisoner fired, not in the attempt to effect an arrest, but in defense of his own person, then his conduct must be measured by the rules applicable to any individual so assaulted, and the fact that he was an officer would not justify him in needlessly killing the deceased.

[10] The other exceptions are without merit and were properly abandoned by not being brought forward in prisoner's brief. Rule 34 of this court (140 N. C. 666, 66 S. E. ix).

[11, 12] The prisoner further assigned for error the action of the court in overruling a motion to set aside the verdict on the ground that one of the jurors had formed or expressed his opinion that prisoner was guilty before he entered the box, and did not let this be known when challenged. The

court found as a fact that such knowledge as the prisoner had in regard to this matter was acquired before the argument of the case was completed and before verdict, but it was not communicated to the court till after the verdict. In *Pharr v. Railroad*, 132 N. C. 418, 44 S. E. 37, the court said: "Motions of this sort must be made in apt time. The knowledge of the alleged fact, upon which the defendant bases its motion, was acquired during the trial and before the verdict was rendered, and the matter should at the earliest opportunity have been brought to the attention of the court. It has been said by this court that, after a defendant has taken chances for a favorable verdict, the purposes of justice are not subserved by listening too readily to objections not taken in apt time." To a similar purport, *Baxter v. Wilson*, 95 N. C. 137; *Spicer v. Fulghum*, 87 N. C. 18; *State v. Perkins*, 66 N. C. 128. Such matters rest in the discretion of the trial court, certainly in the absence of a palpable abuse of discretion. This was not the case here, for the testimony of the juror himself is that he not only was not prejudiced against the prisoner, but that in considering the verdict several of the jurors were in favor of a verdict for murder in the second degree, and that he on the first vote stood out for manslaughter and aided to reduce the verdict accordingly, and that none of the jurors were for acquittal at any time.

Upon careful consideration of all the exceptions, we find no error.

(159 N. C. 133)

MASON v. SEABOARD AIR LINE RY. et al.
(Supreme Court of North Carolina. May 28, 1912.)

CARRIERS (§ 356*)—PASSENGERS—EJECTION—GROUNDS.

A passenger, who purchases a mileage book and signs his name to the contract, there-in stipulating, "Issued in exchange for proper number of coupons from and valid only when presented on train in connection with interchangeable mileage ticket," and who presents the book to an agent who gives him the usual exchange ticket, must on the demand of the conductor present the book when presenting the exchange ticket, and where he refuses to do so he may be ejected, using only necessary force.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 1408, 1410, 1423-1432; Dec. Dig. § 356.*]

Clark, C. J., and Allen, J., dissenting.

Appeal from Superior Court, Mecklenburg County; Adams, Judge.

Action by E. L. Mason against the Seaboard Air Line Railway and another. From a judgment for defendants, plaintiff appeals. Affirmed.

This issue was submitted to the jury: "Was the plaintiff a passenger on the defendant's train, as alleged in the complaint? Answer: No." There was a judgment for the defendants.

Tillett & Guthrie and Stewart & McRae, for appellant. Burwell & Cansler and R. S. Hutchison, for appellees.

BROWN, J. The question presented by this appeal and raised by the several assignments of error is whether the plaintiff was a passenger upon the defendant's train and unlawfully ejected. It is admitted that he was ejected by the conductor under direct orders from the authorities of the defendant, and it is not contended that there is any evidence that the said ejection was accompanied with undue force. There is no evidence of rudeness, insult, or other unnecessary force used in expelling the plaintiff from the train. The facts are practically undisputed.

The plaintiff purchased of the defendant a mileage book at the rate of two cents per mile. He signed his name to the contract contained in it. On April 14, 1910, he was a passenger from Charlotte to Ellenboro on the defendant's road. He had presented his mileage book to the agent at Charlotte, who pulled the proper number of coupons to cover the distance, and gave him the exchange ticket. On his trip he exhibited both the mileage book and the ticket to the conductor and completed his journey. On the return trip the same afternoon, he presented his mileage book to the agent, who pulled his mileage and gave him the usual exchange ticket. When the conductor asked him for his ticket, he handed him the exchange ticket, and upon being asked for his mileage book in order that the conductor might compare the exchange ticket with the book, the plaintiff refused to exhibit his book, but stated to the conductor that he had it in his vest pocket, and repeatedly declined to let the conductor see it.

The evidence of the plaintiff itself discloses that the conductor time and again requested him to show his mileage book, telling him the exchange ticket was not good for passage without it, and that he would be compelled to put him off. The conductor wired the general passenger agent for instructions, and received a reply ordering him to put the plaintiff off the train if he refused to comply with the conditions of his mileage book and exhibit it to the conductor in connection with the exchange ticket. The conductor showed this message to the plaintiff, who still refused to show his mileage book, although he had it in his vest pocket. Whereupon the conductor put the plaintiff off the train at the depot in Lincolnton. The plaintiff hired a vehicle, drove to Gastonia, and came over to Charlotte on another road, reaching there three hours later than he would have done had he remained on the defendant's train.

The court charged the jury, in effect, that if they believed the evidence in the case, the plaintiff was not a passenger on the de-

fendant's train, and therefore was not entitled to recover.

In considering this question, it is well to bear in mind that the rate fixed by law for the sale of tickets upon common carriers is $2\frac{1}{2}$ cents per mile, while mileage books are voluntarily sold by the railroad companies at the rate of 2 cents per mile. It should also be borne in mind that the Legislature has no power to require the railroads to sell mileage books at a less rate than that fixed for ordinary tickets. This has been settled finally by the Supreme Court of the United States in *Lake Shore Ry. v. Smith*, 173 U. S. 684, 19 Sup. Ct. 565, 43 L. Ed. 858; and to the same effect are the decisions of the state courts of Virginia, New York, and others. *Anderson v. Railway*, 106 Va. 61, 55 S. E. 572, 7 L. R. A. (N. S.) 1086, 117 Am. St. Rep. 983, 9 Ann. Cas. 1124; *Beardsley v. Railway*, 162 N. Y. 230, 56 N. E. 488.

So it must be conceded that the mileage book is a special contract of carriage between the carrier and the passenger, signed by the passenger, and made in consideration of a reduced rate of transportation, voluntarily granted by the railroad in consideration of the quantity of transportation purchased. Under such conditions the parties to the contract can incorporate in it such terms and conditions as they have mutually agreed upon. In respect to such contracts it may therefore be stated, as a general rule, that the passenger is entitled only to those rights which the ticket confers, and is bound himself to perform the obligations which the ticket imposes upon him. *Hutchinson on Carriers*, § 1053, where the author cites a great array of cases from the federal and state courts in support of his text.

In discussing a case similar to this, the Supreme Court of Georgia says: "The plaintiff paid a special fare under a special contract. The defendant agreed that the plaintiff might travel for a fare which is not the full fare the law allowed, and the defendant had a right to impose such conditions as they saw fit." To the same effect is *Bitterman v. Railroad*, 207 U. S. 205, 28 Sup. Ct. 91, 52 L. Ed. 171, 12 Ann. Cas. 693; *Mosher v. Railroad*, 127 U. S. 390, 8 Sup. Ct. 1324, 32 L. Ed. 249; *Boylan v. Railroad*, 132 U. S. 146, 10 Sup. Ct. 50, 33 L. Ed. 290; *Watson v. Railroad*, 104 Tenn. 194, 56 S. W. 1024, 49 L. R. A. 454.

The consensus of all the authorities, without a single exception so far as we have been able to find, is that by accepting such a contract at a reduced rate when he has the opportunity to purchase the usual and ordinary ticket, the passenger enters into a contract with the carrier different from that implied by law upon the purchaser of an ordinary ticket at full rate of fare. The purchaser is bound in such cases by the terms of the contract, and is entitled to its advantages of reduced fare.

The right of common carriers to attach

special conditions and limitations to tickets issued at reduced rates seems to have been settled by the decisions of this court. *Rose v. Railroad*, 106 N. C. 168, 11 S. E. 526; *Pickens v. Railroad*, 104 N. C. 312, 10 S. E. 556.

The validity of this mileage contract was passed upon and upheld by this court in an opinion by Mr. Justice Hoke in *Harvey v. Railway Co.*, 153 N. C. 567, 69 S. E. 627, in which it is held that: "A railroad mileage book is a contract of carriage with the purchaser or lawful holder, subject to certain restrictive stipulations, for the wrongful breach of which the holder may be expelled from the company's train." This case is cited and approved in *Dorsett v. Railway* (at the last term of this court) 156 N. C. 441, 72 S. E. 491. In both of these cases the railroad companies were held liable for violation of this very contract. These identical questions have also been recently passed upon in *Desportes v. Railway*, 87 S. C. 160, 69 S. E. 148; *Perry v. Railroad*, 9 Ga. App. 260, 70 S. E. 1122; *B. & O. R. R. v. Evans*, 169 Ind. 410, 82 N. E. 773; *So. Ry. v. De Saussur*, 116 Ga. 53, 42 S. E. 479; *Harris v. Railroad*, 77 N. J. Law, 278, 72 Atl. 50.

It is immaterial whether the plaintiff read this ticket, or not, for he knew of its conditions and complied with them on his trip in the morning. It was his own folly that he refused willfully and unnecessarily to comply with them on his return in the afternoon. The plaintiff admitted that he had his mileage book in his vest pocket, and boastfully refused to produce it. *French v. Trans. Co.*, 199 Mass. 433, 85 N. E. 424, 19 L. R. A. (N. S.) 1006, 127 Am. St. Rep. 506; *Reed v. Railroad* (Tex. Civ. App.) 50 S. W. 432. Assuming, for the sake of the argument only, that we have the right to pass upon the reasonableness of such regulation, we are unable to see any great hardship imposed upon a passenger who desires to save a half cent per mile in traveling to require him to produce his mileage book in connection with the exchange ticket. It is a well-known fact that the last General Assembly thoroughly investigated this question, and refused to interfere, even if it had the power. This regulation is devised to prevent impositions upon the railroad companies. As stated in the argument in this case, if the passenger was not required to exhibit his mileage book to the conductor, but only the exchange ticket, he could secure many exchange tickets at the railroad station and easily sell them at a small profit. Contract of mileage is a personal one and not assignable by its very terms, and were it not for this regulation, the railroad company would be utterly unable to prevent one person from traveling on the mileage book of another. It is useless to discuss the utility of this regulation, because it seems to be universally held that, if the passenger accepts the reduced rate, he must take with it these conditions which the carrier attaches to it. We find, however, in

the books a great many regulations not a whit more unreasonable than this, which have been sustained by the courts. *Reed v. Railroad* (Tex. Civ. App.) 50 S. W. 432; *Railroad v. Barlow*, 104 Ga. 213, 30 S. E. 732, 69 Am. St. Rep. 166; *Wenz v. Railroad*, 108 Ga. 290, 33 S. E. 970; *Eastman v. Railroad*, 70 N. H. 240, 46 Atl. 54; *England v. Railroad*, 32 Tex. Civ. App. 86, 73 S. W. 24; *McRae v. Railroad*, 88 N. C. 526, 43 Am. Rep. 745; *Railroad v. Hudson*, 117 Ky. 995, 80 S. W. 454; *Dangerfield v. Railroad*, 62 Kan. 85, 61 Pac. 405; *Boling v. Railroad*, 189 Mo. 219, 88 S. W. 35.

From an unbroken line of authorities we are of opinion that the refusal of the plaintiff to present his mileage book in connection with the exchange ticket by the express terms of the contract disentitles the plaintiff to ride as a passenger upon the train. It was not optional with the conductor to waive any such violation, and he did not waive it, for he required the plaintiff to perform it that very morning, and the plaintiff voluntarily acknowledged his duty to perform it by producing the mileage book when demanded.

It is contended by the plaintiff that the conductor should have returned to him the exchange ticket. The question involved in this case is not the value of that exchange ticket, but the right of the plaintiff to continue as a passenger on the defendant's train when he willfully and obstinately refused to produce his mileage book in violation of the very contract which he had signed, a part of which reads as follows: "Good for Continuous Passage to Destination, Commencing Only on Date Stamped on Back Hereof. Issued in Exchange for proper number of Coupons from and Valid Only when presented on train in connection with INTERCHANGEABLE MILEAGE TICKET." This exchange ticket was absolutely valueless without the production of the mileage book, and did not entitle the passenger to transportation. The failure, therefore, of the conductor at the time to return it to the plaintiff certainly could not entitle the plaintiff to ride upon the train when he still repeatedly refused to produce his mileage book in connection with it. The identical point is decided by the Supreme Court of Minnesota in *Rahilly v. Railroad*, 66 Minn. 153, 68 N. W. 853, wherein it is said: "We are all agreed that, even if the conductor had no right to take up the ticket, this would not give the plaintiff any right to refuse to pay his fare until and unless the ticket was returned. Having no right to ride on the ticket, it was his duty to pay the fare, or leave the train, and then pursue his own remedy against the defendant for wrongfully withholding the ticket from him." To the same effect is *Elliot v. Railway*, 145 Cal. 441, 79 Pac. 420, 68 L. R. A. 393, in which it is said: "It is further contended that the defendant could not, while

retaining the void ticket, offered by plaintiff, legally demand the delivery of any other ticket or the payment of fare, and could not legally eject plaintiff for failure to comply with such demand. As already stated in our discussion of the findings of the court on this subject, the conductor expressly repudiated this ticket as absolutely void, and notified the plaintiff that he could not honor it. It was, as a matter of fact, entirely without value. We are not at all satisfied that the conductor had any right to retain this ticket, but we cannot see how an improper retention of a worthless ticket by the conductor could give the plaintiff any right to remain on the train without the presentation of a valid ticket or the payment of fare. He had not exhibited or surrendered a valid ticket, he had given nothing of value to the conductor, and he had refused and continued to refuse to pay his fare."

We are of opinion that the judge of the superior court was right in holding that, by his unreasonable conduct in refusing to exhibit the mileage book in his pocket, the plaintiff forfeited his right as a passenger, and was rightfully ejected from the defendant's train. Section 2629 of the Revisal of 1905 authorizes the ejection of passengers who refuse to pay fare, or violate the rules and regulations of the carrier.

No error

HOKE, J. (concurring in the result). I am of opinion that, under existent law, the mileage book, in its present form, constitutes a contract of carriage, subject to certain restrictive provisions, and to the extent that these provisions are reasonable and reasonably insisted on, they bind the parties according to their tenor. In my judgment, the stipulation in question here is a reasonable one, being necessary to prevent the improper use of these books by persons who do not own them, and there is nothing in the record that, to my mind, justifies or permits the conclusion that in this instance the conductor acted maliciously or in wanton disregard of plaintiff's rights as a passenger. I therefore concur in the decision denying recovery to plaintiff.

CLARK, C. J. (dissenting). It is too late to contest the proposition that common carriers are subject to public regulations, and that, when they make regulations themselves, such regulations must be reasonable.

It is not correct that the defendant company sold the plaintiff the mileage book at 2 cents per mile as a favor. When the General Assembly of this state, by chapter 216, Laws 1907, prescribed 2½ cents per mile as a maximum legal passenger rate, an injunction was sued out in the federal court to restrain the operation of this statute on the ground that it was confiscatory. Upon a reference to ascertain the facts, it was found

that the railroad companies were making more money under the new rate than under the former higher rate. Thereupon the railroad companies proposed to the Governor of this state that, if the rate was made 2½ cents per mile, they would issue mileage books at 2 cents per mile. In consequence, the Legislature was called in Special Session in 1908 and adopted the 2½ cent rate. Laws 1908, Ex. Sess. c. 144. It was well understood at the time that the mileage book theretofore in use, and which is still in general use elsewhere, from which mileage is pulled on the train, was intended. No other kind had ever been heard of in this section. It was therefore by virtue of contract with the state, and not as an act of grace, that the plaintiff was enabled to buy this mileage book. It was a distinct violation of contract on the part of the defendant that the mileage book put on sale was hedged about with these restrictions. Good faith to the public and to the plaintiff requires that the defendant should pay damages for the wrongful ejection of the plaintiff.

Even if there had not been this contract between the railroad companies and the state, the regulations attached to this mileage book were unreasonable and should not be enforced. They are unreasonable because never known here, or required, till after the adjournment of the Legislature of 1908, and are practically unknown anywhere except in Virginia, Georgia, and in this state. Their enforcement in South Carolina has been prohibited by statute. These regulations, being unnecessary and vexatious, should not be upheld by the courts.

Having seen fit to require that a mileage book should be used to buy tickets with, certainly it was unreasonable to require thereafter anything more than the presentation of the ticket which had been issued in exchange for the mileage. The ticket was then on the same footing as any other local ticket good for that day and train. If the defendant feared that such ticket might be held by some one who did not own the mileage for which it was issued, then it should simply have required the mileage book to be presented to the conductor as formerly, and not to be exchanged for a ticket. The double requirement is inexcusable.

It is true, as argued before us by defendants' counsel, that it seems a discrimination to permit those who can advance \$20 to purchase a mileage book at 2 cents per mile while those who cannot, or who do not wish to do so, are required to pay 2½ cents. But the railroads themselves originated the system of mileage books upon the ground that it saved them the expense and inconvenience of selling so many tickets, when 1,000 miles could be sold at once. It is in denial of the very reason given for issuing mileage books heretofore that the defendant now requires that tickets shall be bought with mileage books. The whole trouble can be redressed

by the railroads voluntarily, or under compulsion of a statute, selling transportation to all, whether with or without mileage books, at 2 cents per mile—the rate which has been established and which is in force in so many other states and which experience has proven to be most profitable.

In view of the reason heretofore given for placing mileage books on sale, it would seem that the requirement now that these books should be exchanged for tickets puts a double expense upon the railroad, and it has been suggested that the reason therefor is the desire to discourage the public from buying the mileage books which the railroads agreed to issue provided the state would raise the passenger fare to 2½ cents.

If the defendant had shown that in fact the plaintiff was not the holder of a mileage book, and that his ticket was obtained of the agent by misrepresentations, the defense would admit of consideration. But here it is not denied that the plaintiff owned a mileage book, had shown it to this same conductor on this same train on his way up that morning, that in exchange for mileage out of that book he had obtained this ticket from the defendant's agent, that the conductor, evidently doubting his right upon that state of facts to ditch the plaintiff, wired to headquarters, and the company with knowledge of these facts ordered him put off. The ticket on its face recited the number of the mileage book, the company's record shows that the plaintiff had bought it, and the conductor had seen it in his hands that morning. Besides, the station agent who sold the ticket in exchange for the mileage was accessible.

Thus with the money of the plaintiff for this passage in its treasury and with ample proof of the fact as shown by the ticket issued in exchange for such mileage the defendant put the plaintiff off its train without returning his ticket or refunding the money which he had paid to the company for it and for which the ticket was a receipt. This conduct was arbitrary, unreasonable, and unjust, and the defendant should be made to pay such damages as a jury should deem a fair compensation for the humiliation and wrong it has thereby inflicted upon the plaintiff.

ALLEN, J. (dissenting). The opinion of the court, as announced by Mr. Justice BROWN, if carried to its legitimate conclusion, will permit common carriers to make contracts for mileage upon their own terms, and, however unreasonable any stipulation may be, it will be binding because, as he says, it is a special contract based upon a consideration. I think the error consists in assuming that the parties to the contract are upon equal terms, and, in a matter of this importance, that we ought not to go outside of the facts of this case, and prejudge questions not before us.

The question does not arise as to whether the General Assembly has the power to compel common carriers to issue mileage books because they are making such contracts, and I see no reason for suggesting that the power does not exist until the question is presented, nor for intimating that other, and perhaps more stringent, regulations may be adopted.

It is admitted in this case that the plaintiff had a mileage book, which is said in *Harvey v. Railroad*, 153 N. C. 571, 69 S. E. 627, to constitute a contract of carriage, subject to certain restrictive stipulations for a wrongful breach of which the company may, under given conditions, expel the holder from its train.

The restrictive conditions, so far as applicable to this case, are that a ticket shall be procured on the mileage book, and that when the ticket is presented to the conductor, the mileage book shall accompany it. The first of these conditions was complied with, and the plaintiff was on the train of the defendant with a ticket which he had lawfully procured upon his mileage book. He did not present his mileage book to the conductor with his ticket, and was expelled from the train. The question is therefore presented, under the rule adopted in the *Harvey Case*, as to whether the failure to present the mileage book with the ticket was a wrongful breach of the stipulation in the contract, created by issuing the mileage book, which justified the expulsion of the plaintiff from the train under the conditions then existing.

I think there is evidence that there was no wrongful breach of the stipulation, and, if so, the judgment of nonsuit should be set aside and a new trial awarded. I assume that the conductor has the right to demand the mileage book, when necessary to identify the holder, or for the purpose of seeing that the ticket presented corresponds with it; but I deny that he has any right to make such demand for the annoyance of the passenger, or in order that he may assert his authority. In this case, the plaintiff went from Charlotte to Ellenboro on the morning of the day he was expelled, and presented to the conductor his ticket and mileage book. There was a controversy at the time as to the right to see the book; the plaintiff telling the conductor to look at it good, as he would not see it again, and also informing him that he would be back that afternoon. He was expelled on the return trip from Ellenboro by the same conductor, who had compared the ticket and the mileage book on the morning of that day, and after he had accepted the ticket from the plaintiff, which he retained, and had been reminded of the conversation about the mileage book on the trip to Ellenboro. This, as it seems to me, furnishes some evidence that the demand to see the mileage book was not in good faith.

(159 N. C. 393)

ROANOKE RAPIDS POWER CO. v. ROANOKE NAVIGATION & WATER POWER CO.

(Supreme Court of North Carolina. May 28, 1912.)

1. ARBITRATION AND AWARD (§ 82*)—AWARD—CONCLUSIVENESS.

An arbitration award is not conclusive as to a question submitted but not decided.

[Ed. Note.—For other cases, see *Arbitration and Award*, Cent. Dig. §§ 440-450; Dec. Dig. § 82.*]

2. NAVIGABLE WATERS (§ 89*)—"PERSON."

The word "person" within a provision in a water power company's charter that it should not prevent any "person" owning land on the river from operating mills, etc., includes a corporation.

[Ed. Note.—For other cases, see *Navigable Waters*, Cent. Dig. §§ 21, 53, 82, 103, 117, 127, 239-244; Dec. Dig. § 39.*]

For other definitions, see *Words and Phrases*, vol. 6, pp. 5322-5335; vol. 8, p. 7752.]

3. CONSTITUTIONAL LAW (§ 280*)—EMINENT DOMAIN (§ 84*)—NATURE OF PROPERTY—RIPARIAN RIGHTS.

While riparian rights once vested are subject to the rights of the public as to navigation, etc., the owner can be deprived of them only through due process and upon due compensation if they are taken for public use.

[Ed. Note.—For other cases, see *Constitutional Law*, Cent. Dig. §§ 877-890; Dec. Dig. § 280.* *Eminent Domain*, Cent. Dig. §§ 227-230; Dec. Dig. § 84.*]

On petition for rehearing. Petition dismissed.

For former opinion, see 152 N. C. 472, 68 S. E. 190.

W. E. Daniel and Claude Kitchin, for appellant. M. L. Travis, Geo. Green, J. H. Pou, Rutledge & Hagood, Mordecai & Gadsden, and J. C. Spooner, for appellee.

WALKER, J. This is a petition to rehear the above-entitled case which was decided at spring term, 1910, and is reported in 152 N. C. 473, 68 S. E. 190.

A careful consideration of the briefs and arguments of counsel upon the rehearing have not disclosed any matter or authority that was overlooked by us at the former hearing. The case was then presented ably and learnedly by counsel with a full citation of the authorities, and, while it has been again argued with still more elaboration, nothing has been brought forward which induces us to change the opinion of the case we then held or the conclusion we reached.

[1] As to the arbitration of the controversy between George P. Phillips and the Roanoke Navigation & Water Power Company, and the award of Judge Armfield and Mr. Lanier, who were the arbitrators, we are still of the opinion that the submission to arbitration did not embrace the matters involved in this suit. The various controversies pending between Phillips and the Navigation Company and recited in the preamble of the submission are not set forth with sufficient particularity

to enable us to determine their exact nature and extent, but it sufficiently appears that the question to be decided by the arbitrators was whether the Navigation Company could enlarge the canal on its own land and enjoy the use of the water of the Roanoke river, as it was accustomed to do at and before that time, without the consent of Phillips, and the arbitrators answered both questions affirmatively. A careful reading of the submission and award will show conclusively that the question now raised as to the right of the defendant, as successor to the Navigation Company, to dam up Little river by extending the present obstruction from bank to bank, so as to deprive lower proprietors altogether of the use of its waters, was not involved in that submission and award. The Navigation Company was making no such claim as against Phillips, and it is clear that the arbitrators, both among the most eminent lawyers of the state, did not understand that they had been asked to decide any such question. But, if they did so think, it is sufficient to say that the award does not disclose any attempt by them to render any such decision. So far as the use of the waters of Roanoke river was involved in the arbitration, the only question was whether the Navigation Company could exercise the rights and privileges with respect to the waters of the river which were conferred by its charter without the consent of Phillips, and the arbitrators, in making their award upon this part of the submission, use the language of the charter (Priv. Acts 1885, c. 57) in defining the rights of the Navigation Company in the river, without any reference to a larger and more comprehensive use thereafter, and without any suggestion in regard to it. It may be added to what we formerly said upon this subject, and to what we have already stated herein, that, even if the arbitrators had made any such ruling, it could bind and conclude the plaintiff only to the extent of its ownership of the land it acquired by purchase from Phillips, and not the other land below the Phillips tract, which will be injuriously affected by damming the river. *Foster v. Parham*, 74 N. C. 92; *Kissam v. Gaylord*, 46 N. C. 294; 16 Cyc. 695.

The agreement of May 5, 1897, which may not inappropriately be called a *modus vivendi*, cannot be allowed to prejudice the rights of the plaintiff so far as the matters now in controversy are concerned. It was manifestly not intended to have any such effect. The parties carefully guarded their rights against any such inference from their arrangement which was made to provide temporary relief for the parties pending a final adjustment or settlement of their controversies. This will appear from the language of the agreement. Defendant expressly stipulated that the license or permission therein granted by plaintiff should not be construed as a waiver or a concession to the Roanoke Navigation & Water Power Company "of any of its rights,

franchises, and privileges to have the waters of Roanoke river flow by and through and upon its property to the extent it is entitled to use and enjoy said waters for any purposes for which it has the right to apply the same." And the plaintiff agreed that the license or permission therein granted the defendant should not be construed "as a waiver of or concession to the Roanoke Rapids Power Company of any of its rights, franchises, and privileges to draw the waters of Roanoke river into its canal to the extent and for the purpose it was entitled so to do." It would not be right, and of course not just, to permit defendant to construe or use that agreement in a way contrary to its own express stipulation.

The correspondence of the parties shows that plaintiff was all the time denying the right of defendant to use more of the water of the river than was necessary for the purpose of navigation, and warning defendant that it would assert its right to damages for any greater diversion of the water from the river into the canal. In that correspondence, at or about the time the said agreement was made, the following letters passed between the parties. Defendant wrote to plaintiff: "It is only necessary to refer to two statements contained in your communication: First the claim that your company 'under and by virtue of its charter owns the right to the exclusive use of so much of the waters of the Roanoke river as it may need for navigation, manufacturing or other purposes, now or at any future time,' and, secondly, that 'it objects to any use on your part (meaning the undersigned company) of the waters of the said river, or the construction of any dam or other works that will in any manner injure, impair or interfere with its property, rights, franchises or privileges.'" Plaintiff replied: "We do not propose, in the construction and maintenance of our works, to interfere with or encroach upon your company's property, rights, franchises and privileges 'in any unreasonable manner, to the substantial injury' of your corporation. We deny that you have any right, exclusive or otherwise, now or at any future time, to use the waters of Roanoke river for purposes other than navigation. The sole purpose of the incorporation of the Roanoke Navigation Company was to remove the obstructions in Roanoke river, from Halifax westward, so as to afford a safe and uninterrupted passage for boats carrying freight and adapted to the limited capacity of the stream. The quantity of water appropriated and drawn through the canal of that company at the time when the river was the only channel of commerce and in public demand and favor did not perceptibly affect the flow down the natural channels of the stream. The surplus water which continued to flow down these natural channels belongs to the owners of the water rights on the margin of the stream below." It then notifies the defendant that it will de-

fend its rights as a lower riparian proprietor against any encroachment of the defendant by a greater diversion of the waters of Roanoke than it is authorized under the law to create by obstructions in the river. Then followed the agreement which we have before mentioned, by which active controversy was suspended and all rights of the parties reserved. It is useless to pursue this subject any further.

This brings us to a construction of the judgment in *Bass v. Navigation Company*, 111 N. C. 439, 16 S. E. 402, 19 L. R. A. 247, which, the defendant contends, brings into play the rule of *stare decisis* as to the issues involved in the present suit, so far as the same questions were decided in that case as are raised in this one. We have re-examined that case with the greatest care, and are unable to see that the issues in the two cases are at all identical. The fifth headnote states with sufficient accuracy the points decided in the *Bass Case*. It is as follows: "The Roanoke Navigation Company, having acquired the right of way through the plaintiff's land, permitted her, by parol license, to erect in 1852 a private bridge over the canal * * * which she has continuously used ever since until it was removed by the defendant, the purchaser and successor of the said company, in 1890 when engaged in improving the property. Held (1) that such possession did not raise a presumption of a grant to the easement to maintain the bridge; (2) that the right to the fee in the condemned land did not revert to the original owner, or those claiming under him, upon the dissolution of the original corporation; (3) that the license could be revoked, and, being revoked, the defendant had a right to remove it without paying compensation to the owner."

Justice Avery in that case says distinctly that the only reasonable interpretation of the charter of the defendant (*Priv. Acts 1885, c. 57*) is "consistent with the general purpose to permit the use of the water of the canal for mills in subordination to the main object of using it as an artery of commerce." The company was required, if convenient and possible to do so, to make the "canal answer both the purposes of navigation and water-works." He does state that "the new company is now contending for the privilege of using the water itself and farming it out for the purpose of manufacturing," but he does not pass upon that contention, as it was not one of the questions in the case, and besides it will be noted that what he says in respect to this claim does not extend so far as to embrace the right to the exclusive use of the entire flow of the Roanoke river. He refers only to the assertion of a right to use the canal in its then state or condition with the wing dam extending only partly across the river for the said purposes.

The leading question in the case is whether the defendant, as successor of the Roanoke Navigation Company, can appropriate all of

the waters of Little river to its own use by extending its dam to the other bank and thereby depriving the plaintiff, a lower riparian proprietor, of all use of the stream which, as it alleges, will result in the destruction of its property. We held before that it could not be done, and we are still of the same opinion. In order to show that the defendant has no such right, we may well confine ourselves to a consideration of the *Private Laws of 1885, c. 57*, and the *Private Acts of 1891, c. 2*, being the amended charters of the two companies, without entering upon a discussion of the plaintiff's rights as a lower riparian owner in order to demonstrate that it has no such rights which the general law recognizes and will protect against invasion or impairment by the defendant.

In our former opinion we stated that the right of the defendant to use the waters of the canal under the *Acts of 1817 and 1885* was incidental to the public navigation of the river. In other words, that the defendant and its predecessor are authorized by those acts to use for the said purpose only the surplus water of the canal that would otherwise run to waste. We think now that this view is sustained by an important decision upon the subject which was rendered in *Kaukauna Co. v. Green Bay, etc., Canal Co.*, 142 U. S. 254, 12 Sup. Ct. 173, 35 L. Ed. 1004. As the case bears so directly upon the question now under discussion, we may be permitted to extract copiously from it: "It is probably true that it is beyond the competency of the state to appropriate to itself the property of individuals for the sole purpose of creating a water power to be leased for manufacturing purposes. This would be a case of taking the property of one man for the benefit of another, which is not a constitutional exercise of the right of eminent domain. But if, in the erection of a public dam for a recognized public purpose, there is necessarily produced a surplus of water, which may properly be used for manufacturing purposes, there is no sound reason why the state may not retain to itself the power of controlling or disposing of such water as an incident of its right to make such improvement."

Again at page 274 of 142 U. S., at page 278 of 12 Sup. Ct. (35 L. Ed. 1004), the court says: "In *Little Miami Elevator Co. v. Cincinnati*, 30 Ohio St. 629, 643, the right to lease surplus water for private use was recognized as an incident to the public use of a canal for the purpose of navigation, but it was held that such use was a subordinate one and that the right to the same might be terminated whenever the state, in the exercise of its discretion, abandoned or relinquished the public use. It was doubted whether the state could, after abandoning the canal as a public improvement, still reserve to itself the right to keep up a water power solely for private use and as a source

of revenue. By so doing, says the court, "The water power would cease to be an incident to the public use, and the state would be engaged in the private enterprise of keeping up and renting water power after it ceased to act as a government in keeping up the public use." The same ruling was made by this court in *Fox v. Cincinnati*, 104 U. S. 783, 26 L. Ed. 928. See, also, *Hubbard v. City of Toledo*, 21 Ohio St. 379." The court also relies on *Spaulding v. Lowell*, 23 Pick. (Mass.) 71; *French v. Inhabitants of Quincy*, 3 Allen, 9; *Attorney General v. Eau Claire*, 37 Wis. 400; s. c., 40 Wis. 533—and then proceeds to say: "The true distinction seems to be between cases where the dam is erected for the express or apparent purpose of obtaining a water power to lease to private individuals, or where, in building a dam for a public improvement, a wholly unnecessary excess of water is created, and cases where the surplus is a mere incident to the public improvement and a reasonable provision for securing an adequate supply of water at all times for such improvement. No claim is made in this case that the water power was created for the purpose of selling or leasing it, or that the dam was erected to a greater height than was reasonably necessary to create a depth of water sufficient for the purposes of navigation at all seasons of the year. So long as the dam was erected for the bona fide purpose of furnishing an adequate supply of water for the canal and was not a colorable device for creating a water power, the agents of the state are entitled to great latitude of discretion in regard to the height of the dam and the head of water to be created; and, while the surplus in this case may be unnecessarily large, there does not seem to have been any bad faith or abuse of discretion on the part of those charged with the construction of the improvement. The courts should not scan too jealously their conduct in this connection if there be no reason to doubt that they were animated solely by a desire to promote the public interests, nor can they undertake to measure with nicety the exact amount of water required for the purpose of the public improvement. Under the circumstances of this case we think it within the power of the state to retain within its immediate control such surplus as might incidentally be created by the erection of the dam. So far, however, as land was actually taken for the purpose of this improvement, either for the dam itself or the embankments, or for the overflow, or so far as water was diverted from its natural course, or from the uses to which the riparian owner would otherwise have been entitled to devote it, such owner is undoubtedly entitled to compensation." Many authorities could be cited to sustain the views thus expressed, but we need not dwell longer upon this feature of the case.

The defendant purchased the property rights and franchises of the Roanoke Navigation Company at a judicial sale under a decree entered in a suit authorized by the Acts of 1874-75, c. 198, and by Private Acts of 1885, c. 57, the Legislature ratified what had been done and vested in the purchaser as a corporation "the franchises, rights, privileges, works, and property of the Roanoke Navigation Company, as acquired by the sale, including the right to use the water of the Roanoke river to be drawn through the canal for navigation, manufacturing, and other purposes, and the right to own, use, and enjoy the water power of the Roanoke River Navigation Company." With this restriction, set forth in the sixth section of the act: "That this act shall not materially interfere with the legal or vested rights of any person owning or operating mills in Northampton county, or prevent any person owning land on Roanoke river from operating or erecting any mill or other structure to be operated by water power, and using the water of said river for operating said mill or other structure: Provided, in so doing he shall not interfere with the legal or vested rights of any other person or corporation in any unreasonable manner."

By chapter 2 of the Private Laws of 1891 the incorporation of the plaintiff was validated and certain rights, franchises, and privileges conferred upon it, and, among others, the right to erect mills and factories on the lands which are situated on the Roanoke river, below those of the defendant, and to use the water power of the river for the purpose of operating the same, with this proviso: "That in the construction and maintenance of said dams, canals and waste-ways and in the development and use of said water power, neither the rights or property of persons owning lands on the Roanoke river, nor the rights, franchises, privileges or property of any other corporation, shall be interfered with or encroached upon in any unreasonable manner to the substantial injury of any other person or corporation." We think it is evident from these provisions that this right to use the water of the river for manufacturing purposes was conferred upon both corporations, with the restriction or qualification that in the use and enjoyment of those rights they should not unreasonably interfere with each other. Why should the Legislature give to the plaintiff the right to build mills and factories on its lands and to operate the same with power drawn from the river if it had already conferred upon the defendant rights and franchises in conflict with this grant and utterly destructive of it? It was clearly intended that both companies should use and enjoy this right to use the water of the river without unreasonable interference with each other.

[2] The very words of the proviso to the

defendant's charter are that it shall not, in the exercise of its rights and privileges, "prevent any person owning land on Roanoke river from operating or erecting any mill or other structure to be operated by water power and using the water of said river for operating said mill or other structure." It further provided that any such lower proprietor in the use of this river and its water power should not interfere unreasonably with any other person or corporation. We do not think that the word "person," as used in the two charters, should have the restricted meaning which defendant's counsel insist upon. The context shows that it was intended to embrace corporations, and the law requires us to give it that meaning unless the statute clearly forbids it. Revisal, § 2831 (6). The legislative policy was a wise and just one. It permitted the defendant to use the waters of the river for manufacturing purposes in a reasonable manner; that is, so as not to interfere with a like reasonable use by lower proprietors on the stream. The Legislature did not intend to confer a monopoly in the use of the river upon the defendant. The language of the two statutes forbids that any such construction should be placed upon this provision and any such exclusive and extraordinary right conceded to the defendant.

The plaintiff has exercised its rights and privileges with respect to the river in strict accordance with the terms of the statute by returning the water diverted therefrom to the original channel before it reaches the land of any lower proprietor, and no one has complained of such use. The defendant may, perhaps, pursue a similar course and get the full benefit of all the water it needs for its purposes. There is no question of condemnation before us. It is admitted that any extension of defendant's dam will materially impair the plaintiff's works by withdrawing water from the river which is necessary to the successful operation thereof.

The following admission also appears in the case: "All the water drawn into defendant's canal is to develop power for manufacturing purposes and is used solely for those purposes; that said canal, by reason of the works of the defendant, is so disconnected from the river that boats cannot pass from one to the other; and that defendant has no purpose of opening up or using said canal for navigation purposes unless there should arise some public requirement therefor." Upon the facts thus admitted there has been a clear violation of the plaintiff's rights which were acquired by the Acts of 1885 and 1891. No one can safely venture to say that such a use of the river as is contemplated by the defendant is a reasonable one within the manifest meaning of those statutes. We

need not consider what the plaintiff's rights are apart from the legislative grant.

We have assumed, for the sake of discussion, that the Legislature had the power to confer upon the parties the rights, franchises, and privileges, with respect to the waters of Roanoke river, which are named in the Acts of 1885 and 1891, and, if so, each party must accept and enjoy them subject to the conditions and restrictions annexed thereto.

[3] Having passed upon their respective rights under those statutes, it is unnecessary to decide whether the plaintiff has certain riparian rights, as the owner of land bounded by the river, which are property and valuable as such, and which cannot be arbitrarily or capriciously destroyed or impaired. Such rights, when once vested, though they must be enjoyed in proper subjection to the rights of the public, as, for instance, the right of navigation, it is said that the owner can only be deprived of them in accordance with established law, and, if necessary, that they be taken for the public good upon due compensation. *Yates v. Milwaukee*, 77 U. S. 497, 19 L. Ed. 984. Nor is it material to inquire whether the river is navigable or unnavigable, as any right the defendant has as an upper riparian proprietor, and any acquired by the statutes to which we have referred, must be exercised with due regard to the rights of the plaintiff in the stream and subject to a reasonable use by it of the waters thereof for the purpose of generating power to operate its mills or factories. The plaintiff is not interfering with any lawful right to the water of this defendant or with the rights of any lower proprietor. It concedes the right of the defendant to use so much of the water as was required by its predecessor, and as it was appropriating at the time it extended its dam, but it denies that it can divert more than that quantity into its canal and unreasonably interfere with the plaintiff in the use and enjoyment of its property, and it is argued that, if defendant can thus encroach upon the plaintiff's water rights and privileges, it can stretch its dam across the entire river and deprive the plaintiff of all use of the water.

It having been admitted that the extension of defendant's dam beyond what is known in the case as the "wing dam" has and will seriously injure the defendant's works lower down the stream by preventing the natural flow of the water thereto, we held before and now decide that an injunction should issue as indicated in our former opinion.

We see no reason, after a protracted and careful consideration of the case, for reversing or modifying the original judgment.

Petition dismissed.

(159 N. C. 241)

SEWARD v. RECEIVERS OF SEABOARD AIR LINE RY. et al.

(Supreme Court of North Carolina. May 22, 1912.)

1. MASTER AND SERVANT (§ 32*)—BLACKLISTING STATUTE—CONSTRUCTION.

Laws 1909, c. 858, which provides that a former employer may, upon request from any other person to whom a discharged employe has applied for employment, give in writing a truthful statement of the reason for such discharge, read in the light of the common law existing prior to its enactment under which the employer could in good faith report all matters which he believed to be true concerning his employe, will not be held by the words "a truthful statement of the reason for such discharge" to limit the employer's right to the exact reasons for the discharge, so that upon an application the entire record of an engineer was properly given to other railroads to whom he applied for employment.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 38; Dec. Dig. § 32.*]

2. EVIDENCE (§ 244*)—STATEMENT OF CAUSE FOR DISCHARGE—ACTION.

Where it was within the scope of a railroad officer's employment to furnish a copy of the record of former employes to persons applying therefor, a statement in such report which was not of the character permitted to be given by Laws 1909, c. 858, was proper evidence against the company in an action for damages from the making of the improper report.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 916-936; Dec. Dig. § 244.*]

3. MASTER AND SERVANT (§ 32*)—BLACKLISTING.

A statement included in a report of a record of a former employe to the effect that he was at the time suing the company reporting was outside of the information requested and improper as not bearing upon the character and competency of the employe, and would not be rendered proper by the fact that it was true.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 38; Dec. Dig. § 32.*]

4. MASTER AND SERVANT (§ 32*)—BLACKLISTING—ACTION FOR—EVIDENCE—SUFFICIENCY.

In an action for damages for making an improper report upon the record of a discharged employe, evidence held sufficient to go to the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 38; Dec. Dig. § 32.*]

Brown, J., dissenting.

Appeal from Superior Court, Wake County; Webb, Judge.

Action by R. H. Seward against the Receivers of the Seaboard Air Line Railway and the Seaboard Air Line Railway. From a judgment of nonsuit, plaintiff appeals. Reversed, and new trial ordered.

This is an action to recover damages under chapter 858, Laws 1909, for preventing or attempting to prevent the plaintiff from obtaining employment with certain railroad companies as an engineer.

The plaintiff entered the employment of the defendant as engineer on the 31st of January, 1907, and was discharged on the 9th of January, 1909. After his discharge

he applied to the Florida East Coast Railroad Company for employment, and this company, with the consent of the plaintiff, requested the defendant to give it a report of the record of the plaintiff, to which request the defendant replied on January 22, 1909, as follows: "As per your request of the 18th instant, I beg to give below the record of Engineman R. H. Seward: Entered service January 31, 1907. Charged with thirty days actual suspension for refusing to go out. Thirty days on account of accident. Thirty days actual suspension for damage on account of crown sheet to engine being damaged. Thirty days actual suspension for responsibility in connection with collision; and forty-five days record suspension for minor offenses, and dismissed January 9, 1909, for leaving station on time of another train, resulting in head-on collision." The plaintiff also applied to the Norfolk & Southern Railroad Company for employment, and, upon request from said company for the record of the plaintiff, the defendant replied, on July 9, 1909, as follows: "As per your request of July 7th, beg to give below report of Engineman R. H. Seward while in our service, and will state further that this man is now suing the S. A. L. for personal injury. Entered service January 31, 1907. Charged with thirty days actual suspension for refusing to go out. Thirty days on account of accident. Thirty days actual suspension for damages to crown sheet of engine. Thirty days actual suspension for responsibility in connection with collision; and forty-five days record suspension for minor offenses, and dismissed January 9, 1909, for leaving station on time of another train, resulting in head-on collision." The plaintiff also applied to the Durham & Charlotte Railroad Company for employment, and, upon request of said company for the record of the plaintiff, the defendant replied, on December 15, 1909, as follows: "Yours of December 11th. Kindly find below record of R. H. Seward. Entered service January 31, 1907. Charged with thirty days actual suspension for refusing to go out. Thirty days on account of accident. Thirty days actual suspension for damage to crown sheet of engine. Thirty days actual suspension for responsibility in connection with collision; and forty-five days record suspension for minor offenses, and dismissed January 9, 1909, for leaving station on time of another train, resulting in head-on collision."

The action for personal injury referred to in the letter of the defendant of July 9, 1909, was commenced after the discharge of the plaintiff by the defendant, and was settled in October, 1909, by the payment of \$1,350 to the plaintiff. The plaintiff offered evidence tending to prove that he was refused employment by the several companies to which he had applied by reason of the re-

ports made by the defendant, and that the statements contained in the reports were false. He admitted, however, on cross-examination, that he was notified of each charge contained in the report, and had a hearing thereon, and there was no evidence that the report did not contain a true statement of the action of the defendant upon the charge.

The part of chapter 858, Laws 1909, relevant to this case, is as follows: "If any person, agent, company or corporation, after having discharged any employé from his or its service, shall prevent or attempt to prevent, by word or writing of any kind, such discharged employé from obtaining employment with any other person, company, or corporation, such person, agent, or corporation shall be guilty of a misdemeanor, and shall be punished by a fine not exceeding five hundred dollars, and such person, agent, company, or corporation shall be liable in penal damages to such discharged person, to be recovered by a civil action; but this section shall not be construed as prohibiting any person or agent of any company or corporation from informing, in writing, upon request, any other person, company, or corporation to whom such discharged person or employé has applied for employment, a truthful statement of the reason of such discharge."

The plaintiff contended: (1) That the defendant had no right, under the statute, to give the record of the plaintiff, and could do no more than state the reasons for his discharge. (2) That if the defendant could give the record of the plaintiff, it did not state it truthfully, and was actuated by malice.

The defendant contended: (1) That it had the right, upon request, to give the entire record of the plaintiff, and that its communications were privileged, and not actionable, in the absence of malice. (2) That there was no evidence of malice.

At the conclusion of the evidence, his honor, upon motion of the defendant, entered judgment of nonsuit, and the plaintiff accepted and appealed.

Douglass, Lyon & Douglass and R. N. Simms, for appellant. W. H. Pace and Armistead Jones & Son, for appellees.

ALLEN, J. (after stating the facts as above). [1] The statute under which this action is brought by its express terms embraces "any person, agent, company or corporation," and is applicable alike to all who employ labor. It must be read in the light of the common law as it existed prior to its enactment for the purpose of seeing wherein it was deficient, and of discovering the remedy intended to be supplied by the statute. Black on Interpretation of Laws, p. 232, says: "When any question arises as to the meaning or the scope of a statutory enact-

ment, it is a good rule to compare it with the common law on the same subject, and to construe the statute with reference to that law. * * * No statute enters a field which was before entirely unoccupied. It either affirms, modifies, or repeals some portion of the previously existing law. In order, therefore, to form a correct estimate of its scope and effect, it is necessary to have a thorough understanding of the laws, both common and statutory, which heretofore were applicable to the same subject. Whether the statute affirms the rule of the common law on the same point, or whether it supplements it, supersedes it, or displaces it, the legislative enactment must be construed with reference to the common law; for in this way alone is it possible to reach a just appreciation of its purpose and effect. Again, the common law must be allowed to stand unaltered as far as is consistent with a reasonable interpretation of the new law." And again on page 110: "The intention of the Legislature in enacting a particular statute is not to be ascertained by interpreting the statute by itself alone, and according to the mere literal meaning of its words. Every statute must be construed in connection with the whole system of which it forms a part and in the light of the common law and of previous statutes upon the same subject. And the Legislature is not to be lightly presumed to have intended to reverse the policy of its predecessors or to introduce a fundamental change in long-established principles of law."

When we look to the common law, we find that the employer had the right to employ whom he pleased, and to discharge with or without reason, and that the employé could select the person whom he would serve, and had the right to quit the service at pleasure; the only limitation upon the exercise of the right by either being the terms of the contract of service.

"An employer has a right to select his employes according to what standard he may choose, though such standard be arbitrary or unreasonable. An employer certainly has a right to refuse to employ any one whom he knows to have left another employer in violation of a reasonable rule which both employers are seeking to enforce. * * * There are, however, limitations upon the rights of the employers in this matter. While the employé is bound by the reasonable rules of the employer as a part of the contract of employment, and may be reported to other employers for a breach of those rules, there is a correlative duty upon the employer not to report an employé wrongfully. The rule which enters into the contract of employment is as much a part of the contract of the employer as of the employé, and both are bound by it. The employer is strictly within his rights as long as he reports no employé for a violation of

the rule except such as have actually violated it. When, however, he wrongfully makes such a report and an employé is thereby damaged, such employé has a right of action." *Willis v. Mfg. Co.*, 120 Ga. 600, 48 S. E. 178, 1 Ann. Cas. 472.

"It is a part of every man's civil rights to enter into any lawful business, and to assume business relations with any person who is capable of making a contract. It is likewise a part of such rights to refuse to enter into business relations, whether such refusal be the result of reason, or of whim, caprice, prejudice, or malice. If he is wrongfully deprived of these rights, he is entitled to redress. Every person *sui juris* is entitled to pursue any lawful trade, occupation, or calling. It is part of his civil rights to do so. He is as much entitled to pursue his trade, occupation, or calling and be protected in it as is the citizen in his life, liberty, and property. Whoever wrongfully prevents him from doing so inflicts an actionable injury. For every injury suffered by reason of a violent or malicious act done to a man's occupation, profession, or way of getting a livelihood, an action lies. Such an act is an invasion of legal rights. A man's trade, occupation, or profession may be injured to such an extent, by reason of a violent or malicious act, as would prevent him from making a livelihood. * * * A railroad company has the right to engage in its service whomsoever it pleases, and as part of its rights to conduct its business is the right to discharge any one from its service unless to do so would be in violation of contractual relations with the employé. It is the duty of a railroad company to keep in its service persons who are capable of discharging their important duties in a careful and skillful manner. The public interest, as well as the vast property interests of the company, require that none other should be employed by it. Its duty in this regard, and its right to discharge an employé, does not imply the right to be guilty of a violent or malicious act which results in the injury of the discharged employé's calling. The company has the right to keep a record of the causes for which it discharges an employé, but, in the exercise of this right, the duty is imposed to make a truthful statement of the cause of the discharge." *Hundley v. Railroad*, 105 Ky. 164, 48 S. W. 430, 63 L. R. A. 289, 88 Am. St. Rep. 298.

The intelligence and skill of the employé were regarded as his capital which he had the right to sell, and which the employer had the right to buy, and an unlawful interference with the right of either was actionable.

As was said in *Willner v. Silverman*, 109 Md. 356, 71 Atl. 964, 24 L. R. A. (N. S.) 895: "In furtherance of their common welfare, and in settlement of their oftentimes conflicting interests, both employers and employés stand upon a plane of perfect equality before the law, enjoying the same freedom and amena-

ble to the same restrictions." When the employé was discharged, he could not require a statement of the reasons for the discharge, and the employer was under no legal obligation to give to any one, with whom he sought employment, his record or character, while in his service, although he could do so upon request, and according to some of the authorities voluntarily, and there would be no liability in damages if the report was made in good faith and in the belief that it was true, although in fact false; but, if made maliciously, it was actionable.

"An ex-employer may, without rendering himself liable in an action for slander or libel, in good faith, state orally or in writing, and as well without as with a previous request, all that he may believe to be true concerning his ex-employé. It appearing that the publication was made in what is termed 'giving a character,' the presumption is that it is made bona fide, and the burden is on the plaintiff to show malice in the publisher, i. e., either that he had an intent to injure the person spoken of, or that he did not believe in the truth of the statement published. Where no intent to injure exists, a belief in the truth of the language published is a legal excuse for making the publication; but, where an intent to injure exists, a belief in the truth of the language published is not a legal excuse for making the publication. Malice or want of good faith is established when it is shown that the matter published was false within the knowledge of the publisher; or malice may be established by showing a bad motive in making the publication, as that it was made more publicly than was necessary to protect the interests of the parties concerned, or that it contained matter not relevant to the occasion, or that the publisher entertained ill-will toward the person whom the publication concerned." *Townshend on Slander and Libel*, § 245, p. 420.

"The instance that occurs most frequently in ordinary life of this first class of privileged communications is where the defendant is asked as to the character of his former servant by one to whom he or she has applied for a situation. A duty is thereby cast upon the former master to state fully and honestly all that he knows, either for or against the servant; and any communication made in the performance of this duty is clearly privileged for the sake of the common convenience of society, even though it should turn out that the former master was mistaken in some of his statements. But if the master, knowing that the servant deserves a good character, yet, having some grudge against him, or from some other malicious motive, deliberately states what he knows to be false and gives his late servant a bad character, then such a communication is not a performance of the duty, and therefore is not privileged. There is in fact in such a case evidence of express malice which takes the case

out of the privilege.' " Odgers on Libel and Slander, p. 199.

"One of the most ordinary occasions of every day life which brings into existence the question of privilege in regard to communications is when one person, either voluntarily or in answer to an inquiry, states his own views to another concerning the character of some individual who has left his service and seeks to obtain employment elsewhere. A duty is thereby cast upon the former master to state fully and honestly all that he knows either for or against the servant; and any communication made in the performance of this duty is clearly privileged for the sake of the common convenience of society, even though it should turn out that the former master was mistaken in some of his statements. But if the master, knowing that the servant deserves a good character, yet, having some grudge against him, or from some other malicious motive, deliberately states what he knows to be false and gives his late servant a bad character, then such a communication is not a performance of the duty, and therefore is not privileged. There is in fact in such a case evidence of malice which 'takes the case out of the privilege.' " Newell on Defamation, Libel, and Slander, p. 490.

"It seems to us that any person, who upon reasonable grounds believes himself to be possessed of knowledge which, if true, does or may affect the rights and interests of another, has the right in good faith to communicate such belief to that other, and he may make the communication with or without request, and whether he has or has not personally any interest in the subject-matter of the communication." Railroad v. Richmond, 73 Tex. 575, 11 S. W. 558, 4 L. R. A. 280, 15 Am. St. Rep. 794.

The report was regarded as privileged, and, in the absence of express malice, no cause of action could be based on its publication; this doctrine resting on the moral obligation of the employer. The life and limb of the employé were largely dependent on the intelligence, skill, and prudence of his co-employés, and it was the duty of the employer to exercise care to see that no one was admitted to the common employment, who was careless or incompetent. The employer owed the same duty to the public, whose lives and property were committed to his care, and this duty could not be performed unless one employer could, without fear of liability, communicate freely his honest belief as to the standing of a discharged employé, and the law therefore said that such communications were presumed to be made in the performance of a duty, and, in the absence of express malice, they could not be made the basis of an action.

"The general doctrine of privilege, as applied to actions for libel and slander, is founded upon the reasonable view that in the intercourse between members of society, and in proceedings in legislative bodies and in

courts of justice, occasions arise when it becomes necessary or proper that the character and acts of individuals should be considered and made the subject of statement or comment, and that, in the interests of society, a party making disparaging statements in respect to another on such a lawful occasion should not be subjected to civil responsibility in an action of this character, although such statements are untrue. The law of privilege has been stated by judges in different forms of words, but the comprehensive definition of Blackburn, J., in *Davie v. Sneed*, L. R. (5 Q. B.) 611, as applied to communications between individuals, is especially worthy of notice. 'Where,' says that learned judge, 'a person is so situated that it becomes right in the interests of society that he should tell a third person certain facts, then if he, bona fide and without malice, does tell them it is a privileged communication.' There are many examples in the books of communications held to be privileged where the same words, if used other than on a lawful occasion, would be libelous, but which, by reason of the occasion when they were published or spoken, will not sustain an action, although proved to be untrue, unless proved to have been spoken maliciously. The cases of charges made in giving the character of a servant, or in answering an authorized inquiry concerning the solvency of a tradesman, or where the communication was confidential between parties having a common interest in the subject to which it relates, are illustrations." *Moore v. Bank*, 123 N. Y. 424, 25 N. E. 1049, 11 L. R. A. 753.

"It [a report by an employer] was made upon a subject-matter in which the person communicating it had a deep interest, as well as a duty, to perform, and was made to a person having a corresponding interest and duty. If one of defendant's servants had demonstrated his unfitness for a position held by him, it was for its interest, as well as for the interest of the public, that steps should be taken which would render the servant qualified and capable, or that he be dismissed. It would not only be for the interest of the company to remedy the evil, and to act so as to stop all future complaints, but it would be a matter of duty to the public. * * * The communication being of a privileged character, and having been made on a privileged occasion only, the prima facie effect was to overcome and rebut the quality or element of malice, and to cast upon plaintiff the necessity of showing malice in fact; that is, that the defendant was actuated by ill will in what it caused to be done and said with a design causelessly and wantonly to injure the plaintiff. The law is that a communication, to be privileged, must be made upon a proper occasion, from a proper motive, and must be based upon reasonable or probable cause. When not made in good faith, the law does not

imply malice from the communication itself, as in the ordinary case of libel. Actual malice must be proved before there can be a recovery, and, in the absence of such proof, the plaintiff cannot recover." *Hebner v. Railroad*, 78 Minn. 291, 80 N. W. 1129, 79 Am. St. Rep. 387.

We cannot think it was the intention of the General Assembly to withdraw these wholesome safeguards from employes and the public, and that the statute may be effective and will serve a useful purpose without abrogating the principles of the common law. In speaking of a statute having the same objects in view, as the one under consideration, the Supreme Court of Minnesota says: "The act does not attempt to interfere with the right of an employer to discharge an employe for cause or without cause. It does not seek to prohibit an employer from communicating to other employers the nature and character of his employes when the facts would be for their interest. * * * It is the purpose of this law to protect employes in the enjoyment of those natural rights and privileges guaranteed them by the Constitution, viz., the right to sell their labor and acquire property thereby." *State v. Justus*, 85 Minn. 282, 88 N. W. 760, 58 L. R. A. 757, 89 Am. St. Rep. 550.

Prior to the ratification of the act of 1909, statements as to the character and competency of discharged employes were frequently made voluntarily, and not upon request, and were sometimes prompted by malicious motives when the motive was difficult of proof; when malice and the loss of service, as the result of the statement, were proven, the damages were difficult of admeasurement; and when there was no loss of employment, but a mere attempt to prevent the employe from obtaining it, no compensatory damages could be awarded. The act remedies these defects, and under its provisions a statement as to the standing of a discharged employe is not privileged unless made upon request, and whether privileged or not, if made maliciously, and the employer has thereby prevented or attempted to prevent the discharged employe from obtaining employment, the jury may award penal damages.

"Malice or want of good faith is established when it is shown that the matter published was false within the knowledge of the publisher, or malice may be established by showing a bad motive in making the publication; as that it was made more publicly than was necessary to protect the interest of the parties concerned, or that it contained matter not relevant to the occasion, or that the publisher entertained ill will toward the person whom the publication concerned." *Town. S. & L. § 245*.

The employer has the right, under the statute upon request, to give "a truthful statement of the reason for such discharge," and we do not give to these words the re-

stricted meaning contended for by the plaintiff, as in our opinion they include the record of the employe, and if the statement is so made, in the honest belief that it is true, and not maliciously, the employer is protected.

The Supreme Court of Texas, in discussing a similar statute, says in *Railroad v. Hixon*, 137 S. W. 345: "By the term, 'a true statement' of the cause of his discharge, is meant the employer shall give fairly, honestly, and in good faith the ground or cause upon which the master acted. It was meant that he should not be permitted to discharge for one reason, and, when called on to give a statement thereof, assign a different reason."

[2] Applying these principles to the evidence, and it appearing that the plaintiff admits that he was suspended for alleged misconduct 165 days during a service of a little less than two years with the defendant, that he was given a hearing as to each charge, and knew of the record that was made against him, and that the Brotherhood of Locomotive Engineers, of which he was a member, refused to prosecute his appeal when he was finally discharged, we would not hesitate to affirm the judgment of nonsuit but for the fact that the plaintiff says that the charges contained in the report made by the defendant are not true, and the further fact that the defendant incorporated in its letter of July 9, 1909, written by its superintendent, Poole, the statement, "and will state further that this man is now suing the S. A. L. for personal injury," which could not be a part of the record of the plaintiff while in the employment of the defendant, nor a reason for his discharge, as the suit was instituted after he left the service of the defendant. This statement is competent evidence against the defendant because it was within the scope of Poole's employment to furnish a copy of the plaintiff's record, and it was made while performing this duty, and as said by Justice Brown in *Younce v. Lumber Co.*, 155 N. C. 241, 71 S. E. 330: "It is well settled that the declarations of officers of a corporation are competent only when made in line of declarant's official duty, and while discharging it in reference to a transaction for the company."

[3] It is not a sufficient answer as to the effect of this evidence to say that the statement is true, as it was not information the defendant was requested to give, and did not bear on the character or competency of the plaintiff, and was calculated to prejudice him.

[4] There is also evidence that the action instituted by the plaintiff against the defendant referred to in the letter of July 9, 1909, was to recover damages for personal injuries sustained in a collision, which was one of the most serious charges against the plaintiff; that this action was settled in October,

1909, by the payment of \$1,350 to the plaintiff, and that thereafter the defendant, in its letter of December 15, 1909, retained this same charge against the plaintiff.

These facts at least permit the inference, which the jury are not compelled to adopt, that the defendant would not have paid the sum of \$1,350 to the plaintiff voluntarily, on account of injuries sustained in a collision, if he had been guilty of wrongdoing, and that the retention and publication of the charge after the settlement was with knowledge that it was not true. The statute is a wise one and will serve a useful purpose if judiciously administered, but juries in the assessment of damages, when they can be recovered, should mark the line and discriminate clearly between the employé who has honestly endeavored to perform his duty, who is entitled to the highest consideration, and the negligent and reckless employé who is a menace to his coemployés and the public.

Upon a review of the whole record, we are of opinion that there was some evidence for the consideration of the jury, and a new trial is therefore ordered.

New trial.

BROWN, J. (dissenting). The statute under which this action is brought, which is correctly copied in the opinion of the court, is a very useful piece of legislation, and is intended as well for the protection of the traveling public as for the benefit of all employés who discharge their duty in a faithful manner. Taking the statute as a whole, it seems to be very plain in its meaning. The gravamen of the cause of action is an attempt to prevent by word or writing of any kind which is false a discharged employé from obtaining employment. The statute expressly excepts from its operation any cause of action when the statement made by the employer *contains a truthful statement of such discharge*.

In this case the plaintiff is an engineer. He belonged to a class of men who daily take their lives in their hands for our benefit, and to a profession whose unpretending, self-sacrificing heroism has been immortalized in song and story. Of all professions which are interested in having the records of their members made known for the benefit of the efficient and faithful, the profession of a locomotive engineer stands first. In order that publicity may be given to such records, the statute expressly authorizes the giving of a truthful statement as to why an employé has been discharged. If the statement is truthful, it is immaterial what the motive of the master may be in furnishing. If his motive is to prevent the employment in a position of immense responsibility of an incompetent or unfaithful person, then the motive is a laudable one.

The charge which the plaintiff makes in his complaint is that the defendant company, through its superintendent of motive power,

Poole, attempted to prevent his getting employment with certain railroad companies by means of furnishing them with an untruthful statement of his service and record with the defendant company. These letters are published in the opinion of the court. I am constrained to hold that the testimony of the plaintiff himself shows that every material statement set out in these letters has been substantiated by his own evidence, and that upon such testimony the learned judge of the superior court was justified in sustaining the motion to nonsuit.

The plaintiff's evidence tends to prove that he entered the employment of the defendant January 31, 1907, and was dismissed January 9, 1909. During his employment there was in force on the defendant railway the "merit system" whereby an engineer received demerits for bad conduct, and, upon receiving a given number within 12 months, he was discharged. If he did not receive any demerits, then he was given a good mark. During the time of the employment of the plaintiff, a period less than two years, he was actually suspended for 120 days on account of accidents and other charges, and also received 45 days record suspension.

The plaintiff admitted upon cross-examination that he was present and his examination taken each time he was suspended, and that he was notified of his suspension. He admits that, under the rules of the company, he had a right to appeal in each instance in which he was not satisfied with the action of the company in suspending him, and that such appeal could be prosecuted personally by him, or by a committee composed of members of the Brotherhood of Locomotive Engineers. The plaintiff further admits, although he was suspended on so many occasions, he appealed only on one occasion when he was discharged, and that the Brotherhood of Locomotive Engineers refused to take up the appeal for him, even after he had asked them to do so. The plaintiff testified also in respect to the trials by the officers of the defendant in regard to each of the items set forth in the three letters as follows: "These were all investigated. Was notified, was present at each investigation, but did not appeal except in the last case." It is further admitted by the plaintiff upon his examination that, when he applied to the Florida East Coast Railroad, and the Norfolk-Southern, and the Durham & Charlotte, the three railroads to whom these letters were addressed, he authorized the officers of these railroads to apply to the defendant company for his record, and that this record furnished by the superintendent of motive power, Poole, was sent to the said railroad companies at their request, and by the permission of the plaintiff himself. It appears to me to be almost incontrovertible that, upon a comparison of the plaintiff's own evidence with the record furnished to the said companies, every fact set out in the

record is established by the plaintiff himself.

It is admitted in the opinion of the court that the judgment of nonsuit would be sustained by the majority of my Brethren upon the plaintiff's own evidence except for the fact that in his letter of July 9, 1909, Poole made this statement, "and will state further that this man is now suing the Seaboard Air Line for personal injury." The majority seem to be of opinion that this statement affords some slight foundation for this action because the suit was instituted after the plaintiff left the service of the defendant. But the record shows that this suit was pending at the time the request was made for the plaintiff's record, and that the statement was a truthful statement. It is not pretended in the letter that it was a part of his record. On the contrary, the language shows that it refers to a period after his discharge, for the writer says, "That this man is now suing the Seaboard Air Line for personal injury." It was a statement of a fact admitted to be true, and which could be easily discovered while examining the records of the court. Surely it cannot be held to be an evidence of malice because the writer of the letter stated a fact which was manifest to all who chose to examine the public records of the courts of the state. If this is the only ground upon which this action can possibly be maintained, then, with all deference to my Brethren, it appears to me too trivial to receive a moment's consideration.

There is another reason which impels me to the conclusion that the plaintiff cannot recover because of such statement inserted in the letter of July 9th, and that is because it was an unauthorized act of Poole, outside of and beyond his duty, and in no sense ratified by the defendant. While Poole in his capacity as superintendent of motive power was authorized to communicate a truthful statement as to why the plaintiff was discharged, it appears upon the face of the letter itself that the statement in regard to the suit was not a reason for the discharge of the plaintiff, because the suit was brought long after his discharge, and it was therefore the unauthorized act of Poole, and in no way connected with his duty as a servant or officer of the defendant company.

In *Wood on Master & Servant*, § 279, p. 535, it is said: "The question usually presented is whether, as a matter of fact or of law, the injury was received under such circumstances that, under the employment, the master can be said to have authorized the act; for, if he did not, he cannot be made chargeable for its consequences, because, not having been done under authority from him, express or implied, it can in no sense be said to be his act."

It is admitted that it was within the scope of Poole's employment to furnish a copy of the plaintiff's record and to give a truthful

statement of the reason for his discharge, but it was not within the scope of his employment to inject into that statement matters entirely foreign to it and entirely disconnected with it, and which appear upon the face of the statement to have transpired long after the discharge. It seems to me that the act of inserting such foreign matter was not at all incident to the performance of the duties intrusted to Poole by the defendant company, any more than an amanuensis would be authorized to inject the emanations of his own brain into a composition dictated by his master. I think this position is fully supported by the decisions of this court in *Daniel v. Railroad*, 136 N. C. 517, 48 S. E. 816, 67 L. R. A. 455, 1 Ann. Cas. 718; *Jackson v. Telegraph Company*, 139 N. C. 347, 51 S. E. 1015, 70 L. R. A. 738; and *Sawyer v. Railroad*, 142 N. C. 1, 54 S. E. 793, 115 Am. St. Rep. 716, 9 Ann. Cas. 440.

It is not pretended in this case that there was any express authority given to Poole to make any statement concerning the plaintiff upon behalf of the defendant company which had taken place after the plaintiff had ceased to be in its employment. The relation of master and servant had then terminated, and this extraneous matter was inserted by Poole, as appears upon the face of the letter, upon his own authority, and there is no pretense that it was ever ratified by the defendant. On the contrary, it appears upon the face of the communication to be Poole's act and not that of the company.

The principal is not liable, as stated by Mr. Justice Walker in *Daniel v. Railroad*, "when the agent steps aside from the duties assigned to him by the principal to gratify some personal animosity, or to give vent to some private feeling of his own."

(159 N. C. 175)

ROAD TRUSTEES v. GEO. C. BROWN & CO.

(Supreme Court of North Carolina. May 28, 1912.)

1. APPEAL AND ERROR (§ 840*) — REVIEW — QUESTIONS PRESENTED.

Where, in an action for penalties for failure to make a monthly report, begun under Pub. Loc. Laws 1911, c. 115, passed to provide a better system for improving public roads of Macon county, and which, by section 15, provides that any lumber company, corporation, or persons engaged in the lumber business shall pay a special license, that such corporations shall make a monthly report to the road trustees, and that a penalty for \$10 per day for each day they fail to make a report shall be assessed, a demurrer attacking the constitutionality of the statute was overruled, the only point actually presented for review on appeal is the power of the Legislature to require reports by lumber companies as to the quantity of lumber hauled by them each month.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3301-3314; Dec. Dig. § 840.*]

2. HIGHWAYS (§ 165*)—REGULATION OF USE—STATUTES—POWER OF LEGISLATURE.

The state is sovereign as to the regulation of its dirt roads, so that the requirement of Pub. Loc. Laws 1911, c. 115, § 15, that persons engaged in the lumber business shall make a report of the lumber hauled on the county roads in Macon county, is valid.

[Ed. Note.—For other cases, see Highways, Dec. Dig. § 165.*]

3. HIGHWAYS (§ 122*)—TAXATION—UNIFORMITY—CONSTITUTIONAL PROVISIONS.

Pub. Loc. Laws 1911, c. 115, § 15, which provides that any lumber company or person engaged in that business using the public roads in Macon county to haul mill logs, lumber, or other heavy material, shall pay a license, or privilege tax, of two cents per mile on each thousand feet of lumber, and shall make a monthly report to the road trustees of the amount of feet hauled each month, does not violate Const. art. 5, § 3, which requires taxation by uniform rate on all property, being a license or privilege tax on those engaged in the lumber business, and uniform as to all persons falling within that class.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 380, 393; Dec. Dig. § 122.*]

4. CONSTITUTIONAL LAW (§ 230*)—EQUAL PROTECTION OF LAW.

Nor is the law in violation of U. S. Const. amend. 14, providing that no state shall deny to any person within its jurisdiction the equal protection of the laws, for this inhibition neither requires equality in taxes levied by the state, nor deprives it of its police power, and the license taxes in this case are based on a uniform and reasonable classification, designed to compel those most injuring the public roads to assist in the repair thereof.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 687; Dec. Dig. § 230.*]

5. CONSTITUTIONAL LAW (§§ 205, 287*)—DUE PROCESS OF LAW.

Nor does the act violate Const. art. 1, §§ 7, 17, which, respectively, prohibit special privileges, and the deprivation of life, liberty, or property, except by the law of the land.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 591-624, 831, 905; Dec. Dig. §§ 205, 287.*]

Brown and Allen, JJ., dissenting.

Appeal from Superior Court, Macon County; Lane, Judge.

Action by the Road Trustees of Macon County against Geo. C. Brown & Co. From a judgment for plaintiffs in the superior court on appeal from a justice of the peace, defendant appeals. Affirmed.

T. J. Johnston, for appellant. J. F. Ray and Johnston & Horn, for appellees.

CLARK, C. J. [1] Chapter 115, Pub. Local Laws 1911, entitled "An act to provide a better system for working and keeping up the public roads of Macon county," is a substitute for the former system of working the roads in that county. Section 15 of said chapter provides "any lumber company, corporation, person or persons engaged in the lumber business and desiring to use any of the public roads of any of the townships of Macon county, for the purpose of carrying on its or their business of hauling, either

by itself or themselves, or by hiring or contracting with other persons, mill logs, lumber, or other heavy material with log wagons, log carts, or other heavy vehicles, shall pay a license or privilege tax of two (2) cents per mile on each 1,000 feet of mill logs, lumber, or other heavy material so hauled." Then this section provides that such corporations, firms, or persons shall make a monthly report to the road trustees of the amount of feet hauled each month, and a penalty of \$10 per day for each day they fail to make report, etc. This action was begun before a justice of the peace for accumulated penalties aggregating \$50 for failure to make the monthly reports required by the statute. On appeal to the superior court by the defendant from the judgment of \$50 imposed by the justice, the defendant filed a written demurrer, alleging that the statute was unconstitutional because in violation of the fourteenth amendment and in violation of Const. N. C. art. 5, § 3, which requires taxation by uniform rule of all property, and also because in violation of article 1, § 7, of the state Constitution, which prohibits special privileges, and also in violation of article 1, § 17, which prohibits the deprivation of life, liberty, or property except by the law of the land. The demurrer was overruled. The only point actually presented is as to the power of the Legislature to require reports by lumber companies of the quantity of lumber hauled by them each month over the roads of Macon county.

[2] The statute expressly provides this penalty for failure to perform that duty. The failure to pay is made a misdemeanor subject to a fine of \$50, and the civil action for failure to make the report is expressed to be in addition to the fine for failure to pay. There can be no question as to the right of the Legislature to require such report. The state is certainly sovereign as to the regulation of its dirt roads. State v. Sharp, 125 N. C. 632, 34 S. E. 264, 74 Am. St. Rep. 663; State v. Wheeler, 141 N. C. 776, 53 S. E. 358, 5 L. R. A. (N. S.) 1139, 115 Am. St. Rep. 700. This would dispose of this appeal. But the question was debated before us upon the broader proposition whether the act was unconstitutional by reason of the tax being a discrimination, and therefore in violation of the constitutional provisions referred to in the demurrer.

[3, 4] It is a matter of common knowledge that lumber companies and others engaged in lumber business do great injury to the public roads. The Legislature deemed it unjust to make the owners of farm land and free labor pay road tax and work the public roads, and then to allow lumber companies and others hauling lumber to cut them to pieces without any remuneration or any legal method provided to make them bear an adequate proportion of the burdens. It does

not appear upon the face of the act, which is all that is before us upon this demurrer, that there is any other business carried on in that community which would tend to cut up the roads as the hauling of lumber is calculated to do. But, even if this did appear, the Legislature can classify vocations and lay a tax of a different amount upon the different occupations. The only requirement is that the tax shall be uniform upon all in each classification. In *State v. Powell*, 100 N. C. 526, 6 S. E. 424, the town of Morganton was authorized to levy privilege taxes of different sums on general occupations, including livery stables, selling sewing machines, etc., and fixing a penalty for carrying on each business without paying the license. This court held that "a tax is uniform which is the same upon all persons in the same class," and that it is in the discretion of the taxing power to place different rates of taxation on the different classes; citing *Railroad Tax Cases*, 92 U. S. 575, 23 L. Ed. 663, and *Puitt v. Com'rs*, 94 N. C. 709, 55 Am. Rep. 638. *Smith, C. J.*, pointed out that the error in opposing the validity of the taxation consisted "in regarding such tax as imposed on property in which both uniformity and the *ad valorem* principle must be observed. This is not a property tax, but a tax upon an occupation or vocation, and is not less so because the appurtenances of a livery stable necessary in conducting the business may be carriages, horses and other property. Indeed, these articles, though so used, are still subject to the *ad valorem* assessment as property. As other trades, purely personal, without regard to the magnitude of the business carried on may be subjected to a tax of a fixed sum, we see no reason why those which require the use of property may not be." On turnpike roads, which are kept up by private enterprise, there is one rate for lighter vehicles and a heavier rate for heavier vehicles. There is no reason why the Legislature cannot authorize the county to lay a rate of two cents per thousand feet for the use of roads in hauling lumber over them, and content itself with exacting no tax upon other conveyances which do less damage, and for which the legislative judgment is that the regular road tax was a sufficient return.

In *Railroad v. Reidsville*, 101 N. C. 404, 8 S. E. 124, 2 L. R. A. 284, the court sustained the validity of an ordinance of the town which levied a \$50 tax on every railroad running through the town, saying that it was not repugnant to our own Constitution nor to the Constitution of the United States. In *Worth v. Railroad*, 89 N. C. 295, 45 Am. Rep. 679, *Smith, C. J.*, said: "The uniform rule to be observed in the exercise of the taxing power seems to be so far applicable to the taxes imposed upon trades, professions, franchises, and incomes as to require no discriminating tax to be imposed

upon persons for pursuing the same vocation, while varying amounts may be assessed upon vocations or employments of different kinds." It was further added that this principle had been sustained by Mr. Justice Miller in *Railroad Tax Cases*, 92 U. S. 612, 23 L. Ed. 663, which held that it was sufficient "that the rule as to innkeepers be uniform as to all innkeepers, that the rule as to ferries be uniform as to all ferries, and that the rule as to railroad companies be uniform as to all railroad companies."

In *Rosenbaum v. New Bern*, 118 N. C. 92, 24 S. E. 2, 32 L. R. A. 123, *Avery, J.*, says: "The law of uniformity does not prohibit the classification by the municipality of dealers in a particular kind of merchandise separately from those whose business it is to sell other articles falling within the same general terms." To same effect, *Schaul v. Charlotte*, 118 N. C. 733, 24 S. E. 526. In *Lacy v. Packing Co.*, 134 N. C. 572, 47 S. E. 54, the subject is fully discussed, and it was held to be well settled that "a tax is uniform when it is equal upon all persons belonging to the prescribed class upon which it is imposed." It has been held that the tax may be different upon a dealer in whisky by retail and dealer in the same article by wholesale, if uniform as to each class (*Gatlin v. Tarboro*, 78 N. C. 122), on tobacco buyers as a specified class (*State v. Irvin*, 126 N. C. 989, 35 S. E. 430), on hotel keepers as a class graduated in amount by the gross receipts and exempting those whose yearly receipts are less than \$1,000 (*Cobb v. Com'rs*, 122 N. C. 307, 30 S. E. 338), on the total amount of purchases by a merchant in or out of the city except purchases of farm products from the producer (*State v. French*, 109 N. C. 722, 14 S. E. 383, 26 Am. St. Rep. 590), in cities and towns according to population (*State v. Green*, 126 N. C. 1032, 35 S. E. 462; *State v. Carter*, 129 N. C. 560, 40 S. E. 11). In *State v. Stevenson*, 109 N. C. 734, 14 S. E. 1387, 26 Am. St. Rep. 595, it is said: "It is within the legislative power to define the different classes and to fix the license tax required of each class. All the licensee can demand is that he shall not be taxed at a different rate from others in the same occupation as classified by legislative enactment. This is stated as a universal rule. 1 *Cooley, Taxation* (3d Ed.) p. 260." The court further said in reference to the fourteenth amendment: "It has been repeatedly decided by the Supreme Court of the United States that this section of the Constitution does not forbid the classification of property or persons for the purposes of taxation, but merely compels the equal application of the law to all members of the same class, when the classification is based upon reasonable ground, and is not an arbitrary selection"—citing numerous cases. The court also said: "The Legislature is sole judge of what subjects it shall select for taxation (other than

a property tax, which must be uniform and ad valorem), and the exercise of its discretion is not subject to the approval of the judicial department of the state. A very full discussion of the whole matter, concluding as above, will be found in *State v. Packing Co.*, 110 La. 180 [34 South. 368, 98 Am. St. Rep. 459].” *Lacy v. Packing Co.*, 134 N. C. 567, 47 S. E. 53; is cited and the above doctrine reiterated by Hoke, J., in *Land Co. v. Smith*, 151 N. C. 75, 65 S. E. 644. In *State v. Holloman*, 139 N. C. 642, 52 S. E. 408, the court sustained a very similar statute to this except that, instead of the tax being levied in proportion to the quantity of lumber hauled, it laid a flat rate of an annual license tax for each cart or vehicle used for hauling lumber without reference to the quantity in each load or the number of loads made. The court said (139 N. C. 646, 52 S. E. 409): “This statute deprives no citizen of any right to use the highway. It does not restrain trade nor is it oppressive. Heavily loaded vehicles cut up and injure the roads, and a reasonable license tax, the proceeds of which are appropriated to repairing the damage thus produced, is exceptionally equitable. The method for making and keeping in repair the public roads is a matter solely for the legislative department.” The tax of two cents per mile per thousand feet is reasonable, and is not discriminative simply because it does not include all vehicles. As is said in *State v. Holloman*, supra, 139 N. C. 646, 52 S. E. 409: “This license tax is simply a mode of regulating the use of the public roads and requiring that those desirous of using them for extraordinary purposes, as hauling heavy lumber and logs over the road in unusually heavy vehicles, shall not do so without taking out license for such unusual and extraordinary and injurious use of the public highway and paying a license for the privilege.” The reports required to be filed monthly of the quantity of lumber hauled is no hardship on defendants. It is only a method by which the road trustees can ascertain accurately the quantity of lumber hauled by each person engaged in the lumber business and proportion the tax levied accordingly. The fourteenth amendment does not require equality in levying taxation by the state, nor does it interfere with the police power. “How a state shall levy its taxation is a matter solely for its Legislature, subject to such restrictions as the state Constitution throws around legislative action. If, on the other hand, working the roads by labor is a police regulation or a public duty, certainly it is not a matter of federal supervision.” *State v. Wheeler*, 141 N. C. 776, 53 S. E. 358, 5 L. R. A. (N. S.) 1139, 115 Am. St. Rep. 700; *Brannon's Fourteenth Amendment*, 149, 298, 323, and cases there cited.

[5] The other two sections of the state Constitution prohibiting special privileges

and prohibiting the deprivation of life, liberty, and property except by the law of the land which are referred to in the demurrer have no application to this case. The Legislature was within its legitimate powers in prescribing regulations for the maintenance of the public roads of Macon county, and in laying a tax upon the use of heavy vehicles for the purpose of raising a fund to repair the damages usually inflicted on the roads by such traffic.

Affirmed.

BROWN, J. (dissenting). I would be very glad to sustain the act of the General Assembly in question if I could reconcile it with the principles of taxation embodied in our Constitution. I recognize the inherent justice and value of such legislation, for it is an admitted fact that lumber companies do use the public roads to a far greater extent than private citizens. I agreed to the decision in *State v. Holloman*, 139 N. C. 642, 52 S. E. 408, because the statute was framed upon a very different principle from the one under consideration. There is a wide difference between this law and the Hertford county law. The latter applies to all persons, firms, or corporations using the public roads of the township; whereas the Macon county law is confined in its operation to any lumber company, corporation, or persons engaged in the lumber business, and levies a tax of two cents per thousand feet upon the lumber belonging to such users of the public road. This tax cannot be sustained as an exercise of police power. It does not in any way tend to promote health, peace, morals, and good order of the people. *Cooley, Constitutional Limitations*, 572. It is not a license tax or regulation tax in any sense. *Cooley on Taxation*, 408. It is a contract pure and simple for keeping up the public roads, levied solely upon the property of those who happen to be engaged in the lumber business. It does not apply to the private individual who may haul hundreds of thousands of feet of lumber over the same road for his individual benefit. Nor does it apply to those engaged in hauling as a business brick, clay, coal, or other heavy material over the same road. The tax cannot be called uniform because it does not apply to all persons using the public roads, but to a particular class who happen to be engaged in a certain kind of business. I admit that there is certain discretion given to the lawmaking power in regard to legislation affecting the public roads, but it is not an uncontrollable discretion, and, when the tax is confined to one particular class of persons and not extended to all alike who use the same road, it cannot be called a regulation, but it is a revenue measure, pure and simple, and, inasmuch as it is not uniform and does not bear alike upon all who use the public roads, it violates the uniformity of taxation, which is one of the essential

features of our Constitution. Gray's Limitations of Taxing Power, § 1450; State v. Moore, 113 N. C. 697, 18 S. E. 342, 22 L. R. A. 472.

It is said, however, that this action for the penalty may be sustained because the Legislature has a right to make the defendants report monthly to the road trustees the number of feet of lumber, logs, and other heavy material hauled during the preceding month, in order that the tax of two cents per thousand feet may be collected.

It is apparent from reading the statute that this report is simply a part of the machinery for collecting taxes, and, inasmuch as the statute must be taken as a whole, if the tax is void for lack of uniformity, then the whole statute falls to the ground.

ALLEN, J., concurs in this opinion.

(91 S. C. 552)

McGRATH et al. v. CHARLESTON & W. C. RY. CO.†

(Supreme Court of South Carolina. June 12, 1912.)

1. CARRIERS (§ 127*)—INJURY TO SHIPMENT—RIGHT OF ACTION.

Where goods, though injured by a carrier, retain a substantial value, the owner cannot refuse to take them, and sue the carrier for their entire value, but can recover only for the diminution in value.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 560, 562-564; Dec. Dig. § 127.*]

2. CARRIERS (§ 127*)—INJURY TO GOODS—RIGHT OF ACTION—DE MINIMIS.

Machinery being so injured by a carrier that it is valuable only for old iron, for which it would bring, at the price therefor of 25 cents a hundred pounds, 55 to 77 cents, its net value to its owner, if anything, by reason of the expense of receiving it, finding a purchaser, and delivering it, is so insignificant that it will not be considered as regards his right to sue for and recover its entire value before the injury.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 560, 562-564; Dec. Dig. § 127.*]

Appeal from Common Pleas Circuit Court of Abbeville County; R. C. Watts, Judge.

"To be officially reported."

Action by J. F. McGrath and another, partners doing business as McGrath Bros., against the Charleston & Western Carolina Railway Company. Judgment for plaintiffs. Defendant appeals. Affirmed.

W. P. Greene, of Abbeville, for appellant. Wm. N. Graydon, of Abbeville, for respondents.

WOODS, J. The plaintiffs, blacksmiths and wheelwrights at McCormick, S. C., purchased in Savannah, Ga., two lengths of steel shafting and other hardware. The goods were shipped over the defendant's railroad, and, on arrival at McCormick, the shafting was found to be so bent as to be unfit for the use intended. The plaintiffs re-

fused to receive the shafting from the carrier, and duly presented their claim for \$7.15, the entire value of the two pieces, and \$.77 freight. The defendant having failed to pay the claim, this action was brought in the magistrate's court for \$7.90 and \$50, the statutory penalty.

The only witness in the case was J. T. McGrath, one of the plaintiffs, who testified that the bent shafting was of no use to the plaintiffs, but that it was worth 25 to 35 cents a hundred pounds as old iron.

[1] Defendant's counsel asked the magistrate to instruct the jury to find a verdict for the plaintiff for the amount of the claim, \$7.90, less 25 cents a hundred pounds, the value of the shafting as old iron. This request was refused, and defendant then requested the following charge: "That, because property is damaged in shipment, a person cannot abandon it as long as it has a value, but must receive the same, and, if he cannot use it, must sell for its market value at the nearest market, and the amount it brings or would bring must be deducted from the value or the cost of the article in estimating the damage." The magistrate refused this and other similar requests, and charged the jury "that, if the jury find that the shafting was of no value to the plaintiff, he had a right to refuse to accept it and sue for the value." The jury found a verdict for \$57.92, the whole amount of the claim and the statutory penalty; and, on appeal, the judgment of the magistrate's court on the verdict was affirmed by the circuit court. We think the legal proposition relied on by defendant's counsel is sound and well established by authority in this state and elsewhere. A carrier having goods in possession for transportation acquires no title to them. As the goods remain the property of the owner, his right of action against the carrier is for the entire value of the goods if lost or made entirely worthless by the carrier's default; and, in case of destruction of value, the recovery is not affected by the owner's acceptance or his refusal to accept the goods. On the other hand, if the value is merely impaired by actual injury in the hands of the carrier, or by delay in the carrier, the consignee is bound to receive the goods; and his right of action is limited to the impairment of value due to delay in carriage or injury to the goods. In Nettles v. S. C. R. R. Co., 7 Rich. 190, 62 Am. Dec. 409, the action was for the value of a shipment of wool hats which were much injured by being boxed up for several months, when they should have been transported and delivered in a few days. The court held: "The goods, even after great delay in the carriage of them, belonged to the plaintiff. When they were tendered to him, he should have accepted them; and thereby the extreme measure of damages would have been reduced by deduction therefrom of the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

†Petition for rehearing dismissed July 5, 1912.

value of the goods, according to their condition at the time and place of tender." It will be observed that the point involved in that case was not loss resulting from mere delay in delivery, but from actual injury to the goods received in the course of transportation. Indeed, on the point under discussion, it is impossible to distinguish in principle between damage due to delay and damage due to impairment of value by physical injury to the goods. Neither the actual injury nor the delay in transportation amounts to conversion as long as the goods retain a substantial value.

The rule was applied to delayed freight in *Cousar v. So. Ry.*, 82 S. C. 307, 64 S. E. 391, and in *Bullock v. C. & W. C. Ry.*, 82 S. C. 375, 64 S. E. 234. In *Shaw v. S. C. R. Co.*, 5 Rich. 462, 57 Am. Dec. 768, a considerable quantity of a shipment of molasses had leaked out because of injury to the casks in the course of transportation. The court, holding that the consignee must receive the molasses that was left and sue for the value of that which leaked out, quoted with approval the following statement of the principle made in *Smith v. Griffith*, 3 Hill (N. Y.) 333, 38 Am. Dec. 639: "If goods are wholly lost or destroyed, the owner is entitled to their full worth at the time of such loss or destruction. In trover the measure of damages is the value of the goods at the time and place of conversion, with interest, or, perhaps, at any time between that and the trial. And, upon the same principle, if the goods are partially injured, and the party seeks redress for the qualified damage, the measure should be in like proportion." The court recognized and applied the same principle in *Miami Powder Co. v. Port Royal, etc., Ry. Co.*, 38 S. C. 78, 16 S. E. 339, 21 L. R. A. 123, and in *Wall v. Atlantic Coast Line R. R. Co.*, 71 S. C. 337, 51 S. E. 95. These cases are in accord with the authorities elsewhere. 3 *Hutchinson on Carriers*, 1365, 1372; *Mich. Co. v. Bivens*, 13 Ind. 263; *Gulf Co. v. Pitts*, 37 Tex. Civ. App. 212, 83 S. W. 727; *Gulf Co. v. Everett*, 37 Tex. Civ. App. 167, 83 S. W. 257; *Silverman v. Ry.*, 51 La. Ann. 1785, 26 South. 447; *Dudley v. Railway*, 58 W. Va. 604, 62 S. E. 718, 3 L. R. A. (N. S.) 1135, 112 Am. St. Rep. 1027; *Parsons v. U. S. Express Co.*, 144 Iowa, 745, 123 N. W. 776, 25 L. R. A. (N. S.) 842.

The case of *Berley v. C. N. & L. R. R. Co.*, 82 S. C. 232, 64 S. E. 397, was relied on by respondents' counsel as holding that a consignee could refuse to receive goods injured in transportation, but still having a substantial value, and recover the full value. It is perfectly obvious from the following language of the decree that the recovery was allowed on the ground that the evidence admitted of the inference that, when the goods arrived, they had no substantial value. "The defendant first submits the point that

the plaintiff could not recover \$1.84, the entire amount of the claim, because the evidence for the plaintiff shows that the entire value of the piping was only \$1.84, that it was not lost but only injured, and that, after the injury, it was of some value. The plaintiff, Kyzer, testified the piping was so broken as to be of no value to him, though 'it might have been worth something to somebody.' This mere conjecture of value by the plaintiff does not warrant this court in holding there was no evidence to support the judgment of the magistrate that the piping was a complete loss, especially when it is considered that Hook, defendant's agent at Irmo, testified the defendant admitted and allowed the whole claim after investigation."

[2] Still we do not think there should be a reversal in this case. While there can be no doubt that, if the shafting in its bent condition had a substantial value, the consignees were bound to receive it and give the carrier credit for the net amount realized from its due disposition, when the evidence is looked at in a practical way we think it shows that the shafting could not have had any appreciable net value in the hands of the consignees. According to the evidence, it had no value except as old iron, worth from 55 to 77 cents. The actual outlay for handling and delivery to a purchaser would not have been much less than this small sum, so that the net value of the bent shafting in the hands of consignees, if anything at all, was too insignificant to count in the practical administration of justice. As the judgment must be affirmed on the undisputed evidence in the case, it is unnecessary to consider the exception charging error in the admission of testimony that the defendant offered to pay the claim without the penalty.

The judgment of this court is that the judgment of the circuit court be affirmed.

GARY, C. J., and HYDRICK and FRASER, JJ., concur. WATTS, J., disqualified.

(91 S. C. 597)

DRENNAN v. SOUTHERN RY., CAROLINA DIVISION, et al.

(Supreme Court of South Carolina. June 11, 1912.)

1. APPEAL AND ERROR (§ 274*)—REVIEW—NECESSITY OF PRESENTATION OF ERRORS IN TRIAL COURT.

An exception, complaining of the admission of evidence on certain grounds, cannot be reviewed, where those grounds were not presented at trial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1631-1645; Dec. Dig. § 274.*]

2. RAILROADS (§ 347*)—INJURIES TO PERSONS ON TRACKS.

In an action against a railroad company for injuries received by plaintiff at a crossing, evidence of negotiations between the town

council and a railroad company, as to the putting in of an alarm system at the crossing, was admissible to show that the railroad company had notice of the dangerous condition of the crossing.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1124-1137; Dec. Dig. § 347.*]

3. APPEAL AND ERROR (§ 1050*)—REVIEW—HARMLESS ERROR.

The erroneous admission of evidence cannot be the subject of complaint on appeal, where it is not shown that it was prejudicial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4153-4160, 4166; Dec. Dig. § 1050.*]

4. NEGLIGENCE (§ 141*)—CONTRIBUTORY NEGLIGENCE—COMPARATIVE NEGLIGENCE—INSTRUCTIONS.

In an action by plaintiff, who was injured at a railroad crossing, a charge that, if the statutory signals were not given, then the railroad company was negligent per se, and if the failure of the railroad company to give such signals was the proximate cause of plaintiff's injury, he was entitled to recover, unless he was guilty of gross or willful negligence, or was acting in violation of the law, the ordinary defense of contributory negligence being insufficient here, and a showing of gross negligence or violation of the law on the part of plaintiff being necessary to defeat recovery, was correct, sufficiently distinguishing between cases where an accident was caused by ordinary negligence, and where it was caused by the failure of a railroad company to give statutory signals, in which case the statute makes contributory negligence no defense, unless it is gross.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 382-399; Dec. Dig. § 141.*]

5. CONSTITUTIONAL LAW (§ 245*)—EQUAL PROTECTION OF LAW—REASONABLE CLASSIFICATION.

Civ. Code 1902, § 2139, providing that, if a person is injured in his person or property by collision with the engine or cars of a railroad company at a crossing, and it appears that the company had neglected to give the signals required by this law, and that such neglect contributed to the injury, it shall be liable for all damages, unless it is shown that, in addition to mere want of ordinary care, the person injured, or whose property was injured, was, at the time of the collision, guilty of gross or willful negligence, or was acting in violation of law, and that such negligence or unlawful act contributed to the injury, is not in violation of the constitutional provision inhibiting a denial of equal protection of the law; for the purpose of the statute is to compel railroad companies to give the statutory notice, and, while abolishing the ordinary defense of contributory negligence, the classification of all railroad companies is reasonable.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 702; Dec. Dig. § 245.*]

6. CONSTITUTIONAL LAW (§ 311*)—DUE PROCESS OF LAW—CHANGE IN RULES OF EVIDENCE.

Nor is this statute, if considered merely as a change in the rules of evidence, in violation of Const. U. S. Amend. 14, prohibiting the deprivation of life, liberty, or property without due process of law; for the right to have one's controversies determined by the existing rules of evidence is not a vested right, and reasonable changes may be made.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 932; Dec. Dig. § 311.*]

7. DAMAGES (§ 95*)—PERSONAL INJURIES—INSTRUCTIONS.

In a personal injury action, plaintiff should recover damages proportionate to the injuries sustained.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 222-229; Dec. Dig. § 95.*]

Appeal from Common Pleas Circuit Court of York County; R. C. Watts, Judge.

Action by Leonard B. Drennan, revived in the name of Lida E. Drennan, as administratrix of the estate of Leonard B. Drennan, deceased, against the Southern Railway, Carolina Division, and Southern Railway Company. From a judgment for plaintiff, defendants appeal. Affirmed.

The exceptions were as follows:

"(1) Because his honor erred in allowing John T. Roddey, one of plaintiff's witnesses, to testify, over the objection of defendants, as to certain negotiations that took place between the town council of Rock Hill and Southern Railway Company before the injuries to plaintiff's intestate, and as to the putting in of an alarm system at certain crossings in said city of Rock Hill, and that same were taken out; the error being that said testimony was irrelevant and incompetent, and was prejudicial to the defendants.

"(2) Because his honor erred in reading to the jury in his charge sections 2132 and 2139 of the Code of Laws for 1902, and in charging the jury as follows: 'Now, gentlemen, I charge you, as a matter of law, if you should conclude or believe that these signals were not given, as required by this statute, then, under the decisions of our Supreme Court, that is negligence per se; and if there was a failure on the part of the railroad company, its agents and servants, to give the signals with reference to crossing of the highway, street, or traveled place, as required by the statutes, which I have read to you, and if Mr. Drennan was injured by any carelessness and negligence on their part, and that carelessness and negligence or failure to give signals, or anything of that sort, was the direct and proximate cause of his injury, then, under circumstances of that sort, he would be entitled to recover, unless you think that at the time he was injured, or at the time of the collision, if there was one at a crossing, that Mr. Drennan was guilty of gross or willful negligence, or was acting in violation of law, and that such gross and willful negligence or unlawful act contributed to his injury. In other words, in order to make this thing perfectly plain to you, I have already charged you that the law of contributory negligence is a good defense as to a case of ordinary negligence; but the law is a little different where a man is injured at a crossing, where a public highway, street, or traveled place crosses a railroad, if the parties in charge of the locomotive or train fail to give the statutory signals at the crossing, and that failure or negligence on their part

is the direct and proximate cause of his injury.' The error being: (1) That his honor thereby charged the jury that ordinary contributory negligence on the part of the plaintiff would not defeat his action if there was 'any carelessness and negligence' on the part of the defendants, 'or failure to give signals'; the law clearly being that, if there was any contributory negligence on the part of the plaintiff, the same would defeat his action in all cases not falling under section 2139 of the statute. (2) That such charge was misleading and confusing to the jury.

"(3) Because his honor erred in charging the jury, after having read said sections of the statute, as follows: 'Ordinarily, the want of ordinary care on the part of the person injured, the failure on his part to observe due care or due precaution, if that failure to observe due care and due precaution on his part in any manner contributed towards his injury as a direct and proximate cause, then he cannot recover; but where he is injured by a collision at a public crossing by a locomotive engine, and the parties in charge of that engine fail to give the statutory signals—that is, ringing the bell or blowing the whistle within 500 yards, and keeping it up until they get over the traveled place, highway, or public crossing—a mere want of ordinary care on his part, if he is injured under those circumstances, will not prevent a recovery; but the jury must be satisfied that at the time of the injury or collision, if there was one, that the party injured was guilty of gross or willful negligence, or was acting in violation of law, and such gross or willful negligence or unlawful act contributed to his injury.' The error being: (1) That ordinary contributory negligence on the part of the plaintiff will defeat his cause of action in all cases, unless he was injured by a collision at a crossing through failure to give the statutory signals. (2) That section 2139 of the Code, under which such charge was given, is in violation of article 5 of the Constitution of the United States, and also section 1 of article 14 of the Constitution of the United States, and also of sections 5 and 17 of article 1 of the Constitution of the state of South Carolina, in that said statute deprives railroad companies of their property without due process of law, and denies to them the equal protection of the law, in that it deprives railroad companies of the defense of contributory negligence in cases embraced within its terms, while it allows to the individual injured a cause of action for ordinary negligence, and thereby allows him to recover damages when his own contributory negligence was a proximate cause of his injuries.

"(4) Because his honor erred in charging the jury with reference to the measure of damages to which the plaintiff would be entitled, if she was entitled to recover, by charging the jury that she could recover

damages proportionate to the injuries sustained; the error being: (1) That for ordinary personal injuries, where no cause of action for punitive damages has been made out, only compensatory damages are recoverable. (2) That under such charge, the jury was permitted to give the same measure of damages as are allowed under the Lord Campbell's Act, and prescribed in section 2852 of the Code of Laws for South Carolina.

"(5) Because his honor erred in not granting a new trial upon the third and fourth grounds, which were as follows: '(3) That the undisputed evidence in the case shows that the plaintiff's intestate was guilty of contributory negligence as a matter of law, in that, when he had an opportunity for seeing the approach of the engine, he failed to take any precautions whatsoever for his own safety. (4) That the undisputed evidence in the case shows that plaintiff's intestate was guilty of gross or willful negligence in approaching track of defendants, when he had the opportunity of discovering the approach of the engine thereon, and in failing to observe any care or take any precautions whatsoever for his safety.' The error being that the undisputed evidence in the case shows that plaintiff's intestate was guilty not only of contributory negligence, but of gross and willful negligence, in that he attempted to cross defendants' track without making any effort to see whether the engine was approaching, and without taking any precaution whatsoever for his own safety, when his attention had been called to the matter, and in failing to observe the slightest degree of care for his own safety and protection.

"(6) Because his honor erred in refusing to grant a new trial upon the seventh ground, which was as follows: '(7) That the undisputed evidence, as well as the great preponderance thereof, clearly shows that the plaintiff's intestate could have seen the approaching engine, and could have safely stopped in time to avoid injury, if he had exercised any care to discover its approach before he heedlessly went on the track of defendants.' The error being that the undisputed evidence clearly shows that plaintiff's intestate, by exercising the slightest degree of care, could have seen the approaching engine, and could have stopped in time to have avoided injury to himself; but he failed to exercise the slightest degree of care, and, on the contrary, heedlessly went upon said track.

"(7) Because his honor erred in refusing to grant a new trial upon the eighth and ninth grounds, which were as follows: '(8) That the verdict of the jury, considered as a verdict for compensatory damages, under all the facts in the case, was grossly excessive. (9) That the verdict of the jury, considered as a verdict for compensatory damages, under all the testimony, is so grossly excessive as to clearly show that it was the result of sympathy, passion, and prejudice on the part

of the jury.' The error being: (1) That the verdict is grossly excessive, considered as a verdict for compensatory damages. (2) That such verdict, considered as a verdict for compensatory damages, is so excessive as to clearly show that it was the result of sympathy, passion, or prejudice on the part of the jury.

"(8) That his honor erred in refusing to grant a new trial upon the tenth and eleventh grounds, which were as follows:

'(10) That section 2139 of the Code of Laws, which provides that a person who is injured in his person or property by collision with engines or cars of a railroad corporation at a crossing is entitled to recover all damages caused by said collision, when it appears that the corporation neglected to give the signals required, gives a cause for action for *simple negligence* in failing to give said signals. At the same time, said section deprives the railroad corporation of the defense of ordinary contributory negligence, thus fixing one standard of care for the corporation and a different standard of care for the injured person, thereby depriving the defendant corporation of the equal protection of the law, in plain violation of the provisions of both the state and federal Constitutions. (11) That it was error to charge the jury that an injured person could recover damages under said section 2139 for *simple negligence* in failing to give the statutory signals, if such failure contributed to the injury of said injured person, and that in such a case the injured person would be entitled to recover, unless it was shown that, in addition to a mere want of ordinary care, such injured person was, at the time of the collision, guilty of gross and willful negligence, or was acting in violation of the law, and that such gross or willful negligence or unlawful act contributed to the injury, because said section 2139 is in plain violation of the provisions of both the state and the federal Constitutions, in that it makes the railroad corporation liable for damages for *ordinary* or *simple negligence*, and deprives said corporation of the defense of contributory negligence arising from a lack of ordinary care on the part of said injured person, thereby imposing one standard of care for the defendant corporation and a different standard of care for the plaintiff, thus imposing unequal burdens upon the plaintiff and defendant in such cases, when both may be guilty in an equal degree of the same kind of negligence.' The error being that section 2139 is in violation of article 5, and also of section 1, art. 14, of the Constitution of the United States, and is also in violation of sections 5 and 17 of article 1 of the Constitution of South Carolina, in that it deprives railroad corporations of their property without due process of law, and denies to them the equal protection of the law. (2) Because said section deprives railroad companies of the equal protection of

the laws, in that it deprives railroad companies of the defense of contributory negligence, while it allows to the injured person a cause of action for simple negligence, thereby fixing one standard of care for the railroad company and a different standard of care for the traveler, and thus deprives the railroad company of the equal protection of the laws. (3) Because said section deprives railroad corporations of the equal protection of the laws, in that it makes railroad corporations liable for damages for ordinary or simple negligence, and gives to the injured party a cause of action for such ordinary or simple negligence, but deprives the railroad company of the defense of contributory negligence arising from the lack of ordinary care on the part of the injured person, and thus imposes one standard of care for the defendant corporation and a different standard of care for the traveler, who may be injured, thereby imposing unequal burdens upon the plaintiff and defendant in such case, when both may be guilty in an equal degree of the same kind of negligence, thus allowing an injured party to recover damages in a case where his own negligence was a proximate cause of his injury."

B. L. Abney, of Columbia, and McDonald & McDonald, of Winnsboro, for appellants. Thos. F. McDow, of Yorkville, for respondent.

GARY, C. J. The following statement appears in the record: "The above action was commenced in the court of common pleas for York county, S. C., by Leonard B. Drennan, plaintiff's intestate, by the service of a summons and complaint on the defendants on the 6th day of October, 1910. The action was brought by said plaintiff to recover the sum of \$25,000 damages, actual and punitive, for personal injuries alleged to have been sustained by said plaintiff at Wilson street crossing, in the city of Rock Hill, on July 12, 1910, through the alleged concurrent negligence, recklessness, willfulness, and wantonness of the defendants, as set out in the complaint. Thereafter, on the 20th day of October, 1911, the said plaintiff, Leonard B. Drennan, died from typhoid fever, and the action was subsequently continued in the name of Lida E. Drennan, his widow and duly appointed administratrix, by an order of the court of common pleas made in the action. The case was tried at the November, 1911, term of the court for York county, and resulted in a verdict in favor of the plaintiff for the sum of \$15,000. During the progress of the trial, the jury was sent to view the premises. A motion for a new trial was thereupon made upon the minutes of the court, but the same was refused, and judgment was entered against the defendants."

The defendants appealed upon exceptions, which will be reported.

[1-3] The first question that will be con-

sidered is presented by the exception numbered 1. When the testimony was offered, the defendants' attorneys did not object to its introduction, on the ground that it was irrelevant, but on the grounds (1) that it was not in writing, and (2) that there was no allegation of the complaint to which it was responsive. It will thus be seen that the grounds mentioned in the exception are not the same as were urged on circuit. But, waiving such objection, the testimony was competent for the purpose of proving that the defendants had notice of the dangerous condition at the crossing. Furthermore, it has not been made to appear, even if there was error, that it was prejudicial.

[4] The second exception raises the next question for determination. The rules of evidence are different in cases where the injury at a crossing results directly from the failure of the railroad company to give the statutory signals, and in cases where the injury was proximately caused by other acts of negligence. In cases where the injury is the direct result of a failure on the part of the railroad company to comply with the requirements of the statute as to signals, it cannot escape liability, unless it shows that, in addition to a mere want of ordinary care, the person injured was, at the time of the collision, guilty of gross or willful negligence, or was acting in violation of the law. In all other cases, it is only incumbent on the railroad company to show a want of ordinary care on the part of the person injured, which contributed to the injury as a proximate cause, and without which the injury would not have occurred. By reference to the charge, it will be seen that his honor, the presiding judge, clearly instructed the jury as to this difference.

[5] We proceed to consider the exceptions attacking the constitutionality of section 2139 of the Code of Laws, which is as follows: "If a person is injured in his person or property by collision with the engine or cars of a railroad corporation at a crossing, and it appears that the corporation neglected to give the signals required by this chapter, * * * and that such neglect contributed to the injury, the corporation shall be liable for all damages caused by the collision, * * * unless it is shown that, in addition to a mere want of ordinary care, the person injured, or the person having charge of his person or property, was, at the time of the collision, guilty of gross or willful negligence, or was acting in violation of the law; and that such gross or willful negligence, or unlawful act, contributed to the injury."

The constitutionality of said statute was determined in the case of *Kaminitsky v. Railway*, 25 S. O. 53. In that case the court uses this language: "It is said that the provision in regard to the proof of negligence was not really an amendment of the charter,

but a change in the law of evidence. If this were so, it would not make it unconstitutional. 'The right to have one's controversies determined by existing rules of evidence is not a vested right. Like other rules affecting the remedy, they must therefore at all times be subject to modification and control by the Legislature.' Cool. Con. Lim. 452, 453. We do not, however, consider that by the aforesaid provision the main object of the Legislature was to make a change in the law of evidence, but to induce compliance with the previous requirement as to signals. The rule of evidence as to negligence was made to apply only in case of failure to give the required signals; and it is manifest that the purpose was to give an additional sanction to the provision requiring the signals to be given."

The court then quotes with approval the following language from *Pierce on Railroads* (page 460): "A railroad company, although no power is reserved to amend or repeal its charter, is nevertheless subject, like individuals, to such police laws as the Legislature may, from time to time, enact for the safety and health of citizens and the general convenience and good order. Its property and essential franchises are, indeed, protected by the Constitution; but the company itself is not thereby placed above the laws. It was not the design of that instrument to disarm the states of the power to pass laws to protect the lives, limbs, health, and morals of citizens, and to regulate their conduct towards each other, and the mode of using property, so that different owners may not injure each other. Such laws may incidentally impair the value of franchises, or of rights held under contracts; but they are enacted diversio intuitu, and are not within the constitutional inhibition."

The rule as to classification, under the fourteenth amendment to the federal Constitution, is thus clearly stated by the court, through Mr. Justice Van Devanter, in the case of *Lindsley v. Natural Carbonic Gas Co.*, 220 U. S. 61, 31 Sup. Ct. 237, 55 L. Ed. 369: "(1) The equal protection clause of the fourteenth amendment does not take from the state the power to classify in the adoption of police laws, but admits of the exercise of a wide scope of discretion in that regard, and avoids what is done only when it is without any reasonable basis, and therefore is purely arbitrary. (2) A classification having some reasonable basis does not offend against that clause, merely because it is not made with mathematical nicety, or because in practice it results in some inequality. (3) When the classification in such a law is called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed. (4) One who assails the classification in such a law must carry the burden of showing that it does not

rest upon any reasonable basis, but is essentially arbitrary."

Section 2139 of the Code of Laws was the outgrowth of the necessity for legislation to protect the traveling public at highway crossings, and it is peculiarly applicable to railways; in fact it is difficult to conceive how any but railways could be included in the classification. This case, therefore, is embraced within the principles announced in the case last mentioned.

[8] We proceed to consider whether the said section is in violation of the fourteenth amendment to the Constitution of the United States, which provides that no state shall deprive any person of life, liberty, or property without due process of law. In construing section 2139 of the Code of Laws, the court stated, in *Kaminitzky v. Railway*, 25 S. C. 53, that the main object of that section was not to make a change in the law of evidence, but to induce compliance with the statutory requirements as to signals. But, even if the intention of said section was to change the rules of evidence in the manner therein stated, it would not be repugnant to the provisions of the fourteenth amendment to the federal Constitution as to due process of law. Rules of evidence may be changed whenever the grounds for such change are reasonable. A conspicuous instance of such change appears in section 15, art. 9, of the Constitution, which provides that "knowledge by any employé injured, of the defective or unsafe character of any machinery, ways, or appliances, shall be no defense to an action for injury caused thereby, except as to conductors or engineers in charge of dangerous or unsafe cars, or engines voluntarily operated by them." Another instance of such change appears in the act of Congress, approved the 11th of June 1906 (Act June 11, 1906, c. 3073, § 2, 34 Stat. 232 [U. S. Comp. St. Supp. 1911, p. 1317]), which provides that in all actions brought against common carriers to recover damages for personal injuries to an employé, or where such injuries have resulted in his death, the fact that the employé may have been guilty of contributory negligence shall not bar a recovery, where his contributory negligence is slight, and that of the employer was gross in comparison; but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employé. One reason for the change in the rules of evidence by section 2139 of the Code of Laws is that in many instances the party colliding with the train of cars is instantly killed; and the railroad company would have a decided advantage if it was only required to prove that the person injured was guilty of ordinary contributory negligence. The necessity of the case requires proof of more than ordinary negligence on the part of the person injured. A like necessity caused a change in

the rules of evidence, where cattle were killed by a railroad train, as will be seen by the case of *Danner v. Railway*, 4 Rich. 329, 55 Am. Dec. 678, in which it was held that there was a presumption of negligence arising from the mere act of killing the stock.

[7] The next question that will be considered is presented by the fourth exception. When the charge is considered in its entirety, it will be seen that his honor, the presiding judge, instructed the jury that the basis of recovery by the plaintiff was the amount of actual damages sustained by her intestate. But, even if he had charged as contended by the appellant's attorneys, it would not have constituted error. *Sullivan v. Railway*, 85 S. C. 532, 87 S. E. 905.

The last question is whether there was error in refusing the motion for a new trial, on the ground that the verdict was arbitrary, and was the result of sympathy, passion, and prejudice. There is nothing in the record tending to show such fact.

Judgment affirmed.

WOODS, HYDRICK, and FRASER, JJ., concur.

(70 W. Va. 711)

MARTIN v. HUGHES CREEK COAL CO.

(Supreme Court of Appeals of West Virginia.
Jan. 23, 1912. Rehearing Denied
June 15, 1912.)

(Syllabus by the Court.)

RAILROADS (§ 369*)—OPERATION—PERSONS ON TRACK—CARE REQUIRED.

A coal mining corporation, operating on its own private premises a private railway for conveying cars to its tipples for loading, owes no duty to keep a lookout for children on its track, and is not liable for injury to a child from a moving car; its operator not seeing the child.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1259-1262; Dec. Dig. § 369.*]

Miller and Williams, JJ., dissenting.

Error to Circuit Court, Kanawha County.

Action by Albert-A. Martin, an infant, against the Hughes Creek Coal Company. From a judgment granting a new trial after verdict for plaintiff, he brings error. Affirmed.

Cato & Bledsoe, for plaintiff in error.
Brown, Jackson & Knight, for defendant in error.

BRANNON, J. The Hughes Creek Coal Company is a private corporation engaged in mining coal, its works being on land owned by it on the line of the Kanawha & Michigan Railroad. As a part of its operating equipment it has tracks for receiving empty railroad cars and loading coal, connecting with the said railroad as switch tracks, but on its own land. It had some empty cars standing on one of its tracks. The track

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

had a slight down grade from a point at the top of the grade called a knuckle, the point where empty cars stood. One of the company's employes, in order to take one of these cars from the knuckle to the coal tippie to be loaded from the mine, started it down the light one degree grade, it moving by gravity, and, having started by prying it with a crow bar, he got on the rear end of the gondola car, and moved slowly, he says occupying him five minutes, to the front end, where the brake was; the car moving slowly, at the rate of three or four miles an hour. The plaintiff, a child of 23 months, named Albert A. Martin, got out of the gate of the yard of its home, went to this track, and in seeking to cross one of his arms was caught by the moving car and so badly mashed at the elbow that amputation of its arm was necessary. In an action brought by the child a verdict was found for him, which was set aside by the court, and Martin brings a writ of error.

The coal company upon its own premises was using the car in a lawful manner in the transaction of its business. The child had no right upon the railroad track, and was thus, in the eye of the law, a trespasser. It is not, legally speaking, harsh or unwarranted to denominate a child a trespasser under such circumstances; for he is on the property of others uninvited, where he has no right to be. He is in law a trespasser, and the owner of the premises owes him no duty except not to wantonly or willfully injure him. The same rule here applies to a child as to an adult. *Palmer v. Oregon Short Line*, 34 Utah, 466, 98 Pac. 689, 16 Ann. Cas. 229, note page 680. In note in 16 Ann. Cas. 247, are cited many cases for the proposition that "the recent cases adhere to the rule that railroad companies ordinarily owe no duty to children trespassing on their tracks, except the negative one not to injure them after discovering their presence." It owes no affirmative, positive duty. That great writer, Thompson, in his work on Negligence (volume 1, §§ 1024, 1025), says, "As a general rule, he [the owner of premises] is not bound to keep his premises safe or in any particular condition for the benefit of *trespassing children* of his neighbor, or for the benefit of children who occupy no more favorable condition than that of the bare licensees." "The general rule undoubtedly is that the owner or occupier of land is not bound to take pains to prepare his premises in any particular way, to the end of promoting the safety of children who may come thereon as trespassers or as bare licensees, but that, as in the case of adults, they take the premises as they find them, and if they are killed or injured by reason of condition in which they find them, this does not give a right to an action for damages. Liability extends only to wanton injuries. One doctrine under this head is that if a child trespasses upon the prem-

ises of the defendant, and is injured in consequence of something that befalls him while so trespassing, he cannot recover damages, unless the injury was wantonly inflicted, or was due to the recklessly careless conduct of the defendant." Thompson personally criticises the rule, but says it is beyond question the established law. We held this same principle in *Uthermohlen v. Boggs Run Co.*, 50 W. Va. 457, 40 S. E. 410, 55 L. R. A. 911, 88 Am. St. Rep. 884, *Ritz v. Wheeling*, 45 W. Va. 262, 31 S. E. 993, 43 L. R. A. 148, *Conrad v. Railroad Co.*, 64 W. Va. 176, 61 S. E. 44, 16 L. R. A. (N. S.) 1129, and *Dicken v. Liverpool Co.*, 41 W. Va. 511, 23 S. E. 582, cases of injury to children. In them is full discussion of this subject, and we shall not repeat their contents, or tediously elaborate. We assert that those cases do lay down principles which control the present case. As the law says that the coal company owed no duty to this unfortunate child, there could be no legal negligence; and where there is no negligence there is no liability. If the employe had seen the child and taken no care to save it, then we could say there was negligence in law, constituting wanton or willful injury, and therefore legal liability under principles above stated; but the boy who was moving the car did not see the child. It is not proven or claimed that he did. He did not know that the child had been injured until the car reached the tippie, when he was told of the misfortune. The car started before the child reached the track. Just the distance from where the car started to where the child received its hurt is not certain, but from 75 to 90 feet. Bowers, the boy taking the car down, was not on the end of the car next to the child, where was the only brake, but at the rear end, seeming not to be intent on the brake, as the car was moving so slowly, and the tippie not reached. Why Bowers did not see the child may be that, being on the back end of the car, and the box of the car being four boards high, 4½ feet from floor to top, he did not see it.

But, though Bowers did not see the child, yet it is argued that he could and should have done so. This is a claim that the defendant was bound to keep a lookout for the child. This claim is repelled by authorities above, as they hold that as to either children or adults trespassing on private premises the owner owes no duty, except not to wantonly injure after discovery of the presence of the child. Here I may cite a case very much kindred to this one as to the general principle above stated, and particularly as to the matter of lookout. It is *Emerson v. Peteler*, 35 Minn. 481, 29 N. W. 311, 59 Am. Rep. 337. A contractor was grading a street for a city, and used dump cars in a street moved by gravity to carry away earth. Two children got on one of these cars, and when the cars were in motion a child of five years jumped off the car

and was killed. The children were not seen. The court said: "The only ground upon which negligence is predicated is the failure to provide better police supervision of the movement of the cars in order to prevent children from boarding them. * * * But we do not think the law required the defendant, under the circumstances, to provide police supervision to keep off intruders or trespassers from these cars, whether children or adults. He was engaged in improving the street, and his cars and track were lawfully in it for such purpose. * * * Where there is no negligence, the incapacity of the child who happens to be injured cannot create liability. *Kay v. Penn. R. Co.*, 65 Pa. 269, 271, 3 Am. Rep. 628. The burden rested on the plaintiff to establish negligence, and it is not claimed that there was any, unless the failure to employ help to watch and keep children away was such. But the duty which the defendant owed these children was not to keep *constant watch*, or to use extraordinary care, to prevent their approach, but, when discovered in the exercise of ordinary care, to use proper diligence to prevent injury to them." The court said, as I say in this case, that it was an instance of unfortunate accident, imposing no liability on the contractor.

If these principles do not rule this case, what the use of private property? Its use is all there is of benefit in it; and if its use is to be so restricted, where its benefit? It would be so narrowed. If this coal company could not freely use, on its own ground, this car in the necessary transaction of its work, if that use must be hampered by the duty of keeping a constant Argus-eyed watch, it would largely detract from and damage right of private property. If these principles do not apply, where is the limit?

It is contended that, as the law of West Virginia requires public railways to keep a watch on the track to see children, the same reason called for a watch of the defendant's switch track. The preponderance of authority, perhaps, is that a railroad company is not bound to keep a watch for children on its track. *Palmer v. Short Line*, 84 Utah 466, 98 Pac. 689, 16 Ann. Cas. 228, and note page 247; *Southern R. Co. v. Chatman*, 124 Ga. 1026, 53 S. E. 692, 6 L. R. A. (N. S.) 283, 4 Ann. Cas. 675, and note page 680. But our law is different. *Gunn v. Railroad*, 42 W. Va. 676, 26 S. E. 546, 36 L. R. A. 575. However there is a difference in this respect between a public railroad and one of a coal operator used on his own premises for transacting his private business. The one is a public road; the other, private. The public railroad train traverses great stretches of country, at great speed, the coal operator's cars go slowly a short distance. We know, by judicial cognizance as a matter known of all men, that great numbers of people do walk on the public railroad track, and their presence on it in many instances may be ex-

pected; not so in the case of the private track operated in carrying on a coal mine.

We think, on principles above stated, that there was no error in giving the following instructions: No. 2: "The court instructs the jury that the burden of proving negligence is upon the plaintiff, and that the bare fact that the plaintiff was injured does not raise a prima facie presumption of negligence on the part of the defendant." No. 3: "The court instructs the jury that the defendant owed no duty to mere trespassers to keep its premises safe, and the fact that the trespasser is a child does not alter the duty owed to him." No. 4: "The court instructs the jury that the only duty owed by the defendant to the plaintiff was not to wantonly or willfully injure him." No. 5: "The court instructs the jury that the defendant was not bound to take pains to prepare his premises in any particular way, or the cars used thereon, to the end of promoting safety of children who might come thereon as trespassers or as bare licensees, but that the plaintiff must take the premises as they were, and as they were being used, at the time he came on them, and if they believe from the evidence that the defendant, through its servants, did not willfully or wantonly injure the plaintiff, then they must find for the defendant." No. 6: "The court instructs the jury that the law is that the defendant owed to the plaintiff no higher duty or obligation than it owed to an adult who may have been a trespasser upon its premises, and that in order for the plaintiff to recover he must show by a preponderance of the evidence that Ed Bower, the agent of the defendant company, willfully or wantonly caused the injury complained of in the plaintiff's declaration."

We think the court should have given instruction No. 1, as follows: "The court instructs the jury that the evidence in this case is not sufficient to support the verdict for the plaintiff, and they must therefore find for the defendant."

Under these principles, we affirm the judgment of the circuit court, granting a new trial.

MILLER, J. (dissenting). I can not concur in the opinion of the court. In my view it is not supported either by our own cases or some of those cited in the opinion from other states.

The opinion overlooks very important facts, strongly bearing on the rights of the parties, and which can not be properly ignored in any just disposition of the case. The record shows that while the side track is located on the private grounds of defendant, it likewise appears that on each side of this side track, and the public road paralleling it on one side, and the railroad of the Kanawha & Michigan Railway Company paralleling it on the other, defendant had built for the use of its employees some fourteen or fif-

teen dwelling houses; with some intervening buildings; and that west of these was its power house, and its tippie, and the railway station. The infant plaintiff lived with its mother and its grandfather, the latter an employee of defendant, in house No. 1, the westernmost of the mine houses, located on the north side of these tracks and the public road, and only about one hundred and fifty feet from the point on the side track where plaintiff was injured. All the other houses were occupied by families of employees of defendant company, some, if not all of them, having small children, and of which defendant, as the evidence shows, had notice. The locations of these houses, opposite each other, on either side of the public road and the railway tracks, was such as to put defendant on notice that the occupants of these houses would naturally, if not necessarily, cross the side track in visiting and communicating with each other. Besides there was some evidence of beaten paths across and upon the side track. Defendant had created these conditions at the place where plaintiff was injured, and thereby voluntarily assumed upon itself such duties and responsibilities as the law imposes, in operating its side track railroad.

The evidence moreover shows reckless disregard by the servant of the defendant in operating the car that injured plaintiff. He admits that before starting the car down the incline he took no pains to look ahead for objects on the track; that he got on the car at the rear end, and did not go in front where the brake was, or keep any kind of lookout ahead, and did not know that he had run over and injured plaintiff until after he had reached the coal tippie, although he was called to by the mother of the child, running towards it, in the direction of the moving car, from where she had been at work, at a neighbor's, on the south side of the track; and also by a Mrs. Canterbury, who had charge of the child, standing with another child in arms on the porch of house number 1, on the north side of the track, and urging on the pursuit by a small boy six years old sent by her to rescue the plaintiff from the impending danger. It is admitted that at the rate the car was moving it could have been stopped within from five to six feet, and the evidence of some of the witnesses is that plaintiff could have been seen on the track some ninety feet ahead of the car when it was started down the grade.

Under these facts and circumstances did defendant owe plaintiff no duty to keep a lookout? The opinion of the court answers, No; that the only duty owed him was the negative one not to wantonly and recklessly injure him, when discovered on the track. I can not so hold. The opinion concedes that this negative duty is not the full measure of responsibility of a railway company operating trains for long distances; that there is

then a positive duty to maintain a reasonable lookout on its private right of way for helpless persons and dumb animals. So says *Gunn v. Railroad Co.*, 36 W. Va. 165, 14 S. E. 465, 32 Am. St. Rep. 842; *Id.*, 42 W. Va. 676, 26 S. E. 546, 36 L. R. A. 575, and *Bias v. C. & O. Ry. Co.*, 46 W. Va. 349, 33 S. E. 240, and other decisions of this court. What reason or authority would excuse a coal company operating a side track through a village, as in this case, from keeping a reasonable lookout for helpless persons, though technically trespassers? If as our cases hold such a duty is imposed on a railway company running fast trains, the same duty may with greater reason it seems to me be required of a corporation operating a side track in a village, where it has reason to anticipate the presence of helpless persons. Its servants have no paramount duties to distract them, as in the case of trainmen operating fast running trains, at long distance.

The general rule, erroneously applied in the opinion, that the owner of private property owes no duty to a trespasser, though not controverted, I think inapplicable to the facts in this case. Nor in my opinion is its application here supported by our cases of *Ritz v. Wheeling*, *Dicken v. Liverpool Co.*, *Uthermohlen v. Boggs Run Co.*, and *Conrad v. Railroad Co.*, referred to. In neither of those cases, unless it be *Dicken v. Liverpool Company*, did the negligence of defendant relied on constitute active negligence on the part of defendant, as distinguished from passive negligence, particularly illustrated in the case of *Ritz v. Wheeling*, where the injuries were sustained by plaintiff through the condition of the premises, "without the immediate intervention of any human agency save his own." This distinction, though inapplicable to that case is clearly drawn in *Savannah, F. & W. Ry. Co. v. Beavers*, 113 Ga. 398, 39 S. E. 82, 54 L. R. A. 314, opinion by Judge Fish, a case quoted from and much relied on by Judge Brannon in *Uthermohlen v. Boggs Run Co.*, *supra*. The fact that in the case at bar, as in *Gunn v. Railway Co.*, and other cases, defendant was charged with negligently bringing force to bear on plaintiff by a positive act done after his entry on defendant's premises—a negligent act of commission, is what distinguished this class of cases from those of passive negligence, where the injury is not the result of the immediate act of negligence of defendant. In *Dicken v. Liverpool Co.*, the proof showed that the child was injured on the private grounds of defendant, by being run over by a salt car drawn by a mule in charge of a driver, no lines being used. The driver was on a return trip from the salt shed to the salt house of defendant. The driver was on the car looking ahead, and as soon as he discovered the child he called to the mule, and did all he could to stop the

car and save the child, and actually did get to it in time to save its life, but not in time to save the wheel of the truck from passing over its foot. How different that case is from this! I do not deny that there are many decisions supporting the opinion, some of them are cited. But this court in the cases referred to is committed to a different rule.

The distinction I contend for is perhaps best illustrated by the case of *Smith v. A., T. & S. F. Rld. Co.*, 25 Kan. 738, a case practically on all fours with the case at bar, opinion by Valentine, Judge, concurred in by so distinguished a judge as Mr. Justice Brewer, late a distinguished member of the Supreme Court of the United States. That case distinctly holds that the question whether defendant was guilty of negligence in injuring the child on the track was a question of fact for the jury and not one of law for the court. The class of cases to which the opinion of the court would now commit us, as well as those of the contra class including our case of *Gunn v. Railway Co.* and *Bias v. C. & O. Ry. Co.*, supra, are collated in a note to *Southern R. Co. v. Chatman*, 4 Ann. Cas. 675, 680, and supplemented by a similar note to *Palmer v. Oregon Short Line R. Co.*, 16 Ann. Cas. 229, 247, both cited in the opinion of the court. I refer to those notes. The rule of the contra class of cases is the reasonable and humane one. The other, when applied to cases like the one we have here, is cruel and inhuman, and a reproach to the law. I would reverse the judgment below, and enter judgment here for plaintiff on the verdict of the jury.

WILLIAMS, J., concurs.

(70 W. Va. 681)

HINKLE et al. v. NORTH RIVER INS. CO.
(Supreme Court of Appeals of West Virginia.
April 16, 1912. Rehearing Denied
June 15, 1912.)

(Syllabus by the Court.)

1. INSURANCE (§ 640*)—ACTIONS ON POLICIES—PLEADING.

The defense allowed an insurance company by Code of 1906, c. 125, § 64, by filing a statement that the company will rely on breach of condition, warranty, or clause of the policy, is not to be made by plea in abatement, and need not be filed at rules, but may be filed at any time before trial.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1609-1625; Dec. Dig. § 640.*]

2. INSURANCE (§ 640*)—ACTIONS ON POLICIES—PLEADING.

Such statement may be filed without the general issue or plea provided for in that section of the Code that the company is not liable on the policy.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1609-1625; Dec. Dig. § 640.*]

3. INSURANCE (§§ 493, 567*)—ADJUSTMENT OF LOSS—STATUTORY PROVISIONS.

The act (chapter 33, Acts of 1899) published in Code of 1906, serial section 1108, has not

been repealed; and under it, where the loss of a house by fire is total, the insurance company has no right to demand arbitration of the amount of loss, though the policy provides for it.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1266-1268, 1420; Dec. Dig. §§ 493, 567.*]

4. INSURANCE (§ 493*) — EXTENT OF LOSS—VALUED POLICY.

Under a fire insurance policy, to make a loss by fire total under the valued policy act, the building need not be utterly destroyed and extinguished. If its identity is gone, if its remnant cannot be used as a basis of repair or restoration, the loss is total, calling for full payment of the amount of insurance fixed by the policy.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1266-1268; Dec. Dig. § 493.*]

Error to Circuit Court, Randolph County.

Action by Rebecca Hinkle and others against the North River Insurance Company. Judgment for plaintiffs, and defendant brings error. Affirmed.

Rehearing denied; Miller, J., dissenting.

Talbott & Hoover, of Elkins (Hartwell Cabell, of New York City, N. Y., and Arthur S. Dayton, of Philippi, amici curiæ), for plaintiff in error. James Coberly, of Elkins, and Cunningham & Stallings, of Elkins and Parsons, for defendants in error.

BRANNON, P. Rebecca Hinkle and C. E. Madison sued the North River Insurance Company to recover for loss from the burning of a frame building, under an insurance policy issued by that company, and, upon a motion to strike out the plaintiff's evidence and a demurrer to that evidence, judgment was rendered for the plaintiffs, and the insurance company sued out a writ of error.

[1] The company filed a notice or statement that the defense would be noncompliance with and violation of certain conditions, clauses, and warranties of the policy, among them the clause that, in event of disagreement as to the amount of loss, it should be ascertained by arbitration. It is suggested by counsel that this defense could only be made by plea in abatement at rules; whereas the statement or notice was filed in term, and came too late. *Riley v. Jarvis*, 43 W. Va. 44, 26 S. E. 366, is vouched for this. In that case there was an action before a justice and an arbitration pending in it, and in another action a plea of the pending of the action before the justice and arbitration in it was held a plea in bar and too late after other pleas in bar had been filed, and that it was a plea of another action pending; that is, in abatement. So that case does not sustain the point. And, besides, the Code of 1906, c. 125, § 64, serial section 3884, gives right to file such notice or statement of defense, not prescribing that it shall be by plea in abatement, or fixing time of filing, but intending that it may be filed at any time before trial.

[2] The company did not file the plea al-

lowed in section 64, Code of 1906, c. 125, that it was not liable to the plaintiffs, which plea, in *Rosenthal v. Insurance Co.*, 55 W. Va. 238, 46 S. E. 1021, we called, and we now call, the statutory general issue in insurance cases; and counsel argue that this precludes the company from the benefit of the statement which it did file. As we said in that case, the Code, for simplicity, directs what pleading may be used in actions on insurance policies. It allows such notice merely. We admit that in actions generally there must be an issue; but there is an issue from that statement. The statute, after providing for such general issue, says, "but if in any action on a policy of insurance the defense be that it cannot be maintained because of failure to perform or comply with, or violation of, any clause, condition, or warranty" of the policy, then the defendant must file a statement specifying the particular clause, condition, or warranty not complied with or broken. This would seem to say that when this is the case the general issue will not do, but there must be this specification; in fact, it seems to dispense with the general plea when breach of a condition is relied on. We do not think that the technical rule that there must be a plea to form an issue, even though the trial be on the merits as if such plea had been filed, ought to be applied in such a case. We said, in *State ex rel. v. County*, 47 W. Va. 673, 35 S. E. 961, that is a harsh rule where there has been a full trial as if a plea were in, though we could not avoid adhering to it in *Good v. Town*, 65 W. Va. 13, 63 S. E. 615; but we are not disposed to enlarge it and apply it in this case against the true intent of the statute. The general plea would not suit in this case.

[4] The pivotal question in this case rests upon the clause of the policy providing for arbitration in case of disagreement as to the amount of the loss from fire. The policy provides that no suit should be brought on it until after compliance by the insured party with all requirements of the policy. The insurance company and the insured party disagreed as to the amount of loss, and the company demanded an arbitration, and the insured refused it, saying that the loss was total, and there was nothing to arbitrate. Should the court have dismissed the suit for the refusal of the insured to agree to arbitration? Was the loss total? If it was, does that deny right to the company to demand arbitration? Was the loss total? The frame building was 48 feet long, 22 feet wide, two stories. The front lower room, 29 feet long, was intended for a feedroom, but empty at the time; the back part as a dining room and kitchen; the upper story as a residence. The fire started in the dining room or kitchen. It destroyed the rear of the house, so that the roof over that part fell in, and the balance charred and damaged. It burned the counters and shelves in the storeroom

and otherwise damaged that room. It burned through the sides in places, so that a neighboring building caught fire from it. Part of the roof, though damaged, stood up. Witnesses, two experienced carpenters and contractors for building houses, declared the building was left a mere shell, worthless for repair, not usable as a basis for repair. The remnant was torn down, not used in repair or rebuilding, condemned by the town authorities, and torn down. In law, the loss is total if the house must be rebuilt; but, if it can be repaired, the loss is partial. In *Providence Ins. Co. v. Board*, 49 W. Va. 360, 38 S. E. 679, it held that, if the remnant is reasonably adapted for use as a basis on which to restore the building, the loss is not total; and whether it is so adapted for repair depends on the question whether a prudent owner, not insured, desiring such a structure as the house was before the injury, would, in restoring it, utilize such remnant as a basis. The evidence from experienced carpenters and contractors and others is very clear that the remnant of this house could not be used; was worthless for that purpose. There is no evidence to dispute this. To make the loss total, it is not necessary that the fire entirely destroys and works an extinction of the house. There is a total loss where the building is substantially destroyed, though some of the walls still stand. There is a total loss where the property has lost the character in which it was insured, and rendered useless for that purpose, and its remains are practically useless for repair or reconstruction. 19 Cyc. 833. There was evidence that it would cost more to use the materials left than to use new material, which fact shows the loss total. It is the building that is insured, not its materials. Has it lost its identity for use? 13 Am. & Eng. Ency. Law, 323. A dwelling house is totally destroyed, though the stone foundation and sills and first floor are practically intact, and there is no question for the jury, as the building has lost its identity as such; and the fact that some material remains in a more or less injured condition will not prevent the loss from being total. *Lindner v. St. Paul Ins. Co.*, 93 Wis. 528, 87 N. W. 1125, cited in 56 L. R. A. 787, note. See *Hamburg v. Garlington*, 66 Tex. 1031, 8 S. W. 337, 58 Am. Rep. 613, cited in 56 L. R. A. 787, note.

[5] Next comes the question: Though the loss was total, could there be, as there was, recovery of the full sum of insurance fixed by the policy? Where no statute otherwise directs, the recovery is for actual damage; but in 1899 was passed an act (chapter 33) providing that "all fire insurance companies doing business in this state shall be liable, in case of total loss by fire or otherwise, as stated in the policy on any real estate insured, for the whole amount of insurance stated in the policy of insurance upon said real estate." Code of 1906, c. 34, serial

section 1108. If not repealed, it governs this case, as the policy was made after its going into force. But it is urged that it has been repealed by chapter 77, Acts of 1907,¹ revising, amending, and re-enacting chapter 34 of the Code, and omitting this total loss act. It is said that this act of 1907 is a chapter of the Code covering the whole subject of insurance, making it the sole test and repository of insurance law, and thus repealing the act of 1899. We are cited to *Grant v. B. & O. R. Co.*, 66 W. Va. 175, 68 S. E. 709, holding that "a later statute covering the whole matter of an earlier one, not purporting to amend it, and plainly showing it was intended to be a substitute for the earlier act, works a repeal of the earlier act, even though the two are not repugnant in the usual sense." But by that case and *State v. Mines*, 38 W. Va. 126, 18 S. E. 470, and *Herron v. Garson*, 26 W. Va. 62, it must plainly and evidently appear that the later act was intended as a substitute for the former one. It does not so appear in this instance. It was not intended to be the exclusive rule on the subject to use language in *State v. Harden*, 62 W. Va. 313, 58 S. E. 715, 1025. The act of 1907 does not touch that subject of valued insurance policies; it makes no provision touching them. Can we think that it was intended to repeal so important an act as that of 1899? It is not expressly repealed, and repeals by implication are never favored; and the presumption is always against the intention to repeal, where express terms are not used. It must appear "certainly and clearly hostile to the former act. If by any reasonable construction the two statutes can stand together, they must so stand." *State v. Enoch*, 26 W. Va. 253. The court said: "The rule of law is well settled that to repeal a statute by implication there must be such positive repugnancy between the provisions of the new law and the old that they cannot stand together or be reconciled." Evidently these two statutes can stand together. There is no repugnancy of one with the other; they do not treat of the same subject. The act of 1899 is an independent act, not a part of chapter 34 of the Code. It is a special act dealing only with a valued policy, not dealt with by the act of 1907. "The repeal of a special statute must be either express, or the intention of the Legislature must be so clear as to amount to an express direction." *Commonwealth v. Richmond*, etc., R. Co., 81 Va. 355. "When the legislator frames a statute in general terms, or treats the subject in a general manner, it is not reasonably supposed that he intends to abrogate particular legislation, to the details of which he had previously given his attention, applicable to a part of the same subject, unless the general act shows a plain intention to do so." So stated in opinion in *Stewart v. Tennant*, 52 W. Va. 573, 44 S. E.

223. See *Chesapeake & Ohio v. Hoard*, 16 W. Va. 270. This rule is strongly affirmed again in *Clemens v. Board of Education*, 68 W. Va. 298, 69 S. E. 808. The opinion by Judge Robinson says: "The later general law has a final clause expressly repealing all acts and parts of acts inconsistent with the chapter in which it is contained. Even such general repealing clause cannot abrogate the special provision, unless there is real inconsistency. 1 Lewis' Sutherland, Statutory Construction, § 256. The inconsistency must be actual and destructive. It must not be simply a difference. For it, to prevail, must be of the character to cause the former special provision to lose all force. In relation to the provision in question, there is no such inconsistency between it and the later general law. That law exhibits no glaring implication showing an intention to make it inconsistent with the provision; and certainly there are no direct words to the effect." Thus far there is no repeal of the act of 1899.

Another argument made for the proposition that the valued policy act of 1899 is not law is that it was repealed by implication by section 68, c. 77, Acts of 1907, reading as follows: "No fire insurance company shall issue policies on property in this state other than those of the form used by fire insurance companies incorporated under the laws of the state of New York, with such changes and additions as the insurance commissions may deem proper." The New York form contains the provision found in the policy in this case; that is: "This company shall not be liable beyond the actual cash value of the property at the time any loss or damage occurs, and the loss or damage shall be ascertained or estimated according to such actual cash value." This is said to be in conflict with the act of 1899. Apparently so. And yet we cannot think that the Legislature, in the general act of 1907, meant to repeal the act of 1899. There is nothing in the 1907 act express on the point. It is only because the New York policy contains the clause calling for only actual damage that this argument of repeal can be made. Probably that clause of the New York policy was not thought of. There is nothing express in the act itself on the subject, and we cannot think that such repeal was meant. And note the last words of section 68, c. 77, Acts 1907, "with such changes and additions as the insurance commissioner may deem proper," indicating that no repeal of the act of 1899 was intended, as some of the court suggest. As said above, repeal by implication by a later act is only sustained when it is clear that the later act was intended as a substitute. What is said above as to repeal by implication will answer this ground alleged for repeal. The argument is too remote. The conclusion of repeal is reached only by circuitous argument or inference.

¹ Code Supp. 1909, c. 34.

So the valued policy act of 1899 being in force, there was no right of arbitration, and the language in the opinion by Judge Miller, in *Bank v. Insurance Company*, 55 W. Va. 278, 47 S. E. 101, is proper in this case: "The language of the act is broad and unambiguous. Under it, the insurance company shall be liable, in case of total loss by fire or otherwise, as stated in the policy, of real estate insured, for the whole amount of insurance upon said real estate, any provisions in the policy to the contrary notwithstanding. All provisions in a policy in conflict with a valued policy statute are void; and hence a provision for the appointment of arbitrators in case of loss is ineffective, where the property is wholly destroyed. *Elliott on Ins.* § 318."

A witness was asked by the defense whether there was not enough of the building standing "to base an estimate as to what it would cost to either repair or replace the building with a new one like it was before the fire;" but the court would not allow an answer. This relates only to cost, which is immaterial in the case of a valued policy. The cost of restoration is not the question, but the conditions of the remnant. What would such cost show as to the condition of the remnant? Nothing.

For these reasons, the judgment is affirmed.

(70 W. Va. 708)

ROWLAND LAND CO. v. BARRETT.

(Supreme Court of Appeals of West Virginia.
Jan. 23, 1912. Rehearing Denied
June 15, 1912.)

(Syllabus by the Court.)

1. EXCEPTIONS, BILL OF (§ 23*) — SCOPE AND CONTENTS.

A paper read as evidence to the jury, and described in a skeleton bill of exceptions in such manner as to make its identity reasonably certain, is properly a part of such bill of exceptions, if it appears to be copied by the clerk into any part of the certified record. Its identity, and not its position in the record, is essential.

[Ed. Note.—For other cases, see *Exceptions*, Bill of, Dec. Dig. § 23.*]

2. TAXATION (§ 648*) — FORFEITURES—SALE OF LANDS FORFEITED.

A recital in a decree, made in a proceeding to sell forfeited and delinquent lands, that the land was forfeited in the name of a certain designated former owner, is prima facie evidence of the fact of such forfeiture, and of the court's jurisdiction to decree a sale of the land.

[Ed. Note.—For other cases, see *Taxation*, Dec. Dig. § 648.*]

3. FORMER CASE APPLIED AND DISTINGUISHED.

The rule in *Stockton v. Morris*, 30 W. Va. 432, 19 S. E. 531, discussed and applied, and also distinguished.

4. DEEDS (§ 96*)—OPERATION AND EFFECT—EVIDENCE OF TITLE.

The recital in a deed that the grantor obtained title by a certain other deed is not evi-

dence against an adverse claimant of such grantor's title.

[Ed. Note.—For other cases, see *Deeds*, Cent. Dig. §§ 256-260; Dec. Dig. § 96.*]

5. FORMER DECISION APPROVED AND APPLIED.

Point 3 of syllabus in *Wilson v. Braden*, 48 W. Va. 196, 86 S. E. 367, approved and applied.

(Additional Syllabus by Editorial Staff.)

6. TAXATION (§ 764*)—FORFEITURES—SALE OF FORFEITED LAND—VALIDITY OF DEED.

The rule that an inclusive grant from the commonwealth excepting parcels included within the exterior boundaries without proof of the location of the parts excepted is void for uncertainty does not apply to a deed given subject "to the rights of the occupant claimants according to the provisions of the several acts of the assembly relating thereto."

[Ed. Note.—For other cases, see *Taxation*, Dec. Dig. § 764.*]

7. TAXATION (§ 764*)—FORFEITURES—SALE OF FORFEITED LANDS—VALIDITY OF DEED.

A commissioner's deed of forfeited lands excepting such claims as were plotted out by the commissioner upon the original map filed by him with the report of his proceedings as to a former sale is void where the map referred to is proved to have been lost, and there is no proof as to the location of the excepted parcels.

[Ed. Note.—For other cases, see *Taxation*, Dec. Dig. § 764.*]

8. JUDICIAL SALES (§ 61*)—SALE—TITLE ACQUIRED.

When a conveyance of land made by a special commissioner under a sale under a decree of court is offered in evidence to pass title, it must be accompanied by either the whole record of the cause or enough to show that the parties holding title affected by the deed and also the land itself were before the court, and that it was decreed to be sold and was sold and the sale was confirmed by the court, and that authority was given by the decree to the commissioner to make the conveyance.

[Ed. Note.—For other cases, see *Judicial Sales*, Cent. Dig. §§ 119-122; Dec. Dig. § 61.*]

Error to Circuit Court, Raleigh County.

Action by the Rowland Land Company against R. E. Barrett. From a judgment for defendant, plaintiff brings error. Affirmed.

O. P. Fitzgerald, Jr., and Brown, Jackson & Knight, for plaintiff in error. McGinnis & Hatcher and A. A. Lilly, for defendant in error.

WILLIAMS, J. Plaintiff brought ejectment to recover two tracts of land, one containing 1,176 acres and the other 4,217 acres, both described by metes and bounds. Defendant disclaimed title to all, except two contiguous tracts containing 188 acres, situated at the forks of Big Coal river, in Raleigh county, which he describes by giving the exterior boundaries, as if one tract, and pleaded not guilty, as to said 188 acres.

[1] Counsel for defendant in error insist that the bill of exceptions does not incorporate the documentary evidence. It is what is commonly called a skeleton bill of exceptions, and it identifies grants and deeds, which

were read as evidence, by reference to their dates, the names of the grantors and the grantees, and sometimes, also, by stating the number of acres granted. Such data are then followed by a parenthetical clause directing the clerk to copy the paper into the record at that place. That is sufficient description of the paper read to enable any one to identify it with reasonable certainty. That is all the law requires. It clearly falls within the rule laid down in *Tracy's Adm'r v. Carver Coal Co.*, 57 W. Va. 587, 50 S. E. 825, and *Dudley v. Barrett*, 58 W. Va. 235, 52 S. E. 100. It is no objection that the documents referred to happen not to be copied into the bill of exceptions at the points designated. It is enough if they appear anywhere in the record, and are sufficiently described to be identified with reasonable certainty. Orderly arrangement, of course, is desirable, and should be followed by the clerk in making up the record, but the want of it does not necessarily vitiate the bill of exceptions.

Plaintiff claims to derive title from the commonwealth of Virginia, by deeds from Alfred Beckley, commissioner of delinquent and forfeited lands, one to Jacob Pettry, for what is known as the Marsh fork parcel of land, and the other to John F. Clay and Richard Scott, for the Clear fork tract, dated, respectively, 28th of January, 1842, and 2d of July, 1841, and by subsequent, intermediate conveyances.

[2] The court permitted plaintiff to read a number of deeds as evidence, in its chain of title, over defendant's objection, and later, after all its evidence had been introduced, on motion of defendant, excluded a number of them, including the deeds from the commissioner of forfeited and delinquent lands. Why these deeds were excluded does not appear. It may have been because there was no evidence that the commissioner was authorized by decree of the court to make conveyance. But that is no reason for their rejection, because the commissioner of forfeited and delinquent lands was directly empowered by statute then in force to make deed to the purchaser upon full payment of the purchase money. Section 9, c. 8, of an act of the General Assembly, passed March 15, 1838. Or they may have been excluded because the court regarded the report of the commissioner relating to the forfeiture as indispensable to prove title in the state and jurisdiction in the court. Those reports were shown to be lost, and there was no proof of their contents. But that would not justify the exclusion of the deeds in view of the recitals in the decrees made in the cause. The decrees recite that the land was forfeited in the name of Rutter and Etting, and they also authorize the commissioner to sell. Such recitals are prima facie evidence of title in the state by forfeiture, and, title being proven thus to be in the state, there

could be no question of jurisdiction in the court. *Feder v. Hager*, 71 S. E. 107. There was no evidence to rebut this prima facie proof that the state had title.

[3, 6] Again, the deeds may have been rejected because of the following clause in the habendum to the deeds, to wit: "Subject, however, to the rights of occupant claimants according to the provisions of the several acts of the assembly relating thereto." The court may have taken the view that that clause operated to make the grant an inclusive one, excepting parcels of lands included within the exterior boundaries, and, there being no proof of location of the parts excepted, that it fell within the rule declared in *Stockton v. Morris*, 39 W. Va. 432, 19 S. E. 531, and rendered uncertain the description of plaintiff's land. But we do not interpret that clause to be an exception from the operation of the grant of any part of the land described. The deed does not mention any particular claimants, nor otherwise describe any part of the land to which the language might apply. There is a wide difference in the meaning of the language above quoted and the language used in the grant involved in *Stockton v. Morris*, and there construed to be an exception of certain lands from the operation of the grant. In that case the grant declared that the survey upon which it was founded included "nine thousand and sixty-five acres, the property of sundry persons," and then it proceeded to name the various claimants, and to give the location of the several parcels of land claimed by them, and concluded as follows: "And this grant shall be no bar in either law or equity, to the confirmation of titles to the same, as before mentioned and reserved, with its appurtenances." That is an express reservation of title in the commonwealth, with the right given to the various claimants, to perfect their respective claims by obtaining grants from the commonwealth. In the present case it does not even appear by the commissioner's deed that there were, in fact, any occupant claimants, nor that the state meant to reserve title to any part of the land included within the bounds of the grant. It was a grant of all the title then in the state, to be held by the grantee, subject to the rights of occupant claimants, if any such there were, a fact apparently unknown to the commissioner so far as it appears from anything contained in the deed. The provision in the habendum clause is not an exception from the operation of the granting clause of any portion of the land described by metes and bounds. It is simply placed there to show a compliance, by the commissioner, with the statute then in force which protected certain occupant claimants, who then had the state's title, by operation of law, under junior grants from the commonwealth, to any portion of the land within the limits of the forfeited grant. Sections

14 and 17 of the act above cited. So far as it appears from the deeds from Alfred Beckley, commissioner of forfeited and delinquent lands, they constituted grants, without exception, of all the state's title to all the land described by the metes and bounds of the grant. As apropos to the point here discussed, see *State v. Jackson*, 56 W. Va. 573, 49 S. E. 465.

[7] But this question arises: Was the exclusion of the commissioner's deed prejudicial error? If there is a material fault in plaintiff's chain of title at any point which breaks its continuity, it destroys the value of the whole chain as evidence of paper title. A deed from Pyrrhus McGinnis and wife to Augustus Pack, dated August 28, 1854, constitutes the third link in plaintiff's chain of title to the Marsh fork tract. That deed contains the following clause: "To have and to hold the said described & bounded tract or lot of 6776 acres, save & excepting always such occupant claims as were plotted out by the Commissioner of Forfeited & Delinquent lands upon the Original Map filed by him with the report of his proceedings as to sale of the Rutter & Etting of 174,673 13765 & 4160 acres in the Clerk's Office of Fayette Superior or Circuit Court & to which map reference is here especially made and also excepting & reserving 50 acres in Forks of the Marsh & Clear Forks, unto him, the said Augustus Pack, his heirs & assigns forever." This is an exception, in express terms, of the claims of occupants whose claims were plotted out on the original map filed by the commissioner of forfeited and delinquent lands. It makes special reference to the map, presumably for the purpose of identifying and locating the exceptions. This map is proven to have been lost, and no evidence was offered to prove that the land in controversy is not within some one or more of the excepted parcels. The lack of such evidence rendered the description of plaintiff's land uncertain. It amounts to a failure of proof of its location. The plaintiff in ejectment carries the burden of proving, not only title to the land, but also its identity. The court did not err by excluding this deed, after ascertaining that plaintiff had failed to locate any of the excepted parcels plotted out on the map. This deed clearly comes within the rule of *Stockton v. Morris*, supra.

[4] When this conveyance was made, Pyrrhus McGinnis appears to have had title to only one undivided half of the land. The deed from Pettry and wife to him April 24, 1850, grants "one moiety" only of the tract. True, the deed contains the following recital: "The other moiety or half of said tract having heretofore been conveyed by the said Jacob Pettry to the said McGinnis." But there is no other proof than this recital of McGinnis' title to one undivided half of the land. But this defect relates only to quantity of interest, and not to quality of title.

Sally J. Dickinson, executrix of H. C. Dickinson, deceased, and the Kanawha Valley Bank, by deed dated 3d of June, 1886, assumed to convey the whole of a tract of 4,217 acres on Marsh fork to J. Harvey Rowland, the said executrix conveying the undivided seven-eighths, and the bank, the undivided one-eighth. The land had been devised to Mrs. Dickinson by her husband, H. C. Dickinson, but how he came to be the owner of more than one undivided sixth does not appear by the record. There was a deed from Augustus Pack to him and five other grantees in equal proportions, and the record is silent as to how Mrs. Dickinson acquired any greater interest in the land than is shown by that deed to her husband. The bank appears to have claimed title to the one-eighth by deed from Wesley Mollohan, trustee. The deed to the bank recites that the said one-eighth was conveyed to him as trustee by J. D. Moore and wife by deed dated May 8, 1875. Joseph D. Moore is one of the joint grantees with Henry C. Dickinson in the deed from Pack. The deed from Moore to Mollohan, trustee, if any such there be, is not in the record. The recitals in the Mollohan deed are not evidence against a stranger to prove either title in the trustee, or his authority to sell and convey. Pyrrhus McGinnis, the remote grantor, having had legal title to only one undivided half, as we have before pointed out, it follows that H. C. Dickinson and his cointerests acquired legal title to only one undivided half. Dickinson, therefore, had legal title to only the one-sixth of one-half, or one undivided twelfth. J. Harvey Rowland, plaintiff's immediate grantor, acquired no greater interest than Dickinson had, so far as the record shows. So that, even if plaintiff had located the reservations and exceptions in favor of occupant claimants, in the deed from Pyrrhus McGinnis to Augustus Pack, and thereby have identified its land, it still has not proven title to more than one undivided twelfth of the Marsh fork tract.

[5, 8] In plaintiff's chain of title to the clear fork tract there is a deed from James H. McGinnis, special commissioner, to C. L. Thompson. The land appears to have been sold in a suit instituted in the circuit court of Raleigh county, styled *H. T. McVey, Adm'r of S. H. Higginbotham v. Joseph B. Underwood, Adm'r of Richard Scott*, et al. The papers in the cause are lost, and could not be found after diligent search, and the court permitted plaintiff to prove their contents. But the proof does not meet the legal requirement in such a case. There is testimony of a general and indefinite character respecting the purpose of the suit. But a fact, most material to be proven, was entirely omitted. No attempt appears to have been made to prove that the then holders of the legal title were before the court. It does not even appear who they were. A contract of sale of the land by Richard

Scott to Samuel H. Higginbotham was the basis of that suit, which was either a suit to enforce the contract, or to rescind it. It does not clearly appear which was the purpose. The contract is dated August 26, 1854, and it recites that the land sold is "Scott's proportion of a certain tract or parcel of land bought jointly by the said Scott and Clay" at a sale by Alfred Beckley, commissioner of forfeited and delinquent lands. Higginbotham paid \$1,000 down, and was to pay \$600 on the 1st day of March, 1857. But, whatever may have been the purpose of the bill, the court decreed a rescission of the contract, and held that the \$1,000 which had been paid by Higginbotham was a lien on the land in favor of Higginbotham's estate, and decreed a sale of the land to pay it. The land was sold, and the sale confirmed, and James H. McGinnis was appointed a commissioner to make conveyance to C. L. Thompson, who was reported to be the purchaser. Said commissioner did make a deed, and that deed was permitted to be read as evidence, over the objection of defendant. The deed should have been rejected, because there was no proof whatever that the heirs of Richard Scott, in whom the title then was, were before the court. *Wilson v. Braden*, 48 W. Va. 196, 36 S. E. 367 (Point 3 of Syllabus), reaffirmed in *Ronk v. Higginbotham*, 54 W. Va. 137, 46 S. E. 128. The exclusion of this deed would cause a break in the chain of title to the Clear fork tract.

In view of plaintiff's failure to identify its Marsh fork tract of land, in that it did not locate the exceptions in the deed from Pyrrhus McGinnis to Augustus Pack, and in view of the fact that the deed from J. H. McGinnis, special commissioner, to C. L. Thompson for the Clear fork tract, should have been excluded as evidence of paper title, and in view of the further fact that there is no evidence tending to prove possessory title in plaintiff to any part of the land in controversy, it cannot complain of the verdict, which the jury found for the defendant.

It is not necessary to discuss the other assignments of error, relating to instructions and to admission of evidence for defendant, and rejection of certain other evidence offered by plaintiff, because, even if such other assignments should be well taken, they would not constitute prejudicial error.

In disposing of plaintiff's motion to set aside the verdict, the court permitted defendant to modify his disclaimer by enlarging it, so as to include a small strip of land along the Clear fork, outside of the lines of the 38-acre patent, and outside of the fence "as laid down on surveyor Wilson's map extending from 'K' to where said fence crosses said outside line of said 38 acre tract, which said small strip of land outside of the lines and the fence aforesaid is not claimed by defendant." This had the effect to enlarge de-

fendant's original disclaimer, and consequently to reduce the amount of land claimed by him. In view of what we have hereinbefore said, we do not see how this subsequent disclaimer could have prejudiced plaintiff. It might have had a different effect if plaintiff itself had proven title to the strip of land disclaimed. It might then have appeared that it should have had a verdict for such portion of the land as was in issue. But it is unnecessary to decide what would have been the effect in that event, and we do not say. All that we do decide is that, because of plaintiff's failure to prove title, it is not prejudiced by this action of the court in permitting the defendant to reduce his claim after verdict.

The judgment of the lower court will be affirmed.

(70 W. Va. 700)

NORFOLK & W. RY. CO. v. STIPP et al.
(Supreme Court of Appeals of West Virginia,
April 23, 1912. Rehearing Denied
June 15, 1912.)

(Syllabus by the Court.)

1. ADVERSE POSSESSION (§ 58*)—WHAT CONSTITUTES.

Title to land can not be acquired by possession for the statutory period unless that possession is adverse.

[Ed. Note.—For other cases, see *Adverse Possession*, Cent. Dig. §§ 279-281; Dec. Dig. § 58.*]

2. APPEAL AND ERROR (§ 1022*)—FINDING OF COMMISSIONER—CONCLUSIVENESS.

A finding of a commissioner, based on evidence, and confirmed by the circuit court, will be respected on appeal unless plainly wrong.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4015-4018; Dec. Dig. § 1022.*]

Error to Circuit Court, Jefferson County.

Action by the Norfolk & Western Railway Company against John W. Stipp and others. Judgment for plaintiff, and John W. Stipp and I. W. Stipp bring error. Affirmed.

Geo. M. Beltzhoover, Jr., of Charlestown, for plaintiffs in error. Brown & Brown, of Charlestown, for defendant in error Martin.

ROBINSON, J. In condemnation of land for railway purposes, a sum of money was paid into court, so that conflicting claims to it might be determined between U. S. Martin on the one hand and John W. and Isaac W. Stipp on the other. The matter was referred to a commissioner to ascertain to whom the money belonged, and in what proportion it should be paid over, if to both parties. The commissioner found that a part belonged to Martin and a part to the Stipps. This finding and report was based on documents filed before the commissioner and on testimony taken before him in relation to title and ownership of the land from which the money was derived. John W. and Isaac W. Stipp, claiming that they were the right-

ful owners of all the land from which the money arose, excepted to the report. The circuit court, upon a consideration of all the evidence on which the report was based, confirmed the report, and thus denied John W. and Isaac W. Stipp a part of the money, that is, the sum of \$799. They seek a reversal of the order which gives Martin this sum. They insist that he owned no part of the land taken, but that they were the true owners of it all.

A certiorari on behalf of Martin has brought up some title papers that do not appear to have been in the record considered below. These documents can not for the first time be considered on appeal. Martin can not complete the proof of his title here. We are confined to the record that was made up and considered in the circuit court. The matter, however, is immaterial. Though Martin does not show perfect title to the parcel of land as to which the court has ordered the money to be paid to him, still we can not find that the money for that parcel belongs to the Stipps, unless they show that they were the true owners of that part of the land. John W. and Isaac W. Stipp can not complain that Martin got the money on an imperfect title, unless they show that they have the true title to the land from which the money arose. The order of the circuit court giving the money to Martin can not injure the Stipps, unless they themselves are entitled to the money. To be entitled to the money, they must show that they were the true owners of the land. If neither of the parties have shown true title to the land, we can not reverse at the instance of the Stipps; for in that event, they have no right to complain.

The Stipps do not show a perfect chain of title to the Potomac River cliffs, from which the money was derived, but they rely on possession for a long period of time under a deed made in 1868. They say that deed is color of title and that possession under it on the level portion of the land carries their possession to the bounds of the deed. That deed includes the cliffs, they claim, since it calls for the Potomac River. Ordinarily, possession of the level land to which the cliffs are attached, under the color of this deed, would be possession of the cliffs and would ripen into good title to the whole after the running of the statutory bar. Of course, this would not be true as to the cliffs if Martin showed an older perfect title thereto. There would then have to be actual possession on the interlock by the Stipps to take it away from him. No such actual possession by them on that particular part of the land is established by the record. But Martin does

not show an older perfect title to this portion of the land. The record does not bear out his claim of perfect title. His paper chain is defective, and on it alone he relies. He does, however, show a long claim of ownership by himself and those under whom he holds. We must say whether the Stipps had such adverse possession of the cliffs under the color of their deed as to give them good title. Have they held the cliffs adversely? Both by the finding of the commissioner and of the circuit court, the question has been determined against the Stipps. Those findings rest on conflicting evidence. We can not overthrow them unless they are manifestly contrary to the evidence.

[1] We can not say from the evidence, to the extent of overthrowing the report of the commissioner and the finding of the circuit court thereon, that the Stipps have had adverse possession of the land beyond the line of the cliffs, or that their possession under the deed has constructively included the cliffs. It suffices to say that the evidence, though conflicting, will support a finding that the Stipps have not held the cliffs adversely so as to acquire title thereto—that the running of the statute necessary to give them good title has been broken by acts and declarations on their part in recognition of the Martin claim of title and in disavowal of any claim by themselves. A holding or possession to be adverse must be hostile. It must exclude others, not admit them. The evidence will support a finding that these and the other elements necessary to make possession adverse were lacking as to the possession of the cliffs on which the Stipps rely. Besides, it may be found from the evidence that the Stipps all along have construed their deed to take them to the river at the line of the cliffs and not down over the cliffs at the water's edge, so that they have not even had constructive possession of the cliffs by the force of their possession of the level part of the land under the deed.

[2] It is useless to detail the evidence on which the order appealed from is based. The case involves the application of no new principles. Why should we extend discussion? Though different judges might reach different conclusions on the evidence, yet we can not say that the finding of the circuit court on the controlling question of possession is plainly against a preponderance. A finding of a commissioner, based on evidence, and confirmed by the circuit court, is entitled to great respect on appeal. It will be sustained unless plainly wrong. *Baker v. Jackson*, 65 W. Va. 282, 64 S. E. 32.

Let the order be affirmed.

(70 W. Va. 719)

LONG v. POTTS et al.

(Supreme Court of Appeals of West Virginia.
Feb. 20, 1912. Rehearing Denied
June 15, 1912.)

*(Syllabus by the Court.)***PAROL EVIDENCE—AFFIRMANCE BY DIVIDED COURT.**

Parol evidence to affect a promissory note. Owing to a division of opinion among the members of the court no syllabus of law is made.

Poffenbarger and Miller, JJ., dissenting.

Error to Circuit Court, Wetzel County.

Action by Charles Amos Long against W. F. Potts and others. From the judgment, defendants Justus Eakin and another bring error. Affirmed.

Thos P. Jacobs and E. L. Robinson, for plaintiffs in error. P. D. Morris and T. H. Cornett, for defendants in error.

BRANNON, P. Charles Amos Long brought assumpsit against W. F. Potts, Alex Hart, and Justus Eakin on a promissory note made by Potts and Eakin. Much oral evidence was produced. Upon a demurrer by the plaintiff to the defendants' evidence, judgment was for the plaintiff.

Hart and Eakin pleaded non assumpsit and a special plea. This special plea avers that on the day when the note was executed, and before and at the time it was executed, it was agreed between Long and Eakin and Hart that if Eakin and Hart would execute the note as sureties for Potts at 20 days that within that time Long would procure from Potts, and Potts would execute, a deed of trust for the benefit of Long, and in exoneration and in indemnification of Eakin and Hart, on sufficient estate to secure payment of the note, not only to secure the debt, but to indemnify Eakin and Hart by reason of their suretyship. The plea avers that Eakin and Hart by the procurement of the plaintiff, and upon the said agreement, became sureties upon said note for 20 days, with the agreement and assurance that within that time Long would procure Potts to execute, and Potts would execute, such deed of trust, which said Potts agreed to and was able to do. The plea further averred that Long, contriving to injure Eakin and Hart, after he had procured said note and their signatures thereon, failed and refused to secure the execution of said trust deed, though Potts was at all times ready and willing to execute it. The plea was objected to by the plaintiff, and that objection was overruled, and the plaintiff cross-assigns error.

He says that the plea constitutes no defense. Is that plea good in law? I lay down the proposition, spoken by infinite cases, that a writing is deemed in law the full repository of the agreement or contract, and that the whole contract is expressed by it,

and evidence of other oral stipulations is not admissible to incorporate other elements in it, so as to add to, alter, or contradict the agreement spoken by the writing, or to alter it by enlargement of its terms and make the contract have different legal effect and obligation. Long v. Perine, 41 W. Va. 314, 23 S. E. 811; Orrick Co. v. Dawson, 67 W. Va. 403, 68 S. E. 39; Martin v. Railroad, 48 W. Va. 542, 37 S. E. 563. In Town-er v. Lucas, 13 Grat. 705, we find the law thus stated: "It was said by the court in the Countess of Rutland's Case, 5 Coke's R. 25, 'that it would be inconvenient that matters in writing, made by advice and on consideration, and which finally import the certain truth and agreement of the parties, should be controlled by averment of parties, to be proved by the uncertain testimony of slippery memory.' In Stevens v. Cooper, 1 Johns. Ch. (N. Y.) 425, 7 Am. Dec. 499, Chancellor Kent remarks 'that there is no rule of evidence better settled than that which declares that parol evidence is inadmissible to contradict or substantially vary the legal import of a written agreement. Such testimony is not only contrary to the statute of frauds, but to the maxims of the common law; and the rules of evidence on this, as on most other points, are the same in courts of law and equity.' See Fell v. Chamberlain, 2 Dick. R. 484; Wooliam v. Hearn, 7 Ves. R. 211; Jordan v. Sawkins, 8 Bro. C. C. 388. In Crawford v. Jarrett, 2 Leigh, 630, Green, J., states the rule in these words: 'Parol evidence cannot be admitted (unless in case of fraud or mistake) to vary, contradict, add to, or explain the terms of a written agreement, by proving that the agreement of the parties was different from what it appears by the writing to have been.' In Watson v. Hurt, 6 Grat. 633, 644, Judge Baldwin announces the rule in the following terms: 'It is perfectly well settled that the terms of a written contract cannot be varied by parol evidence of what occurred between the parties previously thereto or contemporaneously therewith.' In 1 Greenl. Evi. § 275, the author observes that the rule as now briefly expressed is 'that parol cotemporaneous evidence is inadmissible to contradict or vary the terms of a valid written instrument.' The rule thus announced as a rule of the common law at so early a day has been uniformly adhered to by the courts both of England and this country ever since; but in the application of it to different instruments difficulties have arisen. Courts, while laying down the rule as unquestioned and unquestionable, and professing to recognize its wisdom and binding authority, have drawn distinctions to take particular cases of apparent hardship from without its operation, which at first view would seem to violate the rule itself." In that case a surety was induced to sign a bond by a promise that he would

not be asked to pay; but that oral agreement was held unavailable. In *Woodward, Baldwin & Co. v. Foster*, 18 Grat. 200, a party indorsed a bill of exchange, and it was agreed that the indorsee should retain in his hand the amount paid by him for the bills, and not pay the money over to the drawer of the bill until it was ascertained that the bill had been accepted and paid, and, if not accepted and paid by the drawee, then Foster would refund the money paid him for them. It was held that evidence of this collateral agreement could not be received. The principle above stated was laid down by the court. In 9 Ency. of Evidence, 352, it is stated that, if it appears that a writing in itself appears to be incomplete, oral evidence of contemporaneous agreement may be received; but "if, when so viewed, the writing appears to be complete, such evidence is then inadmissible." Page on Contracts says that in order to let in such evidence the contract must be incomplete on its face. See 1198.

Now, here is a promissory note complete on its face, speaking an absolute promise to pay, imposing an absolute liability; but that character and legal effect are to be destroyed by oral evidence of a collateral agreement. Another contract is made by this evidence far different from the contract legally imported by the note. The note in law imports absolute, unconditional liability; whereas, this oral evidence contradicts it by speaking an inconsistent contract. It qualifies the absolute liability created by the note. Why is it not inconsistent with that note? Much could be written on this subject. If such parol evidence is let in, what becomes of your written contract? What worth is your promissory note? In 17 Cyc. 567, referring to the rule excluding such oral evidence, it is said: "The rule is a necessary one, because of the obvious fact that written instruments would soon come to be of little value, if their explicit provisions could be varied, controlled, or superseded by such evidence, and it is also plain that a different rule would greatly increase the temptation to commit perjury." An absolute note cannot be defeated by oral proof of a condition. *Erwin v. Saunders*, 1 Cow. (N. Y.) 249, 13 Am. Dec. 520. In 17 Cyc. 589, I find the following: "Although the authorities as to the admissibility of parol evidence to affect commercial paper are by no means uniform, the general rule is that bills and other instruments of a similar nature are not subject to be varied or contradicted by parol or extrinsic evidence. Accordingly it has been held inadmissible to show a parol agreement of the payee or holder of commercial paper not to enforce payment against the person or persons liable thereon, or a parol agreement that the payee or holder shall look to some other person or persons for payment, that he shall

require payment only in a certain event or out of some particular fund, that he shall not require payment until a certain security has been exhausted, or shall not call on one of the persons liable for payment until all remedies against the others have been exhausted. It has also been held not admissible to show that the time for the payment of the obligation as agreed upon by the parties is different from the date of maturity as appearing in the instrument, to contradict a note as to the place of payment, or, where by the express terms or legal effect of an instrument it is payable in money, to show that it was agreed that it should be paid in any other way. It has also been asserted that any evidence varying or nullifying the effect of a written acceptance of a bill is inadmissible."

There are cases leading the other way. They say that collateral or independent facts not contradicting the writing may be proven. *Campbell v. Fetterman*, 20 W. Va. 398; 10 Encyclopedia Dig. Va. & W. Va. 698, 699. This rule says the matter to be proven by the oral evidence must not be inconsistent with the writing; but in our case it is. So those cases do not strictly apply. And how many Virginia and West Virginia cases apply the rule just above stated? Page on Contracts (the latest great work on Contracts) § 1189, after saying that, when parties have made a written contract, it is taken to embody all of it, "and merges all prior and contemporaneous negotiations," adds: "To violate this rule, and to admit extrinsic evidence of the intention of the parties direct, for the purpose of displacing their intention as shown in the written contract, is to substitute the inferior for the superior degree evidence, conjecture for fact, presumption for the highest degree of legal authority, loose recollection and uncertainty of memory for the most sure and faithful memorials which human ingenuity can devise or the law adopt." See, also, section 1192.

Another view, not without force, is that this collateral agreement to procure a deed of trust cannot be pleaded against the note, but must be enforced by a separate action for its breach. The New York Court of Appeals so held in *Adams v. Gillig*, 199 N. Y. 314, 92 N. E. 670, 32 L. R. A. (N. S.) 127, 20 Ann. Cas. 911. "It may be assumed that promises of future action, that are a part of the contract between the parties, to be binding upon them, must be stated in the contract. An oral restrictive covenant, or any oral promise to do or refrain from doing something effecting the property about which a written contract is made and executed between the parties, will not be enforced, not because the parties should not fulfill their promises and their legal and moral obligations, but because, the covenants and agreements being promissory and contractual in their nature, and a part of, or collateral to,

a principal contract, the entire agreement between the parties must be deemed to have been merged in the writing. The value of a writing would be very seriously impaired if the rule mentioned in regard to including the entire agreement in such writing is not enforced. A strict enforcement of such rule tends to greater security and safety in business transactions and leaves less opportunity for dishonesty and false swearing, induced, perhaps, by a change of purpose or a failure to obtain the result that was anticipated when the transaction was originally consummated and reduced to writing. Such rule makes it necessary for the parties to a written contract to include everything therein pertaining to the subject-matter of the principal contract, and if by mistake or otherwise an oral agreement, a part of the transaction, is omitted from the writing, it can only be made effective and enforceable by a reformation of the writing, so that the same shall include therein the entire agreement between the parties. The rule is quite universal that statements promissory in their nature and relating to future actions must be enforced, if at all, by an action upon the contract. It is unnecessary to decide or discuss the question whether under some possible circumstances the courts will not in equity lay hold of false statements that are contractual in their nature to prevent the consummation of a fraud."

I have shown that such is the great volume of law in England and America. What is the plain, sound, safe rule? What are the boundaries or limit of its exceptions, when once we ignore the rule? I confess that I am strenuous to maintain this rule of safety and reason. That plea alleges that Long took upon himself the duty to get Potts to make said deed of trust. It is not necessary or proper to repeat the evidence. I assert that it does not sustain the plea by proving that Long took upon himself that obligation. The proposition to give a deed of trust originated with Potts as inducement for a loan. When Potts said that he would give it, Long only assented to it as Potts' proposal. It was Potts who assured the sureties that he would make the deed of trust. It is likely that Potts would so promise, unlikely that Long would assume the duty, and agree that, if he did not get the deed, his loan of \$1,000

would be lost. Highly unreasonable. It is not proven.

Judge WILLIAMS and I hold that the plea is no bar in law. Judge ROBINSON and I hold that the evidence does not sustain the plea. Judge WILLIAMS and I say the evidence cannot be heard.

The result is that the judgment be affirmed.

POFFENBARGER, J. (dissenting). The rule inhibiting parol evidence to contradict, vary, or add to the terms of a written contract is not questioned, nor its wisdom doubted; but it has well-known and wholesome exceptions, one of which is that an oral contract, constituting an inducement to the execution of the written contract, may be shown, breach of which discharges the written contract or estops the party claiming under it. Page on Contracts, § 1204. Eakin and Hart were sureties, benefited in no way by the transaction, and induced to sign the note by Long's expression of assent to the condition. It was a collateral arrangement for discharge of the note; the sureties being liable in the event of failure of the principal to give the deed of trust within the specified time. It allows the note effect according to its letter, but sets up an agreement to which the payee was a party, nonperformance of which amounts to a constructive fraud upon the sureties. Having gotten them on the note, the payee refused to accept the deed of trust tendered in accordance with his collateral agreement with them and the prior agreement between him and the principal, evidently because he prefers the personal security for some reason. The parol evidence rule was never intended for use as a means of accomplishing inequitable and unjust purposes. Nor is there any public policy or reason which forbids such an agreement as the one set up here as attendant upon the written contract, which is obviously only a memorandum, and in a sense incomplete, not reciting any consideration or containing any covenant or agreement on the part of the payee. It is not a formal and elaborate contract, purporting to cover all that transpired between the parties, nor in any way indicating their situation or the purposes of the agreement.

For these reasons, Judge MILLER and I dissent.

(70 W. Va. 722)

A. B. FARQUHAR CO., Limited, v. DEHAVEN et al.

(Supreme Court of Appeals of West Virginia.
April 2, 1912. Rehearing Denied
June 15, 1912.)

(Syllabus by the Court.)

**EXECUTION (§ 161*)—JUDGMENT (§ 46*)—
CONFESSION—VALIDITY.**

A judgment, purporting to be by confession of attorneys in fact, on a note, commonly called a judgment note, on warrant of attorney therein, purporting to empower and authorize the payees, or agent, or any prothonotary, or attorney of record, to appear for the makers and in their names, and confess judgment against them in favor of the payees, for the amount, with costs, and release of errors, entered by the clerk, in the clerk's office, in vacation, without process executed on defendant and declaration filed, is illegal and void on its face; and any execution issued thereon is also without warrant of law, illegal and void, and on motion of defendants should be quashed.

[Ed. Note.—For other cases, see Execution, Cent. Dig. §§ 467-471; Dec. Dig. § 161.* Judgment, Cent. Dig. §§ 65-67, 70, 72, 85-88; Dec. Dig. § 46.*]

Brannon, P., and Robinson, J., dissenting.

Error to Circuit Court, Berkeley County.

Action by Arthur B. Farquhar and others, partners as A. B. Farquhar Co., Limited, against Charles E. Dehaven and others. Judgment for plaintiffs, and defendants bring error. Reversed.

J. O. Henson and Allen B. Noll, for plaintiffs in error. Martin & Selbert, for defendants in error.

MILLER, J. The judgment below to which this writ of error applies, denied the motion of defendants to quash the execution on a judgment in favor of plaintiffs, entered against them, in vacation, by the clerk of the circuit court on September 12, 1910.

The entire record of the judgment as presented here is as follows:

"This day came the defendants, by Martin & Selbert, their attorneys in fact, and say that they cannot gainsay the plaintiffs' action against them, but that they are justly indebted to the said plaintiffs in the sum of \$527.07 with interest thereon from this date and the costs of this action, on account of two certain notes, one dated August 30th, 1909, due six months after date, and the other dated August 30th, 1909, due twelve months after date.

"It is therefore considered that the plaintiffs, Arthur B. Farquhar, Wm. E. Farquhar, and Frances Farquhar, general partners, trading and doing business as A. B. Farquhar Co., Ltd., do recover of and from the said defendants, Charles E. Dehaven and H. L. Dehaven, the sum of Five Hundred and Twenty-Seven Dollars and Seven Cents (\$527.07), with interest from this date until paid, and their costs in this behalf expended. Teste: L. De W. Gerhardt, Clerk Circuit Court of Berkeley County, West Virginia.

"Memo: Said notes were filed with the said clerk upon the day of the entry of said order, and are in the words and figures following:"

The notes referred to, of which one is copied in the record, are judgment notes, in form like those in use in Pennsylvania, bearing six per cent. interest, and providing for a ten per cent. attorneys fee in addition to all other necessary expenses of collection after maturity. They also contain waiver of presentment and protest, homestead and exemption rights real and personal, and other rights, and also the following material provision: "And we do hereby empower and authorize the said A. B. Farquhar Co., Limited, or agent, or any prothonotary or attorney of any Court of Record to appear for us and in our name to confess judgment against us and in favor of said A. B. Farquhar Co., Limited, for the above named sum with costs of suit and release of all errors and without stay of execution after the maturity of this note."

The motion to quash assigned as the only ground therefor that the judgment is void, the clerk being without authority to enter the same upon a judgment note, as was done, without suit and service of process.

As both sides agree the question presented is one of first impression in this State. We have no statute, as has Pennsylvania and many other states, regulating the subject. In the decision we are called upon to render, we must have recourse to the rules and principles of the common law, in force here, and to our statute law, applicable, and to such judicial decisions and practices in Virginia, in force at the time of the separation, as are properly binding on us. It is pertinent to remark in this connection, that after nearly fifty years of judicial history in this State no case has been brought here involving this question, strong evidence, we think, that such notes, if at all, have never been in very general use in this commonwealth. And in most states where they are current the use of them has grown up under statutes authorizing them, and regulating the practice of employing them in commercial transactions. In the early Colonial history of Virginia, they seem to have had considerable recognition, but their use was abolished, and prohibited by penal statutes, enacted in 1744, and they did not again come into use until that statute was repealed by the Code of 1849. 5 Hen. Stat. p. 240, sections 4 and 5; section 12, ch. 76, Code 1819; Revisors' Code, 826, note. This history is pretty thoroughly covered by the arguments of counsel, and the opinion of Judge Moncure in *Insurance Co. v. Barley's Admr.*, 16 Grat. (Va.) 363, Anno. 144. We do not wish to be understood, however, as asquiescing in Judge Moncure's exposition of the common law on the subject, vouched in support of the early colonial

practices so severely condemned by the statute of 1744. It is significant that this statute does not refer the practice condemned to the common law as its source. Section 4 thereof recites: "And whereas a practice *has of late been introduced*, of taking bonds, commonly called judgment bonds, with condition, for the payment of money, and a general power to any attorney, to appear, and suffer judgment, etc. * * *; which practice must be attended with ill consequences, debtors having no previous notice of the time and place of rendering such judgments, whereby they are deprived of an opportunity of making discounts appear against the bond, and are first put to unnecessary law charges, and then obliged to enter into expensive chancery suits for relief: To remedy whereof, &c."

The substantial features of section 5, of this act, are embodied in section 12, chapter 76, Revised Code 1819, reading as follows: "If any Attorney, or other person practicing as an Attorney, shall presume to appear under any power of attorney, *made before action brought*, for confessing or suffering judgment to pass by default or otherwise, for any defendant in any court of record within this Commonwealth, such Attorney shall, for every such offence, forfeit and pay fifteen hundred dollars, to such defendant, for his own use, to be recovered, with costs, by action of debt or information, in any court of record; and, moreover, shall be liable to an action for damages, at the suit of the party grieved." It was this section which on recommendation of the Revisors, was omitted from the Code of 1849, repealing it, and by which repeal it is argued the common law was thereby restored. We find no justification, either in the history of the common law or elsewhere, for the argument presented here, that the repeal of the statute of 1744 by the Code of 1849, revived a local practice not known to the common law, and which the repealing act itself recites had "of late been introduced." That the common law so far as affected by Act of 1744, was restored by its repeal we concede, but farther than that we are unwilling to go.

In *Insurance Co. v. Barley's Admr.*, supra, the latest Virginia case which can be said to have binding force upon us, suit had been brought, but it does not distinctly appear whether or not the process had been executed. The grounds assigned for the motion to set aside the judgment were: (1) That the power of attorney was executed before suit brought; (2) that an attorney in fact not an attorney at law could not confess judgment for his principal; (3) that if an attorney in fact could not confess judgment in open court, only the defendant himself could confess judgment in the clerk's office.

The only points of decision in that case, pertinent in this case, are covered by points 2, 3 and 4 of the syllabus, as follows: (2) "A power of attorney to confess a judgment

may be executed before the action is brought." (3) "A judgment may be confessed either in court or in the clerk's office, by an attorney in fact, though the attorney is not a lawyer." (4) "When a statute changing the common law is repealed, the common law is restored to its former state." The fourth point we concede; and limited by the rules and principles of the common law, as modified by our statutes, section 43, chapter 125, and section 2, chapter 134, Code 1906, we do not know that any particular fault can be found with the general character of points 2 and 3. The Revisors of the Code of 1849, in a note, as a reason for omitting said section 12, as of no value, say: "We do not perceive any good reason why a power of attorney to confess judgment should not be lawful before a writ is sued out as well as after."

By gradual steps, however, the Supreme Court of Appeals of Virginia, in subsequent decisions, have further innovated on the common law. In *Brockenbrough v. Brockenbrough*, 31 Grat. (Va.) 580, 599, it is held, that a judgment rendered in court, upon the confession of the defendant in person, is not subject to collateral attack for lack of process. The judgment in that case, however, was not predicated on the Virginia statute—the same as our section 43, chapter 125, supra—permitting a defendant in vacation to confess a judgment or decree in the clerk's office. This court held practically the same thing in *Hunter's Ex'rs v. Stewart*, 23 W. Va. 549. But in the later case of *Shadrack's Admr. v. Woolfolk*, 32 Grat. (Va.) 709, it was decided, that a judgment confessed by the defendant in the clerk's office in vacation is not the subject of collateral attack by other creditors. By obiter dicta, the court, however, ventured the opinion that if it plainly appeared that the judgment was confessed without a writ or previous process, it would not on that ground be void. Citing the *Brockenbrough Case*, which was a confession in court by the defendant in person. The court said, it perceived no substantial difference between the two cases. In *Saunders v. Lipscomb*, 90 Va. 647, 19 S. E. 450, relying on the two cases just referred to, and in *Manson & Shell v. Rawlings*, 112 Va. 384, 71 S. E. 564, the court went still farther, in holding in the first case, that a judgment by confession by an attorney in fact, in the latter, by defendant in person, in vacation, in the clerk's office, without process, was not subject to collateral attack, and it may be observed that the farthest any of these Virginia cases have gone, literally at least, is to hold such judgments not subject to collateral attack.

The case we have here, on the motion to quash, is one of collateral attack, and to sustain the motion and reverse the judgment below, we must hold the judgment void upon its face. Is it so void? As already indicated, the question must be answered prac-

tically upon the common law rules and principles. We have no statute in any way governing the subject, except section 43, chapter 125, of the Code, providing for a confession by defendant in vacation in the clerk's office. What then is the common law applicable to the case?

In 1 Black on Judgments, section 50, it is said: "All judgments rendered upon the confession of the defendant may be divided into two classes: 1. Those entered in an action regularly commenced by the issuance and service of process. 2. Those entered upon the confession of the defendant, or his warrant of attorney, without the institution of an action. The former class of judgments are well known to the common law, and must be tested and sustained by rules and principles existing independently of statute, while judgments of the latter class derive all their efficacy from positive law and must conform, in order to be valid, to all the requirements and formalities set up by the Legislature." In the same section this writer further says: "Now judgments entered for the plaintiff upon the defendant's admission of the facts and law, as the same are known to the common law and exist independently of statutes, are of two varieties; first, judgment by *cognovit actionem*, and second, by confession *relicta verificatione*. In the former case the defendant, after service, instead of entering a plea, acknowledges and confesses that the plaintiff's cause of action is just and rightful. In the latter case, after pleading and before trial, the defendant both confesses the plaintiff's cause of action and withdraws or abandons his plea or other allegations, whereupon judgment is entered against him without proceeding to trial. In order to sustain a judgment of either of these sorts, it is essential that process, regularly issued, should have been served upon the defendant (though he may accept service with the same effect as if the writ had been served as it usually is); and an agreement in writing made out of court, authorizing the clerk to enter up such a judgment, will not sustain it, where there has been no appearance by the defendant." Blackstone says, on the subject of confession of judgment at common law: "And this happens, in the first place, where the defendant suffers judgment to go against him by default, or *nihil dicit*; as if he puts in no plea at all to the plaintiff's declaration: by confession or *cognovit actionem*, where he acknowledges the plaintiff's demand to be just: or by *non sum informatus*, when the defendant's attorney declares he has no instruction to say any thing in answer to the plaintiff, or in defence of his client; which is a species of judgment by default. If these, or any of them, happen in actions where the specific thing sued for is recovered, as in actions of debt for a sum certain, the judgment is absolutely complete. And therefore it is very usual, in order to

strengthen a creditor's security, for the debtor to execute a warrant of attorney to some attorney named by the creditor, empowering him to confess a judgment by either of the ways just now mentioned (*by nihil dicit, cognovit actionem, or non sum informatus*; in an action of debt to be brought by the creditor against the debtor for the specific sum due: which judgment, when confessed, is absolutely complete and binding. * * * 3 Blackstone, Com. 396, 397. The great Virginia commentator, Mr. Minor, says on this subject (IV Minor's Inst. 726): "The defendant was always allowed to acknowledge the plaintiff's action, and confess a judgment for the amount claimed, or for such part thereof as he and the plaintiff could agree upon, provided it was done in open court. But a confession of judgment in the clerk's office was never contemplated by the common law, and can only take place in pursuance of the authority of some statute."

So according to these authorities the warrant of attorney, in use at common law, was confined to the confession of judgments, in the three ways enumerated by Blackstone, in a pending suit; that is by answering *nihil dicit, cognovit actionem, or non sum informatus*. And as Mr. Black says, judgments by confession of defendant or on his warrant of attorney, without the institution of an action, derive all their efficacy from positive or statute law. And judgment in the clerk's office, as Mr. Minor says, was never contemplated at the common law. Such warrant of attorney was usually given by the defendant to the plaintiff, by way of security, on compromising an action; and it authorized the attorney to whom it was directed to appear for the defendant, and to receive a declaration in an action to be brought against him, and thereupon confess the same in the manner already indicated. Tidd's New Pract. (Ed. 1837) 275; 1 Tidd's Pract. (Ed. 1828) pp. 590, 606; 2 Chitty, Gen. Pract. 333.

In the case at bar, counsel for defendants in error say, they rely upon the fact that there is nothing in the record showing affirmatively that process was not served. The record, however, purports to be a complete transcript of all the proceedings which took place in the clerk's office in vacation, not at rules; and as no process is exhibited or referred to, we think we must necessarily say that no suit was begun by process, and that there was no action pending in which at common law, a judgment on a warrant of attorney could have been confessed, in either of the ways authorized by the ancient practice. Mr. Freeman says, 2 Freeman on Judgments, section 547: "Judgments by confession are in no wise exempt from the rule applicable to other judgments, that to be valid they must be entered in a court having jurisdiction over the subject-matter of the action and the parties thereto. Though no adjudication is in fact required in entering

a judgment of confession without action, yet it has all the qualities, incidents, and attributes of other judgments, and cannot be valid unless entered in a court which might have lawfully pronounced the same judgment in a contested action.' Where the law requires judgments to be signed by the judge, its provision extends to judgment by confession, and renders them void if not so signed." Looking to the literal terms of the power we see it authorizes appearance, but gives no specific authority to waive process, or to appear in the clerk's office, or waive the filing of the declaration; and limited by the rules and practices prevailing at common law, we must say no donee of the power had any authority to waive any of the rights of the plaintiff, to be sued and served with process, and to have a declaration filed on which judgment might lawfully be entered. Without jurisdiction thus acquired a judgment at common law on warrant of attorney would have been void. And even in those states, where it is otherwise provided by statute, the statute being in derogation of common law rights, the statutes are strictly construed. 23 Cyc. 699.

Let us see how this question has been viewed in the other states than Virginia. In Vermont, the Supreme Court says: "Judgments on confession without antecedent process have no basis other than the statute, and a full compliance with the statute is necessary to their validity, and the provisions authorizing them are to be strictly construed." *Mason v. Ward*, 80 Vt. 290, 87 Atl. 820, 130 Am. St. Rep. 987. In Iowa, in response to the contention that the statute there, regulating confession of judgment, was merely cumulative of the common law remedy, the court said: "We do not think this position is correct. * * * So far as we are advised it has never been the understanding of the profession nor of the business community in this State that warrants of attorney to confess judgment had any place in our law. A confession of judgment pertains to the remedy. A party seeking to enforce here a contract made in another State must do so in accordance with the laws of this State. Parties cannot by contract made in another State engraft upon our procedure here remedies which our laws do not contemplate nor authorize." *Hamilton v. Schoenberger*, 47 Iowa, 385. In New Jersey the entry of judgment by a justice on a judgment note without process or proof was declared illegal. That court said: "The defendant must be brought into court in the usual way, and the same proceeding had, as in other cases of written contracts." *Stretch v. Hancock*, 2 N. J. Law, 193. In Tennessee, in *Carlin v. Taylor*, 75 Tenn. 666, the Supreme Court held, that no judgment could be confessed in that state by an attorney, on a judgment note like the one involved here. And in Kansas and Missouri, such notes are condemned,

and the practice of employing them repudiated on principles of public policy, and as giving to the defendant no day in court, and as permitting the defendant to bargain away his right to be heard in court, contrary to public policy. *McCrairy v. Ware*, 6 Kan. App. 155, 158, 51 Pac. 293; *First Nat. Bank v. White*, 220 Mo. 717, 730, 120 S. W. 36, 132 Am. St. Rep. 612, 16 Ann. Cas. 889. We are inclined to agree with the Missouri court in the case last cited, in which they say: "Such agreements are iniquitous to the uttermost and should be promptly condemned by the courts, until such time as they may receive express statutory recognition, as they have in some states."

Of course if a debtor has been summoned into court by process, and given a day and an opportunity to be heard, no good reason could be assigned why a judgment should not be pronounced against him at common law by confession on a warrant of an attorney. The fact that the Virginia court and this court have recognized the right of the defendant by personal appearance, to submit himself without process to the jurisdiction of the court, and to confess a valid judgment against him, and that a proper construction of our statute, section 43, chapter 125, of the Code, might authorize a defendant to appear in person in the clerk's office and make like confession of judgment, we do not regard any justification for the proposition, that he may by warrant of attorney authorize appearance by and confession of judgment, either in court or in the clerk's office, without process directed and regularly served upon him. It is contended, however, that the old legal maxim, *qui facit per alium, facit per se*, is as applicable here as in other cases. We do not think so. Strong reasons exist, as we have shown, for denying its application, when holders of contracts of this character seek the aid of the courts and of their execution process to enforce them, defendant having had no day in court or opportunity to be heard. We need not say in this case that a debtor may not by proper power of attorney duly executed, authorize another to appear in court, and by proper endorsement upon the writ waive service of process, and confess judgment. But we do not wish to be understood as approving or intending to countenance the practice of employing in this state commercial paper of the character here involved. Such paper has heretofore had little if any currency here. If the practice is adopted into this state it ought to be, we think, by act of the Legislature, with all proper safeguards thrown around it, to prevent fraud and imposition. The policy of our law is, that no man shall suffer judgment at the hands of our courts without proper process and a day to be heard. To give currency to such paper by judicial pronouncement would be to open the door to fraud and imposition, and to subject the

people to wrongs and injuries not heretofore contemplated. This we are unwilling to do.

These considerations lead us to conclude that a judgment by confession in the clerk's office, on warrant of attorney, without process regularly issued and served upon or accepted by defendant is void on its face. We therefore reverse the judgment below, quash the execution, and award the defendants costs here and in the court below, incurred on said motion.

ROBINSON, J. (dissenting). The judgment on which the execution issued is regular and valid on its face. The execution could not be quashed. The order overruling the motion to quash the execution is right and should be affirmed. The only record on which the circuit court could act in determining that motion does not show the judgment void. As far as appears from the record leading to the judgment, that judgment is sound. It purports to have been entered in a pending action. The court could not say the defendants were not served with process and that no declaration was filed, even if those things were necessary as to a judgment by confession. But the judgment itself shows that the court had jurisdiction to enter it. The defendants appeared by attorneys-in-fact and answered the action; so says the record. Service of process has never heretofore been considered necessary as to a party who appears. We have always understood that a party could appear, waive a declaration, release errors, and do many other things toward the entry of a judgment against him. And we are sure that it has heretofore been well established that one could appear to an action by an attorney-in-fact and do all that he could in person. The record does not show that the defendants appeared in this action by attorneys-in-fact acting under the so-called judgment notes. For all the court could see in considering the motion to quash the execution, the attorneys-in-fact appeared and confessed for defendant under a valid power of attorney to do so. The power of attorney was not made a part of the record. It can not be assumed that an invalid power of attorney was recognized in the entry of judgment. The presumption is otherwise.

That the judgment was entered in the clerk's office in vacation, does not affect its verity on collateral attack. It has the same dignity in this respect as a judgment entered in court. The statute expressly says so. Code 1906, ch. 125, sec. 43. "Whether a judgment be the act of the court, or be entered up by the clerk under the statute, the effect is the same; in either case it is the act of the law, and until reversed by the court which rendered it, or by a superior tribunal, it imports absolute verity, and is as effectual and binding as if pronounced upon a trial upon its merits." 8 Enc. Dig. Va. & W. Va. 547.

The judgment has been overthrown on a collateral attack by bringing in matters that are not in the record. An issue of matters outside the record on which the judgment rests, made up on a motion to quash the execution, has been resorted to in finding the judgment to be void. Such matters could only be resorted to on a direct attack of the judgment. The circuit court well knew that it could not quash an execution that rested on a judgment fully purporting jurisdiction and validity—that the verity of such judgment could not be impeached on collateral attack. "Where a court of general jurisdiction acts within the scope of its general powers, its judgments will be presumed to be in accordance with its jurisdiction and can not be collaterally impeached unless the record discloses a want of jurisdiction." See the cases cited in 8 Enc. Dig. Va. & W. Va. 545.

If the case of direct attack dealt with by the majority opinion were properly before us, we would be of opinion that common law principles and Virginia law do not condemn the judgment as void, unless it be on the ground that the power of attorney in the notes is so sweeping and general, so full of partiality to the creditor, as to be void. But this moot question we shall not decide. We may suggest that the power of attorney in the notes is not of the definite and particular character of those powers of attorneys to confess judgments long recognized in Virginia. However, if the power of attorney is valid, no service of process on defendants was necessary when those persons authorized by it to appear to the action in behalf of defendants did so appear. Yet the majority opinion is rested on the want of process. Throughout it that ground is relied on; the concluding paragraph emphasizes that ground. Why is service of process necessary if the warrant of attorney is valid? If it is good, and the attorneys constituted by it to appear to the action do appear thereto pursuant to that authority, the defendants that made them attorneys-in-fact for that purpose have thereby entered an appearance. The defendants then have notice of the suit through their attorneys-in-fact. The court takes jurisdiction of the defendants by their appearance. When the attorneys-in-fact appear, that appearance is one by the defendants who authorized those attorneys-in-fact to make it. Surely, the want of direct service of process is not a sound reason for the majority opinion, if the power of attorney is valid. That opinion only makes it invalid because no process was served on the defendants who gave it.

The reasoning of the opinion virtually leads to this: A. is detained in California as an invalid. He hears from home that a creditor is threatening suit. He has no defense and deems it to his best interest that judgment be entered against him. He sends a warrant of attorney to B. to appear to an

action instituted by the creditor and to confess judgment in his behalf. B. can not do so because no service of process can be made on A. The creditor can not take judgment though A. offers to appear and confess it by duly authorized proxy. If this is sound, it is strange that recognition and practise have long been otherwise.

There was just one question to be answered in the assumed case dealt with by the majority: Is the power of attorney a valid one? If it is valid, if it gave the authority it purports to give, a judgment could be confessed under it on behalf of defendants in an action, even in the clerk's office, and that confession would be a waiver or release of errors. 3 Enc. Dig. Va. & W. Va. 70, 74, 75.

BRANNON, P. I concur in the above dissent.

(70 W. Va. 643)

MILLER v. BERKELEY LIMESTONE CO.
(Supreme Court of Appeals of West Virginia.
April 16, 1912. Rehearing Denied
June 15, 1912.)

(Syllabus by the Court.)

1. MASTER AND SERVANT (§ 118*)—INJURIES TO SERVANT—SAFE PLACE TO WORK.

The general rule, which obliges the master to furnish his servant a reasonably safe place in which to work, does not apply to a quarry, where the work to be done necessarily changes conditions and renders the place more or less dangerous as the work progresses.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 250; Dec. Dig. § 118.*]

2. MASTER AND SERVANT (§ 211*)—INJURIES TO SERVANT—RISKS ASSUMED BY SERVANT.

The master is not liable to his servant, as for negligence in failing to furnish a reasonably safe place to work, for injury received in a quarry, by a stone falling upon him from the bank or cliff above, occasioned by the labor performed in operating the quarry. Such an accident was a risk assumed by the servant.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 557; Dec. Dig. § 211.*]

3. MASTER AND SERVANT (§ 199*)—INJURIES TO SERVANT—FELLOW SERVANTS.

All laborers employed by a common master to work in a stone quarry, whether their duty be to drill, to shoot off blasts, or to remove loose stone from the cliff, stand in relation to each other as fellow servants.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 491; Dec. Dig. § 199.*]

4. MASTER AND SERVANT (§ 189*)—INJURIES TO SERVANT—FELLOW SERVANT.

The foreman of a crew of laborers employed to work in a stone quarry, who has power to employ and discharge men and to direct their work, is, nevertheless, only a fellow servant, unless his negligence relates to some nondelegable duty which the master owed to the injured servant. Whether a superior servant is a vice principal depends upon the nature of his negligent act, and not upon his grade or rank.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 427-435, 437-448; Dec. Dig. § 189.*]

5. MASTER AND SERVANT (§ 190*)—INJURIES TO SERVANT—FELLOW SERVANTS.

In the absence of the master's negligence in selecting his foreman, he is not liable for injury to a servant who was led into danger by a false assurance of safety given by the foreman, unless the negligent act of the foreman relates to the master's nondelegable duty.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 449-474; Dec. Dig. § 190.*]

Miller and Robinson, JJ., dissenting in part.

Error to Circuit Court, Berkeley County.

Action by Annie C. Miller, administratrix, against the Berkeley Limestone Company. Judgment for defendant, and plaintiff brings error. Affirmed.

Faulkner, Walker & Woods, of Martinsburg, for plaintiff in error. Marshall McCormick, of Berryville, Va., H. H. Emmert, of Martinsburg, and James F. Minor, for defendant in error.

WILLIAMS, J. Plaintiff's intestate, John W. H. Miller, was employed as a driller in defendant's quarry and on the 16th of July, 1907, was fatally injured by a rock falling upon him, and died shortly thereafter. This action is to recover damages for his death, which plaintiff alleges was due to defendant's negligence in not providing deceased a safe place to work. On a demurrer to plaintiff's evidence, the court rendered judgment for defendant, and plaintiff obtained this writ of error.

Counsel for plaintiff insist that the evidence was sufficient to prove negligence, and that the court erred in sustaining the demurrer thereto. But the sufficiency of the evidence to establish negligence depends upon the law relative to defendant's duty to its servant in the premises.

Defendant operated a stone quarry and employed a number of men, who worked under a foreman. Deceased had worked in the quarry for six or seven years, except in the winter season, when the work stopped. The distance from the natural surface above to the bottom of the quarry was 60 to 80 feet, and the ledge on which deceased was working at the time of the fatal accident was about 8 feet wide, and from 15 to 20 feet below the natural surface. From the ledge upward, the face of the quarry sloped at an angle of about 45 degrees. This slope was not solid rock, but was composed of clay and rock mixed. On the day of the accident deceased and his helper, one Holly, were directed by the foreman to set the drill at a certain point on the ledge, and to begin drilling. They did so, and began drilling about 1 o'clock in the afternoon, and in two or three hours thereafter a rock, weighing 300 pounds or more, which was partially imbedded in the clay some distance up the slope above the driller's head, loosened and rolled

down, striking him on the head and fatally injuring him.

[1] It is a familiar rule of law, too well recognized to merit discussion, that one of the nonassignable duties of the master is to provide his servants a reasonably safe place in which to work. But, like most other general rules, this one has its exceptions, and one is that the master is not under duty to keep the working place safe, when the very work which the servant is employed to perform changes the condition of the place, and makes it more or less dangerous, as the work advances.

[2] As the drilling and blasting progressed, the face of the quarry underwent frequent changes, causing the working place to become more dangerous at some times than at others. Deceased knew this as well as his employer, and assumed such risks as would reasonably be expected to result from the changes in the condition of the place, and which would be brought about by the work which he was employed to perform. 2 Labatt on Master and Servant, § 588; White on Per. Inj. in Mines, § 125; Jacoby Co. v. Williams, 110 Va. 55, 65 S. E. 491; Consolidated Coal & Mining Co. v. Clay's Adm'r, 51 Ohio St. 542, 38 N. E. 610, 25 L. R. A. 848; Finalyson v. Utica Mining & Milling Co., 67 Fed. 507, 14 C. C. A. 492; Thompson v. California Construction Co., 148 Cal. 35, 82 Pac. 367; Heald v. Wallace, 109 Tenn. 346, 71 S. W. 80; Armour v. Hahn, 111 U. S. 313, 4 Sup. Ct. 433, 28 L. Ed. 440; City of Minneapolis v. Lundin, 58 Fed. 525, 7 C. C. A. 344; Gulf, etc., Ry. Co. v. Jackson, 65 Fed. 48, 12 C. C. A. 507; Cleveland, etc., Ry. Co. v. Brown, 73 Fed. 970, 20 C. C. A. 147; Fraser v. Red River Lumber Co., 45 Minn. 235, 47 N. W. 785; Durst v. Steel Co., 173 Pa. 162, 33 Atl. 1102; Poorman Silver Mines v. Devling, 34 Colo. 37, 81 Pac. 252.

Giving full credit to the testimony of plaintiff's witnesses, considering all proper inferences deductible therefrom, and disregarding all of the testimony of defendant's witnesses conflicting therewith, as we must do on considering a demurrer to the evidence, the following facts may be regarded as proved, viz.: That it was the duty of Abe Miller, a shooter, and Allie Waters, his helper, after a blast was set off and before resetting the drill, to remove the earth and loose rock that would be liable to fall and injure the workmen below; that they knew, on the day before the accident, of the presence of the rock that fatally injured plaintiff's intestate, and thought it was dangerous, but failed to remove it; that Abe Miller, knowing that he himself would not be working at the quarry on the succeeding day, told his helper, Allie Waters, to remove the stone before the drill was set on the ledge below it on the next day; that Allie Waters did not remove it, because he was told by Tenas Milbourn, the foreman,

to do something else. He does not remember what other work he was told to do. On cross-examination he says: "On Monday evening a while before quitting [which was the day before the accident], when the driller called my attention to it [the rock], I went and told Mr. Milbourn." Mr. Milbourn denies this, but on demurrer to evidence we must accept the testimony of Waters as true. Presumably, the driller referred to by Waters was the deceased. Abe Madden, another witness for plaintiff, testifies that on the morning of the accident he heard deceased tell Milbourn that "that stone looked dangerous up there," and that Milbourn replied that he had examined it, and that it was all right. This witness also says he heard Milbourn say to deceased that, if he did not set his drill there, he would get some one else in his place. Allie Waters also says that deceased "often helped [him] to clean off a set when he had no drilling to do."

J. F. Purcell, superintendent of the quarries and a witness for defendant, testifies that he instructed the drillers to see that everything was safe above them before beginning to drill, and that he personally instructed deceased on the day of the accident. This is not denied, except inferentially by one or two other drillers, who say that they were not so instructed. The foregoing recital is sufficient to show the state of facts which, as plaintiff's counsel contend, are sufficient to establish defendant's negligence. But some one, or more, of defendant's employes, whose duty it was to remove the dangerous stone, must stand in the relation of vice principal to deceased, before the law will hold it liable for their negligence. It is contended that Tenas Milbourn, Abe Miller, and Allie Waters were all vice principals. That depends, however, upon whether the negligent act, of which they were guilty, related to the performance of a nondelegable duty which defendant owed to deceased, and that, in turn, depends upon whether it was the company's duty to keep the quarry, at all times, in a reasonably safe condition. If so, then Abe Miller and Allie Waters, whose duty it was to take down the loose stone, were performing a nonassignable duty of the master, and therefore occupied the relation of vice principal to deceased. "Whether the employé whose negligence caused the injury was or was not a vice principal is determined by the nature of the functions which he was, as a matter of fact, discharging at the time when the injury was received, and not by the appellation by which he was designated." 2 Labatt on Master and Servant, § 508. Jackson v. Railroad Co., 43 W. Va. 380, 27 S. E. 278, 31 S. E. 258, 46 L. R. A. 337. But we have already said that the master was not under duty to keep the quarry safe. That it would sometimes become unsafe was to be expected. The work could not be performed with-

out blasting down the cliff, and the blasting shattered the rock and made the place unsafe. Deceased must have known that loose stones were liable to fall after a blast, if they were not removed, and men were employed to remove them. The work to be performed being of such character as, necessarily, to produce changes in the conditions surrounding the workmen, the law does not impose upon the master the duty to be present for the purpose of keeping it in a reasonably safe condition. The bank above the ledge was clay mixed with boulders or separate stones, and it was reasonable to suppose that the falling of such stones would be a frequent and a natural occurrence. At least, it does not appear that such was not frequently the case. Why, then, was the fatal accident not an incidental risk which deceased had assumed? It is clearly proven, and not denied, that, before the drill was set, deceased and his helper removed the loose earth and stones that had slid down upon the ledge. How long since they had fallen does not appear, but deceased evidently knew that more was liable to come down.

In *Durst v. Steel Co.*, 173 Pa. 162, 33 Atl. 1102, plaintiff was employed with a gang of men under a foreman, to make excavations, and was injured by the caving in of a bank. The court in point 1 of the syllabus stated the law as follows, viz.: "When danger can only arise as work progresses and be caused by the work done, the employer is not bound to stand by during the progress of the work to see when the danger arises. It is sufficient if he provides against such danger as may possibly or probably arise, and gives the workmen the means of protecting themselves. It is then the duty of the workmen to look out for such dangers, and use the means provided."

In *Mielke v. Railway Co.*, 103 Wis. 1, 79 N. W. 22, 74 Am. St. Rep. 834, plaintiff was employed as a workman in a quarry and was injured by a rock falling, upon him from the cliff above, in very much the same manner that deceased was injured in the present case; the difference being that in that case, while it was shown to be the custom to examine the cliff after a blast was set off, it did not appear that such examination had been made before the accident, while in the present case the danger was apparent, but deceased had been told by the foreman that he had examined the rock and that it was safe. The court there held that the defendant was not liable as not having provided a safe place for his servant to work, and in its opinion (103 Wis. 5, 79 N. W. 23 [74 Am. St. Rep. 834]), says: "The plaintiff and his fellow workmen were practically making the place in which they were to work. At each succeeding blast the conditions and surroundings were changed. The danger to which they were exposed was the direct result of their own operations. It was the result of

their common labor, including that of the foreman. The plaintiff was familiar with the work. He knew that the condition was constantly changing by reason of his own acts. He appreciated the danger, because he knew that rocks were liable to fall. As stated in the *Larson Case*¹: "The negligence, if any, in this view of the case, would be that of the plaintiff and his fellow servants, and the risk of it must be regarded as assumed by the plaintiff as incident to his employment; and, in any view that may be taken of the case, it must be regarded as a risk assumed by the plaintiff as an incident to his employment."

Fraser v. Red River Lumber Co., 45 Minn. 235, 47 N. W. 785, is also very much in point, because the plaintiff, in that case, was injured as a result of the negligence of a fellow servant in the performance of a particular work, a part of which was designed and intended as a convenient means to be used by plaintiff and others in performing their particular work. Defendant company was a manufacturer of lumber, and employed upon its yards a crew of 40 or 50 men, a part of whom were engaged in piling the green lumber, while others were employed in measuring, assorting, scaling, and delivering dry lumber. According to a prevailing custom, in stacking the boards, at certain intervals in the pile the ends of boards were projected from the pile to be used as steps in ascending and descending the pile. In one of the piles a defective board had been negligently put in as a step, and plaintiff, who belonged to the crew of scalers, and who had nothing to do with the piling, in ascending the stack, stepped upon this defective board, and it broke, precipitating him to the ground and causing his injury. There was no proof that the men employed as pilers were not competent workmen. It was contended that the defendant was liable for the negligence of the pilers who had used the defective board, that it did not furnish a safe place, or safe appliance, intended for plaintiff's use in performing his work. But the court there held that the relation of plaintiff to the pilers was that of fellow servant, and that defendant was not liable.

[3] The fact that the laborers were classified as drillers, shooters, and their helpers, does not affect their relation to deceased as fellow servants. They were all engaged in a common employment of the master, whose duty in the premises was discharged when it employed competent workmen, and furnished them proper machinery and appliances for carrying on the work safely. Thereafter the business of keeping the quarry in a reasonably safe condition was a part of the servants' general employment. It is not alleged that Abe Miller and Allie Waters were incompetent servants. They were fellow servants with deceased, and the defendant is not liable for their negligence that caused

¹ 95 Wis. 533, 70 N. W. 662.

the death of deceased. *Flannegan v. C. & O. Ry. Co.*, 40 W. Va. 436, 21 S. E. 1028, 52 Am. St. Rep. 896; *Oliver v. O. R. R. Co.*, 42 W. Va. 703, 26 S. E. 444; *Jackson v. N. & W. R. R. Co.*, 43 W. Va. 380, 27 S. E. 278, 31 S. E. 258, 46 L. R. A. 337; *N. & W. Ry. Co. v. Donnelly*, 88 Va. 853, 14 S. E. 692.

[4] It is claimed that, because *Tenas Milbourn* had the power to employ and to discharge laborers, having actually threatened to get another man to drill in deceased's place if he did not set his drill on the ledge at the point designated and begin drilling, he was, therefore, a vice principal, and defendant is liable for Milbourn's negligence in failing to remove the rock after it had been brought to his attention. But, as we have already intimated, the relation of vice principal does not depend upon the servant's rank or his authority to direct the movements of the laborers under him. The relation of vice principal is determinable by the character of the negligent act which causes the injury; i. e., whether or not it pertains to a nonassignable duty of the master. It may be, and in fact is often, the case that a subordinate servant may be a vice principal in relation to a particular act or omission of duty, and only a fellow servant in all other respects; and, on the other hand, a foreman, having power to direct the movement of laborers under him, may be only a fellow servant. *Jackson v. N. & W. R. R. Co.*, 43 W. Va. 380, 27 S. E. 278, 31 S. E. 258, 46 L. R. A. 337, 2 *Labatt on Master and Servant*, § 520, and numerous cases cited in note.

[5] Notwithstanding an employer's liability statute, making the employer liable in damages to an employé who is injured and who is himself in the exercise of due care and diligence at the time, "by reason of the negligence of any person in the service of the employer, intrusted with and exercising superintendence, whose sole or principal duty is that of superintendence," the Supreme Court of Massachusetts held, in *McGinty v. Reservoir Co.*, 155 Mass. 183, 187, 29 N. E. 510, 512, that, in respect to the negligent act which caused the injury, the superintendent was not a vice principal, although the negligent act had been performed under his direction. That case is very much in point, and we here give the facts: *McGinty* brought an action for damages for injury, caused by the pulling up of a post to which the guy rope of a derrick had been fastened. It was the custom to move the derrick from place to place, and reset it, as occasion required. The post had been set by one Duval, under the direction of Pratt, who was the superintendent. There was no defect in the derrick, or the guy rope, or the post, or the piece of timber used to make the post more secure. The court below left it for the jury to determine whether or not Pratt, the superintendent, was a fellow servant with the plaintiff or a vice principal. But the court of appeals held that this was error, reversed

the lower court, and held, as matter of law, as between plaintiff and the superintendent the relation was that of fellow servant. In the opinion the court says: "It was a part of their [the laborers'] duty to put down the post; and, if there was any negligence in the manner in which or the place where it was sunk, and the mode in which the cross-timber was used, it was their negligence, and not the negligence of the master, or of Mr. Pratt, as representing him. Mr. Pratt, although the superintendent, was still only a fellow servant, as between himself and the plaintiff, and the defendant would not be liable for his negligence."

"Where a city engineer, declared by the charter to be the general superintendent of all work done by the city in the streets, appoints a superintendent of sewer construction, to have charge of that department of the work, and the latter employs a foreman, who controls a gang of men, with power to hire and discharge, and direct when, where, and how to work, such foreman is not a general vice principal of the city in relation to a workman under him who is injured by his negligent act." *City of Minneapolis v. Lundin*, 58 Fed. 525, 7 C. C. A. 344. Additional authorities holding that unless the negligence of the foreman causing the injury related to a nonassignable duty of the master he is only a fellow servant, are the following: *Moon's Adm'r v. Richmond, etc., Co.*, 78 Va. 745, 49 Am. Rep. 401; *Railroad Co. v. McKenzie*, 81 Va. 71; *Cleveland, etc., Ry. Co. v. Brown*, 73 Fed. 970, 20 C. C. A. 147; *Poorman Silver Mines v. Devling*, 34 Colo. 37, 81 Pac. 252; *What Cheer Coal Co. v. Johnson*, 56 Fed. 810, 6 C. C. A. 148; *Railroad Co. v. Baugh*, 149 U. S. 368, 13 Sup. Ct. 914, 37 L. Ed. 772; *White on Per. Inj. in Mines*, §§ 293, 294, 295.

Plaintiff does not allege that defendant neglected to employ competent men to work in its quarry, or that it failed to furnish suitable machinery and appliances, or that it failed to formulate suitable rules to guide and protect its employés in the performance of their work. The only neglect complained of is the alleged failure of defendant to keep the bank of the quarry, above the place where deceased was working, in a safe condition; in other words, that it failed to furnish him a safe place in which to work. But, in view of the nature of the work to be performed in a quarry, defendant was not bound to keep the banks free from dangerous rocks. The unfortunate accident was one of the natural incidents common to deceased's employment, and was, therefore, a risk which he had assumed.

If *Tenas Milbourn*, the foreman, deceived deceased by assuring him that he had examined the rock and that it was safe, and thereby lulled his fears and led him into a danger which he would not otherwise have assumed, defendant is still not liable, for *Milbourn*, although foreman over deceased,

was only his fellow servant. In ordering deceased to work in a place of danger, Milbourn was not representing defendant in relation to a nonassignable duty; and was, therefore, not a vice principal. 2 Labatt on Master and Servant, § 539; *Briegal v. Sou. Pac. Co.*, 39 C. C. A. 359, 98 Fed. 958; *Moore Lime Co. v. Richardson's Adm'r*, 95 Va. 326, 28 S. E. 334, 64 Am. St. Rep. 785; *Jackson v. N. & W. R. R. Co.*, 43 W. Va. 380, 27 S. E. 278, 31 S. E. 258, 46 L. R. A. 337; *Cochran v. Shannahan*, 51 W. Va. 137, 41 S. E. 140.

It not being shown that defendant was negligent in any respect, the question of contributory negligence on the part of deceased becomes immaterial.

We will affirm the judgment.

NOTE BY MILLER, J. I concur in the result, but cannot give my unqualified assent to the points of the syllabus. I think they should be clearly limited by the principles stated in 1 *Bailey on Personal Injuries* (2d Ed.) §§ 127 and 250, and *Haggerty v. Hallowell Granite Co.*, 89 Me. 118, 35 Atl. 1029, *McMillan Marble Co. v. Black*, 89 Tenn. 118, 14 S. W. 479, and *Black's Adm'r v. Virginia Portland Cement Co.*, 106 Va. 121, 55 S. E. 587. According to these authorities a master of a stone quarry is liable for injuries sustained by his servant, due to his negligence in making reasonable inspections and tests, if a reasonable time has elapsed after the place has been rendered dangerous to give opportunity to the master to inspect and test the place and make it reasonably safe for his servant to work in. In *Jacoby v. Williams*, 110 Va. 55, 63, 65 S. E. 491, 494, that court says: "Unquestionably where a servant is employed to engage in a dangerous work, such as excavation, quarrying and the like, the master, as a general rule, owes him the duty to use ordinary and reasonable care and diligence to make his place of work as reasonably safe as the nature of the work admits of, but this general rule does not apply to a place which is constantly changing by reason of the work done." Citing 26 Cyc. 1117, and *Finalyson v. Utica M. & M. Co.*, 14 C. C. A. 492, 67 Fed. 510. It will be observed that this decision, as do many others, limits the exception to places which are "constantly changing by reason of the work done." In other cases the general rule, with respect to the master's duty to provide a reasonably safe place to work, applies to quarries. 1 *Bailey on Personal Injuries*, § 127. The decisions above cited illustrate the application of this principle, and by which I think the points of the syllabus should all be limited.

In this case there is evidence tending to show that the master, through its foreman, had been warned and notified as long at least as the day before the deceased was injured, that the overhanging rock was dangerous, and assured deceased that he had examined the rock and found it safe, and I

am not altogether sure but the question of the reasonableness of the time for inspection by the master ought not to have been submitted to the jury, but I have yielded this point to the opinion of the majority.

ROBINSON, J., concurs.

(70 W. Va. 726)

HARDMAN et al. v. BRANNON.

(Supreme Court of Appeals of West Virginia.
Feb. 27, 1912. Rehearing Denied
June 15, 1912.)

(Syllabus by the Court.)

1. TAXATION (§ 656*)—TAX SALES—TIME FOR SALE.

A sheriff has no authority to sell land for delinquent taxes at a time not fixed by the statute.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. § 1347; Dec. Dig. § 656.*]

2. TAXATION (§ 656*)—TAX SALES—TIME FOR SALE.

If a sheriff should not receive the list of delinquent lands from the auditor in time to complete the publication of notice of sale, and thereafter sell in November or December, as provided in section 6, c. 31, Code 1906, he must, after first publishing the notice required, commence his sale on the first day of a circuit or county court, whichever is first fixed by law to be held in the next succeeding year.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. § 1347; Dec. Dig. § 656.*]

3. TAXATION (§ 734*)—TAX SALES—TIME FOR SALE.

A tax sale appearing on the face of the proceedings to have been made in the month of March in a county wherein the statute provides for a term of circuit court to begin on the first day of February is void, and a deed made in pursuance of such sale is also void.

[Ed. Note.—For other cases, see *Taxation*, Dec. Dig. § 734.*]

4. TAXATION (§ 688*)—TAX SALES—TIME FOR SALE.

Error in the time of making sale appearing on the face of the proceedings is fatal. It is not cured by section 25, c. 31, Code 1906.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. § 1390; Dec. Dig. § 688.*]

5. TAXATION (§ 734*)—TAX SALES—TIME FOR SALE.

Such error will be presumed to have prejudiced the former landowner, and is good ground for avoiding the tax deed made in pursuance of such void sale.

[Ed. Note.—For other cases, see *Taxation*, Dec. Dig. § 734.*]

6. EVIDENCE (§ 41*) — JUDICIAL NOTICE — TIME OF HOLDING COURT.

This court will take judicial knowledge of the time fixed by statute for the holding of regular terms of circuit courts in the various counties of the state.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 56-60; Dec. Dig. § 41.*]

7. TAXATION (§ 809*)—TAX TITLES—SUITS TO TRY TITLE.

A bill attacking the validity of a tax deed must allege the particular matter on which the pleader relies.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. §§ 1600-1604; Dec. Dig. § 809.*]

8. APPEAL AND ERROR (§ 1178*)—DISPOSITION OF CAUSE — REVERSAL — LEAVE TO AMEND.

If the record discloses facts sufficient to avoid a tax deed, which have not been averred in the bill, and a decree has been entered on full hearing below dismissing the suit, without giving leave to amend, this court will reverse the decree, and will remand the cause, with leave to amend the bill to conform to facts so disclosed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4616-4619; Dec. Dig. § 1178.*]

Appeal from Circuit Court, Gilmer County.

Bill in equity by Marcellus Hardman and another against Edwin L. Brannon. From a decree for defendant, plaintiffs appeal. Reversed, with leave to plaintiffs to amend bill to conform to proof.

R. G. Linn and E. A. Brannon, for appellants. R. F. Kidd and W. W. Brannon, for appellee.

WILLIAMS, J. Marcellus Hardman and Marcellus Stump, in his own right and as executor of Susan M. Stump, deceased, have appealed from a decree of the circuit court of Gilmer county, made on the 15th of March, 1907, dismissing their suit which had been brought for the purpose of avoiding a tax deed made to Edwin L. Brannon on the 7th of June, 1904, for a tract of 95½ acres of land. Hardman acquired the land by deed from J. M. Hamilton, special commissioner, April 20, 1889, in a suit in the circuit court of Gilmer county, styled Spencer Collins, Trustee, v. Marcellus Stump and Others, but did not have his deed recorded until February 13, 1902. Hardman then sold it to Susan M. Stump, but retained title to secure \$500 of the purchase price. Mrs. Stump died, testate, in May, 1904, leaving Marcellus Stump her sole devisee and executor. Hardman not having recorded his deed from the commissioner, the land remained on the land books assessed with taxes in the name of Marcellus Stump, the former owner, and present owner of the equitable title. It was sold in March, 1903, in the name of Marcellus Stump for the delinquent taxes of 1900 as a tract of 59 acres, and was purchased by the defendant for \$13.60. Plaintiffs made a tender of the purchase money and interest. There was a demurrer to the bill, which the court overruled, and defendant answered, denying every allegation of the bill, and plaintiffs replied generally. The cause was heard upon the merits, on pleadings and proof, which was altogether documentary, and the court dismissed the suit without giving plaintiffs leave to amend their bill.

[3] The tax deed, which is exhibited with the bill, recites that the sale was commenced and completed in the month of March, 1903, and plaintiffs say that the invalidity of the deed is thereby shown, because the sheriff could not then lawfully sell. The time when he shall sell depends upon statute.

Section 6 of chapter 31 prescribes with great particularity the time when the sheriff shall commence his tax sales. After providing for the posting and publication of notices of sale, that section proceeds to fix the following time, or times, for commencing sale, in the following order, viz.: First, on the first day of the next November or December term of the circuit or county court of the said county, whichever may be held first after the completion of publication of notice; or, second, if no term of either court is held in either November or December, then on the second Monday in December next after the publishing of said notice; or, third, in the event the sheriff should not receive the list of delinquent lands from the auditor in time to publish notice and make sale in November or December, he shall commence his sale on the first day of a circuit or county court, whichever may be held first, in the succeeding year, next after the publication of notice. It does not appear why the present sale was not made in November or December.

[2] But, authority being given to sell on the first day of a circuit or county court in the succeeding year, in a certain event, we think it may be fairly and properly assumed that that event did happen, and that the sale in the succeeding year was made at the time fixed by the statute, unless the contrary affirmatively appear. The statute says he must sell on the first day of a circuit or county court, whichever is first held, after the completion of publication. No other time is given. Does it affirmatively appear that the sale was not commenced on the first day of the first term of a court, circuit or county, whichever was first held in 1903? We think it does, and in the following manner. Under the law then (1903) in force (Code 1899, p. 1148), a term of the circuit court for Gilmer county was appointed for the first day of February.

[6] This fact we take judicial knowledge of because it is fixed by a public statute. The sheriff's return of sales and the deed both show that the sale was begun on the 2d, and completed on the 3d day of March, 1903, a time beyond the February term of circuit court.

It is urged in brief of counsel for defendant that it is not proven that the February term of the circuit court was actually held, nor that a regular term of the county court was not held on the 2d of March, and that it was the first of either of the courts held in that year, in which event they say a sale on the 2d of March would be a compliance with the statute. We do not think this argument sound for two reasons: (1) Because it is the purpose of the statute in fixing the first day of the term of a particular court, as a date for the sale, to have it at a time when the people collect at the courthouse. It is also a continuing notice, in the body of the law, to all delinquent taxpayers, that their land is

liable to be sold on a day certain. (2) The sheriff has to publish his notice in advance of the day fixed for the sale, and he must be governed by the statute fixing the time of the circuit court, and by the statute, or the previous order of the county court, fixing the time of holding that court, and he cannot anticipate that a term of the circuit court fixed in February would not be held. Publication of his notice will have been completed before he could know that a term of court, appointed by law, would not be held. There is a statute providing for the election of a member of the bar to hold the circuit court in the event the judge is not present. Whether the February term of the circuit court was actually held or not is not material, because the time fixed by the statute for the holding of the court is more material in determining the time when the sheriff should publish notice that his sale will be made than the actual holding of the court on the day fixed. Seeing that there was a term of the circuit court for Gilmer county which the statute says shall be held on the first day of February, we are of the opinion that the sheriff could not lawfully sell in the month of March.

[1] Sale of land for delinquent taxes is purely a statutory proceeding, summary in its nature, and, being in derogation of the common-law rights of property, the courts uniformly apply to such statutes the rules of strict construction. They hold that every step in the proceedings which results in divesting the owner of the title to his land must be strictly complied with. "A sale made at a time not appointed or provided for by law is without authority and void." 1 Blackwell on Tax Titles (5th Ed.) § 488; Black on Tax Titles (2d Ed.) § 221; Keith v. Preston, 5 Grat. (Va.) 120; Thatcher v. Powell, 6 Wheat. 119, 5 L. Ed. 221. Chief Justice Marshall, who delivered the opinion of the court in the case last cited, at page 127 of 6 Wheat. (5 L. Ed. 221), says: "In summary proceedings, where a court exercises an extraordinary power under a special statute prescribing its course, we think that that course ought to be exactly observed, and those facts which especially give jurisdiction ought to appear, in order to show that its proceedings are *coram iudice*." This principle, we think, should apply with even greater force in a case wherein a sale of land is made by a ministerial officer, acting by virtue of authority conferred directly by statute, and without any process or order by a judicial court. A history of the statutory proceedings in Virginia and in this state for the sale of land for delinquent taxes, and the court decisions bearing thereon, are reviewed in a well-prepared and elaborate opinion written by Judge Holt in *Hays v. Heatherly*, 36 W. Va. 613, 15 S. E. 223. The more recent decision of *Collins v. Sherwood*, 50 W. Va. 133, 40 S. E. 603, is direct authority on the point we are here discussing. It was decided in

that case that the sheriff could not adjourn his tax sale from December 2, 1871, to January 9, 1872, under a statute which authorized him to adjourn his sales only from day to day, and that such unauthorized adjournment rendered the tax sale void. It necessarily follows that, if a sheriff cannot adjourn a sale, after it is properly begun, to a time other than that fixed by the statute, he cannot begin his sale at a time other than that fixed by the statute.

[4] But it is insisted by counsel for appellee that the failure to sell at the time provided by the statute is cured by section 25, c. 31, Code 1906. We do not think so. That statute is subject to the same rules of strict construction that govern the interpretation and construction of the general statute on the subject of sale of delinquent lands, and it cannot be properly held to embrace and cure any defect in the tax sale proceedings, not therein expressly included. The first part of section 25 prescribes the effect to be given to the deed which the clerk is authorized by a prior section to make to the tax purchaser, and then proceeds to say that it shall have such effect, "notwithstanding any irregularity in the proceedings under which the same was sold, not herein provided for, unless such irregularity appear on the face of such proceedings of record in the office of the clerk of the county court, and be such as, materially to prejudice and mislead the owner of the real estate so sold, as to what portion of his real estate was so sold, and when and for what year or years it was sold, or the name of the purchaser thereof; and not then, unless it be clearly proved to the court or jury trying the case, that but for such irregularity the former owner of such real estate would have redeemed the same under the provisions of this chapter."

In construing section 25, c. 117, Acts of 1872-73 which contained the same provision, in substance, as section 25, c. 31, Code 1906, in respect to proof of prejudice, and whether or not the former owner was misled, it was held by this court in *McCallister v. Cottrille*, 24 W. Va. 173 (Pt. 2, Syl.), that, if the error or irregularity appeared on the record of the proceedings, it must be presumed to have prejudiced the former owner, and that parol evidence was not admissible to prove the fact of prejudice. That decision is authority for the construction of the statute as it now is, and after it was amended by Acts 1882, c. 130, so far as it relates to errors appearing on the face of the proceedings, provided, however, the irregularity complained of is not expressly cured by said section as amended. The question then arises: Does section 25, c. 31, Code 1906, cure a mistake as to the time of sale? We do not think so. The time for making the sale is material for the reasons herein before named. The sheriff has no authority in law to sell at any other time. He cannot appoint his own time. He must pursue the statute strictly. The ex-

ror or mistake as to the time the sale was made appears on the record in the manner in which we have hereinbefore pointed out, and it is not one of the mistakes or irregularities embraced within any of the curative provisions of section 25.

[5] It must, therefore, be presumed that the owner was prejudiced by it, and for this reason we hold the tax deed to be void.

There is no merit in the claim that plaintiffs were misled by the description of the land in the sheriff's return of the list of sales. The land was assessed to Marcellus Stump as 59 acres, and described on the land book as "Steer Creek Mill," and had been so designated since and including the year 1889. It was proper for the sheriff to get his description of the land from the land book, and he apparently did so, for his return list describes it as "Steer Creek Mill." That was the description by which plaintiffs had paid taxes on the land for a number of years before. The fact that the surveyor reported the land to contain 95½ acres cannot affect the case. He did not make his survey and report until after the redemption year had passed. How, then, could that fact mislead and prevent redemption? It could not. That the tract contained, by actual survey, more land than was shown by the assessment and by the sheriff's list of sales, is not a matter of which plaintiffs have any right to complain. True, it had been sold and conveyed to Hardman by the commissioner as a tract of 95½ acres in 1898. But Hardman did not put his deed on record until 1902, nearly four years thereafter, and did not have the quantity of land corrected on the land books. It was the owner's fault that the correct quantity did not appear. On the list of sales, filed by the sheriff with the clerk, in the column headed "Date of each sale," opposite the tract of 59 acres, and just under the word "Redeemed," which is written opposite the tract next above, appear the following figures and marks, viz.: "3-3,." Do these ditto marks indicate that plaintiffs' land was redeemed, and was this notation such a fact as was calculated to mislead plaintiffs? We think not. In tabulated statements ditto marks are generally used to avoid repetition of words, and when so used they are understood to stand for, and to mean the same as, the words or figures next above them. But we think it sufficiently appears from an examination of the list itself that the ditto marks were not here intended to stand for the word "redeemed," but were intended to indicate the date of the sale. This column is headed "Date of each sale," and the first figures appearing in it at the top are, "3-3, 1903." The first two figures stand for March 3d, and, instead of repeating those figures where they would recur, opposite the various tracts of land, ditto marks are used, one set on the left of the column to indicate the month and the day of the month, and one set on the

right to indicate the year. Some of the sales appear to have been made on March 2d, and the figures "3-2" are then used, and ditto marks appear under these figures, in like manner, until a tract is reached which was sold on the 3d, and then the figures, "3-3," are again repeated. This process is carried on throughout the column. The word "Redeemed" occurs in the column a great many times, and is sometimes repeated with no intervening ditto marks, thus clearly indicating that the ditto marks were intended to apply to the dates, and not to the word "Redeemed." Moreover, the law does not make it the duty of any officer to note on the list of sales what land has been redeemed, and it does not appear who wrote the word "Redeemed" on this list. So far as we know, it might have been written by a stranger. Therefore, even if improperly placed there, it is not an error appearing upon the face of the record. Must a tax purchaser's right be held to depend upon the mutilation or alteration of the record by a stranger? We think not. But, assuming that the word "Redeemed" was written by the clerk for his own convenience, and that possibly the ditto marks might be understood, by a person examining the record, to refer to the word "redeemed," and therefore to apply to the tract of land in question, still we think the owners of the land could not thereby have been misled to their prejudice. If land has been redeemed, the owner ought certainly to know it; if he does not he is at fault, and ought not to be heard to say that he was misled by believing that it had been redeemed. It is not possible for the owner to be misled in relation to the redemption of his land without knowing, at the time he discovers the alleged misleading fact, that his land was sold for delinquent taxes. He should then be held to the exercise of diligence to ascertain whether his land is in fact redeemed. The alleged misleading fact appeared on the record in the clerk's office, and, if the owner did actually see it, it would have been an easy matter for him to make inquiry of the clerk in relation thereto, and his failure to do so would be inexcusable negligence.

[7] It is urged that the invalidity of the tax deed, for want of authority in the sheriff to sell, cannot be relied on here as cause for reversal, because that matter was not averred in the bill, and the attention of the lower court was not directed to it. This point is well taken. The want of authority to sell depended on a fact which had to be established in some way, and it is a familiar rule of pleading that every fact, material to plaintiffs' case, must be alleged. Pleading must precede proof. Relief may be granted upon pleading when not denied, without proof, but never upon proof without pleadings. Plaintiffs do not specifically aver that the sale was made at a time not authorized by law, and counsel for defendant

insist that, therefore, the bill is bad, and that the demurrer should have been sustained. The bill attacks the deed on two alleged grounds only, viz.: (1) Misdescription of the land; and (2) because they were misled into believing the land had been redeemed, on account of the word "Redeemed," and the ditto marks under it, appearing on the list of sales filed in the clerk's office. The bill then contains the following general averment, viz.: "For the irregularities aforesaid and other irregularities appearing upon the face of the record of the proceedings in the office of the clerk of the county court aforesaid," etc. This averment is too vague, general, and indefinite to be denominated good pleading. The particular fact relied on should be averred. That a part of the record of the tax sale proceeding is exhibited with the bill, and discloses the fatal error, does not dispense with the necessity of an averment in the bill pointing out the fact constituting the mistake on which plaintiffs rely. "A bill to set aside a tax deed for defects in the proceedings under which it was sold must point out those defects." *State v. McEldowney*, 54 W. Va. 895 (Pt. 9 Syl.), and authorities cited on page 702, 47 S. E. 650, on page 658; *Hogen v. Piggott*, 60 W. Va. 541.†

[§] But, inasmuch as plaintiffs' documentary evidence exhibited with their bill, in connection with the fact that there was a February term of circuit court in Gilmer county, which we judicially know, proves a case which would entitle them to relief, if the matter thus established had been properly pleaded, we will reverse the decree, sustain the demurrer, and will remand the cause, with leave to plaintiffs to amend their bill to conform to the proof. The case being good as to proof, and bad only as to pleading, the court erred in dismissing the suit, without first giving plaintiffs leave to amend. *Lamb v. Cecil*, 25 W. Va. 288; *Lamb v. Laughlin*, 25 W. Va. 300; *Doonan v. Glynn*, 28 W. Va. 225.

BRANNON, P., absent.

(70 W. Va. 750)

BELCHER v. DICKINSON.

(Supreme Court of Appeals of West Virginia.
April 9, 1912. Rehearing Denied
June 15, 1912.)

(Syllabus by the Court.)

1. PLEADING (§ 310*) — REFERENCE TO CONTRACT.

The propriety of the filing of a plea must be tested by the averments of the declaration. It can not be tested by a construction of a contract referred to in the declaration as annexed thereto.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 944, 946, 947; Dec. Dig. § 310.*]

(Additional Syllabus by Editorial Staff.)

2. BILLS AND NOTES (§ 478*) — ACTIONS — PLEADING.

In an action on a note, defendant filed a special plea, setting up failure of consideration.

The declaration averred certain matters of agreement as to the transaction in which the note was given, and the plea set forth a different agreement, and that according to the terms thereof, the consideration had failed. *Held*, that the plea was good.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1519-1521, 1523, 1557; Dec. Dig. § 476.*]

Error to Circuit Court, Kanawha County. Action by A. M. Belcher, administrator, against John Q. Dickinson. Judgment for defendant, and plaintiff brings error. Affirmed.

A. M. Belcher, of Charleston, in pro. per. Linn & Byrne, of Charleston, for defendant in error.

ROBINSON, J. The administrator of Wells sued Dickinson in debt, for the recovery of a promissory note. A special plea that the consideration had wholly failed was admitted over the objection and exception of plaintiff. No replication was put in; plaintiff rested the case on his exception to the filing of this special plea. Judgment was entered for defendant, and plaintiff prosecuted this writ of error.

If the special plea was properly filed, the judgment is right. Since there was no reply to the plea, it was confessed. *Shires v. Boggess*, 68 W. Va. 137, 69 S. E. 466. If it met the case made by plaintiff's declaration, defendant was entitled to judgment. Plaintiff insists that the plea presented no defense to his case, and that it was error to permit it to be filed.

An examination of the plea convinces us that it presents a good defense to that which is averred in the declaration. It avers matters showing a failure of the consideration for which the note was given. The declaration avers certain matters of agreement between the parties in relation to the transaction in which the note was executed; the plea sets forth indeed a different agreement and shows that according to the terms of the same the consideration for the note failed. If the averments of this plea were not true, plaintiff should have joined issue on it. If they were true, as we must take them to be on this record, the case presented by plaintiff is denied.

[2] Plaintiff submits that the consideration for the note was stock in a corporation sold by his decedent to defendant; and that, therefore, the plea which avers failure of consideration by a loss of title to land is no defense. But the plea, as well as the declaration, shows that each share of stock sold defendant represented the ownership of one acre of land. The plea avers that by the agreement under which the stock was sold defendant was to receive good title to as many acres of land as he purchased shares of stock. It avers that the land represented by the stock was so imperfect in title that

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes
† 56 S. E. 139.

the consideration, to the value of the note sued on, failed. The plea in fact avers that land was the real consideration for the note, and that defendant did not get by his purchase of stock the number of acres that he was to have thereby. It sufficiently shows that the real consideration for the note failed. The plea is good under Code 1906, c. 126, sec. 5.

[1] The contract referred to in the declaration as annexed thereto, and sought to be made a part of the declaration in that way, can not be looked to in determining the propriety of the plea. A contract can not be made a part of a declaration by mere reference or exhibition. *Riley v. Yost*, 58 W. Va. 213, 52 S. E. 40, 1 L. R. A. (N. S.) 777. Plaintiff argues a particular interpretation of this contract to show that defendant's plea does not meet the case. But he must be confined to the averments of the declaration in testing the applicability of the plea. We have said that the plea answers the declaration. Whether, if issue had been joined on the plea, and the contract had been introduced as evidence on a trial of that issue, the contract would have defeated the plea, we are not called upon to answer. Certain it is, the applicability of the plea to the case can not be tested by the contract, as plaintiff seems to assume. The applicability of the plea must be tested by the averments of the declaration.

An affirmance of the judgment will be ordered.

(70 W. Va. 735)

McCRA Y et al. v. GEORGE CRAIG & SONS.

(Supreme Court of Appeals of West Virginia.

Feb. 27, 1912. Rehearing Denied

June 15, 1912.)

(Syllabus by the Court.)

1. APPEAL AND ERROR (§ 522*)—RECORD—SCOPE AND CONTENTS — BILL OF EXCEPTIONS.

A bill of exceptions, intended to make the evidence in a case a part of it, but adopting no means by which any paper can be identified with reasonable certainty as a transcript of the evidence, or as containing it, does not make it a part of the record.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 2367-2371; Dec. Dig. § 522.*]

2. ASSUMPSIT, ACTION OF (§ 19*)—PLEADING—DECLARATIONS.

In a special count in assumpsit on a contract to do a number of things, several breaches thereof may be assigned.

[Ed. Note.—For other cases, see *Assumpsit, Action of*, Dec. Dig. § 19.*]

3. PLEADING (§ 34*)—ALLEGATIONS IN GENERAL—CONSTRUCTION—GENERAL RULES.

Ordinarily the general rules of interpretation applicable to contracts and other instruments may be resorted to for ascertainment of the meaning and legal effect of pleadings.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. §§ 66-75; Dec. Dig. § 34.*]

Error to Circuit Court, Pocahontas County.

Action by W. A. McCray and another, partners, against George Craig & Sons, a corporation. Judgment for plaintiffs, and defendant brings error. Affirmed.

John W. Davis, W. A. Bratton, John A. Preston, and Mollohan, McClintic & Mathews, for plaintiff in error. F. R. Hill and Price, Osenton & Horan, for defendants in error.

POFFENBARGER, J. [1] A defect in the bill of exceptions taken in this case precludes consideration of any of the assignments of error based upon the action of the court in admitting and excluding evidence, giving or refusing instructions, and overruling the motion to set aside the verdict. It contains no descriptive matter; affording means of identifying any paper as one embracing the evidence. An order makes a paper styled "General Bill of Exceptions" part of the record, but it says only this as to the evidence: "And the defendant hereby tenders this his general bill of exceptions, which contains all of the evidence and rulings of the court in this cause, not shown in the orders." Nothing purporting to be evidence is actually contained in it, nor is there in it a word purporting to incorporate therein anything as evidence by adoption of any other paper or reference thereto. The order, making the bill a part of the record, says the defendant had had the evidence duly transcribed by the court stenographer and "embodied in the General Bill of Exceptions," and that the bill of exceptions had been completed and the evidence transcribed and presented to the judge; but the order, like the bill, actually contains nothing purporting to be evidence, nor by any means of identification adopts any other paper containing evidence. Blanche Bays, designating herself as official reporter, certifies apparently full and complete evidence in the case, but no order shows her appointment as stenographer for the purposes of the trial. Her certificate is not enough to bring the evidence into the record. That can be done only by an order of the court or certificate of the judge in some form. The statutory method of making the record is exclusive. Though others may be just as good in point of fact, the court cannot adopt them, because the law requires the act of addition or annexation to be done in a particular manner, impliedly excluding all others. Even the liberal rule, applied in *Marshall v. Stalnaker*, 74 S. E. 48, just decided, following *Jackson v. Railroad Co.*, 65 W. Va. 415, 64 S. E. 450, and *De Board v. Camden, etc., Co.*, 62 W. Va. 41, 57 S. E. 279, falls short of the exigency presented here. *Dudley v. Barrett*, 58 W. Va. 235, 52 S. E. 100, rules the question, and determines it against the plaintiff in error.

[2] The assignment of error, challenging

the sufficiency of the declaration, the only one having any basis in the record, is untenable. The common counts in the usual form are obviously good, and the special count on the contract for logging timber and peeling bark is direct, positive, and specific as to one item, compensation for the work done. Other items were for extra work caused by failure of the defendant to remove the delivered logs from the yards along the railroad, as contemplated by the contract, and to extend its railroad to a certain point, and for the hire of a horse used in the work. Nothing in the contract suggests any basis of liability for horse hire, but the other claims might arise upon breaches of implied undertakings of the contract. These are not in terms predicated on the contract, but that instrument is fully set out in the count, and the general averments of duty must necessarily be read in connection with it, and to this there is added an allegation of a promise to pay all of said sums.

[3] Only certainty to a common intent is required, and generally the ordinary rules of interpretation apply to pleadings. *Ceranto v. Trimboli*, 63 W. Va. 340, 60 S. E. 138; *Cameron v. Hicks*, 65 W. Va. 484, 64 S. E. 832. The blending of the three items, thus shown with reasonable certainty to have arisen out of breaches of the contract, is allowable under the rules of pleading. In actions to recover damages for nonperformance of a special contract, a breach of each stipulation or implied agreement may be alleged in one count. 1 Chitty, Pl. (11th Am. Ed.) mar. pp. 333, 334; *Bressy v. Humphreys*, Cro. Jac. 557; *Smith v. B. C. M. Railroad*, 36 N. H. 458. See form in 2 Chitty, Pl. (11th Am. Ed.) mar. p. 332.

Finding no error in the judgment, we affirm it.

BRANNON, P., absent.

(113 Va. 324)

LOVELL et al. v. JAMISON et al.

(Supreme Court of Appeals of Virginia. June 13, 1912.)

TAXATION (§ 810*)—TAX SALE—IDENTITY OF LAND.

Evidence held to warrant a finding that land covered by a tax deed had been sold for taxes and purchased by the state before it had been conveyed by the county clerk to defendant under an application and proceedings to purchase the same as tax lands.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. §§ 1665-1608; Dec. Dig. § 810.*]

Appeal from Circuit Court, Franklin County.

Suit by Lucy Lovell and others against P. M. Jamison and others to remove a cloud on title. From a decree dismissing the bill, plaintiffs appeal. Affirmed.

Dillard & Lee, for appellants. E. W. Saunders and L. W. Anderson, for appellees.

KEITH, P. The appellants, Lucy Lovell and others, are the children and heirs at law of John Fountain Lovell, referred to in the record as "Fount" Lovell, who was the owner of a tract of land delinquent for taxes in the year 1881, and purchased by the commonwealth at a tax sale in 1886. On the 15th of June, 1898, P. M. Jamison filed an application with the clerk of the county for the purchase of this tract, and a copy of the application was served upon divers persons, and among them upon "Fount" Lovell. Lovell died pending the proceedings, in December, 1898, and all the preliminaries having been complied with, on the 19th of December, 1899, the clerk of the county court of Franklin county conveyed the property in dispute to P. M. Jamison. The recitals of the deed, if true, show a compliance with the law in such cases made and provided, and constitute prima facie evidence of the truth of what is therein stated. See *Wright v. Carson*, 110 Va. 498, 66 S. E. 37.

In 1907 the heirs of "Fount" Lovell filed their bill attacking this deed. Defendants answered, and the case was heard upon the bill, answer, exhibits, and depositions, and thereupon the circuit court entered the decree dismissing the bill for want of equity, and the case is before us upon appeal.

We find nothing in the record to overcome the prima facie case made on behalf of appellees by the deed executed by the clerk of the county court of Franklin county, already referred to.

The principal, if not the sole, reliance of appellants, is upon the proposition that the land covered by the deed was never sold for taxes and never purchased by the state, and, therefore, could not properly pass under the deed from the clerk of 1899. The evidence upon the subject of the identity of the land is somewhat obscure, but is sufficient, we think, to maintain the decree. A witness, J. W. Turner, for instance, a brother of "Fount" Lovell's wife, and an uncle, therefore, of the appellants, says: "I saw the advertisement [of the sale of the land] and let Mr. Lovell know about it. Q. What did Mr. Lovell say to you about it? A. He said to let them sell it; that he had three years to redeem it in."

It seems sufficiently to appear from the proof that the land in controversy was delinquent for taxes in 1881, and that Lovell knew it was delinquent; that it was advertised in 1886 for sale for delinquent taxes; that it was sufficiently described by the treasurer's notice, and that Lovell knew it was his land that was being advertised; that it was sold for taxes under said advertisement; that Lovell knew of its sale; and that he was also advised of the application to purchase by P. M. Jamison, but took no steps to redeem it. The land seems to have been of little value, as there is evidence in

the record tending to show that he sold it to Geo. E. Hundley for a wagon, received the wagon, but never made a deed for the land, and that he offered to sell it to Bowles for a yoke of oxen, worth \$40 or \$50.

It was suggested in argument on behalf of appellees that the decree of the circuit court which dismissed the bill for want of equity could be sustained upon the ground that a court of equity did not have jurisdiction to hear and determine the controversy.

The bill was filed to remove a cloud upon title. It is admitted that at the institution of the suit the land was in possession of appellees; so it is contended that the proper remedy would have been an action of ejectment, and that, while there was no demurrer to the bill, the want of jurisdiction may be relied upon in the first instance in this court; and the authorities seem to maintain that position. See *Boston Blower Co. v. Carman Lumber Co.*, 94 Va. 94, 26 S. E. 390; *Collins v. Sutton*, 94 Va. 127, 26 S. E. 415.

On behalf of appellants on this point, the attention of the court is called to the fact that after the institution of the suit, but before the decree was entered, the Legislature passed an act giving courts of equity jurisdiction to entertain suits to remove clouds upon title by reason of a sale and conveyance for nonpayment of taxes, although the complainant had been only the equitable owner of the land in question, and might have been out of possession when the suit was instituted.

In the view we take of the case it is unnecessary to pass upon the effect of the statute, for in any event we are of opinion that the decree of the circuit court must be affirmed.

Affirmed.

(113 Va. 692)

VIRGINIA BEACH DEVELOPMENT CO. v. MURRAY.

(Supreme Court of Appeals of Virginia. June 13, 1912.)

1. COURTS (§ 66*)—TERMS—ADJOURNMENT—VALIDITY.

Under Code 1904, § 3059, as amended by Acts 1910, c. 107, authorizing the continuance of any term of the circuit court by adjournment, but providing that no term shall be continued beyond the day fixed for the beginning of the next regular term, an order of the circuit court adjourning a term until after the beginning of the next term is a nullity, though made under the erroneous belief that a prior order omitting such next term was in force, while it was superseded by act of 1910, fixing the terms of court.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 231-242; Dec. Dig. § 66.*]

2. EXCEPTIONS, BILL OF (§ 41*)—TIME OF SIGNING—STATUTES.

Where the circuit court at the July term rendered final judgment on September 8th, and entered on the same day an order adjourning the term to the date fixed by statute for the next term, the July term must be deemed to

have ended on September 8th, and a bill of exceptions not signed until October 17th was not signed within 30 days, as required by Code 1904, § 3285, as amended by Acts 1908, c. 225, and it is no part of the record on appeal.

[Ed. Note.—For other cases, see Exceptions, Bill of, Cent. Dig. §§ 65-71; Dec. Dig. § 41.*]

Error to Circuit Court, Princess Anne County.

Action between the Virginia Beach Development Company and A. E. Murray. There was a judgment for the latter, and the former brings error. **Affirmed.**

Theo. A. Williams and Geo. A. Frick, for plaintiff in error. J. Edward Cole and L. D. Yarrell, for defendant in error.

BUCHANAN, J. All the errors assigned are based upon bills of exceptions which it is insisted by the defendant in error are no part of the record, since they were not signed by the judge during the term at which final judgment was rendered, or within 30 days after the end of that term. Code, § 3285, as amended Acts of Assembly 1908, c. 225, pp. 336, 337.

The case was tried and a verdict rendered at the December term, 1909, of the circuit court of Princess Anne county. During the same term a motion was made to set aside the verdict, but that motion was not disposed of until the July term of the court (September 8), 1910, when it was overruled and a final judgment entered pursuant to the verdict. On the same day an order was entered adjourning the court until Wednesday, the 20th of that month; the last-named date being after the third Monday in the month—the day fixed by statute for holding the September term of the court for that county. Acts of Assembly 1910, pp. 152, 160. On the 17th of October following the bills of exceptions were signed and ordered to be made a part of the record.

By an order entered in the law order book of the court in March, 1904, in accordance with section 3059, Va. Code 1904, the September term of that court had been omitted, and no doubt the order entered on September 8, 1910, adjourning the court until the 20th of the month, was made under the belief that said order omitting the September term was still in force. But by an act of assembly approved March 9, 1910 (Acts 1910, c. 107, pp. 152, 154), section 3059, Va. Code 1904, had been amended, and it was declared that "until otherwise provided by law the time for holding the said terms in said counties and cities shall be as follows"; and section 3059bb fixes the third Monday in January, March, May, July, September, and November as the time for holding the terms of court in that county. The section as amended also confers power on the circuit courts, under certain circumstances, to omit one of the terms designated by the statute.

In October, 1910, the circuit court did enter an order omitting the September term; but as it was not made until after the order of September 8, 1910, and the order of March, 1904, being rendered of no effect by the amendment made to section 3059 of the Code by the act of March 9, 1910, the question under consideration must be determined without reference to either of those orders omitting the September term of the court.

[1] While section 3059, as amended, provides that the judge of the circuit court might continue the term of a court by adjournment until after the beginning of the term of the court for any other county of his circuit, it expressly declares that "no term of the court shall be so continued beyond the day fixed by law for the beginning of the next regular term of the court for the county or city of the circuit whose term is so extended." The order of September 8th, adjourning the court until after the beginning of the next term of the same court, was not only unauthorized, but in plain violation of the statute.

The record shows that the court was not in session until the 20th of that month, the day to which it had been attempted to adjourn the court. On that day the following entry was made in the order book: "At a circuit court continued and held for Princess Anne county on Wednesday, the 20th day of September, 1910. Present: Hon. B. D. White, Judge. Ordered that court be adjourned to court in course."

The attempted adjournment of the court on September 8th to a day in the next term being a nullity, we have a case where the judge leaves the bench without any order for final adjournment, without again holding court for that term, or intending to do so, until a day after the beginning of the next term, when, even if the statute had not forbidden it, he could not have held it, since two terms of one and the same court cannot be in session at one and the same time and place.

[2] Under these circumstances the 8th day of September ought to be treated as the end of the July term of the court, for it was the last day on which the court was in session during that term, or the judge intended that it should be in session during the period in which under the law it could sit; for after that day no legal business could have been transacted for want of a judge.

In *Wight v. Wallbaum*, 39 Ill. 554, where a court was regularly in session on the 23d of the month, and on that day was regularly adjourned until the next day, and after that time regular convening and adjourning orders were entered from day to day for a week, no judge being present after the 23d of the month, it was held that that day was the end of the term.

In *State v. Todd*, 72 Mo. 288, it was held that an adjournment to the day fixed for

the beginning of the next regular term puts an end to the current term.

In *Johnson v. Pittsburg, etc., R. Co.*, 47 Ohio St. 318, 24 N. E. 493, where the journal of the court of common pleas showed a regular adjournment from day to day up to a day certain of the term, but no other adjournment afterwards during the term, except an entry of an adjournment sine die on the last-named day, which entry was at the next term by a nunc pro tunc order stricken from the journal as having been made through the mistake of the clerk, and it was further shown that no judge was present and no business was transacted in the court after such certain day to which the court had adjourned until the commencement of the next succeeding term, it was held that the term should be deemed to have closed on such day certain, and that a bill of exceptions might be signed and filed within 30 days from that time.

The July term of the court having ended on the 8th day of September, and the bills of exceptions not having been signed until October 17th, more than 30 days after the end of the term, they are no part of the record.

There being no errors assigned, except those based upon the rejected bills of exceptions, it follows that the judgment of the circuit court must be affirmed.

CARDWELL, J., absent.

(113 Va. 728)

W. W. V. CO., Inc., v. BLACK.

(Supreme Court of Appeals of Virginia. June 18, 1912.)

1. PLEADING (§ 193*)—MISJOINDER OF ACTIONS—MANNER OF RAISING QUESTION.

The proper method of raising a question of misjoinder of actions is by a demurrer to the whole declaration containing separate counts.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 425, 428-435, 437-443; Dec. Dig. § 193.*]

2. THEATERS AND SHOWS (§ 4*)—TICKET OF ADMISSION—BREACH OF CONTRACT—REMEDY.

An action of tort will not lie against the proprietor of a theater for not performing his contract, evidenced by a ticket of admission, or continuing his license of admission; but a patron having a ticket, who is prevented from entering the theater, or who is removed therefrom, can only sue on the contract for the money paid for the ticket and the damages sustained by a breach of the contract.

[Ed. Note.—For other cases, see Theaters and Shows, Cent. Dig. § 4; Dec. Dig. § 4.*]

3. PLEADING (§ 204*)—DECLARATION—CAUSES OF ACTION—DEMURRER.

Where the declaration contains two counts stating good causes of action in tort and another count intended to be in tort, it is immaterial whether the latter count states a good cause of action as against a demurrer to the whole declaration.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 486-490; Dec. Dig. § 204.*]

Error to Circuit Court of City of Richmond.

Action by George H. Black against the W. W. V. Company, Incorporated. There was a judgment overruling a demurrer to the declaration, and defendant brings error. Affirmed.

The second count of the declaration states a cause of action for false imprisonment.

The third count states a cause of action for assault and battery.

Allen G. Collins, for plaintiff in error.
John A. Lamb, for defendant in error.

BUCHANAN, J. This case is here upon a writ of error to the action of the circuit court in overruling the demurrer to the declaration.

There are three counts in the declaration. The demurrer is to the whole declaration, and is based upon the ground that the first count is to recover damages for breach of a contract, and the others to recover damages for a tort, and that there was, therefore, a misjoinder of causes of action.

[1] It is not true, as argued by the counsel for the defendant in error, plaintiff in the trial court, that a misjoinder of actions cannot be taken advantage of by demurrer unless it be to each count as well as to the whole declaration. The proper method of raising the question of misjoinder of actions is by a demurrer to the whole declaration. *Creel v. Brown*, 40 Va. 265; *Ferrill v. Brewis' Adm'r*, 66 Va. 765, 767; *Gary v. Abingdon Publishing Co.*, 94 Va. 775, 27 S. E. 595, and authorities cited; 1 Chit. Pl. (7th Ed.) 228, 696.

The second and third counts are admittedly counts in tort. The first count is in the following words:

"George H. Black, plaintiff, complains of the W. W. V. Company, Incorporated, a corporation chartered by and doing business under the laws of the state of Virginia, defendant, which has been duly summoned, etc., of a plea of trespass on the case for this, to wit: That heretofore, to wit, on the 16th day of December, 1910, the said defendant was the owner, user, operator, manager, or lessee of a certain theater or place of amusement in the city of Richmond, Virginia, known as the 'Colonial Theater,' at which said theater or place of amusement said defendant gave certain entertainments to the public, and for which said defendant charged a certain fee or reward to it in that behalf. And said plaintiff says that on December 16, 1910, aforesaid, the said defendant gave at its said theater or place of amusement in the city of Richmond a certain entertainment, to which the plaintiff purchased a ticket from the defendant and paid therefor the price demanded by said defendant, and which price so paid was accepted by said defendant, and the ticket so purchased as aforesaid entitled the plaintiff to

attend and witness said entertainment. And the said plaintiff says that for the purpose of seeing said entertainment he tendered to said defendant the ticket so purchased by him as aforesaid, and was admitted by said defendant to its said theater or place of amusement aforesaid. Yet the said plaintiff says that after he entered said theater or place of amusement aforesaid, as he had a right to do, the said defendant without any cause or justification did illegally, unlawfully, wantonly, maliciously, and with force and violence eject said plaintiff from said theater or place of amusement against the will of said plaintiff, and in utter disregard of the rights of said plaintiff. And said plaintiff says that by reason of the unlawful, illegal, wanton, and malicious conduct of said defendant he has been greatly injured and damaged in his good name, fame, and reputation, and has been humiliated and embarrassed, worried and annoyed, and has been held up to public ridicule, scorn, and disgrace, and has been otherwise seriously injured and damaged, to the damage of the said plaintiff \$10,000.

The plaintiff insists that upon the facts averred in the first count he had the right either to sue in assumpsit for the breach of the contract or in tort for a breach of the duty which the defendant owed to him, and that this right of electing which of these two remedies he would pursue must be considered in determining whether the count is in tort or in assumpsit.

[2] There is a large class of cases in which the foundation of the action springs out of the privity of contract between the parties, but in which, nevertheless, the remedy for the breach or nonperformance of it is indifferently in assumpsit or in case upon tort, as in the case of bailments, attorneys, surgeons, carriers, and the like. See *Ferrill v. Brewis' Adm'r*, supra; *Spence v. N. & W. Ry. Co.*, 92 Va. 102, 113, 22 S. E. 815, 29 L. R. A. 578; 1 Chit. Pl. (7th Ed.) 151, 152, and authorities cited. But it seems to be well settled, in the absence of legislation to the contrary, that an action of tort will not lie against the proprietor of a theater for not keeping or performing his contract or continuing his license of admission to his place of amusement.

It is said in 21 Ency. Pl. & Pr. 647 (and the text seems to be sustained by the great weight of authority), that "a theater ticket being a mere license to the purchaser, which may be revoked at the pleasure of the theatrical manager, upon such revocation, if the person attempts to enter, or if, having previously entered, he refuses to leave upon request, he becomes a trespasser, and may be prevented from entering, or may be removed by force, and can maintain no action of tort therefor. His only remedy is by action on the contract to recover the money paid for the ticket and damages sustained by the

breach of the contract implied by the sale and delivery of such ticket." See *Wood v. Leadbetter*, 13 M. & W. 838; *Burton v. Scherpf*, 1 Allen (Mass.) 133, 79 Am. Dec. 717; *McCrea v. Marslf*, 123 Gray (Mass.) 211, 71 Am. Dec. 745; *People v. Flynn*, 189 N. Y. 180, 82 N. E. 169, 12 Ann. Cas. 420; *Purcell v. Daly*, 19 Abb. N. O. (N. Y.) 301; *Horney v. Nixon*, 213 Pa. 20, 61 Atl. 1088, 1 L. R. A. (N. S.) 1184, 110 Am. St. Rep. 520, 5 Ann. Cas. 349; *Taylor v. Cohn*, 47 Or. 538, 84 Pac. 388, 8 Ann. Cas. 527; *Buenzle v. Newport Amusement Ass'n*, 29 R. I. 23, 68 Atl. 721, 14 L. R. A. (N. S.) 1242; *Cooley on Torts* (2d Ed.) 308; 38 Cyc. 264, 265.

The plaintiff having no right to bring an action of tort for the breach of the contract between him and the defendant, the question of choice of remedies cannot be considered in determining whether the first count is in assumpsit or in tort.

[3] But it is manifest, we think, from the whole declaration, that all the counts were intended to be in case. The contract or license is set out in the second and third counts, as well as in the first. This was done as matter of inducement, and to explain the circumstances under which the wrongs and injuries complained of in each count were done. It is immaterial whether or not the first count states a good cause of action. The second and third counts each do state a good cause of action, not for a breach of the contract or license, but for the wrongs and injuries alleged to have been done the plaintiff by assaulting and imprisoning him. The demurrer being to the whole declaration, and not to each count thereof, and there being no misjoinder of actions, the demurrer was properly overruled.

The judgment complained of must therefore be affirmed. Affirmed.

KEITH, P., absent.

(113 Va. 508)

BROWN et al. v. SURRY LUMBER CO.

(Supreme Court of Appeals of Virginia. June 13, 1912.)

1. LOGS AND LOGGING (§ 3*)—SALES OF STANDING TIMBER—FAILURE TO REMOVE.

Where it was claimed that it was intended by the parties to a contract for the sale of standing timber that the purchaser should commence cutting within a reasonable time, and that he had forfeited his rights by delay, a remark by the seller in a casual conversation with the purchaser that he thought it was time the purchaser was cutting the timber, if he intended to cut it, was not a sufficient demand that the purchaser proceed to justify the court in declaring a forfeiture, especially where for seven years thereafter the seller made no further mention of the matter.

[Ed. Note.—For other cases, see *Logs and Logging*, Cent. Dig. §§ 6-12; Dec. Dig. § 3.*]

2. LOGS AND LOGGING (§ 3*)—SALES OF STANDING TIMBER—TIME FOR REMOVAL.

A deed conveying all the standing timber on a tract of land of a specified size at the time of cutting, together with a right of way

across the land for the purpose of removing the timber, and providing that the purchaser should have five years in which to cut and remove the timber from the time they commenced manufacturing it into wood or lumber, but that they should not be limited as to the time within which they should commence the cutting or removal, did not give the purchaser a perpetual right to enter on the land and cut the timber, but merely a right to do so within a reasonable time.

[Ed. Note.—For other cases, see *Logs and Logging*, Cent. Dig. §§ 6-12; Dec. Dig. § 3.*]

3. CONTRACTS (§ 324*)—VALIDITY.

Contracts which contravene no rule of law must be enforced by the courts.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 1549-1557; Dec. Dig. § 324.*]

4. LOGS AND LOGGING (§ 3*)—SALES OF STANDING TIMBER—TIME FOR REMOVAL.

Where a deed conveying standing timber provided that the purchaser should have 5 years to cut and remove the timber after commencing cutting, but should not be limited as to the time within which to commence, and the purchaser without protest from the seller delayed commencing for nearly 14 years, the seller is not prejudiced by a decree construing the deed as providing for a reasonable time only within which to commence cutting, and holding that one year after the termination of the action would be such reasonable time.

[Ed. Note.—For other cases, see *Logs and Logging*, Cent. Dig. §§ 6-12; Dec. Dig. § 3.*]

Appeal from Circuit Court, Sussex County.

Action by R. A. Brown and another against the Surry Lumber Company. From the decree, plaintiffs appeal. Affirmed.

Geo. Mason and Chas. E. Plummer, for appellants. Wm. B. McIlwaine, W. B. Cocke, and Davis & Davis, for appellee.

KEITH, P. R. A. Brown and his sister, Mrs. Parker, filed their bill in the circuit court of Sussex county, from which it appears that they were seised in fee simple of two tracts of land in the county of Sussex, containing 264½ acres; that by deed dated the 21st of March, 1896, filed as an exhibit with the bill, they sold to the Surry Lumber Company, a corporation under the laws of the state of Virginia, all the timber on the said tracts measuring over 12 inches in diameter at the stump at the time of cutting the same, together with a right of way across the land for the purpose of removing the timber cut from the same and that cut from any other tract of land by said company, and for the purpose of operating a railway, in consideration of \$250 paid in cash, and \$300 to be paid on April 1, 1897. In said deed it was "covenanted and agreed by and between the parties hereto that the said Surry Lumber Company shall have five years in which to cut and remove said timber from the time they commence to manufacture said timber into wood or lumber, but that they shall not be limited as to the time in which they shall commence to cut or remove the same. And it is also further covenanted and agreed by and between the parties hereto that the said Surry Lumber Company shall not commence to cut or remove any of the timber conveyed by this instru-

ment of writing until the purchase price in full for the same shall have been paid."

The deferred payments seem to have been promptly met. The bill charges that at the time the deed was entered into it was contemplated by the parties, and so stated on the part of the Surry Lumber Company, that the timber should be cut without unnecessary delay, and that five years would be ample time for cutting and manufacturing all of it, and the plaintiffs in the court below contend that the proper construction of the deed is, and the intent of all the parties thereto was, that the said company was bound to commence the cutting of timber within a reasonable time after the last payment of the purchase money became due and was paid, and to complete the cutting and removal thereof within five years after so commencing, and that it had, and would have, no right or title to any of the timber not so cut and removed within that period, and that Brown, one of the plaintiffs, several times so notified the company through its agent.

The answer denies that there was at the time of the execution of the deed any purpose or intent, expressed or implied, not contained within the deed itself, and further denies that it ever received notice from the plaintiffs of their construction of the contract as stated in the bill. The answer admits that the defendant did not begin to cut and remove the timber until the latter part of December, 1909.

[1] There is nothing in the proof which affords any aid in the proper construction of the deed in question, nor does the proof sustain the averment in the bill that the company was notified that it was bound to commence to cut the timber conveyed to it within a reasonable time after the last payment of the purchase money became due and was paid. The only evidence upon that subject is contained in the depositions of Edward Rogers and the plaintiff Robert A. Brown. Rogers was asked this question: "Do you remember that some six or seven years ago Mr. Robert A. Brown, one of the grantors, who was then deputy treasurer of Sussex county, called on you at Dendron, perhaps with regard to taxes, and took dinner with you, and after dinner, down about the company's office, mentioned this deed to you at this time, and he told you he thought the company had had time enough to take the timber off, and that he wanted it done? A. No, sir; I have no recollection of such a conversation, and am sure that Mr. Brown never made any demand on us in that way to cut and remove the timber. If he mentioned the subject, it made no impression on me, and I do not remember it."

Speaking on the subject, Brown, in answer to substantially the same question, said: "I think it was about seven years ago. I was deputy treasurer for Mr. Jarratt. I went down there at Dendron one day in

regard to taxes. Mr. Rogers was always very nice to me in that respect, and we were walking out there by the office, and I said to him: 'Mr. Rogers, I think that it is getting time you were cutting my timber, if you want it. I do not consider that you have any more than an option on it.' And I said: 'I think it is getting time you were buying it or cutting it.' Q. State whether or not you told him that you wanted him to cut that timber without further delay? A. I told him I thought, if they expected to cut it, it was getting time they were cutting it—that I thought it had been standing here long enough."

Mr. Brown answers frankly, and his statement of the transaction may be taken as true; but it falls short of being a demand that the Surry Lumber Company should begin to cut the timber embraced in the deed. The subsequent conduct of Brown shows that his statement to Mr. Rogers was never intended as a formal demand by which his rights and those of the Surry Lumber Company were to be determined. He waited for nearly seven years after this conversation before bringing suit, without making any further mention of the matter, and we cannot think that this casual conversation presents such a case of a demand that the Surry Lumber Company should proceed to enforce its rights as would justify a court in what would be in substance and effect the declaration of a forfeiture.

The circuit court heard all these matters, and was of opinion that the rights of the parties were to be ascertained by a construction of the deed, and decreed that the deed executed by the plaintiffs to the defendant company passed to and vested in the company "the present absolute title to all the timber upon the tracts of land in the bill described and mentioned at the date of the said deed, which was then 12 inches in diameter or larger at the stump, or which should grow to the said size within the time limited and fixed by the said deed for removing the same, which title is defeasible as to such of the said timber as shall not be removed from the said land within the time prescribed in the said deed, as herein construed; that the title to the said timber has never reverted to the plaintiffs; and that the Surry Lumber Company was at the time this suit was instituted, and is now, entitled to a reasonable time within which to cut and remove the same from the said land, which reasonable time the court, upon the evidence in this cause, adjudges to be one year from the time that the said plaintiffs shall notify the said defendant that they do not propose to take an appeal from this decree. * * *

[2] The general subject of the construction of deeds such as that in question was carefully examined and considered in *Young v. Camp Mfg. Co.* and *Wright v. Camp Mfg. Co.*, 110 Va. 678, 66 S. E. 843. By the deed in that case the Camp Company was granted

all the pine timber 12 inches in diameter across the stump at the time of cutting on a tract of land in the county of Brunswick, and the right to remove the same for a period of five years from the date of the deed, and the further right, if it should fail to remove the timber within five years, to have such further time in which to remove it as it might desire; provided, that it pay interest to the grantors at the rate of 6 per cent. per annum on the purchase price named in the deed. The court held, among other things, that a deed to standing timber, with the right to erect buildings and use and operate railroads on the land, and with the right, for a fixed period, to cut and remove the timber, and with the further right, on the grantee failing to remove the same within the fixed period, to such additional time as he may desire, on paying interest on the price annually, does not convey an absolute and unconditional title to the timber, but only conveys title to such as may be cut and removed within the fixed period, and such reasonable extensions thereafter as the grantee is entitled to, or as may be agreed on between the parties, and does not give the grantee a right to cut and remove the timber for an indefinite period, and that unless the deed clearly manifests an intention of the grantor to convey to the grantee a perpetual right to enter on the land and cut trees, the grantee of standing timber is allowed only a reasonable time to remove the timber, where the conveyance contains no provision as to the time of exercising the right of removal.

Looking to the deed in this case and all of its terms, we are of opinion that it does not clearly manifest an intention in the grantors to convey to the grantee a perpetual right to enter on the land and cut trees. The grant to the lumber company was for the purpose of enabling it to enter upon the land of Brown and cut and carry away his trees, and, while its language is very broad, we think that, construed in the light of the purpose and intent of the parties to the instrument, the right to cut and remove the timber must be exercised within a reasonable time.

The principal difference between the case under consideration and that of *Wright v. Camp Mfg. Co.*, supra, is that in the latter case the inquiry as to what was a reasonable time was directed to the determination of the period within which the removal of the timber was to be accomplished after the operation began, while here the question to be determined is what was a reasonable time within which it was the duty of the lumber company to begin its operations. The lumber company had no right to begin to cut until payment in full of the purchase price had been made; but this provision is immaterial, as the money was promptly paid. The only other provision of the deed touching the question is that the

Surry Lumber Company "shall have five years in which to cut and remove said timber from the time they commence to manufacture said timber into wood or lumber, but that they shall not be limited as to the time in which they shall commence to cut or remove the same."

[3] Contracts made between parties, which contravene no rule of law, must be enforced by the courts; for if they be such as the parties have a right to make, they constitute for those who enter into them the law by which they are bound. The grantors in this deed have contracted to "grant, bargain and sell, with general warranty, unto the said Surry Lumber Company, their successors or assigns, all of the timber on that certain tract or parcel of land" (describing it), containing 264½ acres; it being mutually agreed and understood "that all trees under twelve inches in diameter at the stump at the time of the cutting of the said timber is reserved and not included in this conveyance." Language could not be broader than this, and the only limitation upon it is to be found in the fact that in order to avail itself of its rights it had to enter upon the land of Brown in order to remove the timber from it, and that right the parties saw fit to limit, as above stated, to five years from the time the process of removal commenced, but without limit as to the time within which the process of removal should begin.

In *Young v. Camp Mfg. Co.*, supra, the deed contained the statement that, if the Camp Company "shall fail to remove said timber within said time [the specified period of five years], it may have such further time to remove the same as it may desire"; and commenting upon that language this court said that if literally construed it "might be extended to one, or a hundred, or a thousand years—that is to say, it is wholly indefinite, and fixes no time within which the contract is to be executed—and it is therefore to be executed within a reasonable time."

As said in 25 Cyc. 1553: "Except where the deed clearly manifests an intention on the part of the grantor to convey to the grantee a perpetual right to enter upon the land and cut trees, the purchaser will be allowed only a reasonable time to remove the timber, where the conveyance contains no provision as to the time for exercising the right of removal. * * * The question of what is a reasonable time is one of fact, dependent on the circumstances of each case. There are no fixed rules for its ascertainment."

If the intention of the parties had been to give to the grantee a perpetual right to enter upon the land and cut the timber, the deed should have ended with the granting clause and no period should have been inserted—which can have no other sensible operation than as a limitation upon the right to cut and remove, which would otherwise have been absolute and unfettered.

[4] This deed was executed on the 21st of

March, 1896. The parties, with knowledge of all the facts, remained quiescent until December, 1909; the grantee exercising no rights under the deed, and grantors making no effective protest or complaint until January, 1910, when they filed their bill. Can the court, in the face of the provision of the deed, that the lumber company should have five years within which to cut and remove said timber from the time they should commence to manufacture it into wood or lumber, but that they should not be limited as to the time in which they should commence to cut or remove it, decree that the right to cut and remove has been lost by delay, in the very teeth of the contract between the parties, which they had a lawful right to make? We think the circuit court went as far as it properly could go when it held that, taking the whole deed together, and construing it in the light of the obvious purpose for which it was made, the appellee should be allowed one year "from the time that the said plaintiffs shall notify the said defendant that they do not propose to take an appeal from this decree, or, in case an appeal is allowed from this decree to the Supreme Court of Appeals, one year from the time the final decree shall be entered in the said cause by the Supreme Court of the state, fixing the rights of the parties under the deed herein referred to."

For the foregoing reasons, we are of opinion that there is no error in the decree of the circuit court to the prejudice of appellants; and it is therefore affirmed.

Affirmed.

(113 Va. 594)

HERRELL, County Treasurer, v. BOARD OF SUP'RS OF PRINCE WILLIAM COUNTY.

(Supreme Court of Appeals of Virginia. June 13, 1912.)

1. ATTORNEY AND CLIENT (§ 71*)—AUTHORITY TO SUE—WAIVER OF OBJECTION.

An objection that an attorney, suing for a county board of supervisors, was not authorized to sue, was waived by an allegation in defendant's answer that he waived any demurrer to the bill, answered the charge, and courted and demanded the fullest investigation of his official conduct, praying that the cause might be referred, with instructions to inquire into all his settlements.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 97-101; Dec. Dig. § 71.*]

2. ATTORNEY AND CLIENT (§ 103*)—AUTHORITY TO SUE—RATIFICATION.

Where, after an attorney had brought suit on behalf of a county board of supervisors to compel an accounting by the county treasurer, the board ratified the attorney's act and employed special counsel to assist in the prosecution thereof, the board's failure to expressly confer on the attorney original authority to sue was immaterial.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. § 154; Dec. Dig. § 103.*]

3. ACCOUNT (§ 20*) — PROCEEDINGS BEFORE COMMISSIONER—NOTICE.

Where a commissioner to whom a suit for an accounting was submitted began the reference on February 6, 1908, "by consent of parties," and defendant and his counsel were present throughout the taking of testimony and participated in all the proceedings, he could not thereafter object that the account was taken without notice to him.

[Ed. Note.—For other cases, see Account, Cent. Dig. §§ 109-131; Dec. Dig. § 20.*]

4. ACCOUNT (§ 20*) — PROCEEDINGS BEFORE COMMISSIONER.

Where a commissioner was appointed to take an account in a suit against a county treasurer for an accounting, the fact that the chancellor went over the calculations with the commissioner was not a proper ground for exception.

[Ed. Note.—For other cases, see Account Cent. Dig. §§ 109-131; Dec. Dig. § 20.*]

5. LIMITATION OF ACTIONS (§ 33*)—COUNTY TREASURER—ACCOUNTING.

A suit by a county board of supervisors against a county treasurer for an accounting, and to recover public moneys in his hands, is not subject to the three-year statutes of limitations.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 146-150; Dec. Dig. § 33.*]

6. LIMITATION OF ACTIONS (§ 182*)—TIME TO PLEAD.

Where, in a suit against a county treasurer for an accounting, his answer joined in the prayer of the bill and specifically prayed for an inquiry into all settlements made by him from the time he became treasurer until the present, and he adhered to such position until after the evidence was closed, it was then too late for him to plead limitations.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 676-682, 695, 705; Dec. Dig. § 182.*]

Appeal from Circuit Court, Prince William County.

Suit by the Board of Supervisors of Prince William County against James E. Herrell, County Treasurer, for an accounting. Decree for complainant, and defendant appeals. Affirmed.

Thos. H. Lion and C. E. Nicol, for appellant. Robt. A. Hutchison and H. T. Davies, for appellee.

WHITTLE, J. This suit (in which the county school board intervened by petition) was instituted by the appellee, the board of supervisors of Prince William county, against the appellant, James E. Herrell, county treasurer, praying for an adjustment of the county levies and moneys received by him, and not accounted for, from the year 1899 to and including the year 1906.

Upon such accounting the court decreed that the board of supervisors recover against the defendant \$1,709.79, with interest on \$1,345.48 from May 1, 1910, until paid, and the county school board \$829.64, with interest and costs. From that decree this appeal was allowed.

[1, 2] In the first assignment of error it is insisted that the suit was instituted against

the appellant by the commonwealth's attorney, without authority of the board of supervisors. This assignment is not sustained; but if there were any irregularity in that respect, it was waived by the defendant, who in his answer avers "that he waives any demurrer thereto [the bill], and hastens to answer every charge therein contained, and now courts and demands the fullest investigation of his official conduct. * * * Respondent unites in the petition and prayer of complainant that this cause be referred to a master commissioner of this court, with instructions to inquire into all the settlements of your respondent. * * *". Moreover, the action of the commonwealth's attorney in bringing the suit was expressly ratified by the board of supervisors, and the board employed special counsel to assist in its prosecution. *Sutherland v. People's Bank*, 111 Va. 515, 523, 69 S. E. 341.

[3] The second assignment of error is that the account of the commissioner, upon which the decree appealed from is founded, was taken without notice to appellant.

This assignment is not borne out by the record. Under the decree of reference of February 6, 1908, the commissioner, *by consent of parties*, began the account on March 11, 1908, and the appellant and his counsel were present throughout the taking thereof, and participated in all the proceedings. The report was returned May 10, 1910, and found against the defendant the amounts covered by the decree of December 21, 1910. To this report the defendant excepted, and on July 13, 1910, the court, without passing on the exceptions, *on the motion of the defendant*, recommitted the account, with instructions to the commissioner to consider his former report in connection with the exceptions, and to amend the same or make a new report, based on his former report and the depositions theretofore taken and papers and records filed, and in light of the exceptions and calculations and evidence, and to make such report as in his judgment might be proper.

On November 22, 1910, the commissioner returned his second report, in which he adheres to his findings on the original settlement. The second reference was merely out of abundant caution, to enable the commissioner to go over his work in light of the exceptions and papers filed therewith and test its accuracy. This he did in the most careful manner, and in the presence of and with the assistance of the honorable judge of the court, and verified the correctness of his former findings.

[4] The action of the judge in thus going over these calculations with the commissioner is made the ground of exception and criticism. So far from subjecting him to censure, as matter of correct procedure, the chancellor was well within his rights, and his painstaking and earnest effort to reach

the very right of the cause is highly commendable.

The defendant was fully apprised of these calculations, and given ample opportunity to be heard; but, when his attention was specially called to the matter by the commissioner, he stated that "he had nothing further to offer."

[5] The last assignment of error is because the commissioner failed to apply the statute of limitations to all demands against the defendant arising out of any account settled by him with the board of supervisors, and to all demands of every sort which arose against him three years prior to the institution of this suit.

[6] We know of no such limitation as is here contended for in a suit by the board of supervisors against a county treasurer to recover public moneys in his hands. *Jennings v. Taylor*, 102 Va. 191, 45 S. E. 913. Besides, in this case, the defendant has expressly waived such right in his answer by uniting in the prayer of the bill for an account, and specifically praying for an inquiry into all settlements made by him "from the time he became such treasurer until the present moment." He adhered to this position until after the evidence was closed, when, for the first time, he interposed the plea of the statute of limitations before the commissioner. No excuse was, or is, offered for his unreasonable delay in tendering the plea, and, even if it had set up a bar to the suit, it might well have been rejected as coming too late.

Other exceptions to the commissioner's report were not pressed, and, being without merit, they do not call for special notice.

Upon the whole case, we are of opinion that the decree of the circuit court is without error, and must be affirmed.

Affirmed.

KEITH, P., absent.

(113 Va. 769)

HOLLY v. COMMONWEALTH.

(Supreme Court of Appeals of Virginia. June 13, 1912.)

1. LARCENY (§ 30*) — INDICTMENT — SUFFICIENCY.

Under Code 1904, § 3994, which provides that in a prosecution for larceny of United States currency it shall be sufficient if accused be proved guilty of the larceny of national bank notes or any other form of money issued by the government, though the particular species be not proved, an indictment charging larceny of three notes of United States currency of the value of \$20 sufficiently charges grand larceny.

[Ed. Note.—For other cases, see *Larceny*, Cent. Dig. §§ 64-75, 99; Dec. Dig. § 30.*]

2. LARCENY (§ 40*) — VARIANCE — PROPERTY TAKEN.

There was no material variance between an indictment charging larceny of three notes of United States currency of the value of \$20

and proof of the taking of one \$10 bill, one \$5 bill, five \$1 bills, and 65 cents in fractional coin. [Ed. Note.—For other cases, see *Larceny*, Cent. Dig. §§ 102-126, 160; Dec. Dig. § 40.*]

Error to Circuit Court, Tazewell County.

Hampton Holly was convicted of grand larceny, and he brings error. Affirmed.

Minter & Minter, of Pocahontas, for plaintiff in error. Samuel W. Williams, Atty. Gen., for the Commonwealth.

WHITTLE, J. The accused, Hampton Holly, was found guilty of grand larceny and sentenced to confinement in the penitentiary for one year.

[1] There are only two assignments of error which need be noticed. The first is to the action of the court in overruling a motion to quash the indictment for alleged insufficiency in the description of the money which is the subject of the larceny.

The indictment charges larceny from the person of the owner of three notes of United States currency of the value of \$20. Va. Code 1904, § 3707.

In *Leftwich's Case*, 61 Va. 716, the court held an indictment for the larceny of United States currency bad, since that was a general term, and not a sufficient designation of the kind of money charged to have been stolen. In consequence of this decision the statute now incorporated in Code, § 3994, was passed.

The last paragraph of that section provides: "And in a prosecution for the larceny of United States currency * * * it shall be sufficient if the accused be proved guilty of the larceny of national bank notes or United States treasury notes, certificates for either gold or silver coin, fractional coin, currency, or any other form of money issued by the United States government, * * * although the particular species be not proved."

After this enactment, in *Dull's Case*, 66 Va. 965, it was held that "an indictment for the larceny of divers notes of the 'national currency of the United States' is equivalent to the phrase in the statute of 'United States currency,' and the indictment is sufficient."

The obvious purpose of the statute is to prevent the escape from punishment of guilty parties by imposing upon the prosecution the difficult, and in most instances impossible, task of describing with precision the particular species of stolen money. The present indictment is plainly within the terms of the statute, and is sufficient.

[2] The last assignment of error is to the refusal of the court to grant the accused a new trial because of supposed material variance between the allegations of the indictment and the facts proved.

As observed, the offense charged is larceny from the person of the owner of three notes of United States currency of the value of \$20. That allegation is the equivalent of the

charge of larceny of three notes, one for \$10 and two for \$5 each, since three notes of those denominations are necessary to amount in the aggregate to \$20.

The evidence showed that, while a confederate held the owner, the accused took from his pocket one \$10 bill, one \$5 bill, five \$1 bills, and 65 cents in fractional coin. And it is contended that this variance between the allegation and proof is fatal.

Discrepancies as to value of property stolen between the indictment and evidence are contemplated by the statute (Code, § 4043), which provides that in a prosecution for grand larceny the accused may be found guilty of petit larceny, or in a prosecution for petit larceny he may be found guilty of that offense, though a case of grand larceny be proved.

But upon common-law principles the contention cannot be maintained.

In 2 Bishop on Criminal Procedure, § 712, the rule is correctly stated as follows: "*More proved than alleged—Less—Part insufficiently described.*—If the proof shows that more articles were stolen at the same time than the indictment charges against the defendant, this will be no variance; for in all criminal cases the allegation may cover less ground than the actual transaction covered. So, on the other hand, if there is less proved than charged, there may be a verdict and judgment sustaining so much of the allegation as the proof covers. Likewise, if the indictment is for the larceny of several articles, and one of them is insufficiently described, and there is a general verdict, judgment may be rendered against the defendant as for the articles of which the description is adequate."

The object of the rule invoked is to protect the accused against a second prosecution for the same offense.

In 12 Cyc. 280 b (a treatise on Criminal Law by H. C. Underhill, assisted by William Lawrence Clark), it is said: "A test almost universally applied to determine the identity of the offenses is to ascertain the identity, in character and effect, of the evidence in both cases. If the evidence which is necessary to support the second indictment was admissible under the former, related to the same crime, and was sufficient, if believed by the jury, to have warranted a conviction of that crime, the offenses are identical, and a plea of former conviction or acquittal is a bar."

So, at page 289 (6), the rule is thus stated: "The theft of several articles at one and the same time constitutes an indivisible offense, and a conviction or acquittal of any one or more of them is a bar to a subsequent prosecution for the larceny of the others."

Tested by these well-settled principles, the accused could not have been jeopardized by the ruling of which he complains.

The judgment of the circuit court is plainly right, and is affirmed.

Affirmed.

(113 Va. 778)

JEFFRIES v. COMMONWEALTH.

(Supreme Court of Appeals of Virginia. June 13, 1912.)

1. INTOXICATING LIQUORS (§ 132*) — SALES ON SUNDAY—STATUTES—REPEAL.

Code 1904, § 3804, punishing the selling of liquor between 12 o'clock on Saturday night and sunrise of the succeeding Monday morning, is repealed by Act March 12, 1908 (Laws 1908, c. 189), punishing any person selling liquor on Sunday, and repealing inconsistent acts.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 141; Dec. Dig. § 132.*]

2. INTOXICATING LIQUORS (§ 208*)—ILLEGAL SALES ON "SUNDAY"—INDICTMENT—REQUISITES.

An indictment alleging that accused sold liquor between midnight of Saturday and sunrise of the succeeding Monday morning does not charge a sale on Sunday, in violation of Act March 12, 1908 (Laws 1908, c. 189), punishing the sale of liquor on Sunday, because a sale made after 12 o'clock Sunday night and before sunrise Monday morning is not a criminal offense, though included in the indictment; "Sunday" being from 12 o'clock Saturday night until 12 o'clock Sunday night.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. §§ 228, 261; Dec. Dig. § 208.*]

For other definitions, see Words and Phrases, vol. 7, pp. 6788, 6789.]

Error to Corporation Court of Roanoke.

One Jeffries was convicted of crime, and he brings error. Reversed, and prosecution dismissed.

Hairston & Willis, A. B. Hunt, and Hoge & Williams, for plaintiff in error. Samuel W. Williams, Atty. Gen., for the Commonwealth.

HARRISON, J. [1] The indictment in this case charges the plaintiff in error with unlawfully selling and dispensing ardent spirits between midnight of a Saturday in July, 1910, and sunrise of the succeeding Monday morning. There is no charge that the accused was selling ardent spirits without a license, but the prosecution is for a violation of the statute prohibiting the sale of ardent spirits on Sunday, and the indictment is, in form, under section 3804 of the Code, which has been repealed by section 19 of the act of March 12, 1908, known as the Byrd law (Code, vol. 3, p. 778), which simply provides that it shall be unlawful for any person to sell ardent spirits on Sunday, and does not, as provided by section 3804, make the violation of the statute to consist of selling spirits between 12 o'clock on Saturday night and sunrise of the succeeding Monday morning. Section 27 of the Byrd law provides a different punishment for its violation from that prescribed by section 3804 of the Code; and section 35 declares that all acts and parts of acts inconsistent therewith are thereby repealed. So that the only existing statute making it unlawful to sell ardent spirits on Sunday is the act of March 12, 1908,

known as the Byrd law, which provides that no person shall sell ardent spirits on Sunday.

[2] As Sunday is from 12 o'clock Saturday night until that hour Sunday night, the charge of the indictment that the sale was between midnight of Saturday and sunrise of the succeeding Monday morning may be true, and yet the accused be innocent of violating the statute, because, if the sale was made after 12 o'clock Sunday night and before sunrise Monday morning, it was made at a time not inhibited by the statute.

It is clear, therefore, that the demurrer to the indictment should have been sustained, because the sale could have been made as therein charged and still not have been a violation of the law.

The judgment complained of must be reversed, the verdict of the jury set aside, and this court will enter the order the lower court ought to have entered, sustaining the demurrer to the indictment and dismissing the prosecution.

Reversed.

(113 Va. 485)

AMERICAN LOCOMOTIVE CO. et al. v. CHALKLEY.†

(Supreme Court of Appeals of Virginia. June 13, 1912.)

1. MASTER AND SERVANT (§ 125*)—INJURIES TO EMPLOYÉS — DEFECTIVE MACHINERY — WANT OF CARE.

Where employers, upon being notified of a defect in a machine upon which an employé was working when injured, caused it to be put in thorough repair by a competent mechanic, and the machine was thereafter in operation up to within a few moments of the accident with no indication that it was out of repair, they were not chargeable with want of ordinary care in not discovering the defect alleged to have caused the accident.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 243-251; Dec. Dig. § 125.*]

2. MASTER AND SERVANT (§ 125*)—INJURIES TO EMPLOYÉS — DEFECTIVE MACHINERY — WANT OF CARE.

Where the defect in a machine upon which an employé was working at the time of his injury developed in a brief space of time between the stopping and starting of the machine, the employers were not chargeable with knowledge of the defect; nor could it be said that with ordinary care they could have discovered it in time to have prevented the injury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 243-251; Dec. Dig. § 125.*]

3. MASTER AND SERVANT (§ 125*)—INJURIES TO EMPLOYÉS—DEFECTIVE MACHINERY—LIABILITY OF MASTER.

To render a master liable for injuries to a servant from defects in machinery, it must be shown that the master knew of the defects, or in the exercise of due care ought to have known of them.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 243-251; Dec. Dig. § 125.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes
† Rehearing denied.

4. MASTER AND SERVANT (§ 270*)—INJURIES TO EMPLOYÉS—ADMISSIBILITY OF EVIDENCE.

In an employe's action for injuries from a machine about which he was working, evidence of an alleged custom not to inspect such machines while they continued to work satisfactorily, or within a month or six weeks, was properly excluded, since the tendency of such custom, if allowed to prevail, would contravene the rule of law which imposes upon the master the duty of reasonable care to inspect machinery.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 913-927, 932; Dec. Dig. § 270.*]

Error to Circuit Court of City of Richmond.

Action by one Chalkley against the American Locomotive Company and another. From a judgment for plaintiff, defendants bring error. Reversed, and remanded for new trial.

McGuire, Riely & Bryan, for plaintiffs in error. A. B. Dickinson and D. M. White, for defendant in error.

WHITTLE, J. In this action damages were awarded the defendant in error, Chalkley (plaintiff below) against the American Locomotive Company and Richmond Locomotive Works for the loss of one of his eyes while in the service of the defendants; the casualty being imputed to their negligence. At the time of the injury the plaintiff was employed as a member of the night force to operate a drill press, which is described as a rotating spindle in a sliding head, used for boring metal. The machine is controlled by belts and pulleys connecting it with a countershaft, which, in turn, is connected with the line shaft. All the machines of that character in the defendants' shops are equipped with "loose pulleys," by means of which any one of them may be stopped without affecting the others. This result is produced by means of a "shifter," an appliance which transfers the belt from a tight pulley to a loose pulley on the countershaft, and stops the machine. When the shifting is reversed, the machine is at once set in motion again. The line shaft is constantly in motion, and distributes power to all machines connected with it.

On the occasion of the accident Chalkley had started the drill press; but, discovering that the bit or drill in the "chuck" was bent and useless, he stopped the machine in the usual way for the purpose of replacing the defective drill with a new one. He had inserted the new drill in the "chuck" and was tightening it with a hammer when the machine suddenly started, causing the spindle to rapidly revolve and the drill to strike against the hammer with great force, by means of which a scale or piece of metal was broken off and penetrated the plaintiff's left eye, putting it out.

[1] The specific ground of negligence upon which the plaintiff bases his right of recovery is that the drill press was out of repair

and in a dangerous condition, of which condition the defendants had actual notice. This notice was sought to be brought home to the defendants by the testimony of an employe named Pierotti, who operated the drill press several weeks before the plaintiff entered the employment of the defendants. This witness testified that on several occasions the machine "started up on him," and he reported the fact to the night foreman. But it appeared that the last trouble that Pierotti had with the drill press occurred at least 2 weeks before Chalkley entered the service of the defendants, and 2½ weeks before he was hurt. In the meantime, and shortly before the accident, the machine had been overhauled by a competent millwright of more than 20 years' experience, who put it in thorough repair. From that time to within a few moments of the accident the machine had been in operation, and there was no indication of its being out of repair.

[2] In these circumstances, it is not possible to ascribe to the defendants want of ordinary care in not discovering the alleged defects, to the existence of which the accident is proximately attributed. Besides, there was other evidence adduced on behalf of the plaintiff which is fatal to his right to recover.

H. C. Chalkley, a brother of the plaintiff, testified that soon after the plaintiff was injured he examined the overhead shafting and belting to discover, if possible, and correct the defect which caused the accident; that in rendering this service he was acting under the orders of a man whom he took to be the foreman of the defendants. His inspection disclosed that the hanger under the loose pulley had dropped down at one end about three-fourths of an inch, the threads of the bolt were worn, and the tap had worked loose and dropped down, which threw the countershaft out of parallel with the main shaft. The inevitable result of this condition was to cause the belt (following the line of least resistance) to run up the countershaft on the tight pulley and start the machine. This the witness said would happen in half a minute, and the machine would "keep driving."

Assuming, as we must assume, the truth of this statement, it demonstrates that the defect which caused the accident developed in the brief space of time which elapsed after the plaintiff stopped the machine to insert a new drill in the "chuck" and the sudden starting of the machine which caused the accident. The plaintiff, therefore, wholly fails to show that the defendants either knew of the defect in question, or could, in the exercise of ordinary care, have discovered it in time to prevent the injury.

[3] The principle is well settled that, to render a master liable for injuries to a servant from defects in machinery or appliances,

it must be shown that the master knew of the defects, or in the exercise of due care ought to have known of them. *Va. & N. C. Wheel Co. v. Chalkley*, 98 Va. 62, 34 S. E. 976; *Cabin Branch Mining Co. v. Hutchinson's Adm'x*, 112 Va. 37, 70 S. E. 480.

[4] The remaining assignment of error is to the rejection by the trial court of evidence of an alleged custom, where a drill press has been set up and the countershaft made plumb, not to inspect the latter while it continues to work satisfactorily, or within a month or six weeks, to ascertain if the countershaft is plumb.

The tendency of such a custom, if allowed to prevail, would contravene the rule of law which imposes upon the master the duty of exercising reasonable care to inspect machinery and appliances. Hence there was no error in excluding this evidence.

Upon the main assignment of error, the judgment must be reversed, and the case remanded for a new trial.

Reversed.

CARDWELL, J., absent.

(113 Va. 607)

HUGHSON v. DAMERON et al.
(Supreme Court of Appeals of Virginia. June 13, 1912.)

1. JUDGMENT (§ 654*)—CONCLUSIVENESS.

A judgment creditor sued the debtor and his wife to set aside a transfer to the wife of the husband's interest in patents as voluntary and fraudulent, and other creditors joined in the suit, which was compromised and stricken from the docket. One of the petitioning creditors subsequently brought an action at law on a claim not involved in the former suit, and recovered judgment within less than four months before the debtor's adjudication as a bankrupt, and this judgment was scheduled as a subsisting debt. *Held*, on an appeal by the trustee in bankruptcy to set aside the same alleged fraudulent transfer, that the decree dismissing the first suit was not an adjudication of title in the wife as against the judgment in the action at law.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1165; Dec. Dig. § 654.*]

2. JUDGMENT (§ 736*)—JUDGMENT IN REM—CREDITORS' SUIT.

Nor was the former creditors' suit a proceeding in rem, in the sense that the decree therein settled the wife's title to the patents as to demands not asserted in that suit.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1264, 1265; Dec. Dig. § 736.*]

3. FRAUDULENT CONVEYANCES (§ 277*)—ACTION TO SET ASIDE—BURDEN OF PROOF.

In a creditors' suit to set aside a transfer of property by an insolvent husband to his wife, the burden of showing the bona fides of the transaction, and that it was made upon a valuable consideration, is on the wife.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 799, 809-814; Dec. Dig. § 277.*]

4. FRAUDULENT CONVEYANCES (§ 90*)—CONSIDERATION—INDEMNITY FOR LIABILITIES ASSUMED.

Where a wife advanced money to her husband out of her separate estate to pay his

debts and in connection with the expenses of patents which he obtained, assuming those liabilities under circumstances creating a quasi relation of principal and surety between the husband and herself, the husband's voluntary assignment of the patents to her was valid to the extent to which it was necessary to indemnify the wife for such expenditures.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 323, 325-328; Dec. Dig. § 90.*]

5. FRAUDULENT CONVEYANCES (§ 328*)—JUDGMENT—RELIEF—ACCOUNTING.

A bill against an insolvent husband and wife to set aside a transfer by the husband to his wife, alleged to be voluntary and fraudulent, should be remanded for an accounting, where it is found that the transfer is valid to the extent to which it was necessary to indemnify the wife for certain advancements to the husband out of her separate estate.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. § 1003; Dec. Dig. § 328.*]

Appeal from Circuit Court, Campbell County.

Bill by one Hughson, trustee in bankruptcy of J. C. Dameron, against Dameron and others, to set aside an alleged fraudulent conveyance. Bill dismissed, and plaintiff appeals. Reversed, and remanded for an accounting.

Polindexter & Hopwood, Wilson & Manson, and James D. Johnston, for appellant. I. P. Whitehead and Alfred B. Percy, for appellees.

WHITTLE, J. This is a suit in equity, brought by appellant, as trustee in bankruptcy of J. C. Dameron, to set aside a transfer from the bankrupt to his wife, N. W. Dameron, of the grantor's ⁸⁵/₁₀₀ interest in two letters patent, the one to a hay press and the other to a baling press. The assignment, which on its face purports to be for the nominal consideration of \$5, is dated January 1, 1910, and was recorded in the United States Patent Office 11 days thereafter.

The bill charges that the assignment was voluntary, and made for the purpose of hindering, delaying, and defrauding the husband's creditors. From a decree denying relief and dismissing the bill, this appeal was granted.

[1] Adopting the language of the brief of counsel for appellees: "The theory of the defense to this suit is twofold: First. That the decree dismissing the suit styled 'Roanoke Sheet Metal Co. v. Dameron' was an adjudication of the title to said patents in N. W. Dameron: (a) As to Adams, Payne & Gleaves, Incorporated, because the suit was for the same purpose and was between the same parties, and was a decision on the merits; (b) that the Roanoke Sheet Metal Company's suit was a proceeding in rem, and partakes of a public nature, and may be pleaded even against strangers. Second. That the conveyance of the letters patent to N. W. Dam-

eron was a settlement upon her of this property in consideration of the fact that she had mortgaged her estate to secure the payment of money which her husband owed."

The suit of the Roanoke Sheet Metal Company, a judgment creditor of J. C. Dameron, was brought against him and his wife and C. W. Wade to set aside the transfer from the husband to the wife of his interest in the patent rights on the ground that it was voluntary and fraudulent. Of these patent rights $\frac{15}{100}$ were admittedly owned by Wade, Adams, Payne & Gleaves, Incorporated, and other creditors of J. C. Dameron, filed petitions in the suit, asking to be made parties and seeking to subject the husband's interest to the satisfaction of their debts. The case was pending in the law and chancery court of the city of Roanoke, and at the June term, 1910, there was a final decree reciting that, it appearing to the court that a satisfactory compromise and settlement had been effected, the case was stricken from the docket at the costs of the plaintiff and petitioning creditors. In point of fact, the evidence shows that Wade purchased and took assignments of all demands asserted in the suit, which was afterwards dismissed by the decree referred to. These debts, aggregating upwards of \$3,000, were bought at a discount by Wade, who took the joint note of J. C. Dameron and his wife for the full amount thereof, secured by a deed of trust on the $\frac{25}{100}$ interest in the patents, in which the husband and wife united. In addition to the debt asserted by Adams, Payne & Gleaves, Incorporated, in that suit, the firm held a separate demand against J. C. Dameron, upon which they subsequently brought an action at law. The case was contested, but resulted in the recovery of a judgment for the plaintiff for \$1,957.50, with interest and costs. Within less than four months after the date of this judgment, J. C. Dameron was, upon his own petition, adjudged a bankrupt, and listed the judgment in his schedules as a subsisting debt against his estate.

Upon these facts, we fail to appreciate the force of the contention of appellees that the decree of the law and chancery court dismissing the suit of the Roanoke Sheet Metal Company is res adjudicata as to the judgment of Adams, Payne & Gleaves, Incorporated, which had not been recovered at that time, and was in no way involved in that litigation.

[2] Nor can we assent to the proposition that the Roanoke Sheet Metal Company's suit was a proceeding in rem, in the sense that the decree therein settled the title of N. W. Dameron to the patent rights, so far as demands not asserted in that case are concerned.

We are, moreover, of opinion that the evidence does not establish actual fraud against J. C. Dameron in the transfer to his wife of the $\frac{25}{100}$ interest in the letters patent.

The sole question for our determination, therefore, is whether or not the assignment was voluntary and void as to *existing creditors* of the grantor, under Va. Code 1904, § 2458.

[3] It is the settled doctrine in Virginia that, in a suit between creditors of an insolvent husband and his wife to avoid a transfer of property from the husband to the wife, the burden of showing the bona fides of the transaction and that it was made upon a valuable consideration is cast upon the wife. The decisions of this court upon that proposition are too numerous and too recent to require citation.

[4] The evidence shows that the husband, who was the inventor of the hay press and baling press, did not have the necessary means to perfect and patent his devices. The wife, on the other hand, owned a house and lot in the city of Roanoke and some property in the country. From time to time, both before and after the assignment, she advanced money to her husband in connection with these patents and in paying his debts, using her separate estate as a basis of credit to raise money for those purposes. It furthermore appears that the wife assumed these liabilities under such circumstances as to create a quasi relation of principal and surety between her husband and herself, and it is clear, under the authorities, that the assignment should be held valid to the extent to which it may be necessary to indemnify her for such expenditures. *William & Mary College v. Powell*, 53 Va. 372, 385; *Rixey v. Deltrick*, 85 Va. 42, 6 S. E. 615; *Miller v. Ferguson*, 110 Va. 222, 65 S. E. 564.

[5] In April, 1910, the Dameron Machinery Corporation was organized, with \$80,000 of common stock, and acquired the patent rights for \$10,000 in money and 5 per cent. of the common stock. Of the \$10,000, \$5,500 was paid to Mrs. Dameron in cash. In addition to the common stock, there was also to be an issue of preferred stock, each share of which carried as a bonus one share of common stock. J. C. Dameron, as attorney in fact for his wife, subscribed to 50 shares of preferred stock, upon which \$2,750 was paid.

Our conclusion upon the foregoing facts is that the decree of the circuit court is erroneous, and must be reversed, and the case remanded for further proceedings, looking to an accounting between J. C. Dameron and his wife. And upon such settlement Mrs. Dameron is to have credit for all expenditures made by her on behalf of her husband, and shall be charged with the net amount received by her in money from the sale of his interest in the patents. There must also be an account of subsisting debts against J. C. Dameron, which were contracted prior to January 1, 1910. And if upon such accounting a balance shall be found against Mrs. Dameron, such balance will constitute an ultimate asset to be resorted to in the event

it shall become necessary to discharge the debts of the class referred to, after exhausting the stock in the Dameron Machinery Corporation held by Mrs. Dameron by virtue of the assignment from her husband. But in the event there should be a balance in her favor, such balance shall constitute a prior claim against the assets. And, finally, if a surplus shall remain after satisfying the debts of the specified class, such residuum shall be decreed to Mrs. N. W. Dameron.

Reversed.

(113 Va. 656)

SAUNDERS et al. v. BANK OF MECKLENBURG et al.

(Supreme Court of Appeals of Virginia. June 13, 1912.)

1. EQUITY (§ 149*)—PLEADING—MULTIFARIOUSNESS.

A bill by the depositors of an insolvent bank, all of whose contracts are identical and who are entitled to participate equally in its assets, against the directors for negligent mismanagement, is not multifarious because the depositors' causes of action are separate and distinct.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 342, 368-370; Dec. Dig. § 149.*]

2. EQUITY (§ 149*)—PLEADING—MULTIFARIOUSNESS.

A bill by the depositors of an insolvent bank to recover from the directors for their negligent mismanagement is not multifarious because it fails to state the time the directors assumed their duties or when the complainants became depositors.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 342, 368-370; Dec. Dig. § 149.*]

3. BANKS AND BANKING (§ 55*)—LIABILITY—DIRECTORS—SUIT BY STOCKHOLDERS.

Where a bank became insolvent and its property was transferred to a receiver, the depositors cannot in their own name maintain a suit against the directors to recover for their negligent mismanagement, unless the receiver has on their demand refused to act, the receiver occupying a fiduciary relation toward them, and being entitled to sue for all wrongs done the corporation which he represents; and so a mere allegation in such a bill that the receiver declined to bring the suit is insufficient, it not showing a demand.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 99-104; Dec. Dig. § 55.*]

Appeal from Circuit Court, Mecklenburg County.

Bill by one Saunders and others against the Bank of Mecklenburg and others. From a decree sustaining a demurrer to the bill, complainants appeal. Affirmed.

John A. Lamb, W. E. Homes, and S. A. Anderson, for appellants. Hill Carter, E. P. Buford, R. T. Thorp, Harry C. Smith, and E. C. Goode, for appellees.

KEITH, P. Saunders and others, depositors in the Bank of Mecklenburg, filed their bill in chancery against certain directors of the bank, in which they allege that the bank had suspended payment and was insolvent;

that, owing to the carelessness, negligence and utter disregard of their duties as directors, loans had been recklessly and improvidently made to insolvent corporations, firms, and individuals; that certain persons named had been allowed to overdraw their accounts—all of which acts of omission to perform their duties had inflicted great loss upon the depositors. They therefore prayed that the directors be made parties defendant, and that proper accounts should be taken to ascertain their liability.

This general statement of the charges of the bill we deem sufficient to bring out the propositions of law which are involved in this cause.

The bill was demurred to upon several grounds—that it fails to show such negligence as would make the defendants, or any of them, liable to complainants; that it fails to show at what time complainants became creditors of the Bank of Mecklenburg; that it fails to show what acts of negligence were committed by the defendants; that it fails to show why the receivers were not proper parties to bring suit against the defendants, or any reason why the complainants undertook to bring suit, instead of the receivers; that it fails to show any request made by the complainants of the receivers to bring suit against the defendants; that the bill is multifarious, in that it seeks to join in the same suit matters which cannot be joined, matters which occurred when some of the defendants were not directors with matters which occurred when they were.

The circuit court sustained the demurrer to the bill, but upon what specific ground of objection is not stated, further than to say that it was dismissed for want of equity.

[1] We will first consider the objection as to multifariousness.

This subject has been very recently considered in the case of Seefried v. Clarke, 113 Va. —, 74 S. E. 204, where, after considering many authorities, the principle is stated to be that where causes, though distinct, are not absolutely independent of each other, and it would be more convenient to dispose of them in one suit the objection of multifariousness will not prevail.

In this case the suit is brought by depositors of a bank whose contracts with the bank are identical, they are entitled to participate equally in its assets, they are very numerous, and every consideration of convenience can be urged in support of their right to unite as plaintiffs.

It is a different case from that of Brown v. Bedford City, 91 Va. 31, 20 S. E. 968. In that case certain stockholders had been fraudulently induced to become subscribers to a company by identical representations. It was held that it was proper for them to unite in one bill, but creditors having been united in the same suit, whose rights and interests

were not only diverse, but wholly antagonistic to the stockholders, a demurrer to the bill was sustained; it being pointed out that the interest of the stockholders was to be relieved from their subscriptions by reason of fraud, while it was to the interest of the creditors that they should be held bound by their undertaking.

[2] Nor does the omission in the bill to state precisely at what time the directors assumed the duties of their office, or when the complainants became depositors, render the bill demurrable.

A similar objection was taken to the bill in *School Board v. Farish*, 92 Va. 156, 23 S. E. 221. In that case the decedent had been county treasurer for several terms, and had given official bonds, with sureties, for each term for which he was elected. Upon his death a bill was filed against his administrator and the sureties on his several official bonds as treasurer, for the purpose of administering his estate, settling his several accounts as treasurer, and having decrees against his administrator and the sureties on his several official bonds for the amounts due by them respectively. It was held that the method pursued was convenient and suitable, that no injury was thereby done to any one, and that the bill was not on that account multifarious.

In *Ackerman v. Halsey*, 37 N. J. Eq. 356, it was held: "That some of the defendants have been directors longer than others is no ground of demurrer, because the court can discriminate between them, and hold those elected recently only liable for losses incurred during their term of office."

[3] In *Marshall v. Farmers' Savings Bank of Alexandria*, 85 Va. 676, 8 S. E. 586, 2 L. R. A. 534, 17 Am. St. Rep. 84, it is said that directors "hold to stockholders, depositors, and creditors the relation of trustees to cestui que trust, and as such are personally responsible for frauds and losses resulting from gross negligence and inattention to their trust duties."

The authority of that case is somewhat diminished by the fact that two of the judges dissented and a third concurred only in the result. It is doubtless true that there is much authority in support of the principle, which it enunciates, that directors stand in the relation of trustees to the stockholders and creditors of a bank. As to what is the precise relation, there is much conflict of authority; many of the courts holding that the directors are officers of the corporation and responsible only to it. Other cases hold that the directors are responsible for actual fraud to the creditors, but not for mere negligence.

We do not deem it necessary to undertake to harmonize the conflict, if that were possible, or to ascertain to what extent a trust relation exists between the directors of a bank and its depositors, as the demurrer to the bill, in our judgment, was properly sus-

tained upon a ground about which there is little diversity of opinion.

Upon the death of an individual all rights of action which survive pass to his personal representative, and are to be asserted by him.

In *Beaty v. Downing*, 96 Va. 451, 31 S. E. 612, it was held that "neither a legatee nor a creditor of a decedent can maintain a suit against his personal representative and another who is a debtor to the estate for the purpose of collecting the debt, except under special circumstances, such as the insolvency of the personal representative, collusion between him and the debtor, the fact that the debtor was a partner of the decedent, or a trustee holding property for, or an agent of, the decedent. A bill which fails to charge these or other special circumstances which will take the case out of the general rule is bad on demurrer."

Conrad v. Fuller, 98 Va. 16, 34 S. E. 893, is to the same effect. For a legatee, distributee, or creditor of the decedent to institute suit against a debtor of the decedent, "there must be some special circumstances which render it necessary or proper for the protection of the rights of such distributee, legatee, or creditor, such as collusion between the personal representative and the debtor, refusal to sue, some impediment in the due prosecution of a suit by the personal representative, or the like."

In *Mount v. Radford Trust Co.*, 93 Va. 427, 25 S. E. 244, it was held that "a stockholder in a corporation has no right to bring a suit in equity in his own name, or for the benefit of himself and other stockholders, upon a cause of action existing in the corporation, and in which the corporation is itself the proper complainant, except where it actually or virtually refuses to institute or prosecute the suit. It must be averred and proved that application was made to the proper authorities to institute suit and they refused, or that such a state of facts exists that the application itself would be useless, or the facts charged must be such as to show that it is reasonably certain that a suit by the corporation would be impossible. But the suit, when brought, is still the suit of the corporation; the stockholder being permitted to sue in this manner simply to set in motion the judicial machinery of the court"—citing *Pomeroy's Eq. Jur.* § 1095; *Dulaney v. Smith*, 97 Va. 130, 33 S. E. 533.

Cook on Stockholders, at section 740, says: "Inasmuch as a fraud, or ultra vires or negligent act, of directors of a corporation is an injury done to the corporation itself, it is the duty and proper function of the corporation to institute any action that may be brought to remedy the injury to the corporation. As already explained, however, a stockholder may bring the action if the corporation improperly refuses or neglects to institute such suit. Before the stockholder brings suit, he

must make a formal request to the corporate officers that suit be instituted by the corporation. Upon its refusal or neglect to comply with that request, he may then bring suit himself. It is well settled, however, that he must allege in his bill in equity that such a request has been made and has not been complied with."

In *Hawes v. Oakland*, 104 U. S. 450, 26 L. Ed. 827, the court examined the right of the shareholder to sustain a suit under the authorities, English and American, and thus states its conclusion:

"There must exist as the foundation of the suit:

"1. Some action or threatened action of the managing board of directors or trustees of the corporation which is beyond the authority conferred by their charter or other source of organization; or

"2. Such a fraudulent transaction, completed or threatened, by the acting managers in connection with some other party, or among themselves, or with the other shareholders, as will result in serious injury to the corporation, or to the interests of the other shareholders; or

"3. Where the board of directors, or a majority of them, are acting for their own interests in a manner destructive of the corporation itself, or of the rights of the other shareholders; or

"4. Where the majority of shareholders themselves are oppressively and illegally pursuing a course, in the name of the corporation, which is in violation of the rights of the other shareholders, and which can only be restrained by the aid of a court of equity.

"5. It must also be made to appear that plaintiff has made an earnest effort to obtain redress at the hands of the directors and shareholders of the corporation.

"6. That he was the owner of the stock on which he claims the right to sue at the time of the transaction of which he complains, or that it has since devolved on him by operation of law."

The opinion in that case was delivered by Mr. Justice Miller, whose judgments will be respected as long as the orderly administration of justice in the courts shall obtain.

Appellants rely largely upon the case of *Campbell v. Watson*, 62 N. J. Eq. 396, 50 Atl. 120, which is doubtless entitled to great respect, and in which the court says that "a bank's creditors, on its insolvency, have a direct interest in its affairs, and are the cestui que trust of the receiver, entitled to enforce all the corporation's rights, and to collect its assets, including the right to claim damages for the directors' negligence." But that case is not in conflict with the principle we are seeking to enforce, which is that, where the assets of an insolvent corporation have passed into the hands of a receiver, it becomes his duty to collect all of its assets

for the benefit of its creditors, including damages which may have accrued by reason of a director's negligence; but it does not follow that because the bank's creditors, upon its insolvency, have a direct interest in its affairs, that it is not their duty to call upon the receiver to collect its assets. In the case of *Campbell v. Watson* the suit was brought by a receiver, and the opinion of the court is to be construed in the light of that fact.

In *Ackerman v. Halsey*, supra, it is held that "where the receiver of an insolvent bank refuses to bring suit, a creditor and stockholder thereof may, for the benefit of himself and of such other creditors and stockholders as elect to join him, maintain a suit against the president and directors for gross official neglect and mismanagement, whereby the bank was financially ruined." This case is cited with approval in *Campbell, Receiver, v. Watson*, supra, 62 N. J. Eq. at page 406, 50 Atl. 120. While the latter case fully maintains the ultimate right of the stockholders and creditors of an insolvent corporation to maintain a suit against directors for official negligence and mismanagement, it is apparent that it was not within the thought of the judge who delivered the opinion to disturb the settled law as to the course of procedure by which their remedy was to be sought.

In *Brinckerhoff v. Bostwick*, 88 N. Y. 52, it is said that "the directors of a corporation, if through gross negligence and inattention to the duties of their trust they suffer the corporate funds to be lost or wasted, are liable for the loss so sustained," and "in case the receiver is one of the directors chargeable with neglect of duty, such action may be maintained by the stockholders, and when the stockholders are numerous the action may be brought by one or more in behalf of all." In such an action "it is not necessary to allege in the complaint a direction from the comptroller, or a demand upon him and a refusal to direct the receiver to bring the action, or a refusal of the receiver to sue."

In *Trustees of Dollar Savings Bank v. Bosselux* (D. C.) 3 Fed. 817, 4 Hughes, 387, the suit was brought by the trustees in bankruptcy of an insolvent bank, and it was held that they might sue the directors of the bank for moneys lost by their gross negligence and a habitual inattention to their duties.

In *Marshall v. Farmers' Bank of Alexandria*, supra, it appears that the bank, having become hopelessly insolvent, ceased to transact business and suspended payment on the 1st day of December, 1876; that the board of directors held a meeting on the 7th of December of that year, and appointed Jefferson Tacey to collect and disburse the assets of the bank under the direction of the board of directors; that on the 21st of De-

cember, 1877, the bank made a deed of assignment of its assets and property of every kind and description to Jefferson Tacey, in trust, to collect and convert them into cash; that the said Jefferson Tacey had been an officer of the bank from its organization, and was, at the time of its suspension, a director, and was, therefore, as stated in the bill, "not a proper person to whom the whole of the assets of said concern should have been assigned for administration, and that without security." There was no demurrer to the bill, and, therefore, the opinion in the case discusses nothing except the sufficiency of the proof to establish the negligence charged. The defendants were well advised not to enter a demurrer, for the action of the bank in placing the control of all of its assets and the management of all of its affairs in the hands of Jefferson Tacey, one of the offending directors, and that without security, brought the case squarely and fully within the influence of the exceptions to which we have adverted. The authorities which we have cited fully sustain that bill. It is, indeed, strikingly similar to *Brinckerhoff v. Bostwick*, supra, where the receiver was one of the directors chargeable with neglect of duty, and it was held that the suit might be maintained without a demand upon and refusal by him to bring suit.

The bill in this case attempts to meet the requirement under consideration by the naked statement that "the receivers of said Bank of Mecklenburg have declined to institute any suit against said directors to assert the liability herein asserted." It is not stated by whom the demand was made, or, indeed, except inferentially, that any demand was made, or the ground upon which the demand was placed. It falls short of what the law requires.

In *Cook on Stockholders*, supra, it is said that, before a stockholder can bring suit, he must make a formal request of the corporate officers that a suit be instituted by the corporation; and in *Hawes v. Oakland*, supra, it is said that it must be made to appear that the plaintiff has made an earnest effort to obtain redress at the hands of the directors and shareholders of the corporation.

In considering this question, we have dealt with cases which deny the right of stockholders to bring a suit in their own name, of the creditor or distributee of an estate to bring a suit against the administrator and a debtor of the estate, or of the creditor of a corporation, after the appointment of a receiver, to institute a suit in his own name to recover the assets of the corporation, except after a demand and refusal by those upon whom the right to sue is primarily cast, save under exceptional circumstances, because they all depend substantially upon the same considerations, and are subject to the same exceptions. That the relation of

trustee and cestui que trust does or does not exist is not the determining factor. If the creditor of a decedent were permitted to exercise the unrestricted right to sue the debtors of the estate, or the stockholders of a corporation, or the creditors of an insolvent corporation, it would lead to infinite confusion. At the same time the stockholder and the creditor have rights which must be protected, and if those upon whom the law has imposed the duty of guarding their rights fail or refuse, after proper request, to take such steps as may be necessary for their protection, or if conditions exist from which it shall reasonably appear that such a request would have been unavailing, then it is plain, from the authorities which we have considered, that they may themselves bring suit, and thus, as Mr. Pomeroy phrases it, "set in motion the judicial machinery of the court."

We are of opinion that the decree of the circuit court must be affirmed.

Affirmed.

CARDWELL, J., absent.

(113 Va. 685)

MURRELL et al. v. TRADERS' & TRUCKERS' BANK et al.

(Supreme Court of Appeals of Virginia. June 13, 1912.)

BANKS AND BANKING (§ 55*)—PLEADING—PETITION TO INTERVENE.

Where an insolvent bank made an assignment of all its assets, and the assignee sued, asking the aid of the court of chancery in the administration of the trust, a bill by creditors of the bank, who sought to recover from the directors for their negligent mismanagement, which was properly dismissed, because there had been no demand upon and refusal by the assignee to begin suit, cannot be treated as a petition to intervene in the suit by the assignee.

[Ed. Note.—For other cases, see *Banks and Banking*, Cent. Dig. §§ 99-104; Dec. Dig. § 55.*]

Appeal from Law and Chancery Court of City of Norfolk.

Bill by one Murrell and others against the Traders' & Truckers' Bank and others. From a decree sustaining a demurrer, complainants appeal. Affirmed.

Jeffries, Wolcott, Wolcott & Lankford, W. L. Williams, and C. J. Collins, for appellants. Jas. G. Martin, T. Catesby Jones, Jas. E. Heath, N. T. Green, Thos. H. Willcox, Tazewell Taylor, O. L. Shackelford, and W. H. Taylor, for appellees.

KEITH, P. The Traders' & Truckers' Bank became insolvent, and Murrell and others, creditors of the bank, instituted a suit against the directors to recover damages from them for gross neglect of duty upon their part. This case differs from that of *Saunders v. Bank of Mecklenburg*,

75 S. E. 94, just decided, in no material respect.

It seems that on the 9th of August, 1909, the bank made an assignment to Winston, trustee, of all of its assets, and that he, at a subsequent date, instituted suit, asking the aid and direction of a court of chancery in the administration of the trust. The bill in the case before us prays that it be heard along with the suit of Winston, Trustee, v. Traders' & Truckers' Bank, and it was suggested in argument that the bill in this case might be treated as a petition in that suit. There was a demurrer to the bill, which the circuit court sustained, and the bill was dismissed.

For the reasons given in the case of *Saunders v. Bank of Mecklenburg*, we are of opinion that there was no error in the decree. We cannot maintain the bill in this case, either as an original bill or as a petition, without doing violence to the principle there established, as it does not appear that any demand or request was made upon the trustee to proceed against those who are named as defendants in this suit. To hold that the bill could be treated as a petition would be a transparent effort to escape from a salutary principle of chancery pleading and practice.

We are of opinion that the decree should be affirmed.

Affirmed.

CARDWELL, J., absent.

(138 Ga. 213)

LESTER BOOK & STATIONERY CO. v. MASSEE et al.

(Supreme Court of Georgia. May 17, 1912.)

(*Syllabus by the Court.*)

PRINCIPAL AND AGENT (§ 123*)—CONTRACTS—AUTHORITY OF AGENT.

The evidence amply supports the verdict, the case was fairly submitted under the charge, which was free from substantial error, and no reason appears for its reversal.

[Ed. Note.—For other cases, see *Principal and Agent*, Cent. Dig. §§ 420-429; Dec. Dig. § 123.*]

Error from Superior Court, Bibb County; W. H. Felton, Judge.

Action by the Lester Book & Stationery Company against W. J. Massee and others. Judgment for defendants, and plaintiff brings error. Affirmed.

West & Dasher, of Macon, for plaintiff in error. Roland Ellis and R. K. Hines, both of Macon, for defendant in error.

EVANS, P. J. The Republican campaign committee of Georgia was organized for the purpose of furthering the candidacy of Hon. W. H. Taft for the President of the United States. The committee consisted of Clark Greer, chairman, Henry Blun, Jr., J. B. Gas-

ton, Harry S. Edwards, and Fred Dismukes. W. J. Massee was the secretary and treasurer of the committee. Massee was not able to give his personal attention to the work, and he employed C. M. Preston to represent him in the work of the committee, and authorized him to sign checks in his name as secretary and treasurer. The headquarters of the committee were at Macon, Ga., in charge of the chairman. The campaign ended with the election of Mr. Taft on November 4, 1908. Some time during the latter part of December, Preston, on the authority of Greer, contracted with the plaintiff for the printing of lists of names in various counties of Georgia. The account for the printing was proved in bankruptcy by the plaintiff against Greer, and a dividend was paid thereon. The plaintiff then sued the members of the committee, except Greer and Dismukes, alleging that they did business as a Georgia mailing list company. The defendants denied liability.

The contention of the plaintiff was that in carrying on their work the committee had compiled a list of voters in various counties of the state, and that it occurred to Greer to publish this list as a mailing list for advertising purposes, and sell the same for the purpose of raising funds to liquidate any indebtedness of the committee, and to build up a permanent campaign fund. On the other hand, the defendants contended that the campaign had ended with the election of Mr. Taft, that all expenses of the committee had been paid, that the committee had dissolved, and that the subsequent contract with the plaintiff was made by Greer and Preston without their knowledge or authority, and was the private and individual enterprise of Greer and Preston. The jury found for the defendants.

On the trial the controlling point was the authority of Preston, who made the contract, to bind the defendants. We have carefully examined the evidence, and have reached the conclusion that the verdict is amply supported by the evidence, that the case was fairly submitted to the jury, that the instruction of the court was free of any substantial error, and that the verdict should stand.

Judgment affirmed. All the Justices concur.

(138 Ga. 204)

SIMPSON v. SIMPSON.

(Supreme Court of Georgia. May 16, 1912.)

(*Syllabus by the Court.*)

APPEAL AND ERROR (§ 588*)—RECORD—BRIEF OF EVIDENCE.

On November 15, 1911, the trial judge heard the application of the defendant in error for temporary alimony, and on December 8, 1911, rendered judgment allowing a specified amount as temporary alimony and another amount as attorney's fees for counsel representing the applicant. Thereupon the plaintiff

in error sued out a bill of exceptions, complaining of this judgment. The bill of exceptions was certified on the 20th day of December, 1911. The evidence is not embodied in the bill of exceptions, but an approved brief of the same is specified as a part of the record. It appears that this brief of the evidence was not approved until the 5th day of January, 1912. *Held*, that the brief of evidence cannot be considered by this court. The trial judge was without authority to approve the brief of evidence after the bill of exceptions had been certified. His authority to deal with the brief of evidence in any way, either by changing it or making indorsements thereon, terminated when he signed the certificate to the bill of exceptions. *Milton v. City of Savannah*, 121 Ga. 89, 48 S. E. 684, and cases cited. And as the only questions raised by the assignments of error are dependent for determination upon the brief of the evidence, the judgment of the court below must be affirmed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2607-2610; Dec. Dig. § 588.*]

Error from Superior Court, Gwinnett County; C. H. Brand, Judge.

Application by A. M. Simpson against J. T. Simpson for temporary alimony. From a judgment allowing temporary alimony and attorney's fees, defendant brings error. Affirmed.

O. A. Nix and J. A. Perry, both of Lawrenceville, for plaintiff in error. N. L. Hutchins, Jr., and I. L. Oakes, both of Lawrenceville, for defendant in error.

BECK, J. Judgment affirmed. All the Justices concur.

(138 Ga. 181)

ELLIS et al. v. MAYOR AND ALDERMEN OF HAZELHURST.

(Supreme Court of Georgia. May 16, 1912.)

(*Syllabus by the Court.*)

1. MUNICIPAL CORPORATIONS (§ 697*)—STREETS—OBSTRUCTION—INJUNCTION—SUFFICIENCY OF EVIDENCE.

The evidence for the plaintiff examined, and found sufficient to withstand a motion for a nonsuit.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1502-1505; Dec. Dig. § 697.*]

2. DEDICATION (§ 1*)—REQUISITES—PAROL DEDICATION.

An express dedication to a municipality of a particularly described parcel of land for use as a public street may be made by parol.

[Ed. Note.—For other cases, see Dedication, Cent. Dig. §§ 8, 10-12; Dec. Dig. § 1.*]

3. DEDICATION (§ 35*)—ACCEPTANCE—EXTENT.

Where the confines of the land dedicated to a municipality for use as a street are definitely fixed by the dedicator in his offer of dedication, municipal acceptance of the whole may be implied from improvements or repairs done on a portion of the street by the municipality in recognition of the dedication.

[Ed. Note.—For other cases, see Dedication, Cent. Dig. §§ 63-71, 75, 76; Dec. Dig. § 35.*]

4. DEDICATION (§ 33*)—ACCEPTANCE—EXPRESS ACCEPTANCE.

Inasmuch as an acceptance of the dedication of a street imposes upon the municipality

duties and burdens with respect thereto, an express acceptance must be by authorized officials or the governing body of the municipality.

[Ed. Note.—For other cases, see Dedication, Cent. Dig. § 66; Dec. Dig. § 33.*]

5. DEDICATION (§ 36*)—ACCEPTANCE—EXTENT.

If an owner offers to dedicate land to a municipality for a public street on condition that the whole parcel defined by him must be opened by the grading of the entire width of the street, and by removing all obstructions therefrom, acts done by the municipality from which an acceptance will be implied must be in compliance with the prescribed condition. But if the intent of the dedicator be to dedicate a street of specified dimension to be opened up by the municipality, and the street is opened up by the municipality so as to meet the exigencies of safe and convenient travel, such acts by the municipality would be sufficient to indicate acceptance of all the land which was dedicated for use as a street.

[Ed. Note.—For other cases, see Dedication, Cent. Dig. § 72; Dec. Dig. § 36.*]

6. DEDICATION (§ 43*)—EVIDENCE—RELEVANCY.

On an issue whether an owner of land had dedicated a certain street, his deed describing the land as bounded by the street which he intended to dedicate for public use is relevant evidence.

[Ed. Note.—For other cases, see Dedication, Cent. Dig. §§ 83, 84; Dec. Dig. § 43.*]

7. DEDICATION (§ 43*)—EVIDENCE—RELEVANCY.

On the issue of whether or not an owner of land had dedicated a street to a municipality and marked it out, testimony that the defendant, who was the grantee of the alleged dedicator, and a citizen of the municipality several years after the alleged dedication, shortly before the trial measured the width of the street, is irrelevant.

[Ed. Note.—For other cases, see Dedication, Cent. Dig. §§ 83, 84; Dec. Dig. § 43.*]

8. TRIAL (§ 194*)—INSTRUCTIONS—EFFECT OF EVIDENCE.

It was error to charge that "most of the evidence only indirectly bears upon the issues of the case."

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 413, 439-441, 446-454, 456-466; Dec. Dig. § 104.]

Error from Superior Court, Jeff Davis County; C. B. Conyers, Judge.

Action by the Mayor and Aldermen of Hazelhurst against R. S. Ellis and others. Judgment for plaintiffs, and defendants bring error. Reversed.

P. L. Smith, of Hazelhurst, and W. W. Bennett, of Baxley, for plaintiffs in error. S. D. Dell, of Hazelhurst, for defendants in error.

EVANS, P. J. This contest is between the city of Hazelhurst and a landowner over the width of Gill street. The landowner was proceeding to erect a fence on what he claimed to be the outer limits of his land abutting on Gill street, and the city filed a petition to enjoin the building of the fence, which was alleged to encroach 20 feet on the street. The city submitted evidence tending to show the following: Gill street extends westward from second avenue to the incorporate lim-

its, crossing a branch. In 1898 W. C. Swain owned a tract of land lying westward from the branch and reaching beyond the city limits. He lived on this land, and desired to open a street 80 feet in width from the branch to the corporate limits of the town. Accordingly, in that year, he staked out a street 80 feet in width from the branch to the city limits, and constructed fences on both sides of the street. In some places the fences were a little more than 80 feet apart. He said to several people that he would give the street to the town if they would open it up. He told his son that he was giving the street to the town to open it up. In 1899 he sold 12 acres of land to Mr. Leeth, "beginning at the old hand mill branch at the foot of Gill street, and then running 280 yards towards the residence of the said W. C. Swain, down a street 80 feet wide to be given and appropriated to the town of Hazelhurst by the said W. C. Swain, bounding said 12 acres on the south." He also sold land to Mr. Deal, giving Gill street as a boundary. He told another person that "he donated that 80 foot street to the town if they would open it up." Shortly after these declarations and transactions, the city authorities worked the street by grading the roadbed from the branch to the top of the hill, keeping it in repair, and constructing a sidewalk on the north side for about 280 yards. From the top of the hill to the city limits the land was level, and the consistency of the soil was such that the roadbed required very little attention to keep it in good condition. The city's street force, and some citizens who were permitted to do personal labor in lieu of street tax, worked the street, shaping up the roadbed to the top of the hill, and cutting the underbrush from the top of the hill to the corporate limits. The larger trees were not cut, but were left for shade trees. The sidewalk was constructed on the northern side of the street, and the roadbed, including the drain ditches to the top of the hill, was about 35 or 40 feet wide, and from the top of the hill the roadbed was level, and had been worked sufficiently to keep it in repair up to the filing of the suit. The defendant Ellis purchased a tract of land, which embraced the street in its description, from W. C. Swain in December, 1903. He testified that, when Swain sold him the land, he told him "that he had opened up that road out there himself, so that he would be able to sell to Mr. Leeth; * * * that he intended giving the plaintiff a street, but had not done so." At the time the defendant bought the land from Swain, there was just a road opened up about 12 feet wide, and that was all that Swain ever opened up. The fences built by Swain were about 120 feet apart. The defendant had built the fence, with the exception of two panels, at the time of the service of the injunction;

and these were built afterwards by permission of the court. The defendants offered testimony as to the amount of the work done by the city, the character of the growth of the timber on the land, and the intention of Swain to give to the city the street if it would open it up.

[1] 1. Under the testimony submitted by the plaintiff, the jury were authorized to find a dedication of the street to the city and its acceptance by the city, and the court properly refused a nonsuit.

[2] 2-4. A dedication results where one being the owner of land consents either expressly or by his actions that it may be used by the public for any particular purpose. No particular form is required in making a dedication. It may be done orally or in writing, or it may be inferred from acts or implied from long user. *Mayor, etc., of Macon v. Franklin*, 12 Ga. 239. An express dedication of a particularly described parcel of land to a public use may be established by parol evidence, and its acceptance also be so shown. Where an owner of land makes an express dedication of a particular portion of his land to a municipal corporation, its acceptance may be shown by any act of the municipality recognizing the existence of the street and treating it as one of the streets of the city.

[3] Where the extent of the grant is defined by the landowner himself in his statement making an express dedication to a municipality, it is not necessary that the public authorities should work the entire street within the confines of the grant to make effectual the act of acceptance. Any improvements or repairs done on the street by the public authorities in recognition of the dedication of a defined strip of land for a street may be regarded as an acceptance of the dedication. 1 *Elliott on Roads and Streets*, §§ 167, 168, 169. The distinction should be noted between acts of user when solely relied on to raise an implication of a dedication, and acts of user as evidencing an acceptance of an express dedication. In the former case a dedication will not be implied beyond the use (*Swift v. Lithonia*, 101 Ga. 706, 29 S. E. 12), while in the latter the dedicatory has definitely fixed the limits of the land dedicated to public use, and proof of any acts by the public authorities, done in recognition of the offer of dedication, will be sufficient to imply an acceptance of the dedication.

[4] An express acceptance is usually shown by the order of some officer or body having jurisdiction in such matters. Inasmuch as an acceptance of the dedication of a street imposes upon a municipality duties and burdens with respect thereto, if an express acceptance be relied on, it must be by authorized officials or governing body. 1 *Elliott on Roads and Streets*, § 166. It was therefore erroneous for the court to charge the jury, on the subject of express acceptance, that "accept-

ance by any official of the city would be presumed to be done by the authority from the city itself."

[5] 5. One of the points made by the defendant is that the dedication was made on the condition that the entire width of the street should be opened up by the city, and that the failure of the city to cut the trees and remove every obstruction within the 80 feet defeated the dedication. If the dedicatory by the act of dedication had expressly provided that the acceptance could be evidenced only by such acts, there could be no acceptance except in compliance with the terms imposed by the dedicatory. On the other hand, if the intent of the dedicatory was to dedicate a street of a specified dimension to be opened up by the city, if it was opened up by the city so as to meet all the exigencies of safe and convenient travel, such acts by the city would be sufficient to indicate acceptance of all that was dedicated.

[6] 6. Over the defendant's objection the court allowed in evidence a deed to J. W. Leeth from W. C. Swain, the defendant's predecessor in title, recorded prior to the defendant's purchase, wherein the land conveyed was bounded as follows: Beginning at the old hand mill branch at the foot of Gill street, and running 280 yards toward the residence of W. C. Swain, down a street 80 feet wide to be given and appropriated to the town of Hazelhurst by W. C. Swain, bounding said 12 acres on the south, etc. This deed was admissible as a declaration of the dedicatory of his intention to donate the street to the town. The deed from Leeth to Miles was inadmissible, being *res inter alios acta*.

[7] 7. The court allowed testimony to the effect that a witness and the defendant, just prior to the filing of the suit, measured the street and staked it off. While this testimony bore no relation to the act of dedication, its admission was not harmful to the defendant.

[8] 8. Complaint is made of a preliminary instruction by the court that "most of the evidence only indirectly bears upon the issues in this case." This remark of the court was inapt. Its tendency was to confuse the jury as to what evidence bore directly on the case, and that which indirectly illustrated the issue.

Judgment reversed. All the Justices concur.

(128 Ga. 208)

JOHNSON v. McDANIEL

(Supreme Court of Georgia. May 16, 1912.)

(*Syllabus by the Court.*)

1. LANDLORD AND TENANT (§ 245*)—RENT—LIEN.

Where a landlord sold to a tenant certain mules and wagons and supplies in the month of November, 1909, the tenant giving his notes

for the purchase price of such articles, and the articles were furnished to the tenant for the purpose of making a crop upon the lands rented to him by the landlord for and during the year 1910, the landlord had a lien upon the crops raised by the tenant during the year 1910, under the provisions of section 3348 of the Code, and the lien could be enforced in the manner provided in section 3366 of the Code.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 988-990; Dec. Dig. § 245.*]

2. FORECLOSURE OF LANDLORD'S LIEN—SUFFICIENCY OF EVIDENCE.

There was sufficient evidence to authorize the jury to find that the tenant, the plaintiff in error here, was a resident of Walton county at the time of the foreclosure of the landlord's lien in that county.

3. APPEAL AND ERROR (§ 1078*)—REVIEW—ERROR WAIVED IN APPELLATE COURT—FAILURE TO URGE OBJECTIONS.

Grounds of the motion for a new trial, not argued in the brief of counsel for plaintiff in error, are treated as abandoned.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4256-4261; Dec. Dig. § 1078.*]

Error from Superior Court, Walton County; C. H. Brand, Judge.

Action by G. A. McDaniel against Son Johnson. Judgment for plaintiff, and defendant brings error. Affirmed.

W. O. Dean, of Monroe, for plaintiff in error. G. A. Johns, of Winder, for defendant in error.

BECK, J. Judgment affirmed. All the Justices concur.

(128 Ga. 209)

JORDAN v. J. A. CALLAWAY & CO.

(Supreme Court of Georgia. May 17, 1912.)

(*Syllabus by the Court.*)

1. INJUNCTION (§ 241*)—JUDGMENT ON BOND.

Judgment against the sureties on a bond to dissolve an injunction and receivership cannot be entered in the main case, as in appeal cases, by virtue of Civil Code, § 3550, except where the bond is conditioned for the payment of the eventual condemnation money. Where the bond is conditioned otherwise than for the eventual condemnation money, and especially where the verdict fails to fix liability according to the terms of the bond, the remedy is by an independent action on the bond.

[Ed. Note.—For other cases, see *Injunction*, Cent. Dig. §§ 544-552; Dec. Dig. § 241.*]

2. JUDGMENT (§ 489*)—COLLATERAL ATTACK.

Where the court is without authority to enter up a judgment against a surety on a bond in the main case, the judgment is to be treated as void, and not as merely erroneous.

[Ed. Note.—For other cases, see *Judgment*, Cent. Dig. §§ 924, 925; Dec. Dig. § 489.*]

3. JUDGMENT (§ 415*)—EQUITABLE RELIEF.

A party against whom a void judgment exists may bring an equitable petition to have such judgment canceled and set aside.

[Ed. Note.—For other cases, see *Judgment*, Cent. Dig. §§ 781-783; Dec. Dig. § 415.*]

Error from Superior Court, Tattnall County; W. W. Sheppard, Judge.

Action by J. A. Callaway & Co. against W. W. Washington. Judgment for plaintiffs against defendant and G. L. Jordan, surety on his bond, and Jordan brings error. Reversed.

Jas. K. Hines, of Atlanta, and E. C. Collins, of Reidsville, for plaintiff in error. W. T. Burkhalter and Way & Burkhalter, all of Reidsville, for defendant in error.

EVANS, P. J. J. A. Callaway & Co. filed a petition against W. W. Washington, alleging: The defendant and one Blount entered into a contract with them, wherein Callaway & Co. were to furnish to Washington and Blount the necessary funds to pay for turpentine timber then bought and boxed on the lands of J. L. Cowart, F. M. Williams, and others, to the amount of \$492.28, and to pay the necessary pay rolls of Washington and Blount while chipping and otherwise working the timber for turpentine during that season; Washington and Blount agreeing to deliver to their turpentine still all the crude turpentine made by them that season, to be distilled by Callaway & Co. at \$6.50 per barrel, the spirits to be shipped by them to the Savannah market, the net proceeds from the spirits and rosin to be applied to the cost of distillation and advances of every kind made by Callaway & Co., and the balance, if any, turned over to Washington and Blount. By mutual consent Blount was discharged from the contract, and Washington assumed all his obligations. Washington was indebted to Callaway & Co. under this contract \$457.13, besides interest, as appeared by an attached bill of particulars. Washington agreed that all existing leases, and such as he might subsequently acquire, should be assigned to Callaway & Co. as security for the money and advances made by them; and agreeably to this arrangement all leases were assigned to Callaway & Co., except one from J. L. Cowart to 600 acres of land. Washington refused to transfer this lease, or to pay to Callaway & Co. the amounts advanced by them to pay for the lease; but, on the contrary, he was going forward gathering the gum from the trees for the purpose of using the same independently of his contract, and he was insolvent. They prayed that Washington be enjoined from removing any of the crude gum from the trees covered by any of the turpentine leases mentioned, that a receiver be appointed to take charge of his turpentine business, and that they have judgment against him for the amount of their account. The court granted a temporary injunction and appointed a receiver, and afterwards dissolved the injunction and dismissed the receiver, upon the defendant filing with the clerk of the superior court a bond, with good security, in the sum of \$750, "conditioned to pay the

plaintiffs the net proceeds of all turpentine products derived, between this date and the final determination of this cause, from the lands covered by the J. L. Cowart lease, as described in said original petition, provided the jury trying said case shall find that the plaintiffs are entitled to the same and in favor of the injunction." The defendant gave bond, with G. L. Jordan as security, pursuant to this order. Subsequently the case came on to be tried, and the following verdict was rendered: "We, the jury, find for the plaintiffs to the amount of \$392.09." Upon this verdict a judgment was entered against the defendant W. W. Washington, and against G. L. Jordan as security on the injunction bond. A *fi. fa.* issued and was levied upon the property of the surety, who filed a petition to declare the judgment null and void, on the grounds that it was unauthorized by the verdict; that he did not contract to become liable to pay any judgment that might be rendered against Washington in the case, but only for such gum as they might recover from the Cowart lands, and such sums as he received from the receiver, in the event the jury trying the case should find the plaintiffs were entitled to the same and in favor of the injunction; and that there was no finding in the case that the plaintiffs were entitled to the gum or an injunction, but merely a general verdict that the plaintiffs were entitled to recover a stated sum on the account sued on. A demurrer to the petition was filed, on the grounds that no cause of action was set out; that the surety had his day in court, and could not afterward be heard; that the bond bound him to pay the amount for which Callaway & Co. obtained judgment against Washington; and that, under the statutes in such cases made and provided, judgment was properly entered up against him on the injunction bond, which judgment had not been excepted to. The court sustained the demurrer and dismissed the petition, and exception is taken to this judgment.

[1] 1. Prior to the act of 1893 (Civil Code, § 3550), it was necessary to bring an independent suit on all bonds given in an equitable proceeding. Since that enactment, when a bond has been made by the losing party in an equitable proceeding, conditioned to pay the eventual condemnation money in that action, it shall not be necessary to bring suit on the bond, but judgment may be entered thereon in the main case as in appeal cases. This enactment is applicable only to cases where a bond has been given by the losing party, conditioned to pay the eventual condemnation money in the action; and if the bond is otherwise conditioned, the obligee is remitted to an independent action for redress. *Offerman, etc., R. Co. v. Waycross R. Co.*, 112 Ga. 611, 37 S. E. 871. The eventual condemnation money secured by an injunction bond is the amount ultimately fixed and settled by the judgment or decree

of the court in the case. *Lockwood v. Safold*, 1 Ga. 72. The bond given in this case was not for the eventual condemnation money. It was not a bond obligating the security for the amount to be recovered on the trial of the case. It was a bond conditioned to pay the plaintiffs the amount of the net proceeds derived from the turpentine privileges upon said tract of land between the date of the order, and that of the final hearing, as well as the amount in the hands of the receiver directed by said order to be delivered to the defendant, in the event the jury trying the case should find the plaintiffs were entitled to the same and in favor of the injunction. It was executed pursuant to an order dissolving an injunction and dismissing the receiver, upon the execution of a bond in the sum of \$750, "conditioned to pay the plaintiffs the net proceeds of all turpentine products derived, between this date and the final determination of this cause, from the lands covered by the J. L. Cowart lease, as described in said original petition, provided the jury trying the case shall find that the plaintiffs are entitled to the same and in favor of the injunction." The verdict of the jury was for "the plaintiffs to the amount of \$392.09." Verdicts are to be construed in connection with the pleadings in the case. The suit was to recover certain sums alleged to be due upon an attached bill of particulars, and the prayer for injunction and receiver was ancillary to this relief; the plaintiffs contending that by reason of the special facts of the case, and the insolvency of the defendant, they were entitled to have the crude turpentine produced from the premises leased from J. L. Cowart impounded for the purpose of appropriating so much thereof as might be necessary to the satisfaction of the judgment. It is clear from the general scope of the pleadings that the plaintiffs were not entitled to recover from the security on the bond any sum, except that which was established in the trial as being the net proceeds derived from the turpentine privileges upon the Cowart tract of land. Even if in this particular proceeding a judgment could have been entered upon the bond, it was a prerequisite that there be a finding fixing the surety's liability according to the condition in his bond. The verdict was general, and did not cover this issue. A judgment cannot be entered up upon a verdict, except as authorized by the verdict.

[2] 2. It is said that the remedy of the surety was by direct exception to the decree as entered. If the bond had been for the eventual condemnation money, so as to have authorized judgment to have been entered against the surety, and the judgment as entered was merely erroneous, the remedy of the surety to avail himself of any error in the judgment would have been by direct ex-

ceptions to it. *Booth v. Mohr*, 125 Ga. 472, 54 S. E. 147. But as we have already pointed out, the bond given in this case was not a bond for the eventual condemnation money, which would authorize a judgment to be entered upon it in the main case as a result of the verdict, nor was there any verdict to support a judgment against the surety. The judgment against the surety is not merely erroneous; it is void.

[3] 3. In his equitable petition the security prays that the judgment entered against him be declared null and void. A party against whom a void judgment exists has a right to have it set aside, and thus clear away any cloud that it may cast upon his right to alienate his property so long as it remains of record against him. *Crane v. Barry*, 47 Ga. 476. One of the jurisdictional grounds of equity is to cancel writings which cast a cloud over the complainant's title.

Judgment reversed. All the Justices concur.

(138 Ga. 247)

FINLEYSON v. INTERNATIONAL HARVESTER CO. OF AMERICA.

(Supreme Court of Georgia. June 12, 1912.)

(Syllabus by the Court.)

1. SALES (§ 176*)—REMEDIES OF SELLER—ACTION FOR PRICE—RENEWAL NOTE.

Where, in 1907, a promissory note was given in renewal of an original note which had been executed in 1903 for the purchase price of a mowing machine and rake, and in the latter note it was recited that, "in consideration of this renewal contract and the extension of time hereby given, it is agreed that said payee has fully kept and made good all its representations, warranties, and obligations in the sale of said machine," a recovery on such note could not be prevented, or the amount thereof reduced, on the ground that when the sale was made and the original note given the agent of the plaintiff agreed that the plaintiff would open an agency for supplies at a named place where the purchaser could conveniently get supplies and repairs for the mower; that this furnished a consideration for the note, and that the seller had not complied with such agreement. Accordingly in a suit on such note it was not error, as against such a defense, to direct a verdict for the principal and interest specified on the face of the note. *American Car Co. v. Atlanta Street Ry. Co.*, 100 Ga. 254, 28 S. E. 40; *Atlanta Street Ry. Co. v. American Car Co.*, 103 Ga. 254, 29 S. E. 925; *Atlanta Consolidated Bottling Co. v. Hutchinson*, 109 Ga. 550, 35 S. E. 124; *Madison Supply & Hardware Co. v. Brown Carriage Co.*, 137 Ga. 195, 73 S. E. 344.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 436-444; Dec. Dig. § 176.*]

2. BILLS AND NOTES (§ 537*)—ACTIONS—AMOUNT OF RECOVERY—ATTORNEY'S FEES.

Where a promissory note, in addition to principal and interest, provided for the payment of "reasonable attorney's fees in collecting by suit or otherwise," the presiding judge was not authorized to direct a verdict for a certain amount as attorney's fees because of the testimony of a member of the bar that such amount would be reasonable, although

there was no conflicting evidence on the subject. *Baker v. Richmond City Mill Works*, 105 Ga. 225, 31 S. E. 426; *Jennings v. Stripling*, 127 Ga. 785, 56 S. E. 1026; *Proctor v. Crooker*, 129 Ga. 732, 59 S. E. 781; *McCarthy v. Lazarus*, 137 Ga. 282, 73 S. E. 493.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1862-1894; Dec. Dig. § 537.*]

3. APPEAL AND ERROR (§§ 714, 1140*)—COSTS (§ 233*)—DISPOSITION OF CAUSE—AFFIRMANCE ON CONDITION—RECORD—COSTS ON APPEAL.

Direction is given that if, within 20 days from the filing of the remittitur in the office of the clerk of the superior court, the defendant in error will write off from the verdict the amount of attorney's fees included therein, the judgment will stand affirmed; otherwise, it will be reversed and a new trial granted.

(a) It is stated in the brief of counsel for defendant in error that he has written off the recovery of attorney's fees; but there is nothing in the record or bill of exceptions to show that this has been done, and this court is bound to act upon what appears from the record and bill of exceptions.

(b) As the plaintiff in error has obtained a material modification of the judgment which was rendered against him in the trial court, judgment is rendered in his favor for the costs of bringing the case to this court and the costs in this court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2958-2963, 4462-4478; Dec. Dig. §§ 714, 1140;* Costs, Cent. Dig. §§ 884-891, 929; Dec. Dig. § 233.*]

Error from Superior Court, Wilcox County; U. V. Whipple, Judge.

Action by the International Harvester Company of America against J. H. Finleyson. Judgment for plaintiff, and defendant brings error. Affirmed, on condition.

Dan R. Bruce, of Valdosta, for plaintiff in error. Hal Lawson, of Abbeville, for defendant in error.

LUMPKIN, J. Judgment affirmed, on condition. All the Justices concur.

(133 Ga. 248)

KENT v. GEIGER et al.

(Supreme Court of Georgia. June 12, 1912.)

(*Syllabus by the Court.*)

APPEAL AND ERROR (§ 537*)—BILL OF EXCEPTIONS—DELAY IN CERTIFICATION—DISMISSAL.

A bill of exceptions, having been tendered to the trial judge for certification on a given date, was returned by him to counsel for plaintiff in error for correction, and was certified at a date 34 days later. The certified bill of exceptions contained 10 typewritten pages. In the absence of any statement as to the cause of delay, it must be held that such delay was unreasonable, and therefore that the bill of exceptions must be dismissed. *Mulling v. Exchange Bank of Waycross*, 137 Ga. 431, 73 S. E. 654.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2404, 2405; Dec. Dig. § 537.*]

Error from Superior Court, Montgomery County; C. B. Conyers, Judge.

Action by J. B. Geiger and others, relat-

ors, against W. B. Kent. Judgment for relators, and defendant brings error. Dismissed.

W. W. Bennett, of Baxley, for plaintiff in error. F. H. Saffold, of Swainsboro, E. J. Gilles, of Lyons, W. C. Davis, of Dublin, and Echol Graham, of McRae, for defendant in error.

ATKINSON, J. Writ of error dismissed. All the Justices concur.

(133 Ga. 341)

STARNES v. STATE.

(Supreme Court of Georgia. June 13, 1912.)

(*Syllabus by the Court.*)

CRIMINAL LAW (§ 1023*)—APPEAL—FINAL DECISION—DECLARATION OF MISTRIAL.

Under section 6138 of the Civil Code of 1910, "no cause shall be carried to the Supreme Court upon any bill of exceptions, so long as the same is pending in the court below, unless the decision or judgment complained of, if it had been rendered as claimed by the plaintiff in error, would have been a final disposition of the cause, or final as to some material party thereto." The mere passing of an order declaring a mistrial in a capital case in the absence of the defendant terminates the trial, but is not a final decision in the cause, which is still left pending for trial under the indictment. Neither is it a ruling upon any motion or question raised by the plaintiff in error which would have been a final disposition of the cause if it had been rendered as contended for by him. Hence a bill of exceptions complaining only of the granting of an order declaring a mistrial in the absence of the defendant is prematurely brought, and will be dismissed on motion. *Oliveros v. State*, 118 Ga. 776, 45 S. E. 596.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2583-2598; Dec. Dig. § 1023.*]

Error from Superior Court, Floyd County; J. W. Maddox, Judge.

N. L. Starnes was convicted of crime, and brings error. Dismissed.

Max Meyerhardt and Denny & Wright, all of Rome, for plaintiff in error. John W. Bale, Sol. Gen., of La Fayette, M. U. Mooty, of La Grange, and T. S. Felder, Atty. Gen., for the State.

LUMPKIN, J. Writ of error dismissed. All the Justices concur.

(133 Ga. 219)

FOWLER v. WOOD.

(Supreme Court of Georgia. May 17, 1912.)

(*Syllabus by the Court.*)

1. VENDOR AND PURCHASER (§ 176*)—PERFORMANCE OF CONTRACT—PAYMENT OF PRICE—ABATEMENT.

A bond for title contained the usual formal parts and the recital that "the condition of the obligation is such that whereas, the above bound [obligor] has this day agreed to sell the said [obligee] a certain tract or parcel of land lying and being in the 1,397th and 502d

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

dist. G. M., and bounded as follows: [By lands of coterminous owners]—containing 242½ acres, at \$12.50 an acre, and known as the W. C. Williams place, for the sum of \$3,031.25, and has given his promissory notes dated September 4, 1906, and due as follows:” the dates upon which the notes fell due being set forth. In defense to a suit on the notes, the obligee in the bond pleaded that there was a deficiency in the acreage, and that the land described by boundaries contained 18½ acres less than had been represented by the agent of the vendor that it contained, and asked a proportional abatement of the purchase price represented by the promissory notes sued on. The plaintiff, the administrator of the obligor named in the bond for title, contended that the sale of the land was by the tract, and not by the acre. *Held*, construing the entire instrument, that the sale was by the acre, and, that being true, the defendant was entitled to a proportional abatement of the purchase price.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 333-340; Dec. Dig. § 176.*]

2. VENDOR AND PURCHASER (§ 317*)—REMEDIES OF VENDOR—ACTION FOR PRICE—INSTRUCTIONS.

There was no error in the charge of the court complained of.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 934-937; Dec. Dig. § 317.*]

Error from Superior Court, Gwinnett County; C. H. Brand, Judge.

Action by T. A. Fowler, administrator, against E. V. Wood. Judgment for defendant, and plaintiff brings error. *Affirmed*.

I. L. Oakes, of Lawrenceville, for plaintiff in error. O. A. Nix, of Lawrenceville, for defendant in error.

BECK, J. The plaintiff in error, Fowler, administrator upon the estate of Williams, brought suit upon certain promissory notes against Wood, the defendant in error. The defendant in his plea admitted the execution of the notes, their delivery to the plaintiff, and the ownership of the latter, but contended, among other defenses, that the notes were given for the purchase price of a certain tract or parcel of land; that at the time of the execution of the notes a bond was delivered to him, conditioned to make title to the land upon the payment of the notes. The bond for title was as follows, omitting the formal parts and the recital of the penal sum: “The condition of the obligation is such that whereas, the above bound W. C. Williams has this day agreed to sell the said E. V. Wood a certain tract or parcel of land lying and being in the 1,397th and 562d dist. G. M., and bounded as follows: Adjoining lands of Mrs. S. E. Cain, A. J. Crane, J. W. Roebuck, Isaac Duncan, J. C. Pool, G. W. Martin, J. S. Hardy, G. W. Hardy, Mrs. Holman—containing 242½ acres, at \$12.50 an acre, known as the W. C. Williams place, for the sum of \$3,031.25, and has given his promissory notes dated September 4, 1906, and due as follows [reciting the dates of each note]: Now, if the said E. V. Wood

shall well and truly pay the said several sums of money at the time or times specified, then the said W. C. Williams is bound to execute to the said E. V. Wood or assigns a good and sufficient title to the aforesaid tract of land; but on failure of the said E. V. Wood to pay the aforesaid sums of money, or either of them, at times specified, then the obligation to be void and of no effect.” Defendant alleged that upon a survey of the land described it was found to contain 223½ acres, or about 18½ acres less than it had been represented to contain, and insisted that he was entitled to a proportional abatement of the purchase price. The jury returned a verdict in favor of the defendant, and the plaintiff’s motion for a new trial was overruled.

[1] 1. Construing the entire instrument together, we are of the opinion that the bond for title set out in the statement of facts shows a sale of land by the acre; and, that being true, the defendant was entitled to an abatement of the purchase price proportionally to the deficiency in acreage.

[2] 2. Exception is taken to the following charge of the court: “But at last, considering the whole case, all that occurred, the burden rests upon the plaintiff to satisfy you of his right to recover in the case.” Immediately preceding this instruction the court had charged the jury as follows: “Under his plea the defendant admitted what is known as a *prima facie* case. He assumes the burden of establishing his right to prevail on account of the allegations set up in his plea; that is to say, he admitted the plaintiff was the owner and holder of the notes and had a right to recover upon them, unless he could show he did not have the right. When he did that, at that point the plaintiff was entitled to recover in this case before any evidence was introduced; then the plaintiff, Fowler, was entitled to recover the full amount appearing to be sued upon these notes, principal, interest, and attorney’s fees. At that point defendant takes up the issue and undertakes to show, as he contends, that he is not entitled to recover that amount for the reasons stated to you awhile ago and set forth in his plea. Then he assumes the burden at that point to establish his contention. The burden of proof in the beginning was upon the plaintiff, and when he made this admission it was shifted to the defendant.”

We do not think this charge was error. While the defendant in the case, by admitting the execution, delivery, and ownership of the notes, had shown a *prima facie* case in favor of the plaintiff, and had thereby assumed the burden of proof and obtained the right to open and conclude, as the case developed under the evidence the burden finally rested upon the plaintiff “to satisfy the jury,” in the language of the court’s

charge, "of his right to recover in the case." When the bond for title was introduced in evidence by the defendant, it showed upon its face, as we have ruled above, that the sale of the land was by the acre, and that the defendant was entitled to an abatement of the purchase price proportionally to the deficiency in acreage. The plaintiff contended that the words "at \$12.50 an acre" were not in the bond for title when it was delivered to the defendant, the obligee in the bond. The defendant insisted that those words were in the bond. The plaintiff introduced evidence to show that the bond had been altered by the insertion of this very material stipulation. It not appearing from the record that the bond bore internal evidence of any alteration, *prima facie* upon its production the case stood in favor of the defendant. Whether the bond had been changed or not in the respect indicated was the controlling question in the case under the evidence, and the right of the plaintiff to recover depended upon his showing that the words "at \$12.50 an acre" had been inserted in the bond after its delivery to the defendant. This was the vital, controlling issue upon which the plaintiff's case rested, and as to this controlling question the burden of proof was upon the plaintiff. So, in the language of the court's charge, "at last, considering the whole case, all that occurred, the burden rested upon the plaintiff to satisfy the jury of his right to recover in the case."

The court submitted to the jury for their determination the question as to whether the sale of the land was by the tract or by the acre. This affords the plaintiff in error no ground of complaint, as the court was authorized to instruct the jury, under the bond for title as it appeared to be written, that the sale was by the acre.

Judgment affirmed. All the Justices concur.

(138 Ga. 342)

WEBB v. NEWSOM, Sheriff.

(Supreme Court of Georgia. June 13, 1912.)

(Syllabus by the Court.)

1. MANDAMUS (§ 55*) — AFFIDAVIT OF ILLEGALITY—REFUSAL TO ACCEPT.

Mandamus will not lie as a remedy to compel a sheriff to accept an affidavit of illegality filed to an execution issued by the Comptroller General against a tax collector in default and his bondsmen, and which was levied on the property of one of the alleged bondsmen, who avers in his affidavit of illegality that he did not sign the tax collector's bond, or authorize any one else to do so for him.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. §§ 109-112; Dec. Dig. § 55.*]

2. EXECUTION (§§ 166, 171*)—REMEDY—AFFIDAVIT OF ILLEGALITY.

In such case an equitable petition for injunction is an available remedy, when filed by a bondsman.

[Ed. Note.—For other cases, see Execution, Cent. Dig. §§ 485, 486, 497-518; Dec. Dig. §§ 166, 171.*]

Error from Superior Court, Brooks County; W. E. Thomas, Judge.

Action by J. C. Webb for writ of mandamus against J. B. Newsom, Sheriff. Judgment for defendant, and plaintiff brings error. Affirmed.

Shipp & Kline, of Moultrie, for plaintiff in error. Bennet, Long & Harrold, for defendant in error.

HILL, J. The Comptroller General issued a *fi. fa.* against Gibson, as the tax collector of Brooks county, and the sureties on his bond, for the sum of \$5,596.33. This execution was levied by the sheriff of Brooks county on the property of J. C. Webb, one of the alleged sureties on the collector's bond. Webb tendered an affidavit of illegality to the sheriff, wherein he alleged, among other things, that he did not sign the bond of the tax collector, or authorize any one else to sign his name thereto. This affidavit was refused by the sheriff, who continued to advertise Webb's property for sale. Before the date of the sale of the property Webb presented a petition for mandamus to the judge of the superior court of the circuit in which the parties resided, praying that the sheriff be required to accept the illegality and file the same with the clerk of the superior court of Brooks county for trial. The judge to whom the petition was presented denied the writ as prayed for, on the sole ground that "illegality was not and is not the remedy of the plaintiff." To this judgment the plaintiff excepts, and brings his case to this court by bill of exceptions for review.

[1] 1. The only question to be decided is whether the court erred in denying the writ of mandamus, and in holding that affidavit of illegality was not the proper remedy of the plaintiff. We think the court was correct in so holding. The earlier decisions of this court, based upon Tax Act 1804 (Cobb's Digest, p. 1052) § 24, were to the effect that an affidavit of illegality would not lie to an execution proceeding against a defaulting tax collector and his sureties. And it was held that that part of the act of 1804 which prohibits an affidavit of illegality from being entertained by the courts was constitutional. *Eve v. State*, 21 Ga. 50, 59. See, also, *Perkins v. State*, 101 Ga. 291, 28 S. E. 840. By the act of 1823 the duty of issuing executions was changed from the Treasurer to the Comptroller General. Cobb's Digest, p. 1025. The general rule was stated, in some of the earlier decisions, to be that there could be no judicial interference hindering or delaying the state in the collection of taxes due it. See *Decker v. McGowan*, 59 Ga. 805; *Brown v. Barnes*, 99 Ga. 4, 28 S. E. 86; *Bohler v. Schneider*, 49 Ga. 201. It was said, in some decisions, that the parties complaining must pay the taxes and pursue their remedy, either against the tax collector individually,

or the taxpayer could pay to "the government what it demanded of him, at the time of the demand, as he will be certain of getting it back, with interest, after more or less of delay." Just how is not stated. This last view was expressed in *Eve v. State*, 21 Ga. 59. See, also, *Cody v. Lennard*, 45 Ga. 85, 88; *Vanover v. Justices*, 27 Ga. 354, 357; *Yancey v. Manchester Mfg. Co.*, 33 Ga. 622.

Prior to the act of 1910, following the decision of the Supreme Court of the United States in the cases of *Central of Ga. Ry. Co. v. Wright*, *Compt. Gen.*, 207 U. S. 127, 28 Sup. Ct. 47, 52 L. Ed. 134, 12 Ann. Cas. 463, and *Georgia Railroad & Banking Co. v. Wright*, *Compt. Gen.*, 207 U. S. 127, 28 Sup. Ct. 47, 52 L. Ed. 134, 12 Ann. Cas. 463, the declared policy of the state was that there should be no replevin, or judicial interference, in any levy or distress for taxes due under the Code, but the party injured was left "to his proper remedy in any court of law having jurisdiction thereof." 1 Civil Code 1895, § 903, and citations. In the cases just cited, on page 131 of 207 U. S., on page 48 of 28 Sup. Ct. (52 L. Ed. 134, 12 Ann. Cas. 463), it was said: "Actions were begun by the plaintiffs in error, in the superior court of Fulton county, to enjoin the enforcement of executions in the hands of the sheriff, issued for taxes assessed by the Comptroller General on the shares of the corporate stock of the Western Railway of Alabama, an Alabama corporation, which stock was alleged to be held and owned by the plaintiffs in error. The superior court refused to award an injunction. Upon writs of error the Supreme Court affirmed the judgments of the court below. 124 Ga. 596, 53 S. E. 251; 124 Ga. 630, 53 S. E. 207. The cases were remitted to the superior court of Fulton county, and that court rendered final decrees in favor of the defendants below, holding the tax executions to be lawful. The cases were again taken to the Supreme Court of Georgia and there affirmed. 125 Ga. 589, 54 S. E. 52; 125 Ga. 617, 54 S. E. 64." And, after an elaborate discussion of the tax laws of Georgia, the decision of this court, holding that an injunction would not lie in those cases, was reversed, on the ground that the tax system of this state did not afford due process of law under the fourteenth amendment of the Constitution of the United States. Subsequently to the decision last cited, the Legislature of this state amended the law relative to the method of assessing and collecting taxes. Acts 1910, p. 22. By the fourth section of that act it is provided that, "should the taxpayer desire to contest the taxability of said property under this section, he may do so by petition in equity in the superior court of the county where said property is assessed." Thus it will be seen that the policy adopted by the Legislature of the state as to the method of contesting the "taxability of said property" is by "peti-

tion in equity in the superior court of the county where the property is assessed."

No constitutional question was raised by the earlier decisions, which were rendered prior to the adoption of the fourteenth amendment to the Constitution of the United States. Nor was the *kind* of remedy to be used decided, but merely the right to test the enforcement of the execution at all. The cases where this court held that illegality would not lie would probably have applied to any other remedy under the act of 1904. But the Supreme Court of the United States, in the *Wright Cases*, *supra*, reversing this court, held that a taxpayer must have a hearing and due process of law. And if this is true as to the taxpayer, how much more must it hold good as to a security on a tax collector's bond, who avers that he never signed the bond at all, or authorized any one to sign it for him. In other words, that he is not even surety on the bond and that no liability attaches to him.

What, then, is the remedy in such a case? For, for every right there must be a remedy. Our Civil Code 1910, §§ 1034-1041, provides that any railroad company, desiring to resist the collection of the tax provided for in the preceding sections, may resist its collection by filing an affidavit of illegality to the execution issued by the Comptroller General, which shall be returnable to the superior court of Fulton county, to be determined as other illegalities. This is the only case where provision is made for the return of illegality in such cases, so far as we know, except by municipal charter in some instances. Under the law the Comptroller General issues the tax *fi. fa.*, but no provision is made generally, or otherwise, for the return of an illegality to the Comptroller General, who has no authority to try it. The general rule is that an illegality must be returned to the court from which the *fi. fa.* issues. Civil Code 1910, § 5307. But the Comptroller General is not a court, and no express authority has been conferred on him by the Legislature to hear and determine such cases. If the sheriff of Brooks county had taken the illegality tendered him in this case, where would he have returned it? No place has been fixed by law for returning it, and he properly declined to take it. Mandamus, therefore, would not lie to compel the sheriff to take the affidavit of illegality.

[2] 2. What, then, is the remedy in a case like the present? Reasoning by analogy from former decisions of this court, and from the act of the Legislature of 1910, *supra*, in the case of the taxpayer, where petition to a court of equity and injunction is the declared remedy, we hold that injunction is a proper remedy in a case like the present. *City of Atlanta v. Jacobs*, 125 Ga. 528, 54 S. E. 534. In the older cases, holding that illegality would not lie, the form of the remedy was not attacked merely, but the right to in-

terfere at all. Neither did the cases holding that injunction was a remedy establish the fact that resort to a court of equity was the exclusive remedy; but they recognize that it is a remedy, and the Legislature, following the decision in the Wright Cases, supra, provided for an equitable proceeding by a taxpayer. It is true that none of the acts or decisions apply in terms to the bondsmen of tax collectors, but only to taxpayers and tax collectors; but, analogizing from the act of 1910, we think the better view is that the remedy is by equitable petition and injunction. Instances may be conceived where the only adequate relief would be in a court of equity. This is an available remedy, and mandamus to compel the sheriff to take an affidavit of illegality will not lie.

Judgment affirmed. All the Justices concur.

(11 Ga. App. 208)

CRUMM v. J. P. ALLEN & CO.
(No. 3,932.)

(Court of Appeals of Georgia. April 16, 1912.
On Motion for Rehearing, May 27, 1912.)

(Syllabus by the Court.)

1. CORPORATIONS (§ 524*)—ACTION BEFORE A JUSTICE—APPEAL—WHO MAY ENTER.

Any officer or agent of a corporation against whom a suit has been brought in a justice's court, who appears and manages the case in behalf of the corporation, may enter an appeal for the corporation.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2131-2137; Dec. Dig. § 524.*]

2. EVIDENCE (§ 577*)—EVIDENCE AT FORMER TRIAL—"INACCESSIBLE"—WITNESS.

A party to a pending case is not, though beyond the jurisdiction of the court when the case is tried, "inaccessible," within the meaning of section 5773 of the Civil Code of 1910, so as to authorize the introduction of his testimony delivered on a former trial of the case.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2406; Dec. Dig. § 577.*]

For other definitions, see Words and Phrases, vol. 4, p. 3488.]

3. JUSTICES OF THE PEACE (§ 111*)—TRIAL—NONSUIT.

Where a case has been called for trial in a justice's court, and the attorney for the plaintiff announces ready, participates in the selection of a jury, and offers evidence in behalf of his client, the justice of the peace is not authorized to grant a nonsuit, though the plaintiff fails to make out his case; and the case should be disposed of by a verdict of the jury in the defendant's favor.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. § 364; Dec. Dig. § 111.*]

Error from Superior Court, Fulton County; J. I. Pendleton, Judge.

Action by C. V. Crumm against J. P. Allen & Co. Judgment for defendant, and plaintiff brings error. Affirmed.

Lowndes Calhoun, of Atlanta, for plaintiff in error. George Gordon, of Atlanta, for defendant in error.

POTTLE, J. The certiorari was overruled. It appears from the petition, which is verified by the magistrate's answer, that the defendant, a corporation, was sued in a justice's court upon an open account. A plea was filed by the defendant, denying indebtedness, and this plea was verified by the oath of J. P. Allen, who swore that he was authorized to file the plea, and was familiar with the facts therein stated. The judgment of the magistrate was in favor of the plaintiff, and the defendant entered an appeal to a jury in the justice's court. The appeal and bond were signed, "J. P. Allen Company, per J. P. Allen, Secretary." When the case was called for trial on the appeal, a motion was made to dismiss the appeal, upon the ground that the appeal and bond had not been executed by an authorized officer of the corporation. The justice postponed decision on this motion, and allowed the defendant to file at the next term of the court a written ratification of the act of J. P. Allen in entering the appeal, which ratification was duly executed by the corporation, and under its seal. The motion to dismiss the appeal was overruled. The plaintiff announced ready for trial, and a jury was stricken. The attorney for the plaintiff testified that she was absent in the city of New York, and he offered to prove the testimony of the plaintiff delivered on a previous trial of the case. The court refused to permit this, and, the plaintiff offering no other evidence, the defendant was allowed to take a verdict.

1. Section 5002 of the Civil Code of 1910 provides that "an appeal may be entered by the plaintiff or defendant in person, or by his attorney at law or in fact." Section 5005 provides that, "in case of corporations, the appeal may be entered by the president or any agent thereof managing the case, or by the attorney of record." Counsel for the plaintiff in error rely upon King Hardware Co. v. Bowden, 113 Ga. 924, 39 S. E. 404, to sustain the proposition that a secretary and treasurer of a corporation is not, by virtue of his office, clothed with the authority to sign an appeal bond and enter an appeal in behalf of the corporation. It may be conceded that the decision relied on sustains the position taken by counsel; and that the appeal in the present case could not on its face be said to have been entered by an authorized agent of the defendant. A corporation can, of course, act only through an agent; and any officer duly authorized so to do by the corporation may enter an appeal in its behalf. If, therefore, a person undertakes to enter an appeal in behalf of a corporation, it should appear that he has been clothed with authority to act for the corporation and bind it by the appeal so entered. But section 5005 of the Civil Code of 1910 expressly provides that any officer of the corporation managing the case may enter the appeal. We do

not think it absolutely essential that the appeal itself should recite that the person acting for the corporation was the agent managing the case. The appeal is valid if it appears from the record in the case, and if the court knows as a matter of fact, that the person thus undertaking to bind the corporation by the appeal is its agent managing the case. The record shows that J. P. Allen filed the plea in behalf of the corporation, and made oath to the defense that he was authorized to file the plea, and was familiar with the facts therein stated, and that these statements were true. It is therefore apparent that Allen was the agent of the corporation managing the case, and, as such, he had authority to enter the appeal. This being so, no ratification of such authority was necessary; and it is immaterial whether the ratification filed in this case would have been sufficient if the agent entering the appeal had been undertaking to act as an attorney in fact under the provisions of section 5002 of the Civil Code of 1910.

[2] 2. Error is assigned upon the refusal of the justice of the peace to permit proof of the testimony of the plaintiff in a former trial of the case. The Civil Code of 1910, § 5773, provides: "The testimony of a witness, since deceased, or disqualified, or inaccessible for any cause, given under oath on a former trial, upon substantially the same issue and between substantially the same parties, may be proved by any one who heard it, and who professes to remember the substance of the entire testimony as to the particular matter about which he testifies." Counsel raises the rather novel point that his client was inaccessible, within the meaning of this section of the Code, so as to authorize the admission of her testimony on a former trial; but we do not think the case comes within either the letter or the spirit of the statute. The whole purpose of the statute was to enable a party to obtain the benefit of the testimony on a former trial of an absent witness, inaccessible to the court, without the consent or procurement of the party. If a party should procure the absence of a witness beyond the jurisdiction of the court, or do anything to bring about such absence, he certainly would not be permitted to use the former testimony of the witness. The statute means that the witness whose testimony is sought is inaccessible, both to the party desiring his testimony and to the court. Certainly it could not be said that a party could ever be inaccessible to himself. He is presumed to know when his case will be called for trial; and it is his duty to be present if he desires to offer himself as a witness, or to testify by depositions in support of his claim. It has frequently been held that, while secondary evidence of the contents of a writing is admissible when the writing is beyond the jurisdiction of the court, yet that, where the writing is in the possession of a party to the case, it

cannot be said to be beyond the jurisdiction until it has been determined by notice to produce that the writing is not in the power, custody, or control of such party; for, where a writing is in the possession of one of the parties to the case, it cannot be said to be inaccessible. *Cutter-Tower Co. v. Clements*, 5 Ga. App. 291, 63 S. E. 58. If a party to a pending case should die, evidence of his testimony on a former trial of the case would be admissible; but it can never be said that a party in life is so inaccessible, within the meaning of the statute, as to authorize proof of his testimony offered on a former trial of the case.

[3] 3. The only other point arises upon the contention that the justice should have dismissed the action or granted a nonsuit; and that he had no right to permit a verdict to be returned in favor of the defendant. Counsel rely upon *Bateman v. Smith Gin Co.*, 98 Ga. 219, 25 S. E. 422, to support this contention. In that case the plaintiff failed to appear; and the justice permitted counsel for the defendant to impanel a jury and take a verdict in his favor. It appears in the present case that counsel for the plaintiff were present in court when the case was called, announced ready for trial, and joined with the defendant's counsel in the selection of a jury. It further appears that the plaintiff did offer evidence, because her counsel took the stand in her behalf and testified that she was absent in New York. The mere fact that he was not allowed to testify further what the plaintiff had sworn to on a former trial is immaterial. The case was not different from any other, where the plaintiff has offered evidence and failed to make out the case. The justice of the peace had no right to award a nonsuit, and had very little, if any, control over the case at all. The jury stood in the place of the magistrate, were judges of both the law and the facts; and, under the circumstances, the only proper disposition that could have been made of the case was by a verdict in the defendant's favor. See *Favors v. Johnson*, 79 Ga. 553, 4 S. E. 425.

Judgment affirmed.

On Motion for Rehearing.

Counsel for the plaintiff in error has filed a motion for rehearing, upon the ground that this court has misapprehended the scope and effect of the ruling of the Supreme Court in the case of *King Hardware Co. v. Bowden*, cited in the opinion. A decision of the Supreme Court is binding upon this court as a precedent only in so far as the ruling therein announced may have been authorized by the facts of the case under consideration. In the *Bowden* Case, it appears that the attorney for the King Hardware Company stated in his place that C. L. King, who signed the appeal bond, was the agent of the King Hardware Company managing the case. This was

the only evidence before the court that King was the agent of the company managing the case; and the only question really presented to the Supreme Court for decision was whether this statement of counsel was sufficient to show that King had authority to enter the appeal in behalf of the King Hardware Company. We do not feel bound to extend the doctrine of that decision further than the facts of the case demand. It is true that the Supreme Court in the course of the opinion, said that the bond should on its face disclose that it was executed by some person authorized to sign thereto the appellant's name; but, as we have shown, this statement of the court was obiter, and we think the ruling which we have heretofore announced is to the effect that, where the record itself discloses that the person who signed the appeal bond in behalf of the appellant corporation was in fact its agent managing the case, this would be sufficient to save the appeal.

Moreover, the Supreme Court held directly, in *Sanders v. Mathewson*, 121 Ga. 302, 48 S. E. 946, that, to render the appeal valid, it was not necessary that the appellant should sign the appeal bond at all. In the course of the opinion, Mr. Justice Lamar said that, in order to show that the appellant assented to the appeal, good practice would suggest that he or his authorized attorney should execute the bond; and the case of *King Hardware Company v. Bowden* is cited in support of this proposition. But, nevertheless, the court held that, there being no statute in this state requiring the appellant to sign the bond, his failure to do so would not work the dismissal of the appeal, if the proper security were given. As was said by the learned justice who wrote the opinion: "Here the bond recites that the appeal was by the appellant, and that she tendered the security. Inasmuch as there has already been a judgment against her, and she is bound thereby, and will likewise be bound for the eventual condemnation money, in case another judgment is recovered against her on the appeal, it is a needless thing for the appellant to sign the appeal bond. The appellee requires nothing more from him, except security; and that is furnished when the surety signs the bond."

The copy bond appearing in the record of the present case does not disclose that it was signed by the surety; but, inasmuch as no point is made on this by the plaintiff in error, and no motion was made to dismiss the appeal for this reason, we assume that the omission of the name of the security was a clerical error in the copy, in view of the fact that the bond recites on its face that the appellant, J. P. Allen & Co., comes and tenders a named person as security. Of course, it must appear in all cases that the appellant consented to the appeal. The present record discloses that Allen filed a defense for the

corporation, verifying the truth thereof by his affidavit, and that afterwards the corporation filed in the justice's court a document, under the seal of corporation, stating that Allen did have authority to enter the appeal for the corporation, and that it ratified his act in so doing. It is true that this written ratification was not filed within the time required by section 5002, Civil Code 1910; but, nevertheless, it can be looked to for the purpose of showing that the corporation had in fact assented to the entering of the appeal by its officer and agent, Allen. We see no reason for changing the view expressed in the opinion originally filed in this case, and we adhere to the decision then made.

Motion denied.

(11 Ga. App. 246)

O'CONNOR et al. v. UNITED STATES, for use of WM. M. BYRD & CO.

(No. 4,117.)

(Court of Appeals of Georgia. June 5, 1912.)

(Syllabus by the Court.)

1. EVIDENCE (§ 175*)—BEST AND SECONDARY EVIDENCE—CERTIFIED COPY.

Whenever in a suit in one of the courts of this state the contents of a public document of the United States government become material as evidence, a duly certified copy of such document is the best evidence of which the nature of the case will admit; the original of the document being required, by the acts of Congress and the rules and regulations of that department of the United States government having custody of the paper, to be kept on file in the proper office of such department.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 561, 565, 568, 569; Dec. Dig. § 175.*]

2. JUSTICES OF THE PEACE (§ 84*)—PROCEDURE—TIME FOR MAKING DEFENSE.

When suit is brought in a justice's court upon a written instrument other than an unconditional contract, it is not necessary that the defendant shall file his defense at the first term. The marking of the name of his counsel on the docket is sufficient appearance, and the defendant may make his formal defense at any time before final trial.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 266-278; Dec. Dig. § 84.*]

3. UNITED STATES (§ 67*)—CONTRACTS—ACTIONS ON CONTRACTORS' BONDS.

This being an action upon the bond of a contractor with the United States government, conditioned to pay the claims of all laborers and materialmen which the contractor failed to settle, and there being no proof either of the breach of the bond or of the amount which the plaintiffs were entitled to recover, a verdict and judgment in favor of the plaintiffs were unauthorized, and should have been set aside on certiorari.

[Ed. Note.—For other cases, see United States, Cent. Dig. § 50; Dec. Dig. § 67.*]

4. EVIDENCE (§ 43*)—JUDICIAL NOTICE—RECORD IN OTHER CAUSE.

In the trial of one case the court cannot take judicial notice of the record of another case even in the same court, without its formal introduction in evidence.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 62-65; Dec. Dig. § 43.*]

*(Additional Syllabus by Editorial Staff.)***5. EVIDENCE (§ 157*) — "SECONDARY EVIDENCE."**

Secondary evidence is such evidence as from necessity in some cases is substituted for stronger and better proof.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 460-470; Dec. Dig. § 157.*

For other definitions, see Words and Phrases, vol. 7, pp. 6378, 6379.]

Error from Superior Court, Richmond County; H. C. Hammond, Judge.

Action by the United States of America, for the use of Wm. M. Byrd & Co., against E. J. O'Connor and others. Judgment for plaintiff, and defendants bring error. Reversed.

Goodrich contracted with the United States government through one of its quartermasters to erect a public building, and gave bond payable to the United States of America, with O'Connor and Schweers as sureties, in which it was stipulated that Goodrich should make full payment to all persons supplying him with labor or materials in the prosecution of the work. Wm. M. Byrd & Co. furnished certain materials to the contractor, and, upon his failure to pay for them, sued him in a justice's court, and obtained a judgment. Suit upon the bond was afterwards brought in the justice's court, in the name of the United States of America, for the use of Byrd & Co., to recover the amount of that judgment. No written defense was filed at the first term, but counsel for the defendants marked his name upon the docket. Several terms after the term to which the summons was made returnable the case was called for trial. At that time, pending the trial, defendants offered a written plea denying the allegations of indebtedness in the summons, and demanding proof thereof. The magistrate refused to allow this plea to be filed. The plaintiff offered in evidence a certified copy of the contract made with the government by Goodrich, and also certified copies of contracts relating to alterations to be made in the building, and to extensions of the time limit within which the work was to be completed, to which extensions the sureties on the bond had assented in writing. Objection was made to the introduction of all these papers, on the ground that the originals were the best evidence; their loss or destruction not having been shown. This evidence being admitted, no further evidence was introduced by the plaintiff, and no evidence of any character was introduced by the defendants. The justice of the peace thereupon entered judgment in favor of the plaintiff against the defendants for \$94.06, being the amount of the judgment which had theretofore been recovered against Goodrich. The defendants sued out a certiorari to the

superior court, complaining of the judgment entered against them and of the rulings hereinbefore referred to, made during the progress of the trial. The certiorari was overruled, and defendants except.

D. G. Fogarty, of Augusta, for plaintiffs in error. C. H. & R. S. Cohen, of Augusta, for defendant in error.

POTTLE, J. [1] 1. The contract and the bond to secure its performance were made under the provisions of Act Cong. Aug. 13, 1894, c. 280, 28 Stat. 278 (U. S. Comp. St. 1901, p. 2523). That section provides, among other things, that "any person or persons making application therefor, and furnishing affidavit to the department under the direction of which said work is being, or has been, prosecuted, that labor or materials for the prosecution of such work has been supplied by him or them, and payment for which has not been made, shall be furnished with a certified copy of said contract and bond, upon which said person or persons supplying such labor and materials shall have a right of action, and shall be authorized to bring suit in the name of the United States, for his or their use and benefit, against said contractor and sureties, and to prosecute the same to final judgment and execution." The right to sue was not restricted to courts of the United States, and hence it was competent for the plaintiffs to institute their action in any court of the state of competent jurisdiction. *Mondou v. New York, New Haven & Hartford R. Co.*, 223 U. S. 1, 32 Sup. Ct. 169, 56 L. Ed. 327; *Galveston, H. & S. A. R. Co. v. Wallace*, 223 U. S. 481, 32 Sup. Ct. 205.† The copy contract and bond which were offered in evidence were certified under the seal of the War Department of the United States by the Quartermaster General of the army. His certificate recited that the contract and bond thereto attached were true copies of the records of the War Department in the office of the Quartermaster General. There was a further certificate, signed by the acting Secretary of War, that the person claiming to be such was the Quartermaster General of the army of the United States, and that full faith and credit should be given to his attestation as such. We fully agree with counsel for the plaintiff in error that Congress has no right to prescribe rules of evidence for the state courts. *Small v. Slocumb*, 112 Ga. 279, 37 S. E. 481, 53 L. R. A. 130, 81 Am. St. Rep. 50. All that the law of this state requires is that the best evidence which exists of the fact sought to be proved must be produced, unless its absence be satisfactorily accounted for. Civil Code 1910, § 5748.

[5] Secondary evidence is defined to be "such as from necessity in some cases is substituted for stronger and better proof." Civil Code 1910, § 5750. The originals of the contract and bond were on file in the office of

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes
† 56 L. Ed. 518.

the War Department at Washington, and were, therefore, inaccessible to the plaintiffs. The statutes of the United States require such records to be kept on file in the proper office of the government. When, in a suit in a court of this state, the contents of a public record of the United States government, on file in one of the departments, becomes material as evidence, the law of this state will not require a suitor to produce the original record, but a duly authenticated copy is admissible in evidence, not by virtue of any act of Congress undertaking to prescribe rules of evidence for the state courts, but under and in pursuance of the rules of evidence prescribed by the Legislature of this state. Such is the uniform current of authority. See 17 Cyc. 345-346, and cases cited. In *Huckabee v. State*, 7 Ga. App. 677, 67 S. E. 837, this court held that a certified copy of a record in the office of the collector of internal revenue of this state, showing the names of all persons who had paid special taxes in his district, was admissible in evidence for the purpose of showing that a particular person had paid the special tax as a retail liquor dealer. This decision was rendered before the passage of an act of the General Assembly of this state, making such a record admissible in evidence in the courts of this state, and was decided upon the general rules of evidence prevailing in this state at the date of the decision. This decision is really controlling upon the point presented in the present case. Moreover, it is to be observed that the act of Congress upon which the suit is predicated expressly provides that any person furnishing labor or materials shall have a right to bring suit upon a duly certified copy of the contract and bond. This would seem to be something more than a mere rule of evidence. The statute creates a right to sue upon the copy contract and bond. It does not say that, when suit is brought upon the original bond, a certified copy will be admissible in evidence, but it says that the suit itself may be brought upon a certified copy of the bond. Under the very terms of the act of Congress, a certified copy stands for all purposes in lieu of the original bond. There was no objection to the jurisdiction of the state court; and, having assumed jurisdiction, it was incumbent upon the Georgia court to give full effect to the act of Congress upon which the suit was predicated.

The further objection was made that the certificate to the contract and bond was not in the proper form, because it recited that the contract and bond attached were true copies of the records of the War Department in the office of the Quartermaster General, and that it did not appear from the evidence that these copies were true copies of the original contract and bond. The recital in the certificate that the papers attached were copies of the records of the War Department sufficiently indicates that they were

copies of the originals in that department. It is not to be presumed that the War Department would have on file simply copies of a contract and bond executed with the United States government, but the presumption is that the records on file in that department were original documents, of which copies were attached to the certificate.

[2] 2-4. The magistrate was evidently of the opinion that the suit was upon an unconditional contract in writing, and that, therefore, it was necessary under section 4734 of the Civil Code of 1910 for the defendants to make their defense at the first term. See, also, *G., F. & A. Ry. Co. v. Sheppard*, 3 Ga. App. 241, 59 S. E. 717. In *Smith v. Chivers*, 6 Ga. App. 154, 64 S. E. 493, it was held that the defendant in a justice's court, when sued on an unconditional contract in writing, must appear and make his defense at the first term, either by pleading or by marking his name or that of his attorney on the docket. When the contract sued upon is not unconditional, there is no requirement that the defendant shall make his defense in the justice's court at the first term. He may do so at any time before final trial, even on the appeal. *Lewis v. Nevils*, 97 Ga. 744, 25 S. E. 409. The magistrate, therefore, erred in refusing to permit the defendants to enter their defense at the trial.

[3] It was also error to award judgment in favor of the plaintiffs. The plaintiffs failed to make out their case. There was no proof of the breach of the bond, nor of the amount which the plaintiffs were entitled to recover.

[4] It is argued in the brief of counsel for the defendants in error that, the judgment against Goodrich having been rendered in the same court in which the suit on the bond was pending, the court had a right to take judicial cognizance of the existence of this judgment and of the amount which had been recovered thereon against Goodrich. This contention is effectually disposed of by the decision in the case of *Glaze v. Bogle*, 105 Ga. 295, 31 S. E. 169. In that case a plea of *res adjudicata* was filed, setting up a judgment in a former suit between the same parties in the same court. When the plea was read, the judge, without any evidence having been introduced, directed the jury to sustain the plea by finding a verdict for the defendants. The Supreme Court held: "In the trial of one case the court can no more take judicial notice of the record in another case in the same court, without its formal introduction in evidence, than if it were a record in another court; much less can this court take notice of the existence of a record not introduced in evidence in the court below." The judge of the superior court should have sustained the certiorari and remanded the case for a new trial.

Judgment reversed.

(71 W. Va. 144)

NEELEY v. TOWN OF CAMERON.

(Supreme Court of Appeals of West Virginia.
Oct. 22, 1912.)

(Syllabus by the Court.)

1. EVIDENCE (§ 495*)—OPINION EVIDENCE—AMOUNT OF DAMAGES.

In a personal injury case, an estimate of the damages is peculiarly for the jury from facts, data, and circumstances detailed by witnesses, and a mere opinion as to the amount of damages suffered is not admissible.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2283; Dec. Dig. § 495.*]

2. APPEAL AND ERROR (§ 1050*)—REVIEW—HARMLESS ERROR—ADMISSION OF EVIDENCE.

The admission of improper opinion evidence is not always ground for reversal. If a statement of inference, conclusion, or judgment is accompanied by the facts on which it is based, error in admitting it is usually harmless, since the jury can judge of its probative value.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4153-4160, 4166; Dec. Dig. § 1050.*]

3. APPEAL AND ERROR (§ 1050*)—REVIEW—HARMLESS ERROR—ADMISSION OF EVIDENCE.

Where the opinion of a witness, accompanied by the facts on which it is based, relates merely to the amount of damages suffered by personal injury, and it plainly appears that the jury acted on the facts and excluded the opinion in estimating the damages, the admission of the opinion will not call for reversal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4153-4160, 4166; Dec. Dig. § 1050.*]

4. APPEAL AND ERROR (§ 1031*)—INSTRUCTIONS—PROVINCE OF COURT AND JURY.

Though it is always good practice directly to predicate an instruction relating to facts on the belief of the jury "from the evidence," harm from failure to do so will not be presumed and reversal based thereon when it does not appear that the jury were misled thereby, their verdict being clearly within the evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4038-4046; Dec. Dig. § 1031.*]

Error to Circuit Court, Marshall County.

Action by S. B. Neeley against the Town of Cameron. Judgment for plaintiff, and defendant brings error. Affirmed.

McCamie & Clarke, of Wheeling, for plaintiff in error. Simpson & Showacre, of Moundville, for defendant in error.

ROBINSON, J. The Town of Cameron seeks to reverse a judgment recovered against it by Neeley, who sued for damages arising from personal injury caused by a defective street.

At the trial, plaintiff, a witness in his own behalf, was asked to state how much he had been damaged by the injury. Over the objection of defendant, he was permitted to answer and stated that he thought he had been injured about five thousand dollars. Defendant insists that the testimony was inad-

missible—that its admission calls for a reversal and new trial. Let us briefly consider the point.

[1] In a personal injury case, an estimate of the damages is peculiarly for the jury from facts, data, and circumstances detailed by witnesses, and a mere opinion as to the amount of damages suffered is not admissible. The court should have sustained the objection to the question. Plaintiff had testified to the jury as to the character of his injury, the severity and duration of his pain and suffering, the loss of time from his occupation, and the amount of his expenditure for attention and cure. It was for the jury, not for himself or other witnesses, to say how much he was injured. The case is different from those in which this court has sanctioned the admission of opinion evidence, such as *Hargreaves v. Kimberly*, 26 W. Va. 787, 53 Am. Rep. 121; *Hurxthal v. Boom & Manf. Co.*, 65 W. Va. 346, 64 S. E. 355; *Kunst v. City of Grafton*, 67 W. Va. 20, 67 S. E. 74, 26 L. R. A. (N. S.) 1201. The reasons given for the admission of opinion evidence in cases like those do not generally apply to proof of damages for personal injury. Besides, the element of pain and suffering, at the least, is a distinguishing feature. Human judgment is not so safely in accord in regard to that element of damages as it is in regard to such things as rental value, depreciation in land, and other commercial matters, which have a familiar standard in every community. The same is true as to a permanently crippled part of the body. At wide variance would different witnesses value the loss. Each one would assume his own standard since every day knowledge and experience, tending to a general standard, cannot guide him.

[2] But the admission of improper opinion evidence, is not always ground for reversal. "If a statement of inference, conclusion, or judgment is accompanied by an enumeration of facts on which it is based, the error, if any, is usually harmless; as the jury can estimate the true probative value of the statement. Thus, where a witness states, merely by way of summary or introduction, his mental induction or deduction from facts which he gives in detail, the error does not furnish cause for reversing a judgment." 17 Cyc. 60. In this connection it has been stated: "Harm cannot be predicated of an opinion which goes no further than the witness has just presented of his own knowledge in the nature of actual demonstration." *Brown v. Town of Swanton*, 69 Vt. 53, 37 Atl. 280.

[3] In the case before us, plaintiff had given to the jury an enumeration of the facts on which he based the opinion he gave. The jury were, therefore, enabled to say to what extent the opinion was worth consideration. Indeed it appears that the jury

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

gave it no consideration; for, from the same facts and circumstances on which plaintiff said he was injured five thousand dollars, they found that he was injured only in the sum of four hundred and six dollars and twenty-five cents.

It must be observed that this improper opinion evidence related not to the establishment of the right to recover, but merely to the estimate of damages. The jury have said from much competent evidence that plaintiff had the right to recover. The error does not pertain to the finding of that right. It must be dealt with solely in relation to the finding as to the amount of damages. The unquestioned facts before the jury showed that he was entitled to the amount found, if entitled at all. Then, can we say that the error in admitting this opinion evidence harmed defendant so as to demand a reversal? Certainly not. It plainly appears that the jury acted on the facts—not on the opinion of plaintiff—that they found for plaintiff only such an amount as the facts warranted and not such an amount as he claimed in his testimony. It seems clear that if the improper evidence had been excluded, the result would have been the same. Since the jury found only a little over four hundred dollars which the facts justify, it is plain that they were controlled by the facts and gave no weight to the plaintiff's opinion in relation to five thousand dollars. Defendant was not prejudiced in point of fact by the improper ruling. Principles enunciated in *Hall v. Lyons*, 29 W. Va. 410, 1 S. E. 582, *Taylor v. Railroad Co.*, 33 W. Va. 39, 10 S. E. 29, and other cases, are applicable here.

[4] Defendant submits that one of the instructions given for plaintiff was improper because it did not directly say to the jury that they must be governed by the evidence. It is always good practice to predicate instructions on the belief of the jury "from the evidence." There is authority saying that instructions not so predicated are bad. But certainly it goes far in technicality to say that jurors must always be told to act on the evidence. Jurors know that they must rely on the evidence as a basis of their finding, even when not directly reminded in that particular. The following quotation is pertinent: "The objection made to the plain-

tiff's prayers, that they do not say that 'the jury must find from the evidence' is hypercritical. All instructions are based on the evidence; and the jury are told that if they find, which means, without possible chance of misleading, that, if the evidence convinces them of the state of facts set out in 'the prayer, then they must find for the plaintiff.'" *Blumhardt v. Rohr*, 70 Md. 328, 17 Atl. 266. The instruction before us relates to the elements of damages that the jury may consider. Instructions similar to the one in question, with the omission of a clause predicating that the jury shall believe from the evidence, have been approved by this court. *Riley v. Railroad Co.*, 27 W. Va. 151; *Evans v. Huntington*, 37 W. Va. 601, 16 S. E. 801. This instruction is one telling the jury that, if they find for the plaintiff, they may consider certain proper elements in estimating the damages and award him such sum as in their judgment will compensate him for the injuries which they find are the natural and direct result of the negligence complained of. It is argued that the jury were left free to depart from the evidence. We do not think so. The elements of damages mentioned in the instruction are merely those which from the evidence related to the case. Fairly construed, the instruction limited a finding under it to the evidence. Other instructions given in the case relating to finding on the main issue of negligence or no negligence were directly predicated on the belief of the jury "from the evidence." We shall not indulge the presumption that because of this one instruction the jury ran at large in considering their verdict. It is not reasonable to do so. Moreover, the finding of the jury is within the evidence. It clearly appears from the record that the jury did not go beyond the evidence in any particular—that they were not misled. If the instruction was erroneous, it affirmatively appears that it did no harm.

The other points submitted for reversal are not tenable. They involve no novel propositions of law and do not demand definite discussion. Except as to the harmless error which has been referred to, the case was fairly tried and submitted to the jury. The evidence sustains the verdict. The judgment must be affirmed.

(113 Va. 439)

BEMISS et al. v. COMMONWEALTH et al.
(Supreme Court of Appeals of Virginia. June 13, 1912.)

1. APPEAL AND ERROR (§ 1234*)—LIABILITY ON BONDS—EXTENT OF LIABILITY.

Under Code 1904, § 3470, providing that the condition of supersedeas bonds shall be to perform and satisfy the judgment, etc., and to pay all actual damages incurred in consequence of the supersedeas, where a supersedeas was given to suspend the operation of a decree directing the delivery of bonds to a party, damages from the depreciation in the value of the bonds and the loss of the difference in interest between that borne by the bonds and that which could have been realized on the money invested therein are recoverable, although the supersedeas did not contain a provision for the payment of actual damages; the statute being read into every statutory supersedeas given since its passage.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4761-4777; Dec. Dig. § 1234.*]

2. APPEAL AND ERROR (§ 1234*)—LIABILITY ON BONDS—EXTENT OF LIABILITY.

Where bonds directed by a decree to be delivered to a party depreciated in value during the time the operation of the decree was suspended by a supersedeas, the recovery on the supersedeas of the damages from the depreciation cannot be denied, on the ground that by delivery of the bonds after affirmance of the decree the party received all that he was entitled to under the decree.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4761-4777; Dec. Dig. § 1234.*]

Error to Law and Equity Court of City of Richmond.

Action between the Commercial Trust Company, trustee, and the First National Bank. Judgment against Bemiss and another on the supersedeas bond executed by them, and they bring error. Affirmed.

Munford, Hunton, Williams & Anderson, for plaintiffs in error. George Bryan, for defendants in error.

KEITH, P. The chancery court of the city of Richmond, by its decree entered on the 17th of March, 1910, directed its clerk to deliver to the First National Bank of Richmond, Va., or to George Bryan, its attorney, Virginia century bonds of the face value of \$25,500. From this decree an appeal was allowed upon the petition of the Commercial Trust Company, and a supersedeas bond in the penalty of \$1,000 was required, which was executed by Bemiss and Williams, the plaintiffs in error, and bears date the 12th of May, 1910. The condition of this bond was that if the said petitioners "shall perform and satisfy the decree in case the same be affirmed, or said appeal and supersedeas be dismissed, and shall also pay all damages, costs, and fees which may be awarded against or incurred by them, then this obligation to be void; otherwise, to remain in full force and virtue."

The decree appealed from was affirmed and the First National Bank gave notice that on a certain day it would move the law and equity court of the city of Richmond for a judgment against the petitioners, Bemiss and Williams, for the penalty of the bond, claiming that the costs and damages sustained amounted to \$1,519.26, of which sum \$828.75 was for alleged depreciation in value of the bonds during the period the decree of March 17, 1910, was suspended by the appeal, and \$690.51, difference between interest at 6 per cent. on the market value of the bonds and 3 per cent. interest on the face value of said bonds, during the same period.

The petitioners here, defendants in the court below, cravedoyer of said bond and demurred to the notice; the ground of demurrer being that the condition of the bond, to pay "all damages, costs, and fees which may be awarded against or incurred by them," does not cover such costs and damages as are set out in the notice.

The court overruled the demurrer, the petitioners pleaded conditions performed, and, a jury having been waived, the whole matter of law and fact was submitted to the court. The facts agreed were as follows: That the Virginia century bonds, between the 17th day of March, 1910, and the 11th day of March, 1911, depreciated in market value \$697.50; that between the dates named the First National Bank loaned money at a rate of interest as high as 6 per cent., but that the average rate was 5½ per cent.; that the money collected from the United States on account of the Mohawk was, upon the recommendation of the receiver, invested in Virginia century bonds in order that the fund should be exempt from taxation; that the bank could have realized 2½ per cent. interest on the cost of said bonds in addition to the 3 per cent. interest which was paid on the face value of said bonds, which, between the dates named, would have been \$575, but the money invested in said bonds would have been liable to taxes, which, between the dates named, would have amounted to \$402.50, leaving the amount claimed to have been lost by the plaintiff on account of interest \$172.50; that either party may rely upon the printed record in the case of Commercial Trust Company, Trustee, v. First National Bank, and the opinion handed down on March 9, 1911 (112 Va. 44, 70 S. E. 532), as fully as if the same had been fully set out; that because of the supersedeas granted in the case the \$25,500 of Virginia century bonds referred to in the decree of March 17, 1910, were retained in the custody of the clerk of the court from the 17th day of March, 1910, to the 13th day of March, 1911, at which date they were delivered under and pursuant to the terms and conditions of said decree to the First National Bank, and no other or further payment has been made to

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

the said bank in satisfaction of said decree; that if, at any time subsequent to said 17th day of March, 1910, the First National Bank had made application to the chancery court to have entered an order directing that the aforesaid century bonds be sold and the proceeds held to await the result of this litigation, Eppa Hunton, Jr., of counsel for the Commercial Trust Company, would have made no objection to such a decree for the clients whom he represented, and he believes that no objection would have been made to such a decree by counsel for the other appellants in the suit of Commercial Trust Company v. First National Bank; that on the 20th day of July, 1911, the court entered a judgment against Bemiss and Williams for the sum of \$697.50 on account of the depreciation in value of the bonds mentioned in said notice of motion for judgment, and the further sum of \$172.50 on account of interest as set forth in said notice, with interest on both sums from the 13th day of March, 1911, to which action of the court Bemiss and Williams excepted. To that judgment a writ of error was awarded, and the case is before us for consideration.

[1] Upon the demurrer the plaintiffs in error rely chiefly upon the case of *Cardwell v. Allen*, Trustee, 69 Va. 184. The opinion there construed section 13 of chapter 178 of the Code of 1873, which sets forth the condition of an appeal and supersedeas bond to be to "pay all damages, costs and fees which may be awarded against or incurred by the appellants or petitioners," and it was held that this language was not broad enough to cover the rents and profits of real estate in the possession of the appellant. The language of the bond in the present case is identical with that construed in the case just cited; but the statute upon the subject has been amended, and so much of it as is pertinent to the question before us reads as follows: The condition of the bond, if a supersedeas be awarded, shall be "to perform and satisfy the judgment, decree, or order, or the part thereof, proceedings on which are stayed, in case the said judgment, decree, or such part, be affirmed, or the appeal, writ of error, or supersedeas, be dismissed, and also to pay all damages, costs, and fees, which may be awarded against or incurred by the appellants or petitioners, in the appellate court, and all actual damages incurred in consequence of the supersedeas."

It is unnecessary to consider what our opinion would be as to the binding force of *Cardwell v. Allen*, supra, had there been no change in the statute since that case was decided. It is true that the language of the bond in this case is identical with the language of the bond in that case, and it may be conceded that the construction placed upon the statute by the court in *Cardwell*

v. Allen would not have embraced the damages claimed by the notice in the case before us. The statute, however, has made a radical change, and has provided that the bond shall be for the payment of all damages, costs, and fees, and all actual damages incurred in consequence of the supersedeas, which is broad enough to cover the damages in question; the whole contention in support of the demurrer being, that, as this court had held in *Cardwell v. Allen* that the condition to pay all damages, costs, and fees was not broad enough to cover the rents and profits of real estate, it is not broad enough to cover the damages claimed in this case. When the change in the statute was made, it was the purpose of the Legislature to enlarge the scope of the supersedeas bond and to extend its protection to cases not theretofore embraced in it, and that statute is, we think, to be read into every statutory supersedeas bond which has been executed since its passage. Had the statute in the Code of 1873, which was construed in the case of *Cardwell v. Allen*, been such as we now find it to be in section 3470 of the Code of 1904, we cannot for a moment believe that the condition of the bond before us, which is to pay all damages, costs, and fees, would not have been held sufficient to cover the rents of real estate in the hands of the appellant, which were excluded by the judgment of the court in *Cardwell v. Allen*, and sufficient to embrace all actual damages incurred in consequence of the supersedeas, although the latter phrase had not in terms been set out in the supersedeas bond as it was executed.

We are of opinion that there was no error in the judgment of the law and equity court upon the demurrer.

[2] It is also claimed, on behalf of the plaintiffs in error, that the judgment of the law and equity court was erroneous in allowing the sum of \$697.50 on account of depreciation in the value of the bonds between the date of the decree, which was the 17th day of March, 1910, and the 11th day of March, 1911, when they were actually delivered to the defendants in error. The contention of plaintiffs in error rests upon the proposition that inasmuch as it appears that the century bonds were delivered to the defendants in error in kind, and it does not appear that they have ever been sold, they have received what the decree in the case of *Commercial Trust Company v. First National Bank* gave them, and that no loss upon this account has been sustained.

In this view we cannot concur. When the decree of March, 1910, was rendered, which was subsequently affirmed, the bank was entitled to the immediate possession of the century bonds, to do with as to it seemed best. They were worth at that date in the

market a certain sum. Possession of them was wrongfully withheld from the bank for about a year, and when the bank actually received them they had depreciated to the amount for which the court gave judgment. The bank, in March, 1911, received what had diminished in value \$697.50, as compared with what it was entitled to receive in March, 1910. We think it comes plainly within the condition of the bond.

Upon the whole case we are of opinion that there was no error to the prejudice of the plaintiffs in error, and the judgment is affirmed.

Affirmed.

(113 Va. 574)

EXPOSITION ARCADE CORPORATION v. LIT BROS.

(Supreme Court of Appeals of Virginia. June 13, 1912.)

1. SALES (§ 467*)—CONDITIONAL SALE—RESERVATION OF TITLE—DESTRUCTION OF PROPERTY—LOSS.

A buyer, in possession of goods bought under conditional sale, and destroyed while in his possession, but without his fault, must bear the loss, as between himself and the seller.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1354, 1358-1364; Dec. Dig. § 467.*]

2. INSURANCE (§ 593*) — FIRE POLICIES — FAILURE TO COLLECT—SET-OFF—QUESTION FOR JURY.

Where a buyer under a conditional sale of personal property, on its being destroyed by fire before payment of the price, delivered the policies to the seller for collection and credit, the seller's liability for failure to collect a portion of the insurance was an unliquidated demand, depending on negligence, and was properly submitted to the jury, as against the buyer's claim that he was entitled to credit as a matter of law for full amount of the policies.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1452, 1476-1478, 1481, 1482, 1485; Dec. Dig. § 593.*]

Error to Law and Chancery Court of City of Norfolk.

Action by Lit Bros. against the Exposition Arcade Corporation. Judgment for plaintiff, and defendant brings error. Affirmed.

R. R. Hicks, for plaintiff in error. E. R. Baird, Jr., for defendant in error.

KEITH, P. Lit Bros. proceeded by motion in the court of law and chancery of the city of Norfolk against the Exposition Arcade Corporation to recover certain moneys claimed to be due them, and obtained a judgment for the sum of \$2,427.95, to which a writ of error was obtained by the defendant corporation.

From the facts in evidence it appears that Lit Bros., a corporation organized under the laws of the state of Pennsylvania, in consideration of the sum of \$6,279.50 paid and to

be paid, sold to the Exposition Arcade Corporation certain personal property, consisting of household furniture, which was delivered to the defendant company, but the title to which was reserved to Lit Bros. until all the payments under the contract of sale had been made. It was further agreed that the property should be insured for an amount not less than \$4,000, the policy of insurance to be assigned to Lit Bros. as additional security. This contract bears date in March, 1907, and on the 29th of June, 1907, the property was wholly destroyed by fire. It appears that the Exposition Arcade Corporation had policies of insurance in several companies, amounting to \$5,500, which it turned over to Lit Bros., who proceeded to collect from the insurance companies, but realized only \$2,462.45, which, added to the sum which was paid in cash, left due by the Exposition Arcade Corporation the sum for which judgment was rendered.

[1] The claim of the plaintiff in error is, first, that where a seller puts property in the possession of a vendee, with reservation of title, it is at the risk of the seller, and the loss is on the vendor when the property is destroyed without fault upon the part of the vendee.

Upon this question there seems to be some conflict of opinion. The cases from Massachusetts (Tabbutt v. American Ins. Co., 185 Mass. 419, 70 N. E. 430, 102 Am. St. Rep. 353, and Swallow v. Emery, 111 Mass. 356) and Alabama (American Soda, etc., Co. v. Blue, 40 South. 218¹) sustain the position of plaintiff in error. But the weight of authority is, we think, to the contrary.

In Williston on Sales, § 304, it is said: "Where goods are delivered to the buyer, but title is retained by the seller until the price is paid, the buyer immediately acquires the right to use the goods as his own, and has, indeed, exactly the same power over them, and right in regard to them, that he would have if he had bought them and mortgaged them back to secure the price. The time for payment in such sales frequently extends over months, and sometimes over years. It is necessarily to be expected by the parties that the goods will deteriorate during this period, and, nevertheless, that the buyer will be bound to pay the price. It seems properly to follow that, if the goods are accidentally destroyed or injured, the buyer must stand the loss; that is, he must pay the price in full at the time agreed. The decisions upon the point are in conflict, but the weight of authority sustains the view here expressed."

In support of the text a number of authorities are cited, among them Chicago Equip-

¹ Reported in full in the Southern Reporter; reported as a memorandum decision without opinion in 146 Ala. 682.

ment Co. v. Merchants' Bank, 136 U. S. 268, 10 Sup. Ct. 999, 34 L. Ed. 349, where Mr. Justice Harlan uses the following language: "The agreement that the title should remain in the payee until the notes were paid * * * is a short form of chattel mortgage. The transaction is, in legal effect, what it would have been if the maker, who purchased the cars, had given a mortgage back to the payee, securing the notes on the property until they were all fully paid. The agreement by which the vendor retains the title and by which the notes are secured on the cars is collateral to the notes, and does not affect their negotiability. It does not qualify the promise to pay at the time fixed, any more than would be done by an agreement of the same kind, embodied in a separate instrument, in the form of a mortgage. So far as the notes upon their face show, the payee did not retain possession of the cars; but possession was delivered to the maker. The marks on the cars showed that they were to go into the possession of the maker, or of its transferee, to be used. The suggestion that the maker could not have been compelled to pay, if the cars had been destroyed before the maturity of the notes, is without any foundation upon which to rest. The agreement cannot properly be so construed. The cars having been sold and delivered to the maker, the payee had no interest remaining in them, except by way of security for the payment of the notes given for the price. The reservation of the title as security for such payment was not the reservation of anything in favor of the maker, but was for the benefit of the payee and all subsequent holders of the paper. The promise of the maker was unconditional."

In *La Valley v. Ravenna*, 78 Vt. 152, 62 Atl. 47, 2 L. R. A. (N. S.) 97, 112 Am. St. Rep. 898, 6 Ann. Cas. 684, the Supreme Court of Vermont held that "there may be a recovery of the unpaid purchase price for property sold and delivered on condition that the title shall not pass until full payment is made, although without the fault of the purchaser the property is destroyed before the price falls due."

Burnley v. Tufts, 66 Miss. 49, 5 South. 627, 14 Am. St. Rep. 579, is to the same effect. See, also, *Tufts v. Griffin*, 107 N. C. 47, 12 S. E. 68, 10 L. R. A. 526, 22 Am. St. Rep. 863; *Tufts v. Wynne*, 45 Mo. App. 42.

In *American Soda Fountain Co. v. Vaughn*, 69 N. J. Law, 582, 55 Atl. 54, it is said: "In a contract of sale, where the title remains in the vendor until the purchase price is paid, and notes are given for unpaid installments of the purchase price, if it appears upon a construction of the contract that the consideration for the notes was the delivery of the goods, with the right to acquire title by payment, it is no defense to an action upon the notes that the subject of the sale was destroyed by fire before the title passed."

Many other cases are cited by Williston in support of the text, but those referred to are deemed sufficient.

[2] The second ground of defense was that *Lit Bros.* should have been required to credit their demand against the *Exposition Arcade Corporation* with the face value of the policies of insurance which had been taken out upon this property.

The defendant pleaded non assumpsit to the motion for judgment, and filed its particulars of defense, the first paragraph of which is as follows: "The furniture mentioned in the notice was insured for its full value in the name of the plaintiff, in a good, solvent insurance company, and was destroyed by fire without defendant's fault. The policies were delivered to the plaintiff and collected by him. Said plaintiff could have, and should have, collected from said insurance companies the amount of \$6,000. Plaintiff failed to collect said insurance, and such failure has damaged defendant to the said amount, which damages defendant offers to set off against the claim of plaintiff; the plaintiff being a nonresident of Virginia and having no estate in Virginia. This statement of grounds of defense is to be considered a special plea in the nature of a plea of set-off."

Now, that is defendant's statement of its case. It comes before the court with a plea of set-off, and the court told the jury that "the defendant is only entitled to have credited on the amount due by it to the plaintiff for the unpaid purchase price of the furniture bought by it such sums as the plaintiff actually collected from the policies of insurance held by it, unless it appears from the evidence that the plaintiff ought, in the exercise of reasonable care and diligence, to have collected a larger amount from said policies." The defendant excepted to this, and asked the court to instruct the jury that "if from the evidence they believe that the plaintiff settled, without the consent of the defendant, the insurance claims described in the evidence at less than their face value, then the jury must allow the defendant an offset against plaintiff's claim to the amount of the difference between the face value of the insurance claims and the amount actually collected by the plaintiff on account of said insurance."

The court gave the instruction asked for by the plaintiff, and refused that which was asked for by the defendant. The defendant also asked the court to instruct the jury, that "the burden is upon the plaintiff to show that he collected on account of said insurance the amount collectible thereon," which the court also refused to give.

In *Waterman on Set-Off*, at page 89, § 73, it is said: "As the defendant, when he interposes a set-off, stands in the light of a plaintiff in a cross-action, the burden of proof is on him to establish his set-off."

And dealing specifically with unliquidated demands, pleaded as set-offs, it is said at page 345, § 292: "The damages to be recovered on a policy of insurance are always uncertain. The amount depends on the proof at the trial. The plaintiff may declare for a total loss, yet be able to prove only a partial loss, the extent of which will be greater or less according to the circumstances of each particular case. A policy of insurance is a contract of indemnity. The assurer undertakes to indemnify the assured for the damages he may sustain by losses in consequence of the perils insured against by the policy. It is like a bond to save harmless. In most cases nothing can be more unliquidated than the amount of such indemnity. It depends upon a great variety of facts and circumstances, to be disclosed and digested at the trial."

We think, therefore, that there was no error in the ruling of the court, which left it to the jury to say whether or not the plaintiff ought, in the exercise of reasonable care and diligence, to have collected a greater amount from the policies.

Upon the whole case, we are of opinion that there is no error in the judgment complained of, and it is affirmed.

Affirmed.

(113 Va. 537)

CARSON v. CITY OF RICHMOND.

(Supreme Court of Appeals of Virginia. June 13, 1912.)

1. EMINENT DOMAIN (§ 8*)—STATUTORY POWER—CONSTRUCTION.

The power conferred by statute to condemn land must be strictly construed, and the manner of executing it must be observed.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 25, 30, 34, 43, 44; Dec. Dig. § 8.*]

2. EMINENT DOMAIN (§ 158*) — AWARD OF COMPENSATION — RIGHTS OF PARTIES TO AWARD—JUDICIAL DETERMINATION.

Under Code 1904, § 1105f, authorizing the condemnation of land, requiring the commissioners to ascertain the just compensation therefor, and that the court may ascertain what persons are entitled to the money paid into court and in what proportions, commissioners appointed to report the compensation for land taken, and the additional damages, if any, have no power, where there is a controversy as to who is entitled to such compensation, or in what proportions, to determine who is entitled thereto, but that question must be determined by the court.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 426, 428-432; Dec. Dig. § 158.*]

Appeal from Hustings Court of City of Richmond.

Condemnation proceedings by the City of Richmond against J. P. Carson and another. There was a judgment confirming the report of the commissioners, and J. P. Carson appeals. Reversed in part.

J. P. Carson and W. P. De Saussure, for appellant. H. R. Pollard and Christian, Gordan & Christian, for appellees.

BUCHANAN, J. This is a proceeding instituted by the city of Richmond to condemn certain lands for its purposes. One of the lots, a part of which was condemned, was subject to a ground rent for 99 years, with the right of renewal to the lessee for successive terms, forever. At the time of the institution of the proceeding the plaintiff in error, J. P. Carson, was the owner by assignment of the rights of the landlord under the lease, and the Old Dominion Steamship Company had acquired the rights of the lessee. Both Carson and the steamship company were parties to the proceeding. Commissioners were appointed as provided by section 1105f, Va. Code 1904, and ascertained and reported that a just compensation for the land taken was \$3,625, and that no damage would result to the residue of the property or to another person by reason of the taking. They further reported that, of the compensation reported, Carson, the owner of the ground rent to which the lot is subject, is entitled to the sum of \$811.40 (which sum, capitalized at 5 per cent., is equal to \$40.57, by which the annual ground rent of \$650 on the whole property must be credited), and that the steamship company is entitled to \$2,813.60, the residue of the said sum of \$3,625.

No exception was made to the said report as to the compensation allowed for the land taken (its fee-simple value, as we understand the report), but Carson excepted to the report as to the manner in which the commissioners undertook to apportion or distribute that sum. His exception was overruled by the court, and the report of the commissioners confirmed, and the compensation allowed, which had been paid into court, was directed to be paid to the parties in accordance with the report of the commissioners.

The first and second assignments of error may be considered together. They are as follows:

"First. The effort of the commissioners of appraisal to reduce the rent reserved in the lease from Wm. Allison and wife to Lewis Ludlam, under which the Old Dominion Steamship Company holds the possession of the land, is illegal, ultra vires, and should not have been confirmed by the court.

"Second. The hustings court, being without jurisdiction in this proceeding to reform the said lease or vary the covenants, erred in confirming the said commissioners' report and in ordering 'that the yearly rental of \$650, payable in quarter-yearly installments, * * * be reduced by the sum of \$40.57 annually.'"

[1] It is well settled in this state that, in

proceedings like this, the power conferred must be strictly construed, and the manner of executing it carefully observed and followed. *Fisher v. Smith*, 32 Va. 611, 612; *Painter v. St. Clair*, 98 Va. 85, 34 S. E. 959; *C. & O. Ry. Co. v. Walker*, 100 Va. 69, 40 S. E. 633, 914.

[2] Section 1105f of Va. Code 1904 provides when and how any company chartered in this state, which is authorized to condemn lands, or any interest or estate therein, may acquire the same for its purposes; and by subsection 25 of that section its provisions, as far as they can be applied, govern cities in exercising the right to condemn property for their purposes. That section prescribes the duties to be performed by the commissioners, the form of oath they are to take, and the form of report they are to make. From these are to be ascertained the extent of their powers.

By subsections 8 and 15 it is provided that the commissioners, after viewing the property, or the interest or estate which is sought to be condemned, and the adjacent property, and hearing evidence, shall ascertain what will be a compensation for the said property and land, or for such interest or estate therein as is proposed to be taken, and assess the damages, if any, to the adjacent or other property of such tenant or owner, or to the property of any other person, beyond the peculiar benefits that will accrue to such properties, respectively, from the construction and operation of the company's works.

By subsections 7 and 16 it is provided that before executing the duties of his office each commissioner shall take an oath to the effect that he will faithfully and impartially ascertain what will be "a just compensation for such land (or such interest or estate in the land) of the freehold whereof — is tenant, and for such other property as is proposed to be taken by the — Company for its purposes, and award the damages, if any, resulting to the adjacent and other property of said tenant or owner, and to the property of any other person, beyond the peculiar benefits that will accrue to such properties, respectively, from the construction and operation of the company's works."

By subsections 8 and 17 the form of the report the commissioners are required to make is prescribed. Their report must state by what court and for what purpose they were appointed, that they met on the day designated in the order, or to which they were regularly adjourned, upon the land to be condemned, the limits of which were described to them, and which they are required to describe in their report; that they were duly sworn, and that upon such evidence as was before them they "are of opinion and do ascertain that for the said part (or for the estate or interest in the part) and for the other property so taken —

will be a just compensation, and the damages to the adjacent and other property of said tenant or owner, and to the property of other persons, who will be damaged in their property by reason of the construction and operation of the works of said company, beyond the peculiar benefits that will accrue to such properties, respectively, from the construction and operation of such works are: * * *

In order to enable the court to dispose properly of money paid into court, subsection 14 provides that "it may have inquiries by a commissioner to ascertain what persons are entitled thereto, and in what proportions, and may make an order of publication requiring all interested to appear before the commissioner, that their respective claims may be passed upon. After such reference to a commissioner, and such publication, the court shall make such disposition of the money so paid into court as may seem to it right."

From these and other provisions of section 1105f it is clear, we think, that the commissioners appointed to ascertain and report the compensation for the land, or interest or estate therein, taken, and the additional damages, if any, provided for, have no power, where there is a controversy or doubt as to who is entitled to such compensation or damages, or in what proportions, to pass upon or determine who is entitled to the same. Neither the statute authorizing the appointment of the commissioners, the order appointing them, the oath they take, nor the report they are required to make, impose any such duty or confer any such power upon them. On the contrary, provision is expressly made (subsection 14) for determining, in case of controversy or doubt, the parties to whom and in what proportions such compensation and damages are to be paid.

One of the objects of subsection 14 was that the condemning body might not be obstructed in the prosecution of its work by controversies in respect to the title to or interest in the land sought to be taken, but to transfer such controversies from the land to the fund paid into court. *Richmond, etc., R. R. Co. v. Seaboard, etc., Co.*, 103 Va. 399, 49 S. E. 512; *Swann v. Washington, etc., R. R. Co.*, 108 Va. 282, 287, 61 S. E. 750. When a report has been made, the sums ascertained by it may be paid into court by the condemning party, and it may enter and construct its work upon the land described in the report, although the proceedings are still pending. Subsection 11.

For the duties of ascertaining a just compensation for the land to be condemned and the incidental damages resulting from the taking and the construction and operation of the works constructed and operated thereon—duties expressly imposed by the statute—the commissioners are peculiarly fitted. *Richmond, etc., Co. v. Seaboard, etc., Co.*, supra,

and authorities cited. But for determining controversies between persons interested in, or claimants to, the land taken, or to the compensation and damages reported, the proper decision of which depends frequently upon intricate questions of law, such commissioners as a rule are ill qualified. It is true that in some jurisdictions all these duties are imposed upon the commissioners or juries, who ascertain the compensation and assess the damages. This seems to be the case in the state of Maryland, as shown by the case of the Mayor and City of Baltimore v. Latrobe and Others, 101 Md. 621, 61 Atl. 208, 4 Ann. Cas. 1005, so much relied on by the counsel of the defendant in error. The statutes in that state seem to materially differ from ours. But while under our statutes the commissioners to ascertain the compensation, etc., for the land condemned have no such power, it is clear, we think, that the court having jurisdiction of the condemnation proceedings has full power under the provisions of subsection 14 of section 1105f to ascertain the rights and interests of the claimants to the fund, and in the language of that section "to make such disposition of the money so paid into court as may seem to it right."

It follows, from what has been said, that we are of opinion that so much of the report of the commissioners as attempted to make disposition of the money ascertained by them to be a just compensation for the land taken was in excess of their powers and ought to have been stricken out as surplusage, and the report in other respects only confirmed. *Swann v. Washington, etc., R. R. Co.*, supra, and cases cited.

At a day subsequent to the confirmation of the report of the commissioners the hustings court, without any hearing on its part, or having inquiries made as to who was entitled to the fund, as provided by subsection 14 of section 1105f, entered an order distributing the fund paid into court in accordance with the report of the said commissioners. The rights of the parties claiming the fund in court have never been considered or ascertained in the manner prescribed by the statute.

The court is of opinion that the order of the hustings court, confirming the commissioners' report, and all proceedings in the case subsequent thereto and based thereon, are erroneous and must be reversed; and this court, without passing upon any other question involved in the case, will enter such order as the hustings court ought to have en-

tered, striking out as surplusage so much of the commissioners' report as attempted to dispose of the compensation allowed for the land taken, and confirming the said report in other respects, and will remand the cause to the hustings court, with directions to proceed, in the manner provided by subsection 14 of section 1105f of the Code, to ascertain the rights of the claimants to the fund paid into court, and to dispose of it accordingly. Reversed in part.

CARDWELL, J., absent.

(113 Va. 616)

LAMBERT v. JAMES E. PHILLIPS & SON.
(Supreme Court of Appeals of Virginia. June 13, 1912.)

APPEAL AND ERROR (§ 1002*) — REVIEW — FINDINGS.

A verdict upon conflicting evidence cannot be disturbed on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3935-3937; Dec. Dig. § 1002.*]

Error to Circuit Court of Richmond.

Action by James E. Phillips & Son against G. W. Lambert. There was a judgment for plaintiffs, and defendant brings error. Affirmed.

O'Flaherty & Fulton and W. L. Royall, for plaintiff in error. John A. Lamb, for defendants in error.

HARRISON, J. This action to recover the value of certain work and materials furnished by the plaintiffs, as plumbers, is before us for the second time. *Lambert v. Phillips & Son*, 106 Va. 632, 64 S. E. 945.

At the former hearing, the law applicable to the facts of the case was fully and clearly stated, and the case remanded for a new trial in accordance with the views then expressed.

With respect to the second trial, the record of which is now before us for review, it is only necessary to say that upon careful consideration of the same we find no error in the trial to the prejudice of the plaintiff in error. The evidence before the jury touching the right of the defendants in error to recover was conflicting, and the case was fairly submitted in accordance with the law as already laid down by this court. Under such circumstances, upon well-settled principles, the verdict of the jury cannot be disturbed, and the judgment complained of must therefore be affirmed.

Affirmed.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

(113 Va. 563)

DELAWARE, L. & W. R. CO. v. COTTEN.
(Supreme Court of Appeals of Virginia. June 13, 1912.)

1. APPEAL AND ERROR (§ 859*)—REVIEW—SCOPE.

Where a case has been heard by the court, and the evidence is certified, it is to be heard on a writ of error as on a demurrer by the defendant to the evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3441-3445; Dec. Dig. § 859.*]

2. APPEAL AND ERROR (§ 1008*)—REVIEW—FINDINGS.

Where a case is tried by the court, the judgment has the same effect as the verdict of a jury, and will not be disturbed, unless plainly against the evidence, or without evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3955-3969; Dec. Dig. § 1008.*]

3. APPEAL AND ERROR (§ 1047*)—REVIEW—RULINGS ON EVIDENCE—PREJUDICE.

A judgment on trial by the court will not be reversed for rulings in admitting or rejecting evidence, where the evidence other than that involved in the objections is amply sufficient to sustain the judgment.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4132, 4133, 4146-4152; Dec. Dig. § 1047.*]

Appeal from Circuit Court of Norfolk.

Action by Preston S. Cotten against the Delaware, Lackawanna & Western Railroad Company. Judgment for plaintiff, and defendant appeals. Affirmed.

J. W. Willcox and Morris, Garnett & Cotten, for appellant. Williams & Tunstall, for appellee.

HARRISON, J. This record shows that in August, 1908, the Delaware, Lackawanna & Western Railroad Company entered into a contract in writing with the Henderson Jarrett Company, Incorporated, of Norfolk, dealers in lumber, at Norfolk, Va., by which it was agreed that the lumber company would deliver to the railroad company, at Scranton, Pa., 100 cars of "pine collar timber," not peeled, to be not less than 18 feet long and 30 per cent. thereof to be 10 inches in diameter, 30 per cent. 12 inches, 30 per cent. 14 inches, and 10 per cent. 16 inches, at the price of 13¼ cents per lineal foot. The contract further provided that, should the material furnished fail to comply with the specifications, the railroad might return the same at the expense, including freight charges, cost of handling, etc., of the shipper. This pine collar timber was commonly known and designated as "mine props." The lumber company proceeded to fill the order, completing the same by October 27, 1908. As the lumber was delivered, the railroad company distributed the same to its various mines in the outlying district around Scranton, where the greater part thereof was promptly used. When the parties came to a final settlement of the balance due the lum-

ber company under the contract, differences arose as to the size of the props and the method of calculating the balance due. The railroad company insisted that the lumber company had not delivered as many props of the larger sizes as the contract called for, and further contended that in ascertaining the diameter of the logs a deduction of one inch should be made for the bark, notwithstanding the provision of the contract that the material to be furnished should be *unpeeled*, and, further, that when a log measured under the bark 15, 13, or 11 inches, it was to be put in the next lower class, since the contract did not call for props of that size. In other words, if a log actually measured 14 inches, including the bark, 1 inch was deducted for the bark, thus reducing the diameter to 13 inches, and then the log was to be put in the 12-inch class, because the contract did not contemplate a log 13 inches in diameter. This method of measurement made a very large difference in the diameter of the logs, and was repudiated by the lumber company as arbitrary and in utter disregard of the contract.

Various attempts were made to bring about a settlement of these differences, and in the spring of 1909 a final conference was had, which resulted, as was supposed, in a satisfactory adjustment. At this conference it appears to have been agreed that there should be added 1 inch to all the measurements, representing the difference between an over-bark and an under-bark measurement; that, when this had been done, the logs which by proper measurement fell into the intermediate grades, not named in the contract, should be divided equally, and one-half assigned to the next highest grade and one-half to the next lowest grade; and, this having been done, that the value should be reckoned according to a scale agreed upon. The parties reached totally different results in the calculation by each of the balance due under this compromise adjustment.

The evidence for the plaintiff shows very clearly and satisfactorily that by proper calculations, such as were contemplated by the terms of the adjustment, there was a large balance due to the lumber company. The result of the calculation made by the railroad company was a trifling balance due, which it tendered the plaintiff in full discharge of its obligation. This tender was rejected, upon the ground that it had been arrived at in total disregard of the terms of adjustment which had been adopted. Thereupon Preston S. Cotten, the assignee of the lumber company, brought this suit to recover of the defendant railroad company the sum of \$8,098.04, the balance originally claimed and demanded by the lumber company as its due.

The case was heard by the judge of the circuit court of the city of Norfolk without

a jury, who gave the plaintiff a judgment for \$4,159.60, to which the present writ of error was awarded on the petition of the defendant railroad company.

[1, 2] The case having been heard by the judge without a jury, and the evidence being certified, it is to be heard here as on a demurrer by the defendant to the evidence. The judgment of the trial court has the same effect as the verdict of a jury, and this court will not disturb its finding, unless it is plainly against the evidence, or without evidence. *Martin v. Railroad Co.*, 101 Va. 406, 44 S. E. 695; *Parsons v. Maury*, 101 Va. 516, 44 S. E. 758; *Gray v. Rumrill*, 101 Va. 507, 44 S. E. 697.

We have examined carefully the evidence, which is too voluminous to be discussed in detail, and find that it abundantly sustains the finding and judgment of the circuit court. Viewed from the standpoint of a demurrer to the evidence, the judgment is not only amply sustained, but is fully justified.

[3] Several objections were taken by the defendant to the action of the court in admitting and rejecting certain evidence. In the view we take of the case, it is unnecessary to consider these exceptions, for the reason that, if they were well taken, it could not affect the result. The evidence, other than that involved in these objections, is amply sufficient to sustain the judgment, and therefore the testimony objected to could not possibly have had any influence on the mind of the court prejudicial to the objecting party. *Gerst v. Jones & Co.*, 73 Va. 518, 34 Am. Rep. 773.

The judgment complained of must be affirmed.

Affirmed.

CARDWELL, J., absent.

(113 Va. 490)

BOWE et al. v. SCOTT et al.†

(Supreme Court of Appeals of Virginia. June 13, 1912.)

1. MUNICIPAL CORPORATIONS (§ 697*)—OBSTRUCTION OF ALLEY—PUBLIC NUISANCE—INJUNCTION—SPECIAL DAMAGE.

Where plaintiffs owned real estate in a city which did not abut on the section of a public alley obstructed, under an ordinance authorizing the closing of the alley for 30 years, and had not suffered any special damage therefrom, they could not maintain a bill to enjoin the obstruction, it being a public nuisance, under the rule that an individual cannot maintain a bill to enjoin a public nuisance, unless he has suffered or will suffer therefrom special or peculiar damage to himself, as distinguished from injury to the general public.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1502-1505; Dec. Dig. § 697.*]

2. PLEADING (§ 245*)—AMENDMENT.

Where a demurrer had been sustained to a bill, the court did not err in refusing an amendment stating facts which were known,

or might have been known, to plaintiffs prior to the argument of the demurrer.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. §§ 635, 653-675; Dec. Dig. § 245.*]

Appeal from Chancery Court of Richmond.

Action by N. W. Bowe and others, against Elizabeth S. Scott and others. From a decree sustaining demurrers to the bill, and overruling plaintiffs' motion to file an amended bill, and dissolving an injunction previously awarded, and dismissing the bill, plaintiffs appeal. Affirmed.

R. E. Byrd and David Meade White, for appellants. Page & Leary, Braxton & Eggleston, Leake & Buford, and H. R. Pollard, for appellees.

WHITTLE, J. The principal question presented by this appeal involves the right of individuals (owning real estate in the city of Richmond, but whose lots do not abut on the section of the public alley obstructed, and who have not suffered any peculiar damage therefrom) to have declared null and void a city ordinance authorizing the closing, for the period of 30 years, of a public alley reaching from Shafer street to Harrison street, to the extent to which it bisects the respective lots of the appellants, Elizabeth S. Scott and E. T. D. Myers, Jr.; also to enjoin the defendants from closing any portion of the alley, or from exercising any rights under "the void ordinance."

From a decree sustaining demurrers to the original bill, overruling the motion of the plaintiffs to file an amended bill, dissolving the injunction theretofore awarded, and dismissing the bill, this appeal was granted.

[1] Speaking generally, the obstruction of a public highway is a public nuisance, and the trend of authority is that an individual cannot maintain a bill to enjoin such nuisance, unless he can show that he has suffered or will suffer therefrom special and peculiar injury or damage to himself, as distinguished from injury or damage to the general public. Moreover, such special and peculiar injury or damage must be direct, and not purely consequential, and must be different in *kind*, and not merely in *degree*, from that sustained by the community at large.

The foregoing statement of the rule denotes the line of cleavage between remedies for public nuisances which may be maintained by an individual and such as must be asserted for or on behalf of the public.

The rule is thus stated in 29 Cyc. 1210: "It is absolutely essential to the right of an individual to relief against a public nuisance that he should show that he has suffered or will suffer some special injury other than that in which all the general public share alike, and the difference between the injury to him and the injury to the

general public must be one of kind, and not merely of degree." 4 Pom. Eq. Jur. § 1349; 5 Pom. Eq. Rem. § 542, where numerous cases are cited.

The research of counsel has drawn our attention to decisions which show that the statement of the law as given in Cyc. prevails in England and generally throughout the United States. It is also the established doctrine in Virginia. *Beveridge v. Lacey*, 24 Va. 63; *Com'th v. Webb*, 27 Va. 729; *James River & K. Co. v. Anderson*, 39 Va. 278; *Richmond Trust Co. v. Murphy*, 98 Va. 109, 34 S. E. 982; *Fisher v. S. A. L. Ry.*, 102 Va. 369, 46 S. E. 381, 1 Ann. Cas. 622; *Brown v. Baldwin*, 112 Va. 536, 72 S. E. 143.

In *James River & K. Co. v. Anderson*, supra, at page 278, Tucker, P., observes: "The property of the plaintiff, Anderson, lies in another square to the eastward, and that of Mills two squares off. As well might a lot owner at Rocketts complain of the narrowing of the main street on Shockoe Hill, and bring his private action or bill for an injunction. Such remote injuries common to the whole population are to be remedied by the action of the constituted corporate authorities, or by prosecution for a nuisance. If Anderson and Mills can implead the defendants for narrowing a street not contiguous to their property, every man in the community might do so. To prevent this evil, the law forbids an action by a private individual for a common nuisance, unless he can show a special injury." At page 307, Judge Tucker, on the question of jurisdiction, remarks: "In whatever light I have been enabled to view this case, I am perfectly satisfied that the injunction never should have been granted, and that upon the hearing it should have been altogether dissolved."

The learned chancellor, in a clear and conclusive opinion, shows that, though the injury to the plaintiffs, as stated in the bill, may be greater than that sustained by other persons living more remote from the scene of the obstruction, such injury is nevertheless greater in degree only, and not in kind.

Therefore, under the authorities, the bill does not state a case of such special injury as would entitle the plaintiffs to an injunction.

[2] After the court had announced its decision sustaining the demurrer to the bill upon a ground involving its dismissal, plaintiffs' counsel stated that they would offer

within very few days an amended bill. The chancellor found that the matters of amendment (which were of a nature somewhat similar to those contained in the original bill) were either known to the plaintiffs, or might well have been known to them, prior to the argument of the demurrer, and held that the motion to file the amended bill came too late.

In this ruling we think there was no error. Judge Grinnan, in that connection, justly remarks: "When the proceedings in a cause have reached the stage that they have reached in this suit, a motion to file an amended bill is received with reluctance, and not granted but for some good reason. If such an innovation as is here desired were to be granted, it would open a precedent whereby suits might be greatly and unnecessarily prolonged, to the inconvenience, delay, and expense of litigants. Instead of a plaintiff being at pains to state his whole case in his bill, as he ought to do, if possible, he would be at liberty to present his case to the court by piecemeal; and the announcement of the court's decision would serve no other purpose than to give notice that the bill needed additional allegations. While the courts are liberal in allowing amendments, the indulgence has never gone to this extent. * * * Courts have discretion in these matters; but this discretion is in no sense an arbitrary or capricious one. It is a discretion that is at all times hedged about and governed by those rules that have long been established and recognized as binding upon the courts."

The action of the court in overruling the motion for leave to file the amended bill is well sustained by authority. 1 Bar. Chy. Pr. 324, 327; *Alsop v. Catlett*, 97 Va. 364, 34 S. E. 48; *Vashon v. Barrett*, 99 Va. 346, 38 S. E. 200; *Jackson v. Valley Tie Co.*, 108 Va. 714, 722, 62 S. E. 964.

Concurring, as we do, in the ruling of the court sustaining the demurrer to the bill, it becomes unnecessary, and would, indeed, be improper, to express any opinion with respect to the validity of the ordinance, or the right of the public to redress the alleged invasion of their prerogative by prosecution, or other appropriate remedy, for a common nuisance.

The decree appealed from is without error, and must be affirmed.

Affirmed.

KEITH, P., and CARDWELL, J., absent.

(113 Va. 687)

SMITH, County Treasurer, v. BELL et al.[†]
(Supreme Court of Appeals of Virginia. June 13, 1912.)

1. ELECTIONS (§ 83*)—QUALIFICATIONS OF VOTERS—PAYMENT OF TAXES.

Under Const. art. 2, § 21 (Code 1904, p. ccxiii), requiring as a prerequisite to the right to vote, that the voter shall pay all state poll taxes assessed or assessable against him, a person assessable with poll taxes, who pays such taxes without their actual assessment against him, as required by law, is entitled to vote.

[Ed. Note.—For other cases, see Elections, Cent. Dig. §§ 77-81; Dec. Dig. § 83.*]

2. ELECTIONS (§ 83*)—QUALIFICATIONS OF VOTERS—PAYMENT OF TAXES.

Under Const. art. 2, § 21 (Code 1904, p. ccxiii), requiring the payment of state poll taxes as a prerequisite to the right to vote, and section 38 (page ccxvi), requiring county and city treasurers to file lists of persons who pay such taxes before each regular election, a treasurer properly included on such list the names of persons paying their taxes to him personally after they had been returned delinquent and he had paid his collections to the auditor, notwithstanding Code 1904, § 605, requiring payment of taxes appearing on the delinquent list to the collector or auditor, and providing that they cannot be collected by the treasurer, since the payment, having reached the proper officer, was as valid as if made to him in the first instance, and the constitutional right of suffrage cannot be subordinated to statutory enactments relative to the collection of taxes.

[Ed. Note.—For other cases, see Elections, Cent. Dig. §§ 77-81; Dec. Dig. § 83.*]

Error to Circuit Court, Princess Anne County.

Petition for a mandamus by R. J. Bell and others against A. C. Smith, County Treasurer. To review an order granting the mandamus, defendant brings error. Reversed.

R. R. Hicks and Loyall, Taylor & White, for plaintiff in error. N. T. Green and J. L. Jeffries, for defendants in error.

WHITTLE, J. Article 2 of the Virginia Constitution (Code 1904, p. ccxi) deals with the elective franchise. Section 38 of that article (Code 1904, p. ccxvi) provides that after January 1, 1904, the treasurer of each county and city shall, at least five months before each regular election, file with the clerk of the circuit court of his county, or the corporation court of his city, a list of all persons in his county or city who have paid, not later than six months prior to such election, the state poll taxes required by the Constitution.

In compliance with that requirement, the plaintiff in error, A. C. Smith, as treasurer of Princess Anne county, on May 6, 1911, filed with the clerk of the circuit court of the county a list of all persons who had paid to him their capitation taxes for the years 1908, 1909, and 1910, and who were consequently, prima facie at least, entitled to vote at the general election to be held on November 7, 1911.

On September 2, 1911, the defendants in error filed a petition in the circuit court of Princess Anne county, praying for a mandamus to require the plaintiff in error to return and file with the clerk a new list of voters who had personally paid their poll taxes to him for the years 1908, 1909, and 1910, and that he specially omit from said list the names of certain persons who had never been assessed with poll taxes as required by law, and certain other persons included therein, who, though they had been assessed with poll taxes, were returned delinquent for the years 1908 and 1909.

The case was heard upon the pleadings and evidence, and to an order of the circuit court granting the prayer of the petition this writ of error was allowed.

It is not denied that, with respect to both classes of persons who were deprived of their right to vote at the November, 1911, election by the order complained of, many of them were either assessed or assessable with poll taxes under the Constitution, and had paid their taxes to the treasurer, who accounted for the same to the auditor of public accounts. The question, therefore, for our determination, is whether these citizens are to be disfranchised solely because, in case of one class, they paid their poll taxes to the treasurer without having been previously assessed by the commissioner of the revenue and without his certificate of assessment (Acts 1910, p. 584), and in case of the other class because they paid their taxes to the treasurer after they had been returned delinquent (Va. Code, 1904, §§ 605, 606, 607, 608).

Section 21 of article 2 of the Constitution (Code 1904, p. ccxiii) provides that "any person registered under either of the last two sections shall have the right to vote for members of the General Assembly and all officers elective by the people, subject to the following conditions: That he, unless exempted by section 22, shall, as a prerequisite to the right to vote after the first day of January, 1904, personally pay, at least six months prior to the election, all state poll taxes assessed or assessable against him, under this Constitution, during the three years next preceding that in which he offers to vote. * * * " Tazewell v. Herman, 108 Va. 416, 60 S. E. 767, 61 S. E. 752; Tilton v. Herman, 109 Va. 503, 64 S. E. 351.

[1, 2] It is plain that section 21 contemplates the payment of poll taxes, not only by persons who have been assessed with such taxes, but also by persons who are assessable therewith. Nevertheless, the decision of the circuit court denies such right to the latter class, and to that extent nullifies the provision and disfranchises citizens who have fully complied with its terms. The order, moreover, strikes from the voting list the names of other citizens, who

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes
† Rehearing denied.

were assessed by the commissioner of the revenue, and were registered voters of the county, and had paid their poll taxes to the treasurer, *who paid his collections to the auditor*, merely because such payment was made after the taxes had been returned delinquent.

Section 608 of the Code provides that taxes appearing on the delinquent list (returned under section 605) may be paid either to the clerk or to the auditor, but that such taxes cannot be collected by the treasurer.

It may well be that these citizens, by selecting the treasurer as the medium for transmitting their taxes to the auditor, assumed the risk of his discharging that duty; yet, after the money reached the hand of the proper officer, the payment was as valid as if it had been made to him in the first instance. The state undoubtedly possesses plenary power to devise adequate means for assessing, levying, and collecting its revenues, subject only to such limitations as may be imposed by the Constitution; but the confusion in this case arises from the attempt to subordinate the right of suffrage granted to the citizen, in certain conditions, by the Constitution, to statutory enactments of the character indicated. Such legislation is essential, but it may not be so interpreted and enforced as to abridge the elective franchise as guaranteed by the Constitution.

For these reasons, the order of the circuit court must be reversed, with costs, and the case remanded for further proceedings.

Reversed.

(113 Va. 496)

BONOS v. FERRIES CO.

(Supreme Court of Appeals of Virginia. June 13, 1912.)

1. TRIAL (§ 152*)—DEMURRER TO EVIDENCE—PARTY HAVING BURDEN OF PROOF.

One, though having the burden of proof, may demur to the evidence; the question still being whether, after disregarding all his evidence in conflict with that of demurree, there remains enough to entitle him to judgment.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 349; Dec. Dig. § 152.*]

2. TRIAL (§ 154*)—DEMURRER TO EVIDENCE.

The degree of particularity with which a demurrer to evidence must state the ground thereof depends on the character of the case, and it is enough that it fully advises demurree of demurrant's contention.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 351, 353; Dec. Dig. § 154.*]

3. FERRIES (§ 17*)—LEASES—LAND INCLUDED.

A lease of ferries and all other property of the lessors now used, "or subject to be used," for the uses and purposes of said ferries, includes land liable to be used for ferry purposes, though not already actually so used.

[Ed. Note.—For other cases, see Ferries, Cent. Dig. § 41; Dec. Dig. § 17.*]

Error to Corporation Court of Norfolk.

Action by the Ferries Company against George Bonos. Judgment for plaintiff. Defendant brings error. Affirmed.

E. R. Baird, Jr., S. M. Brandt, and W. H. Moreland, for plaintiff in error. R. R. Hicks, for defendant in error.

KEITH, P. The Ferries Company brought an action of unlawful detainer against Bonos to recover possession of a certain parcel of land which is described in the writ. The defendant appeared and pleaded not guilty, and after the evidence for the plaintiff and the defendant had been introduced before the jury the plaintiff demurred to the evidence, the court rendered a judgment for the premises in favor of the plaintiff, and the defendant has brought the case before us by writ of error.

The first error assigned is that upon the plea of not guilty the burden of proof was upon the plaintiff, and therefore it was error to compel the defendant to join in the demurrer; second, that under the provisions of the Virginia statute in such case made and provided the defendant was not required to join in the demurrer until the ground of demurrer was stated in writing; and, third, that in giving judgment for the plaintiff for the property in question the court erred, it never having been used for ferry purposes, and, there being no evidence of any enlargement creating a necessity therefor, it did not pass under the lease from the city of Portsmouth and the county of Norfolk to R. E. Jordan, under whom defendant in error claims, he acquiring nothing more as to this property than the right to subject it to ferry uses upon proof that the growth and increase of the ferry business made it necessary for their operation, and that it would be acquired at the joint expense of the city and county.

[1] In *Johnson's Adm'r v. C. & O. Ry. Co.*, 91 Va. 171, 21 S. E. 238, there is a satisfactory statement of the rule governing demurrers to evidence. In that case the authorities were considered, and the law stated to be that "by the demurrer to evidence the party demurring is considered as admitting the truth of his adversary's evidence, and all just inferences which can be properly drawn therefrom by a jury, and as waiving all of his own evidence which conflicts with that of his adversary, and all inferences from his own evidence (although not in conflict with his adversary's) which do not necessarily result therefrom."

In terms or in substance this statement has been reaffirmed in many subsequent cases. The fact that the demurrant has the burden of proof to carry does not, we think, affect the question. It imposes upon him an additional burden. It renders a successful resort to the demurrer to the evidence more difficult; but we are at a loss to perceive how the demurree can suffer any prejudice by reason of that fact.

When Mr. Burks in his pamphlet on "De-

murrer to Evidence," page 5, which is cited in the petition for a writ of error, states that "either party may demur to the evidence of the other, but this method of defense is not available to the party who has the burden of proof on any issue," we take it that he means that under such circumstances a demurrer is not capable of being used to advantage by him upon whom rests the burden of proof. But while a party who under such circumstances demurs to the evidence undertakes an onerous task, there is no arbitrary rule which denies him relief; but the court must still inquire whether, after disregarding all of the demurrant's evidence which is in conflict with that of the demurree, there remains enough to entitle him to a judgment.

[2] In this case the defendant pleaded not guilty, the plaintiff demurred, and stated in writing that "the matter aforesaid, so introduced and shown in evidence to the jury by the defendant, is not sufficient in law to maintain the said issue on the part of the defendant, and that it, the said plaintiff, is not bound by the law of the land to answer the same. Wherefore, for want of sufficient matter in that behalf to the said jury shown in evidence, the said plaintiff prays judgment, and that the jury aforesaid may be discharged from giving any verdict upon said issue."

The degree of particularity with which the ground of demurrer should be stated in order to meet the requirements of our statute must depend to some extent upon the character of the case. The real point in controversy here is as to the interpretation to be placed upon the lease under which the property is claimed. It is certain that the defendant was fully advised of the contention upon the part of the plaintiff which he was required to meet, and that he can have suffered no prejudice from the want of a more specific statement of the ground of demurrer.

Passing, then, from the formal objections, we find that the case upon its merits is not to be distinguished from that of *Consolvo & Cheshire v. Ferries Co.*, 112 Va. 318, 71 S. E. 634. In that case the court considered the identical instrument which lies at the root of this controversy, the lease from the city of Portsmouth and the county of Norfolk to R. E. Jordan, and Judge Harrison, speaking for the court, uses the following language: "The facts in this case impel the conclusion that the use of the property in controversy belongs jointly to the city of Portsmouth and the county of Norfolk, and that its use passed from them to R. E. Jordan under their joint lease to him of March 31, 1909, and by assignment from R. E. Jordan to the Ferries Company, the plaintiff in this case; that its present use by the Ferries Company is a necessity for the opera-

tion of the Norfolk county ferries and the public convenience; and, further, that the adverse claim, under the demise from Norfolk county, asserted by the defendants, *Consolvo & Cheshire*, is wholly inadequate to defeat the superior rights of the plaintiff."

[3] We refer to the opinion in that case in extenso, and are of opinion that it fully sustains the judgment under consideration, which affects land used or subject to be used for ferry purposes. The phrase "subject to be used" was certainly meant to enlarge the scope of that which would have been embraced by the word "used." If the land in question was used, or was *subject to be used*—that is to say, liable to be used—for ferry purposes, then it passed under the lease, whether it had been actually so used or not.

We are of opinion that there is no error in the judgment complained of, which is affirmed.

Affirmed.

(113 Va. 683)

HAWSE v. FIRST NAT. BANK OF PIEDMONT, W. VA.

(Supreme Court of Appeals of Virginia. June 18, 1912.)

1. **BILLS AND NOTES (§ 497*)—OWNERSHIP—EVIDENCE.**

While possession of a note regular on its face is *prima facie* evidence of ownership and that it has been taken in good faith for value, when that presumption is rebutted, the burden falls on the holder to show that he is the owner in good faith for value.

[Ed. Note.—For other cases, see *Bills and Notes*, Cent. Dig. §§ 1675-1687; Dec. Dig. § 497.*]

2. **EVIDENCE (§ 466*)—TESTIMONY AFFECTING NOTE—ADMISSIBILITY.**

In an action by a bank against one of several joint indorsers on a note, testimony was admissible for defendant to show that his liability was released because of the action of the bank in releasing its president, who was a joint indorser with him.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. § 2145; Dec. Dig. § 466.*]

3. **TRIAL (§ 253*)—INSTRUCTION—IGNORING DEFENSES.**

In an action against one of several joint indorsers on a note, an instruction that judgment could be given against one indorser alone for the entire principal, that evidence tending to show any less or different liability of defendant than that appearing on the face of the note must be disregarded, etc., was erroneous, as ignoring a defense that defendant was released because plaintiff bank released its president, who was a joint indorser.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 613-623; Dec. Dig. § 253.*]

Error to Circuit Court of City of Richmond.

Action by the First National Bank of Piedmont, W. Va., against A. L. Hawse. Judgment for plaintiff, and defendant brings error. Reversed.

Emmett Seaton and Meredith & Cocke, for plaintiff in error. Thomason & Minor, for defendant in error.

HARRISON, J. This action was brought by the First National Bank of Piedmont, W. Va., against A. L. Hawse, as one of several joint indorsers on a negotiable note held by it. The note sued on was the fifth renewal of a note which the bank had discounted for the makers and indorsers thereof in April, 1906. The original note had four indorsers, one of whom was M. A. Patrick, the president of the bank; but the note sued on had only three indorsers, the name of M. A. Patrick having been dropped.

[1] The principal defense relied on was that the plaintiff bank had lost its right to recover of the defendant by releasing M. A. Patrick, one of the indorsers jointly liable with him, and that the release of Patrick by the bank was not only in violation of the defendant's legal right to have the liability of all those bound with him continued until the note was paid, but that it was in violation of a distinct agreement by the bank, repeated whenever the note was renewed, that it would not be used before the names of all the other parties thereto who were liable with the defendant had been procured.

The evidence on behalf of the defendant, which was chiefly in support of this defense, shows that at the inception of the transaction the original note was the joint obligation of the two makers and the four indorsers thereon. M. A. Patrick, who was called by the defendant as an adverse witness, testifies that he was the president of the plaintiff bank throughout the time that this note and its several renewals was held by the bank. He admits that he was jointly liable thereon with the defendant, that he secured each renewal of the note, and that, whenever he sent the new note to the defendant to be indorsed by him, it was accompanied with the assurance that the names of the other parties would be procured before the note was used. This witness further admits that as president of the bank it was his duty to attend to the matter of securing these renewals, and that in each instance he acted for and on behalf of the bank, as its president and agent, and with full authority to represent the bank in the matter. Throughout the trial, this and other evidence, tending to show that Patrick had been released from the note with the full knowledge of the bank, and that his release therefrom had been ratified by the bank, was objected to as inadmissible, because, as claimed, the note sued on was complete on its face, and such evidence tended to alter or vary the terms of a valid written contract.

There is no question that the possession of a note, regular upon its face, is prima facie evidence of ownership and that it has

been taken in good faith for value; but that is a presumption that may be rebutted, and when it is rebutted the burden is upon the holder to show that he is the owner in good faith for value.

The evidence in this case tends strongly to rebut that presumption in favor of the plaintiff, and yet it offered no evidence and rested its case solely on the note.

[2] The first assignment of error is to the action of the court in sustaining the motion of the plaintiff to strike out such parol evidence adduced by the defendant as tended to alter or vary the terms of the contract between the parties as expressed by the note in suit, or which tended to show a less or different liability upon the defendant than that shown by the note itself.

It is manifest from the record that this action of the court was taken upon the theory that the evidence to which we have adverted was inadmissible, as tending to vary the contract, and that it was this evidence which was intended to be excluded; otherwise, the motion was vague and indefinite, and the action of the court well calculated to confuse and mislead the jury. The evidence introduced by the defendant to show that his liability on the note was at an end, because of the action of the bank in releasing its president, who was joint indorser with him, was not for the purpose of altering the contract sued on, and could have had no such effect. The purpose of the evidence was to show that the condition precedent to the defendant's liability, agreed upon between him and the agent of the bank, had not been performed. For this purpose it is well settled that the evidence excluded was admissible. *Woodward, Baldwin & Co. v. Foster*, 59 Va. 200; *Ward v. Churn*, 59 Va. 801, 98 Am. Dec. 749; *Catt v. Oliver*, 98 Va. 580, 36 S. E. 980.

In the case last cited this court says: "No rule of law is better settled, or of greater importance, than that a written contract cannot be contradicted or varied by evidence of an oral agreement between the parties made before or at the time of such contract. The object of the evidence introduced in this case was not, however, for the purpose of contradicting or varying the writings in question, but to show that the conditions upon which they were to become operative never occurred. That this may be done within certain limitations is well settled."

In such cases, as was said in *Nash v. Fugate*, 73 Va. 595, 609 (34 Am. Rep. 780), "the oral evidence tends to prove independent facts, which, if established, avoid the effect of the written agreement by facts dehors the instrument, but do not tend to contradict or vary it."

The Supreme Court of the United States held, in the case of *Burke v. Dulaney*, 153 U. S. 228, 14 Sup. Ct. 816, 38 L. Ed. 698, that

in an action by the payee of a negotiable note against the maker evidence was admissible to show by parol an agreement between the parties, made at the time of making the note, that it should not become operative as a note until the maker could examine the property for which it was to be given and determine whether he would purchase it.

In section 315 of Joyce on Defense to Commercial Paper, it is said: "Condition that Other Signatures be Procured.—Where a note is signed by a person upon the condition that it is not to take effect until the signature of another has been procured, it may be shown in defense to an action on the paper by a payee or holder with notice of such fact that there has been a breach of the condition upon which defendant affixed his signature to the paper. So where a person signs a note as surety and leaves it with the principal payor, on condition that the signature of another be obtained before delivering the same, it may be shown that the instrument was delivered in violation of such condition, as the payor will be regarded as the agent of the surety in such a case."

In the light of the authorities cited, it is clear that the circuit court erred in excluding the evidence adduced by the defendant to show that the bank could not recover from him because it had violated its agreement to procure all of the signatures of the parties jointly liable thereon before using the note, and had released from liability its president, M. A. Patrick, who was jointly liable, as indorser, with the defendant.

[3] The second assignment of error is to the action of the court in giving to the jury the following instruction:

"The court instructs the jury that upon any negotiable note, whether payable in Virginia or not, an action may be maintained and a judgment given against any one of the endorsers thereon alone for the entire principal of such note and charges of protest, with legal interest thereon from the date of such protest. If the jury believe from the evidence that Maner Jenkins, a notary public, at the request of the cashier of plaintiff bank, presented said note at said First National Bank of Piedmont, W. Va.,

on the day it became due and payable, viz., the 1st day of March, 1909, and demanded payment thereof, and that payment was refused, and that said notary public thereupon protested the same for nonpayment, and on the same day deposited in the post office at Piedmont, W. Va., notice of such presentment, nonpayment, dishonor, and protest, addressed to A. L. Hawse, at Richmond, Va., they must find for the plaintiff, and must disregard all evidence tending to show any less or different liability upon the said Hawse than that appearing upon the face of said note."

What has been said in dealing with the first assignment of error is equally applicable to this instruction, and need not be repeated in this connection. The instruction was plainly erroneous. It practically excluded from the jury's consideration all of the evidence introduced by the defendant, and in effect told them that the only evidence to be considered by them was the note itself.

The evidence in the case, as already seen, tends strongly to show that M. A. Patrick, who was jointly liable with the defendant, was released from the note in suit by the bank, or at least with its knowledge and acquiescence. The question raised by this evidence should have been submitted, under proper instructions, to the jury, in order that they might determine from such evidence whether or not the defendant had thereby sustained his defense, and established his right to be released from liability for the note sued on.

The third assignment of error is to the action of the court in refusing to set aside the verdict as contrary to the law and the evidence. As the case must be remanded for a new trial, we will not discuss the evidence further than has been found necessary in disposing of the first and second assignments.

For the errors pointed out, the judgment complained of must be reversed, the verdict of the jury set aside, and the case remanded for a new trial, to be had not in conflict with the views expressed in this opinion.

Reversed.

CARDWELL, J., absent.

(113 Va. 671)

SMITH et al. v. MULLEN et al.

(Supreme Court of Appeals of Virginia. June 13, 1912.)

DEEDS (§ 101*) — DESCRIPTION — PRACTICAL CONSTRUCTION.

Complainant's grantor purchased certain land from decedent, under whom defendant claimed, which the contract of sale described only as "40 acres of land, more or less, said land being part of Clifton [the name of a farm] and adjoining the lands of Alexander Pratt and Belvidere." The land was not surveyed, nor the boundaries fixed; but the parties went on it and, in the presence of witnesses, designated the lines and corners of the part intended to be sold, both expressing themselves as satisfied with the lines and corners then indicated, and with the body of land embraced within such limits. During the vendee's ownership, fences were built on the lines as indicated, which have been since maintained on those lines and regarded as showing the true boundaries. In a suit to settle the vendor's estate, a commissioner was appointed to convey the land, and his deed described it as 40 acres lying in the county of King George, and formerly a part of Clifton, adjoining and bounded by other lands of the vendor and certain others. It was afterwards ascertained that the tract so set off contained only 31.66 acres, and, the same having been conveyed to plaintiff, he sued to recover the balance. *Held* that, the land having been practically located, and neither the contract nor the commissioner's deed having contained a sufficiently definite description to enable a surveyor to locate it, plaintiff was bound by the practical location, and could not recover the deficiency in quantity.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. § 233; Dec. Dig. § 101.*]

Appeal from Corporation Court of Fredericksburg.

Suit by James B. Mullen and others against Galen R. Smith and others. Decree for complainants, and defendants appeal. Reversed and dismissed.

Alvin T. Embrey, for appellants. Wm. D. Carter, for appellees.

HARRISON, J. It appears from the record that prior to 1891 William Merrill owned a farm in King George county, known as "Clifton," containing about 400 acres; that on the 16th day of February, 1891, he entered into a contract in writing with Letcher Washington, by which he agreed to sell the latter 40 acres, more or less, of this farm. The only description contained in the contract of the land sold is: "Forty acres of land, more or less, said land being part of Clifton and adjoining the lands of Alexander Pratt and Belvidere." The contract does not clearly show what the aggregate purchase price was, but it is conceded that it was \$200. No survey of the land sold to Washington was made, but the evidence shows that the parties went upon the ground at the time of the sale and agreed upon the lines and corners.

Merrill, the vendor, died about 1896, and a suit in equity was instituted in the circuit court of King George county to settle up his

estate. At that time Letcher Washington had made payments on his purchase sufficient to reduce the balance due from him on the land to \$109.34, which sum he paid to the administrator of William Merrill, and filed his petition in the pending chancery suit, setting up his purchase from Merrill under the contract of February 16, 1891, alleging the payment of the purchase money, and asking that a commissioner might be appointed to make him a deed. By decree of October 10, 1896, J. E. Mason, commissioner appointed for the purpose, was directed to "convey the said 40 acres of land with special warranty to the said Letcher Washington." By this same decree the sale of the Clifton farm, which had been sold by order of the court, was confirmed to the purchaser, Galen R. Smith, "after deducting the 40 acres purchased from Wm. Merrill, during his lifetime, by Letcher Washington." By deed of November 10, 1896, Mason, commissioner, conveyed to the purchaser "Clifton" farm, "containing by estimation, after deducting the aforesaid purchase of Letcher Washington, 300 acres, be the same more or less." Commissioner Mason did not make the deed as directed to Letcher Washington, and by deed of November 1, 1898, C. H. Ashton, substituted commissioner, conveyed to Washington "the said tract of land of 40 acres lying and situate in the county of King George, and formerly a part of what is known as Clifton farm, and which adjoins and is bounded by other land of the said Washington, the land of J. H. Carpenter and of J. M. Branigan, the Belvidere farm, and the residue of the Clifton farm."

In March, 1899, a final decree was entered in the cause, settling up the Merrill estate, and it was dismissed from the docket.

By deed dated June 10, 1904, Letcher Washington conveyed this land to the appellee James B. Mullen, describing it as a certain tract or lot of land conveyed to him by C. H. Ashton, commissioner, and giving practically the same description given in the deed from the commissioner to him. By deed of February 22, 1901, the appellant Galen R. Smith conveyed by metes and bounds, courses and distances, to the appellant J. H. Carpenter, 19.68 acres, it being part of the Clifton farm purchased by the grantor from the court. This conveyance is bounded by the Washington purchase on the upper side and the rear. In April, 1907, some 16 years after Washington's purchase, Mullen, his grantee, had the land surveyed for the first time, and found that, instead of 40 acres, the Washington tract only contained 31.66 acres, a difference of 8.34 acres. Thereupon Mullen, the appellee, instituted this chancery suit in the circuit court of King George county, alleging that he was entitled to 40 acres of land by virtue of his purchase from Washington, and asking that

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

the court decide and determine the definite location of such 40 acres of land, and that the deed from Ashton, commissioner, to Washington, and the deed from Mason, commissioner, to the appellant Smith, be reformed so as to make them fix definitely the boundary of his said land.

The judge of the circuit court of King George county being so situated as to make it improper for him to hear and decide the cause, it was, by order entered May 5, 1908, removed to the corporation court of the city of Fredericksburg, to be there heard and determined.

Since the institution of this suit, the appellee James B. Mullen has by deed dated December 16, 1909, conveyed the land purchased by him from Letcher Washington to Charles T. Purks, who has filed a petition herein setting up his rights as the grantee of Mullen, and asking that these rights be protected.

By decree of May 9, 1911, the corporation court of the city of Fredericksburg held that the appellee James B. Mullen was entitled to the relief prayed for by him, and directed a surveyor, as special commissioner appointed for the purpose, to go upon the land, and, in accordance with the plat and survey made and filed by James B. Mullen with his bill, to run the lines so as to include in the Washington or Mullen tract 40 acres. The result of this order was to carve out of the tract of 19.68 acres owned by J. H. Carpenter 8.34 acres, in the shape of a triangle, which was added to the Mullen tract of 31.66 acres, thereby completing the 40 acres claimed by Mullen. The report of the surveyor and commissioner carrying out these directions of the court was, over the objection of the appellants, confirmed by decree of July 11, 1911. From these two decrees this appeal has been taken.

In his bill the plaintiff Mullen admits that no survey of the land sold to Washington was ever made. It is not controverted that Washington's purchase was an undefined portion of a 400-acre tract, with nothing in the contract to distinguish it from any other portion of the "Clifton" farm, except that it joined Alexander Pratt and "Belvidere," two other large farms adjoining "Clifton." The decree of the circuit court of King George county directing a deed to be made to Washington, and the deed made in pursuance of that decree, are as indefinite in description of the land as the contract in pursuance of which they were made. It would be impossible to locate the land intended to be sold by the description thereof in either the contract, the decree, or the deed. There is no evidence by which either the circuit court of King George or the corporation court of the city of Fredericksburg could have told what lines to run in order to cut off Washington's 40 acres. The action of the corporation court was purely arbitrary.

It could as easily have decreed that Mullen's back line be moved west to include 40 acres, as to decree, as it did, that his side line and his back line be pulled out in a northerly direction until 40 acres were embraced, without anything to show that Merrill and Washington, the original vendor and vendee, ever contemplated any such figure of land or location of lines. It is clear that the contract set up in the bill and attempted to be proved is so vague and indefinite in its description of the land sold that it cannot be enforced by a court of equity. The agreement sought to be enforced must not only be clearly proved, but it must be certain and definite in all its parts. Its terms must be sufficiently precise to obviate any reasonable misunderstanding of their import, and if they be vague and uncertain a court of equity will decline to interfere to enforce it. *Railroad Co. v. Lewis*, 76 Va. 883; *Tidewater Ry. Co. v. Hurt*, 109 Va. 204, 63 S. E. 421.

In *Westfall v. Cottrills*, 24 W. Va. 763, a contract to sell and convey "40 acres off the Spring Fork end of my tract of 147 acres on Beech fork, in Calhoun county," was held to be too vague and indefinite to be specifically enforced.

In *Blankenship v. Spencer*, 31 W. Va. 510, 7 S. E. 433, "67½ acres, being the lower end of a larger tract," was held to be an insufficient description of the land sold for it to be enforced.

In the case of *Butcher v. Creel's Heirs*, 50 Va. 201, C. conveyed to B. 5 acres of land, including a mill and sawmill, "reserving to himself the right to build or erect a sawmill on the opposite side of the said river, or at the further end of the dam of the aforesaid saw and grist mill." It was held that there was no such certainty in the description of the land intended to be excepted out of the conveyance as to withdraw it from the operation of the deed.

In *Virginia Iron, Coal & Coke Co. v. Crane's Nest C. & C. Co.*, 102 Va. 405, 48 S. E. 393, where it appeared that the contract described no definite boundary, but called for "a certain piece of land lying on Sandy Ridge, in Wise county, Va., say 40 or 50 acres, more or less," out of a larger boundary, it was conceded that the contract was void for uncertainty in its description of the land referred to. See, also, *Barnes v. Hustead*, 219 Pa. 287, 68 Atl. 839; *Hamilton v. Harvey*, 121 Ill. 469, 13 N. E. 210, 2 Am. St. Rep. 119; *Robeson v. Lewis*, 64 N. C. 784; *Rampke v. Beuhler*, 208 Ill. 384, 67 N. E. 796.

In the cases cited, the contracts were held unenforceable because the description of the subject-matter was too vague, indefinite, and uncertain to be enforced. The contract, decree, and deed under which Mullen and Purks claim in the case before us, is not more certain, definite, and specific in its

identification of the land intended to be sold than in the cases cited.

The evidence shows that at the time of the sale by William Merrill to Letcher Washington, in February, 1891, the parties went upon the land and in the presence of witnesses designated the lines and corners of the land intended to be bought and sold, and that both expressed themselves as satisfied with the lines and corners then indicated, and with the body of land embraced within those limits; that during Washington's ownership of the land fences were built upon the lines thus indicated by the parties, and have been ever since maintained upon those lines, and regarded as showing the true boundary of the land sold by Merrill to Washington. The parties by this practical location, assented to by both, fixed their lines, which were left indefinite in the written contract, and although, as shown by the recent survey made at the instance of Washington's grantee, the boundary contains less than the parties may have supposed, it is all that was definitely described as constituting the subject-matter of the contract, and Washington and his alienees cannot at this late day question the result of such practical location, but must abide by it as the only definite description of the land sold under the contract, the decree, and the deed relied on.

For these reasons, the decrees complained of must be reversed, and this court will enter such decree as the lower court ought to have entered, dismissing the original and amended bills filed by the appellee James B. Mullen.

Reversed.

CARDWELL and WHITTLE, JJ., absent.

(91 S. C. 343)

DUNCAN et al. v. KELLY et al.

(Supreme Court of South Carolina. April 24, 1912.)

APPEAL AND ERROR (§ 353*)—TIME TO PERFECT APPEAL—EXTENSION.

Time for perfecting appeal may be extended because of appellants' attorney having been so engrossed in his public duties as not to be able to perfect it in time.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1920-1922; Dec. Dig. § 353.*]

Action by W. W. Duncan and another against Joseph Kelly and others. Defendants, having appealed, move for extension of time to perfect appeal, on the ground that their attorney was so engrossed in his public duties as to be unable to perfect the appeal in time. Time extended.

J. C. Otts, for the motion. Wallace & Barron, contra.

PER CURIAM. Upon hearing the motion by appellants' attorney for an extension of

time to perfect this appeal, it is ordered that the time be extended for 15 days from this date, and that the cause be docketed for trial at the foot of the docket of Second circuit. This order is made on condition that the appellants do pay respondents' attorneys the sum of \$20, as expenses for meeting this motion, within 10 days from this date.

(91 S. C. 544)

RIDGEWAY v. BROADWAY et al.

(Supreme Court of South Carolina. July 1, 1912.)

MECHANICS' LIENS (§ 59*)—"OWNER."

One who contracts to purchase land, pays part of the price, and takes possession under his contract, is an "owner" within Civ. Code 1902, § 3008, which gives a mechanic's lien for labor performed or materials furnished for a building under contract with, or consent of, the owner.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. §§ 75, 76; Dec. Dig. § 59.*]

For other definitions, see Words and Phrases, vol. 6, pp. 5134-5151; vol. 8, p. 7744.]

Appeal from Common Pleas Circuit Court of Clarendon County; J. W. De Vore, Judge.

Action by Thomas H. Ridgeway against N. G. Broadway, survivor of Broadway Brothers, and others. Judgment for defendants, and plaintiff appeals. Reversed.

A. Levi and Charlton Du Rant, both of Manning, for appellant. Davis & Weinberg, of Manning, for respondents.

HYDRICK, J. This is an action to establish and foreclose a mechanic's lien for \$124 for labor done and materials furnished by plaintiffs in the building of some barns, stables, sheds, and fences on a plantation while it was owned by Broadway Bros. The plantation originally belonged to P. B. Harvin, who, in the early part of 1909, contracted to sell it, for \$10,000, to Broadway Bros., who paid \$1,050 on the purchase price in cash and gave their note for the balance, due November 1, 1909, and took possession under their contract. They rented it to plaintiff for the year 1909, and during the year plaintiff alleges that, at their request, he did the work and furnished the materials for the value of which he is now suing and seeking to impress a lien upon the property. Some time before November 1, 1909, the date of the maturity of their note for the balance of the purchase money, Broadway Bros. sold the property to the defendants Walters for \$12,000, and on that day, by agreement of all concerned, Harvin conveyed the plantation to Walters, who gave Harvin a first mortgage for the part of the purchase money left unpaid on that day, and he also gave N. G. Broadway, the survivor of Broadway Bros., a second mortgage for \$4,000, which included what they had paid on the purchase price to Harvin and their profit on

the sale to Walters. Subsequently Broadway assigned his mortgage to the defendant Davis.

The sole question presented by the appeal is whether, under the facts stated, Broadway Bros. were the "owners" of the plantation, when the improvements were made, in the sense in which that word is used in section 3008, vol. 1, Code 1902, which reads as follows: "Any person to whom a debt is due for labor performed or furnished, or for materials furnished and actually used in the erection, alteration, or repair of any building or structure upon any real estate, by virtue of an agreement with, or by consent of, the owner, of such building or structure, or any person having authority from, or rightfully acting for, such owner, in procuring or furnishing such labor or materials, shall have a lien upon such building or structure, and upon the interest of the owner thereof in the lot of land upon which the same is situated, to secure the payment of the debt so due to him, and the costs which may arise in enforcing such lien under this chapter, except as is provided in the following sections."

The law is well settled that one who buys land, pays a part of the purchase price, and takes possession under his contract of purchase, is the owner of the land in equity. He may mortgage it, convey it to another, or devise it, and, if he dies intestate, it descends to his heirs. The vendor holds the legal title as trustee for the vendee, his heirs and assigns, and is bound to convey it upon performance or tender of performance of the contract of sale. *Landrum v. Hatcher*, 11 Rich. 54, 70 Am. Dec. 237; *Roddy v. Elam*, 12 Rich. Eq. 343; *Whitmire v. Boyd*, 53 S. C. 315, 31 S. E. 306.

We have no doubt that the Legislature intended the word "owner" to include the owner of the equitable as well as the owner of the legal title. 27 Cyc. 29; 20 A. & E. Ency. L. (2d Ed.) 803.

Reversed.

GARY, C. J., and WOODS, J., concur. WATTS and FRASER, JJ., did not participate.

(91 S. C. 546)

EASTERLING v. ATLANTIC COAST LINE R. CO. et al.

(Supreme Court of South Carolina. July 1, 1912.)

1. RAILROADS (§ 844*)—HIGHWAY CROSSINGS—STATUTORY SIGNALS—FAILURE TO GIVE—PLEADING—SUFFICIENCY.

A complaint against a railroad company, stating that plaintiff's decedent was crossing the company's tracks at a public crossing when he was struck by defendant's engine through defendant's negligence in failing to give any signal by ringing the bell or sounding the whistle in any way whatsoever of the approach of the engine, etc., sufficiently charged violation of

Civ. Code 1902, § 2132, which requires a bell to be rung or a whistle to be sounded at least 500 yards from the place where the railroad crosses any public highway, street, or traveled place, especially in the absence of a motion to make more definite and certain.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1107-1112; Dec. Dig. § 344.*]

2. RAILROADS (§ 350*)—CROSSING ACCIDENTS—WANTONNESS—EVIDENCE.

Failure of enginemen to give the highway crossing signals required by Civ. Code 1902, § 2132, warrants submission to the jury of the issue of recklessness and wantonness in an action for death of a traveler struck by the locomotive at a crossing.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1152-1192; Dec. Dig. § 350.*]

3. NEGLIGENCE (§ 100*) — CONTRIBUTORY NEGLIGENCE—WANTON ACTS.

Contributory negligence is no defense to a reckless or wanton injury.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 85; Dec. Dig. § 100.*]

Appeal from Common Pleas Circuit Court of Dorchester County; R. W. Memminger, Judge.

"To be officially reported."

Action by Ann C. Easterling, administratrix of J. B. Easterling, against the Atlantic Coast Line Railroad Company and another. Judgment for plaintiff, and defendants appeal. Affirmed.

Mordecai & Gadsden and Rutledge & Hagood, both of Charleston, and Legare Walker, of Summerville, for appellants. Logan & Grace, of Charleston, for respondent.

HYDRICK, J. The exceptions raise only two questions: (1) Was this action brought under section 2132, vol. 1, Code 1902? (2) Did the court err in refusing to direct the verdict for defendants?

[1] Section 2132, so far as applicable to this case, reads: "A bell of at least thirty pounds weight and a steam whistle shall be placed on each locomotive engine, and such bell shall be rung, or such whistle sounded, by the engineer or fireman, at a distance of at least five hundred yards from the place where the railroad crosses any public highway or street or travelled place, and be kept ringing or whistling until the engine has crossed such highway or street or travelled place."

The complaint charges, in paragraph 4, that Easterling "was crossing a public crossing and traveled place," when he was struck and killed by an engine and train of cars operated by the defendant railroad company. In paragraph 5 it is alleged that his death was caused by the negligence, recklessness, and wantonness of the defendants in "failing and omitting to give any signal by ringing the bell or sounding the whistle, or in any other way whatsoever of the approach of said locomotive and train of cars to said public crossing or traveled place." These allegations are clearly sufficient to bring the

case under the statute. The answer of defendants and the course of the trial clearly show that defendants were fully apprised of the fact that plaintiff intended to rely upon the statute. But if the allegations were so indefinite as to leave the matter in doubt, their remedy was by motion to make the complaint more definite and certain. *Lee v. Railroad Co.*, 84 S. C. 140, 65 S. E. 1031.

[2, 3] There was abundant testimony to carry the case to the jury and to sustain the verdict. There was positive testimony that the crossing signals were not given. This was sufficient to compel submission to the jury of the issue of recklessness and wantonness (*Mack v. Railway*, 52 S. C. 323, 29 S. E. 905, 40 L. R. A. 679, 68 Am. St. Rep. 913; *Osteen v. Railway*, 76 S. C. 368, 57 S. E. 196), and therefore to prevent a non-suit or the direction of a verdict on the ground that the only reasonable inference to be drawn from the testimony was that intestate was guilty of contributory negligence, because that is no defense to a reckless or wanton injury. Nor can it be said that the only inference to be drawn from the testimony is that intestate was "guilty of gross or willful negligence, or was acting in violation of the law, and that such gross or willful negligence or unlawful act contributed to the injury," so as to defeat a recovery under the provision of section 2139, Code 1902.

Affirmed.

GARY, C. J., and WOODS, J., concur. WATTS and FRASER, JJ., did not participate.

(91 S. C. 521)

LONG et al. v. CUMMINGS et al.
(Supreme Court of South Carolina. June 12, 1912.)

1. INFANTS (§ 24*)—ADVERSE POSSESSION.

In an action to recover possession of land devised to plaintiffs by their father, where plaintiffs at the time of trial were only 22 and 24 years old, adverse possession commenced after the father's death was not a defense.

[Ed. Note.—For other cases, see *Infants*, Cent. Dig. § 25; Dec. Dig. § 24.*]

2. JUSTICES OF THE PEACE (§ 129*)—JUDGMENT—COLLATERAL ATTACK—WANT OF JURISDICTION—PRESUMPTIONS.

Under Code Civ. Proc. 1902, § 87, providing that, from the time of filing a transcript of a judgment rendered by a magistrate in the office of the circuit court, it becomes a judgment of that court, such a judgment is thereafter entitled to all the presumptions attaching to a judgment of that court, and cannot be attacked collaterally because the transcript does not affirmatively show that the magistrate or trial justice had jurisdiction.

[Ed. Note.—For other cases, see *Justices of the Peace*, Cent. Dig. §§ 408-411; Dec. Dig. § 129.*]

Appeal from Common Pleas Circuit Court of Hampton County; J. W. De Vore, Judge.

"To be officially reported."

Action by Polly V. Long and another against C. H. Cummings and another. From a judgment for plaintiffs, defendants appeal. Reversed.

At the time of trial it appeared that plaintiffs were 22 and 24 years of age, respectively.

W. S. Smith, of Hampton, and W. B. De Loach, of Camden, for appellants. S. G. Varn, of Varnville, and W. H. Townsend, of Columbia, for respondents.

HYDRICK, J. This is an action to recover possession of a tract of land, which is claimed by plaintiffs as devisees under the will of their father, W. E. Altman, who died in 1890. The defendants claim from the same source, under a deed dated May 4, 1891, made to their father, C. C. Cummings, by the sheriff of Hampton county, in pursuance of a sale of the land as the property of W. E. Altman, under an execution issued upon a transcript of a judgment rendered by a trial justice against W. E. Altman in favor of W. S. Tillinghast. Cummings took possession about the time of his purchase and retained possession, until his death, in 1896. Since then the defendants have been in possession.

[1] At the time of the sale, the plaintiffs were infants of tender years, and have but recently attained their majority. Hence the defense of adverse possession cannot avail defendants.

Following is a copy of the transcript:

"Transcript of judgment from Trial Justice's Court.

"On action of defendant for professional services.

"Judgment in this action was rendered for plaintiff and against the defendant, June 22, 1889.

Recovery	\$53 00
Costs	4 55
Transcript fee.....	25

\$57 80

"I hereby certify that the foregoing is a true and correct transcript from my docket of a judgment rendered by me.

"J. O'H. Sanders, Trial Justice. [L. S.]

"Varnville, July 9, 1889."

[2] The circuit court held that the transcript was null and void, because it did not appear affirmatively that the trial justice had acquired jurisdiction of the defendant W. E. Altman, either by the service of process upon him, or by his appearance in the action, and gave judgment for the plaintiffs. This ruling was in conflict with the decision in *Love v. Dorman*, 91 S. C. 384, 74 S. E. 829, recently filed, in which the court, construing section 87 of the Code of Procedure, held that, from the date of the receipt of a transcript by the clerk of the circuit court and the entry thereof in the abstract of judg-

ments, it becomes a judgment of the circuit court, and is therefore entitled to the presumptions which attach to such a judgment, and that it cannot be collaterally attacked, except for jurisdictional defects appearing upon its face.

Judgment reversed.

GARY, C. J., and WOODS, J., concur. WATTS and FRASER, JJ., did not participate.

(138 Ga. 219)

GENERAL SUPPLY CO. v. TOCCOA PLUMBING CO. et al.

(Supreme Court of Georgia. May 17, 1912.)

(*Syllabus by the Court.*)

1. ACCOUNT, ACTION ON (§ 7*)—EVIDENCE—ADMISSIBILITY.

On the trial of this case, which was a suit upon an open account, the question for determination was what amount, if any, was due the plaintiff after allowing the defendant proper credits upon the account for certain articles of merchandise which had been returned, and for the amounts collected, or which, in the exercise of due diligence, should have been collected, by the plaintiff upon an open account against a debtor of the defendant, which the latter had transferred to the plaintiff as collateral security; and it was error for the court, upon the trial of the case, to permit one of the defendants, over objections duly made, to testify that "he [the manager of the plaintiff corporation] stated that he [the manager] had his accounts insured, and that this suit he had brought was just a matter of form, which he had to go through with before he could collect his insurance; that his insurance covered a range of \$1,000. I never heard of credit insurance before. There may be such a thing. It is new to me." This evidence was entirely irrelevant, and probably prejudicial to the plaintiff.

[Ed. Note.—For other cases, see Account, Action on, Cent. Dig. §§ 13-17; Dec. Dig. § 7.*]

2. PLEDGES (§ 80*)—DUTIES OF PLEDGEE—ENFORCEMENT OF RIGHTS OF ACTION.

Where a debtor transfers to his creditors an open account, which the former holds against one of his debtors, as collateral security for the payment of an open account, the transferee is chargeable, not with the amount due on the open account thus transferred, but with such an amount as he may have collected, in the absence of proof that he could have collected more by the exercise of ordinary care and diligence.

[Ed. Note.—For other cases, see Pledges, Cent. Dig. §§ 75-85; Dec. Dig. § 30.*]

Error from Superior Court, Elbert County; D. W. Meadow, Judge.

Action by the General Supply Company against the Toccoa Plumbing Company and others. Judgment for defendants, and plaintiff brings error. Reversed.

Z. B. Rogers, of Elberton, and B. F. Davis, of Toccoa, for plaintiff in error. C. P. Harris, of Elberton, for defendants in error.

BECK, J. Judgment reversed. All the Justices concur.

(138 Ga. 265)

JOHNSON v. STATE.

(Supreme Court of Georgia. June 12, 1912.)

(*Syllabus by the Court.*)

1. SUFFICIENCY OF EVIDENCE.

The evidence is amply sufficient to authorize the verdict.

2. CRIMINAL LAW (§ 938*)—NEW TRIAL — NEWLY DISCOVERED EVIDENCE.

The newly discovered evidence is merely cumulative, does not connect the deceased with the transaction, and probably would not change the result were a new trial granted.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2306-2317; Dec. Dig. § 938.*]

Error from Superior Court, Fulton County; W. E. Thomas, Judge.

Robert Johnson was convicted of crime, and brings error. Affirmed.

Thos. B. Brown, of Atlanta, for plaintiff in error. Hugh M. Dorsey, Sol. Gen., and E. A. Stephens, both of Atlanta, and T. S. Felder, Atty. Gen., for the State.

HILL, J. Judgment affirmed. All the Justices concur.

(138 Ga. 316)

SPARKS v. G. OBER & SONS CO.

(Supreme Court of Georgia. June 13, 1912.)

(*Syllabus by the Court.*)

JUDGMENT (§ 367*)—VACATION—GROUNDS.

This is a motion to set aside a judgment, rendered in the absence of the defendant and her attorney, and to reinstate the case. The evidence before the judge was sufficient to support a finding that the defendant was lacking in diligence, and there was no abuse of discretion in refusing to vacate the judgment and reinstate the case.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 709; Dec. Dig. § 367.*]

Error from Superior Court, Bibb County; W. H. Felton, Judge.

Action by the George Ober & Sons Company against W. L. B. Sparks. Judgment for plaintiff, and defendant brings error. Affirmed.

Du Pont Guerrey and A. L. Dasher, both of Macon, for plaintiff in error. Hall & Hall, of Macon, for defendant in error.

EVANS, P. J. Judgment affirmed. All the Justices concur.

(138 Ga. 317)

JOSEY v. GROVES.

(Supreme Court of Georgia. June 13, 1912.)

(*Syllabus by the Court.*)

NEW TRIAL (§ 116*)—PROCEEDINGS TO PROCURE—TIME FOR FILING MOTION.

Under the express provision of section 6089 of the Civil Code of 1910, all applications for a new trial, except in extraordinary cases, must be made during the term at which the trial was had; and when the term continues longer than 30 days, the application shall be

filed within 30 days from the trial. Where the party applying for a new trial did not file his application or motion within 30 days from the trial, the court did not err in dismissing the motion, although within less than 30 days counsel for the party prevailing at the trial entered a written acknowledgment of service, waiving a copy and all further service of the same; such acknowledgment of service not having the effect of curing the failure to comply with the requirements of the statute as to the time of filing the motion.

[Ed. Note.—For other cases, see *New Trial*, Cent. Dig. §§ 238, 238½, 240, 241; Dec. Dig. § 116.*]

Error from Superior Court, Bibb County; W. H. Felton, Judge.

Action between John Josey and W. C. Groves. From the judgment, Josey brings error. Affirmed.

Oliver C. Hancock, of Macon, for plaintiff in error. C. A. Glawson, of Macon, for defendant in error.

BECK, J. Judgment affirmed. All the Justices concur.

(138 Ga. 264)

SIMS v. STATE.

(Supreme Court of Georgia. June 12, 1912.)

(*Syllabus by the Court.*)

CRIMINAL LAW (§ 1160*)—WRIT OF ERROR—REVIEW—QUESTIONS OF FACT.

The ground of the motion for a new trial raised only the question of the sufficiency of the evidence to support the verdict. No complaint was made as to any ruling of the presiding judge pending the trial. The evidence authorized the verdict; and, the presiding judge having approved it, this court will not interfere.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 5084; Dec. Dig. § 1160.*]

Error from Superior Court, Early County; W. C. Worrill, Judge.

Van Sims was convicted of crime, and brings error. Affirmed.

R. H. Sheffield and B. R. Collins, both of Blakely, for plaintiff in error. J. A. Laing, Sol. Gen., of Dawson, R. R. Arnold, of Atlanta, and T. S. Felder, Atty. Gen., for the State.

LUMPKIN, J. Judgment affirmed. All the Justices concur.

(138 Ga. 206)

THOMPSON v. STEPHENS.

STEPHENS v. THOMPSON.

(Supreme Court of Georgia. May 17, 1912.)

(*Syllabus by the Court.*)

1. APPEAL AND ERROR (§ 637*)—RECORD—TIME FOR CERTIFICATE TO BILL OF EXCEPTIONS.

Where, in a bill of exceptions, it is recited that the same was tendered within the time prescribed by law, the writ of error will not be dismissed because of the failure of the presiding judge to certify the same within the statu-

tory period, unless it be made to appear that his failure to do so was caused by some act of the plaintiff in error or his counsel.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 2784, 2829; Dec. Dig. § 637.*]

2. APPEAL AND ERROR (§ 398*)—PROCEEDINGS TO TRANSFER CAUSE—PAUPER AFFIDAVIT.

In a citation by a legatee against an executor for a settlement before the ordinary, a personal judgment is intended. But if, instead of a personal judgment against the executor, a judgment against the assets of the estate in his hands is entered, and the executor enters an appeal to the superior court from such judgment by a pauper affidavit, in which he deposes that as executor he is unable to pay the costs or give the security required by law, such appeal will not be dismissed on the ground that it should have been made by the executor as an individual.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 2103-2119; Dec. Dig. § 398.*]

3. WILLS (§ 714*)—CONSTRUCTION—DEVISES TO CREDITORS.

A provision in a will as follows: "I desire that my present crop be appropriated to payment of the debt due J. T. Stephens, as he has been kind to me, and balance to my other creditors"—is not a legacy to the named creditor of an amount equal to his debt against the testator. It is the expression of the desire of the testator that, in the payment of his debts from a specific fund, the indebtedness of the named creditor shall be first extinguished.

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. §§ 1698-1703; Dec. Dig. § 714.*]

(*Additional Syllabus by Editorial Staff.*)

4. WILLS (§ 755*)—CONSTRUCTION—"DEMONSTRATIVE LEGACY"—"GENERAL LEGACY"—"SPECIFIC LEGACY."

A "demonstrative legacy" is one of a certain amount or quantity, the particular fund or personal property being pointed out from which it is to be paid or taken; it differing from a "general legacy" in that it does not abate upon insufficiency of assets, and from a "specific legacy" in that there is recourse for its payment from the general estate in the event of ademption.

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. §§ 1947, 1948; Dec. Dig. § 755.*]

For other definitions, see *Words and Phrases*, vol. 2, pp. 1980, 1981; vol. 3, p. 7633; vol. 4, pp. 3071-3073; vol. 8, p. 7870; vol. 7, pp. 6800-6804; vol. 8, p. 7803.]

Error from Superior Court, Campbell County; L. S. Roan, Judge.

Petition by J. T. Stephens against James R. Thompson, as executor of the will of Samuel Thompson, for a rule nisi requiring an accounting and settlement of the petitioner's legacy. From the judgment, both parties bring error. Reversed on main bill of exceptions, and affirmed on cross-bill.

Moore & Pomeroy and W. W. Hood, all of Atlanta, for plaintiff in error. J. F. Go-lightly, of Atlanta, for defendant in error.

EVANS, P. J. [1] 1. On the call of the case in this court a motion was made to dismiss the bill of exceptions, on the ground that it was tendered more than 30 days after the rendition of the judgment and the ad-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

journment of court. The bill of exceptions recites that it was presented within the period allowed by law, and there is nothing in the record to negative the fact that, although the bill was certified more than 30 days after the judgment complained of, it was not presented within the statutory period. Under the ruling in *Proctor v. Piedmont Portland Cement Co.*, 134 Ga. 391, 67 S. E. 942, the motion cannot prevail.

[2] 2. The case arose in this way: J. T. Stephens filed a petition to the court of ordinary, alleging that Samuel Thompson died testate, and his will was duly probated in solemn form; that James R. Thompson qualified as executor of the will, and has received large sums of money from the sale of real estate of his testator; and that petitioner is a legatee under the will, and is entitled to the sum of \$250, or other large sum; and he prays a rule nisi against the executor for an accounting and settlement of his legacy. The executor answered the petition, denying that the plaintiff was a legatee in his testator's will. The ordinary adjudged that the plaintiff was a distributee of the estate of Thompson and entitled to receive \$298.11, "which James R. Thompson, executor of Samuel Thompson, is due to J. T. Stephens. And it is ordered that, on the payment by the said James R. Thompson to J. T. Stephens of said amount of \$298.11, he be relieved from said obligation by said Stephens, and on his failure to pay said sum of \$298.11 within four days from this date that execution issue in favor of J. T. Stephens against James R. Thompson, executor of Samuel Thompson, deceased, to be made of the goods and chattels, lands and tenements, of said Samuel Thompson, to cover the said sum of \$298.11, with all costs of these proceedings." The defendant entered an appeal to the superior court in forma pauperis, reciting that he is advised and believes that as such executor he has good cause of appeal, and that owing to the poverty of the estate of Samuel Thompson the defendant, as executor, is unable to pay the costs or give the security required by law in case of appeal. A motion was made in the superior court to dismiss the appeal, on the ground that the judgment was personal against the executor, and that his affidavit in lieu of paying the costs or giving the bond was predicated, not upon his own poverty, but upon that of the estate which he represented. The court refused to dismiss the appeal.

The petition for settlement in the court of ordinary was against the executor, and the judgment rendered was a judgment, not against the executor *de bonis propriis*, but *de bonis testatoris*. In a citation proceeding in the court of ordinary for a settlement by a legatee against an executor, a personal judgment is intended; and if such a judgment is rendered, an appeal cannot be taken by the executor without paying costs and giving secur-

ity, or making oath of his inability so to do. *Hickman v. Hickman*, 74 Ga. 401. But no personal judgment was rendered in this case. The judgment was rendered against the assets of the testator in his hands. If the executor had entered a personal appeal, he would have been met with the objection that there was no judgment against him, and therefore he could not appeal. As the judgment stood against the assets of his testator in his hands, the adverse party in the judgment is the estate of his testator, and the only appeal which could be entered was by the party adversely affected by the judgment. It may be true that the Code section (Civil Code, § 5009), which prescribes that an executor, when sued as such, or defending solely the title of the estate, may enter an appeal without paying costs and giving bond, does not apply. But Civil Code, § 5010, does provide for an appeal from a proceeding in the court of ordinary, by any party who will make and file an affidavit in forma pauperis as there described. The plaintiff, having entered up a judgment against the estate of the testator, should not be allowed to have an appeal in forma pauperis by the executor dismissed, and thus deny the adverse party to the judgment the privilege of an appeal. See *Barfield v. Hartley*, 108 Ga. 435, 33 S. E. 1010.

[3] 3. By consent the case was tried by the judge without the intervention of a jury, and the controlling question was the construction of the will of Samuel Thompson. It was the contention of the plaintiff, Stephens, that he was a legatee under the will. The executor denied that he took anything under the will as a legatee. The testator devised and bequeathed his property to his wife and children. The third item of his will contained this clause: "I desire that my present crop be appropriated to the payment of the debt due J. T. Stephens, as he has been kind to me, and balance to my other creditors." This is the clause of the will in which the plaintiff, Stephens, insists that the testator bequeathed to him as a legacy an amount equal to his debt.

[4] The Code declares: "A specific legacy is one which operates on property particularly designated. A gift of money to be paid from a specified fund is nevertheless a general legacy." Civil Code, § 3902. A demonstrative legacy is one of a certain amount or quantity; the particular fund or personal property being pointed out from which it is to be paid or taken. It differs from a general legacy in that it does not, in the first instance, abate upon insufficiency of assets, and from a specific legacy in that there is recourse for its payment from the general estate in the event of ademption. *Gardner on Wills*, 554; *Hutchinson v. Fuller*, 75 Ga. 88. The provision in the will was neither a specific nor a demonstrative legacy. The will was executed in the middle of the year, and

this clause indicates the testator's purpose to have his debts paid from the crop of the current year, with the direction that his creditor, Stephens, shall be given a preference in priority of payment over his general creditors. The testator's language is clear that his present crop is appropriated to the payment of all of his debts; and it might be contended that all of his creditors were made legatees, to the extent of his indebtedness to them, with as much force as to say that the one who is named, and to whom the testator sought to give preference in payment, is a legatee. There is nothing in the context that requires a different construction; and we think the court erred in awarding judgment in favor of Mr. Stephens on the footing that he was a legatee.

Judgment reversed on main bill of exceptions, and affirmed on cross-bill. All the Justices concur.

(138 Ga. 336)

RORIE v. RORIE.

(Supreme Court of Georgia. June 13, 1912.)

(Syllabus by the Court.)

APPEAL AND ERROR (§ 299*)—DISMISSAL—GROUNDS.

Where the charge of the court is the only alleged error complained of by direct bill of exceptions, and no error is assigned on the final judgment of the court, under the rulings in the cases of *Morris v. Dougherty*, 132 Ga. 346, 63 S. E. 1114, and *Lyndon v. Georgia Ry. & Elec. Co.*, 129 Ga. 353, 58 S. E. 1047, the writ of error will be dismissed. See, also, *Taylor v. Wright*, 132 Ga. 586, 64 S. E. 656.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 299.*]

Error from Superior Court, Haralson County; M. J. Head, Judge pro hac.

Action between J. E. Rorie and F. A. Rorie. From the judgment, J. E. Rorie brings error. Writ of error dismissed.

James Beall, of Carrollton, and Walter Matthews, of Buchanan, for plaintiff in error. E. S. Griffith, of Buchanan, for defendant in error.

HILL, J. Writ of error dismissed. All the Justices concur.

(138 Ga. 334)

TOLAND v. CAMP.

(Supreme Court of Georgia. June 13, 1912.)

(Syllabus by the Court.)

VENUE (§ 21*)—OBJECTIONS—DEMURRER.

Where it appears from the face of an equitable petition that it does not pray for substantial relief against any party litigant who is a resident of the county in which the suit is brought, the superior court of the county where such petition is filed is without jurisdiction of the case, and it is error for the trial judge to overrule a demurrer filed thereto on that ground. *Orr Shoe Co. v. Kimbrough*, 99 Ga. 143, 25 S. E. 204; *Fleetwood v. Dees*, 80

Ga. 729, 7 S. E. 102. See *Hamilton v. DuPre*, 111 Ga. 819 (2), 35 S. E. 684.

[Ed. Note.—For other cases, see Venue, Cent. Dig. § 34; Dec. Dig. § 21.*]

Error from Superior Court, Polk County; Price Edwards, Judge.

Action by A. A. Camp against Paul Toland. Judgment for plaintiff, and defendant brings error. Reversed.

W. H. Terrell, of Atlanta, for plaintiff in error. Bunn & Bunn, of Cedartown, for defendant in error.

HILL, J. Judgment reversed. All the Justices concur.

(138 Ga. 277)

DRIVER v. DRIVER et al.

(Supreme Court of Georgia. June 13, 1912.)

(Syllabus by the Court.)

DIRECTION OF VERDICT—NO ERROR.

Under the evidence, there was no error in directing a verdict in favor of the defendants.

Error from Superior Court, Sumter County; Z. A. Littlejohn, Judge.

Action by Rutherford Driver against Annie Driver and others. Judgment for defendants, and plaintiff brings error. Affirmed.

C. R. Winchester and Shipp & Sheppard, all of Americus, for plaintiff in error. L. J. Blalock, of Americus, for defendants in error.

LUMPKIN, J. Judgment affirmed. All the Justices concur.

(138 Ga. 342)

MONROE et al. v. BALDWIN.

(Supreme Court of Georgia. June 13, 1912.)

(Syllabus by the Court.)

REFUSAL OF INSTRUCTIONS—NO ERROR.

There was no error on the part of the court in refusing to grant the injunction prayed for in this case.

Error from Superior Court, Haralson County; Price Edwards, Judge.

Action by B. A. Monroe and others against J. E. Baldwin. Judgment for defendant, and plaintiffs bring error. Affirmed.

Copeland, Hamilton & Hutchens, of Rome, for plaintiffs in error. Griffith & Matthews, of Buchanan, for defendant in error.

HILL, J. Judgment affirmed. All the Justices concur.

(138 Ga. 274)

HEGWOOD v. STATE.

(Supreme Court of Georgia. June 12, 1912.)

(Syllabus by the Court.)

1. CRIMINAL LAW (§ 784*)—TRIAL—INSTRUCTIONS—CIRCUMSTANTIAL EVIDENCE.

It is only where a case is solely dependent upon circumstantial evidence that the court is

required to instruct the jury as to the law of such evidence. Accordingly, where the charge in the indictment is supported by both circumstantial and direct evidence, it is not error for the court to omit to give in charge the law of circumstantial evidence. *Nobles v. State*, 127 Ga. 212 (5), 56 S. E. 125.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 1883-1888, 1922, 1960; Dec. Dig. § 784.*]

2. CRIMINAL LAW (§ 784*)—TRIAL—INSTRUCTIONS—CIRCUMSTANTIAL EVIDENCE.

Where, in a case dependent upon both positive and circumstantial evidence, the court gave in charge Pen. Code, § 1013, that, "whether dependent upon positive or circumstantial evidence, the true question in criminal cases is, not whether it is possible that the conclusion at which the testimony points may be false, but whether there be sufficient testimony to satisfy the mind and conscience beyond a reasonable doubt," such instruction was not erroneous because the court, in the absence of a request, failed to define to the jury the meaning of positive and circumstantial evidence.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 1883-1888, 1922, 1960; Dec. Dig. § 784.*]

3. HOMICIDE (§ 309*) — INSTRUCTIONS—DEGREES OF OFFENSE.

After giving the jury the definition of voluntary manslaughter as contained in the Penal Code, the court gave the following charge: "So you will observe that if the deceased * * * made an actual assault upon the defendant, or if the deceased attempted to commit a serious personal injury upon the defendant, or if there were other equivalent circumstances to justify the excitement of passion, the grade of the homicide, if there was a homicide, may be reduced to voluntary manslaughter." It was not cause for a new trial that the word "may" instead of "should" was used in the concluding paragraph of this charge.

[Ed. Note.—For other cases, see *Homicide*, Cent. Dig. §§ 649-656; Dec. Dig. § 309.*]

4. OTHER ASSIGNMENTS WITHOUT MERIT.

The other assignments of error upon the charge of the court are so clearly without merit as not to require further consideration.

5. SUFFICIENCY OF EVIDENCE—NEW TRIAL REFUSED.

The verdict was supported by the evidence, and the court did not err in refusing a new trial.

Error from Superior Court, Habersham County; J. B. Jones, Judge.

John Hegwood was convicted of crime, and brings error. Affirmed.

Sam Kimzey and J. J. Kimsey, both of Cornelia, for plaintiff in error. Robt. McMillan, Sol. Gen., of Clarksville, and T. S. Felder, Atty. Gen., for the State.

FISH, C. J. Judgment affirmed. All the Justices concur.

(138 Ga. 265)

BEACH v. STATE.

(Supreme Court of Georgia. June 12, 1912.)

(Syllabus by the Court.)

1. WITNESSES (§ 345*) — IMPEACHMENT — INDICTMENT.

While a witness may be discredited by proper proof that he has been convicted of a

crime involving moral turpitude (*Powell v. State*, 122 Ga. 571, 50 S. E. 369), it is not competent to discredit him by showing that he has been simply indicted for such an offense (*Slappey v. Sumner*, 136 Ga. 692, 71 S. E. 1075); and a mere arrest being a less formal and solemn charge, proof of it is so much the more inadmissible for such purpose (7 Enc. Ev. 308, and cases cited in note 24).

(a) Accordingly, on a trial for murder, it was error to permit a witness for the accused to testify on cross-examination, and over appropriate objection of the accused, as follows: "I have been arrested for lots of things—for fishing out of season; once for assault with intent to murder. Common little warrants from the magistrate don't count. They only count that come up here. The common warrants were for fishing out of season. * * * I was not up for shooting in the charge for assault with intent to murder against me. They claimed I hit the man with a bottle. No one saw it. One fellow said I did it, and he could not prove it. No witnesses saw it. About three or four fellows waylaid him, fellows from town."

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. §§ 1126-1128; Dec. Dig. § 845.*]

2. CRIMINAL LAW (§ 417*)—EVIDENCE—DECLARATIONS OF THIRD PERSON.

On the trial of one indicted for murder, the declarations of another person that he alone committed the offense are not admissible in evidence in favor of the accused. *Robison v. State*, 114 Ga. 445, 40 S. E. 253 (2).

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 950-967; Dec. Dig. § 417.*]

3. WITNESSES (§§ 321, 380*)—CRIMINAL LAW (§ 1170½*) — IMPEACHMENT OF OWN WITNESS—CONTRADICTORY STATEMENTS.

Though a party may, under Civil Code, § 5879, impeach his own witness if he can show to the court that he has been entrapped by the witness by a previous contradictory statement, the rule does not apply where the testimony of a witness is not prejudicial to the party calling him. *Nathan v. State*, 131 Ga. 48, 61 S. E. 994 (3), and authorities cited.

(a) Accordingly, where a witness for the state, on a trial for murder, testified that he was present when the deceased was shot and killed, and that "I did not shoot him. I don't know exactly who shot him. The pistol shot came from where Jesse [the accused] and some other fellows were standing. A good many were standing there. I cannot say from whom the pistol shot came"—it was error, upon the statement of the solicitor general that he had been entrapped by the witness, to allow him to question the witness as to alleged contradictory statements made to the solicitor for the purpose of laying the foundation for impeaching him, and to substantially prove by another witness for the state that the witness whom it was sought to impeach had previously stated to the solicitor general that the shot that killed the deceased came from the accused.

(b) Such error was not cured by an instruction of the court to the jury that the testimony of the impeaching witness as to what was said by the witness so attacked was not to be considered as proving facts that the solicitor general thought the assailed witness would testify to, "but merely to show, if it does show, that the solicitor general was imposed upon or entrapped by the witness [sought to be impeached]; otherwise, he would not have put him upon the stand. That is the purpose of it."

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. §§ 1094, 1099, 1100, 1210-1219; Dec. Dig. §§ 321, 380.* *Criminal Law*, Cent. Dig. §§ 3129-3135; Dec. Dig. § 1170½.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

4. CRIMINAL LAW (§ 823*)—HOMICIDE (§ 308*) — INSTRUCTIONS — ASSUMPTION OF FACT.

On a trial for murder, where the contention of the accused was that he did not commit the homicide and that he was in no way concerned in it, it was not accurate to instruct the jury as follows: "Where a homicide was shown to have been committed, and no circumstances of extenuation or palliation were disclosed at the time of proof of the homicide, then a presumption arises that the killing was murder, and the burden would be upon the defendant to show that the offense committed under those circumstances was some less degree of crime or none at all." No presumption arises against the accused under the circumstances indicated, unless it be shown that he committed the homicide. The error in the instruction was not sufficiently cured by the fact that it was immediately followed by this language: "When you reach the conclusion that murder has been committed, the question then remains whether the defendant is the one who committed the murder."

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1992-1995, 3158; Dec. Dig. § 823.* Homicide, Cent. Dig. §§ 642-647; Dec. Dig. § 308.*]

5. REVIEW.

Other assignments of error are without merit, and do not require further consideration.

Error from Superior Court, Chatham County; W. G. Charlton, Judge.

Jesse Beach was convicted of murder, and brings error. Reversed.

David S. Atkinson, of Savannah, for plaintiff in error. Walter C. Hartridge, Sol. Gen., of Savannah, and T. S. Felder, Atty. Gen., for the State.

FISH, C. J. Judgment reversed. All the Justices concur.

(11 Ga. App. 209)

HALL & HAM v. STONE. (No. 4,032.)
(Court of Appeals of Georgia. May 22, 1912.
Rehearing Denied June 11, 1912.)

(Syllabus by the Court.)

1. PARTNERSHIP (§ 11*) — EXISTENCE—SHARING PROFITS AND LOSSES.

Where the owner of a ginhouse and machinery turns over to another its management upon an agreement that the owner is not to share any losses resulting from the operation of the plant, but is to be paid for its use a sum equal to one-half of any net profits which may be received, no partnership relation is created, even as to third persons.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. § 26; Dec. Dig. § 11.*]

2. BAILMENT (§ 31*)—ACTION BETWEEN PARTIES—PRESUMPTIONS AND BURDEN OF PROOF.

The evidence was such as to authorize a finding that the presumption of negligence, which arose against the defendant who operated the gin, upon proof of the destruction by fire of the plaintiff's cotton, had not been rebutted.

[Ed. Note.—For other cases, see Bailment, Cent. Dig. §§ 124-131; Dec. Dig. § 31.*]

Error from City Court of Baxley; W. C. Lankford, Judge.

Action by W. L. Stone against Hall & Ham.

Judgment for plaintiff, and defendants bring error. Reversed.

W. W. Bennett and V. E. Padgett, both of Baxley, for plaintiffs in error. Parker & Highsmith, of Baxley, for defendant in error.

POTTLE, J. The plaintiff delivered a lot of seed cotton to be ginned at a ginnery which he claimed was being operated by the defendants as partners. While stored in the gin the cotton was destroyed by fire, and the plaintiff recovered a verdict for its value, in an action sounding in tort, against both defendants as partners. The defendants are here upon a bill of exceptions complaining of the overruling of their motion for a new trial. The motion contains many grounds, but, under our view of the law, there are two controlling questions: (1) Were the defendants partners? (2) Was the plaintiff entitled, under the evidence, to recover?

[1] 1. The evidence in reference to the existence or nonexistence of a partnership between the defendants is not conflicting, and the facts may be gathered from the following testimony of the defendant Hall: "I had nothing at all to do with the running of that ginnery. I owned the gin. Ham run it. I had no connection with the management of this gin. I had nothing to do with employing the hands or paying them. If Mr. Ham made anything, he was to give me one-half of what he made out of it. Mr. Ham was to pay the debts for the running of it. If he didn't make anything, I didn't get anything. I wasn't to pay anything at all. I was to pay no expenses of the gin at all." In brief, Hall owned a gin and Ham undertook to operate it. If profit was made, Hall got half, but he was to sustain no part of any loss which the operation of the ginnery might entail. Under these facts, did the trial judge correctly apply the law in holding that Hall and Ham were partners as to the plaintiff?

The Code provides (Civil Code 1910, § 3158): "A joint interest in the partnership property, or a joint interest in the profits and losses of the business, constitutes a partnership as to third persons. A common interest in profits alone does not." By the plain letter of this statute there would seem to be no partnership relation between the defendants, for it is undisputed that Hall was not to share in the losses. But it is said that as Ham contributed to the enterprise all the labor, and supplied whatever expenses were necessary, he became jointly interested with Hall, the owner of the property, to such an extent as to make them partners as to third persons. It is, however, settled by decisions of the Supreme Court that the ordinary arrangement between a landlord and a cropper does not create the partnership relation, even as to third persons, though the cropper is to furnish all the labor, and receive half the net profits after paying the expense of

making the crop. *Gurr v. Martin*, 73 Ga. 528; *De Loach v. Delk*, 119 Ga. 884, 47 S. E. 204. This is the exact situation here, and these decisions are in principle controlling. In *Dawson National Bank v. Ward*, 120 Ga. 861, 48 S. E. 313, it appeared that Ward owned a warehouse and placed Gurr in charge to manage it under an agreement to divide the profits. They were sued as partners, and the court held: "A contract whereby one conducting a cotton warehouse business in his own name and on his own account agrees with another that the latter shall attend personally to the business, and receive as compensation for his services a given proportion of the net profits, does not create a partnership. The proportion of profits given to him who attends to the business without having an interest in the same is merely the measure of wages for the service rendered." See, also, the recent case of *Cowart v. Fender*, 137 Ga. 586, 73 S. E. 822. The defendant in error relies upon *Brandon v. Conner*, 117 Ga. 759, 45 S. E. 371, 63 L. R. A. 260, but in that case it appeared that each of the persons contributed property to the common enterprise, and this distinction is pointed out in *Dawson National Bank v. Ward*, supra. The decision in the *Brandon Case*, supra, is apparently somewhat of a departure from the letter of the statute, and the subsequent decisions of the Supreme Court indicate an unwillingness to extend that decision so as to cover a case like the present. The real meaning and intent of the contract between Hall and Ham was that Ham should have the use of Hall's gin, and pay Hall, as compensation for such use, a sum to be measured by one-half of whatever profits flowed from the enterprise. So construing it, it is clear to our minds that they were not partners, and, as there was nothing in the evidence to indicate that Hall had done or said anything to estop him to deny the partnership relation, a verdict should have been directed in his favor upon his plea of no partnership.

[2] 2. We are of opinion, however, that the verdict was warranted against Ham. "In all cases of bailment, after proof of loss, the burden is on the bailee to show proper diligence." Civil Code 1910, § 3469. "All bailees are required to exercise care and diligence in protecting and keeping safely the thing bailed. Different degrees of diligence are required, according to the nature of the bailments." Civil Code 1910, § 3470. Fire was discovered in the gin about 2 o'clock in the afternoon, and, was apparently extinguished. Indeed, the plaintiff himself during the course of the afternoon brought several hundred pounds of cotton, and stored them in the ginhouse. Stone himself testified: "The last time I went in there that afternoon before Mr. Ham closed up was just before night. I was vitally interested in that fire and cotton. I looked pretty well for fire. I looked everywhere I thought there could be

any fire. I tried to see that it was out. Any man with that much money at stake would have done the same thing." Ham remained in and about the house until about 10 o'clock at night, when he went home without leaving any one at the gin to watch for fire. The testimony indicates that before going he made the most careful examination for fire, and reached the conclusion that it had been extinguished. The ginhouse was burned about midnight, and the plaintiff's cotton destroyed. Under the evidence the jury might well have found that Ham had rebutted the presumption of negligence arising against him from proof of the loss of the cotton; but we are not prepared to say that they were bound to do so. The degree of diligence varies with the nature of the bailment, and questions of negligence and diligence are peculiarly for the jury. Cotton is inflammable, and the well-known fact that a hidden spark may smoulder for hours, and sometimes even for days, before developing into a flame, authorized the jury to find that Ham was lacking in the degree of diligence which the nature of the bailment required in leaving the house without a watchman, even though he in good faith believed the fire had been extinguished. While it does not affirmatively appear that the destruction of the house was the result of a continuation of the fire which began in the afternoon, the jury were authorized to infer that this was the case. We would not set aside the verdict upon the ground that it is unsupported by any evidence. See *Net-zow Mfg. Co. v. Sou. Ry. Co.*, 7 Ga. App. 163, 66 S. E. 399; *Atlantic Compress Co. v. Central of Ga. Ry. Co.*, 135 Ga. 140, 68 S. E. 1028.

3. With the exception of the ruling of the trial judge upon the question of partnership, we find no material error in the record. The law of hiring, as embraced in section 3476 et seq. of the Civil Code of 1910, has no application to the case.

Judgment reversed.

(11 Ga. App. 240)

WILLIAMS v. STATE. (No. 4,085.)

(Court of Appeals of Georgia. June 5, 1912.)

(Syllabus by the Court.)

1. CRIMINAL LAW (§ 84*) — JURISDICTION—TRANSFER OF CAUSES.

In answer to a certified question from the Court of Appeals, the Supreme Court has instructed that so much of the act of August 18, 1911 (Acts 1911, p. 229), amending the act creating the city court of Blakely, as provides that the judge of the superior court shall transfer to the city court for trial a true bill for a misdemeanor which has been returned by the grand jury in a case which originated in the city court, but in which, under the provisions of the amendatory act, a demand for an indictment was entered by the defendant, is unconstitutional and void. There was, therefore, no error in the present case in refusing to transfer to the city court for trial the in-

dictment which had been returned by the grand jury against the plaintiff in error.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 296-327; Dec. Dig. § 84.*]

2. INTOXICATING LIQUORS (§ 236*)—CRIMINAL PROSECUTION—SUFFICIENCY OF EVIDENCE.

The evidence fully authorized the verdict, and the motion for a new trial, based solely upon the general grounds, was properly overruled.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. §§ 300-322; Dec. Dig. § 236.*]

Error from Superior Court, Early County; W. C. Worrill, Judge.

Peter Williams was convicted of unlawful sale of intoxicating liquors and brings error. Affirmed.

Certified questions answered by Supreme Court. 74 S. E. 1083.

W. W. Wright, of Blakely, for plaintiff in error. J. A. Laing, Sol. Gen., of Dawson, and R. R. Arnold, of Atlanta, for the State.

POTTLE, J. By the act approved August 18, 1911, amending the act creating the city court of Blakely, it was provided that, upon the original call of any criminal case in that court, the defendant shall have a right to demand an indictment by the grand jury, and that such demand shall be allowed and the case referred to the grand jury for investigation, unless the defendant shall fail to give bond within five days, in which event the city court may proceed to try the case notwithstanding the demand for indictment. It was further provided in the act that, "if the grand jury return a true bill for a misdemeanor in the matter, the judge of the superior court shall transfer the same to the city court for trial." Acts 1911, p. 229.

The plaintiff in error was arraigned in the city court, and upon the original call of the case entered a demand for indictment by the grand jury. The demand was duly allowed, and a true bill was thereafter returned by the grand jury, charging the defendant with the unlawful sale of intoxicating liquors. Upon arraignment in the superior court under the indictment, the accused demanded that the case should be transferred to the city court for trial, basing his demand upon the above-recited provision of the act of 1911. The judge of the superior court declined to transfer the indictment to the city court, and his refusal to do so is made the basis of one of the assignments of error in the reviewing court. The accused was convicted, and his motion for new trial was overruled.

[2] The only assignment of error in the motion for new trial is that the verdict was without evidence to support it; but, in view of the fact that one of the witnesses for the state testified positively that on December 2, 1911, he and another person bought a half pint of rye whisky from the accused, there

is manifestly no merit in this assignment of error.

[1] Really the only point which counsel for the plaintiff in error insisted upon was that the trial judge erred in refusing to transfer the indictment to the city court for trial. This assignment of error involved a consideration of the constitutionality of the provision in the local amendatory act requiring the judge of the superior court to transfer the indictment to the city court for trial, and this question was certified by the Court of Appeals to the Supreme Court for instruction, as we are required to do under the terms of the constitutional amendment creating this court. The Supreme Court has accordingly instructed the Court of Appeals that so much of the act of August 18, 1911, amending the act creating the city court of Blakely, as requires the judge of the superior court to transfer to the city court for trial all indictments in cases where accusations have been filed in the city court and demands for indictment have been made and allowed, is unconstitutional and void, in that it seeks to deprive the superior court of jurisdiction with which it is vested by the Constitution of the state. It is well settled that the superior court may transfer to the city court any indictment charging a misdemeanor, but a law which seeks to make this act on the part of the court mandatory is unconstitutional and void. There was, therefore, no error in refusing to transfer the indictment in the present case, nor will the judgment of the court below, overruling the motion for a new trial, be disturbed.

Judgment affirmed.

(11 Ga. App. 273)

NEAL-BLUN CO. v. ZEIGLER et al.

(No. 3,608.)

(Court of Appeals of Georgia. July 2, 1912.)

(Syllabus by the Court.)

1. APPEAL AND ERROR (§ 70*)—PROCEEDINGS TO TRANSFER CAUSE—TIME FOR TAKING PROCEEDINGS.

The bill of exceptions disclosing that no final judgment was rendered in the case, and the only assignment of error being as to the judgment overruling a motion to strike certain portions of the answer, the writ of error was prematurely sued out, and this court is without jurisdiction. *Simmons v. Peagler*, 7 Ga. App. 252, 66 S. E. 629, and citations.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 367-378, 386, 411; Dec. Dig. § 70.*]

2. APPEAL AND ERROR (§ 14*)—DISMISSAL—RECORD OF EXCEPTIONS.

Leave, however, is granted to the plaintiff in error to have the official copy of the bill of exceptions, on file in the office of the clerk of the city court of Savannah, recorded therein as an exception pendente lite.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 48-57; Dec. Dig. § 14.*]

Error from City Court of Savannah; Davis Freeman, Judge.

Action between the Neal-Blun Company and Bridget Zeigler and others. From the judgment, the Neal-Blun Company brings error. Writ of error dismissed, with direction.

Oliver & Oliver, of Savannah, for plaintiff in error. O'Byrne, Hartridge & Wright, of Savannah, for defendants in error.

HILL, C. J. Writ of error dismissed, with direction.

POTTLE, J., not presiding.

(11 Ga. App. 308)

COCHRAN v. JONES & OGLESBY.

(No. 4,192.)

(Court of Appeals of Georgia. July 2, 1912.)

(Syllabus by the Court.)

EVIDENCE (§ 441*)—PAROL EVIDENCE AFFECTING WRITINGS—SALES—WARRANTY.

Where an instrument in the form of a note and mortgage is executed to secure payment of the purchase price of a mule, and in the instrument the purchaser stipulates to pay for the mule if it should die, and that, in consideration of credit extended, risk of death is assumed, and the mule is bought on the "judgment" of the purchaser, the latter is not, upon the death of the mule, entitled to prove an express warranty of soundness by the seller, and defeat the purchase price on account of a breach of such warranty.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1719-1845, 2080-2047; Dec. Dig. § 441.*]

Error from City Court of Cartersville; A. M. Foute, Judge.

Action by Jones & Oglesby against John L. Cochran. Judgment for plaintiffs, and defendant brings error. Affirmed.

Finley & Henson, of Cartersville, for plaintiff in error. J. T. Norris, of Cartersville, for defendants in error.

POTTLE, J. An instrument was executed in the form of a note and mortgage to secure payment of the purchase price of two mules. The instrument obligated the purchaser to pay \$25 per month until the whole amount should be paid. It contained the further stipulation: "I or we insure the good condition and safe-keeping of said property, and will pay if it be lost, damaged, or destroyed, and, if live stock, will pay though it may die. I or we assume said risk in consideration of the credit extended, and purchase the property on my or our own judgment." One of the mules died. The mortgage was foreclosed, and the purchaser pleaded in defense that the seller had expressly warranted the soundness of the mule, and that the mule had died from a disease which it had at the time of the sale. The issue was submitted to the jury, and they found against the defendant. His motion for a new trial contains several grounds, but they will not be specially noticed, since we are clearly of the opinion that the terms of the written contract precluded the defense relied on.

Where a note is given for the purchase price of an article, and the terms of the sale are not set forth in the note, parol proof of an express warranty and a breach thereof does not violate the rule forbidding the variation of or addition to a written contract by parol evidence. In such a case the contract of sale is in parol, and the note is simply evidence of the indebtedness. *Pryor v. Ludden & Bates Co.*, 134 Ga. 288, 67 S. E. 654, 28 L. R. A. (N. S.) 267. But where the note purports to contain the contract of sale, and sets forth the warranty made, or that the seller did not warrant the soundness or suitability of the thing sold, the parties have reduced their contract to writing, and it cannot be varied by parol. *McNeel v. Smith*, 106 Ga. 215, 32 S. E. 119, and cit. If the statement in the written instrument, that the purchaser would pay though the mule should die, had stood alone, the words, "from a cause not existing at the date of the sale," might be superadded, as expressing the intention of the parties. *Whigham v. Hall*, 8 Ga. App. 509, 70 S. E. 23. But when the purchaser, in consideration of credit extended, added to the stipulation to pay if the mule died the statement that he purchased the property on his own judgment, no other construction of the terms of the sale is admissible than that he did not rely on any statements or warranties by the seller, but acted on his own judgment, based upon his own examination, and upon his own knowledge and experience. A finding in favor of the plaintiff was demanded, the plaintiff in error was not entitled to an abatement of the purchase price, the right result was reached, and, if any errors were committed, they were harmless.

Judgment affirmed.

(11 Ga. App. 296)

GEORGIA GRANITE CO. v. SIMS.

(No. 4,175.)

(Court of Appeals of Georgia. July 2, 1912.)

(Syllabus by the Court.)

1. EXPLOSIVES (§ 12*)—BLASTING—NEGLIGENCE.

While excavating a ditch, the defendant's agent placed a charge of dynamite for the purpose of removing rock imbedded in the soil. The ditch was adjacent to a public highway near which the plaintiff was operating a store. Near the store, and within range of vision of the defendant's agent, the plaintiff's mare was hitched. The dynamite was discharged, and as a consequence thereof a rock weighing 45 pounds was thrown a distance of 300 feet, and injured the plaintiff's mare. Held, that if the defendant's agent knew, or in the exercise of ordinary care ought to have known, of the dangerous proximity of the plaintiff's mare, it was negligent for him to discharge the dynamite at all while the mare was there, without regard to whether the defendant was negligent in reference to the quantity of dynamite used, or in the manner in which the load was discharged.

[Ed. Note.—For other cases, see Explosives, Cent. Dig. §§ 9, 10; Dec. Dig. § 12.*]

2. EXPLOSIVES (§ 12*)—NEGLIGENCE—BLASTING.

There being evidence that, if properly placed and discharged, a load sufficiently large to accomplish the purpose designed by the defendant would not have projected a rock weighing 45 pounds a distance of 300 feet, the maxim "res ipsa loquitur" was applicable, and the jury were authorized to infer that the defendant was negligent, either in reference to the quantity of explosive used, or in the manner in which it was placed and discharged. *Payne v. Rome Coca-Cola Co.*, 10 Ga. App. 762, 73 S. E. 1087.

[Ed. Note.—For other cases, see Explosives, Cent. Dig. §§ 9, 10; Dec. Dig. § 12.*]

3. REVIEW ON APPEAL.

No error of law was complained of, and, under the principles above announced, the verdict was warranted by the evidence.

Error from City Court of Atlanta; H. M. Reid, Judge.

Action by E. S. Sims against the Georgia Granite Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Candler, Thomson & Hirsch and A. W. Candler, all of Atlanta, for plaintiff in error. Walter A. Sims, of Atlanta, for defendant in error.

POTTLE, J. Judgment affirmed.

(11 Ga. App. 303)

MOSLEY v. STATE. (No. 4,210.)

(Court of Appeals of Georgia. July 2, 1912.)

(Syllabus by the Court.)

1. CRIMINAL LAW (§ 825*)—INSTRUCTIONS—CHARACTER OF ACCUSED.

The trial judge instructed the jury on the subject of evidence relating to the good character of the accused as follows: "There has been proof of good character of the defendant submitted in evidence. You consider that testimony along with the other testimony in the case, and endeavor to arrive at the truth of the transaction." *Held*, this instruction was not erroneous. The question is fully controlled by the decision of the Supreme Court in the case of *Brazil v. State*, 117 Ga. 32, 43 S. E. 460. Certainly, in the absence of a written request for a more specific charge as to the weight and effect which the jury would be authorized to give to evidence of good character, the instruction was sufficient on the subject.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2005; Dec. Dig. § 825.*]

2. LARCENY (§ 64*) — CRIMINAL LAW (§ 1159*)—POSSESSION OF STOLEN PROPERTY—APPEAL—REVIEW.

The jury were authorized to infer guilt, from the possession of property which had been recently stolen, in the absence of a satisfactory explanation by the accused of his possession. In the present case the explanation which the accused gave of his recent possession seems to have been reasonable; but this question was exclusively for the determination of the jury, and this court is not authorized to grant a new trial because the jury refused to accept as satisfactory the explanation given of the possession of the property. While the evidence is exceedingly weak, yet, in the absence of a satisfactory explanation, the recent possession of the stolen property, and the inference arising therefrom, furnish sufficient evidence to support the verdict, and, as no mate-

rial error of law was committed on the trial, the judgment must be affirmed.

[Ed. Note.—For other cases, see Larceny, Cent. Dig. §§ 170-178; Dec. Dig. § 64.* Criminal Law, Cent. Dig. §§ 3074-3083; Dec. Dig. § 1159.*]

Error from Superior Court, Toombs County; K. J. Hawkins, Judge.

Henry Mosley was convicted of crime, and brings error. Affirmed.

Wm. B. Kent, of Mt. Vernon, and O. P. Thompson, of Atlanta, for plaintiff in error. Alfred Herrington, Sol. Gen., of Swainsboro, and Hines & Jordan, of Atlanta, for the State.

HILL, C. J. Judgment affirmed.

(11 Ga. App. 301)

HUNT et al. v. MCKINNEY. (No. 4,184.)

(Court of Appeals of Georgia. July 2, 1912.)

(Syllabus by the Court.)

1. BILLS AND NOTES (§ 107*)—PATENT RIGHTS—REGULATION OF SALE.

A promissory note, given for the right to sell a patented article in specified territory, is not, under the provisions of sections 4293 and 4294 of the Civil Code of 1910, void because there is not expressed in the face of the note "the consideration of the same, stating the thing or article for which the same was given." The purpose of the law contained in these sections of the Code was to place a purchaser of a note expressing on its face such a consideration in the same position as the payee with reference to its enforcement. If the consideration is not so expressed, the right to enforce the note is governed by the same rules as are applicable to a note founded upon any other valid consideration. *Parr v. Erickson*, 115 Ga. 873, 42 S. E. 240; *Lee v. Hightower*, 3 Ga. App. 226, 59 S. E. 597; *Simmons v. Council*, 5 Ga. App. 386, 389, 63 S. E. 238.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 227; Dec. Dig. § 107.*]

2. BILLS AND NOTES (§ 107*)—PAROL EVIDENCE—ORAL GUARANTY.

It is no defense to an action brought by the payee upon a promissory note, the consideration of which, though not expressed on its face, was the right to sell a patented clothesline in a certain county, that the wire bought by the purchaser to make the clothesline rusted, and the seller orally guaranteed that such wire, if used, would not rust, but would be suitable for the purpose intended.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 227; Dec. Dig. § 107.*]

3. REVIEW OF EVIDENCE.

The evidence demanded a verdict for the plaintiff, and there was no error in directing the jury so to find.

Error from Superior Court, Haralson County; Price Edwards, Judge.

Action by J. M. McKinney against R. C. Hunt and others. Judgment for plaintiff, and defendants bring error. Affirmed.

Griffith & Matthews, of Buchanan, for plaintiffs in error. J. S. Edwards and W. P. Robinson, both of Buchanan, for defendant in error.

POTTLE, J. Judgment affirmed.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.

(113 Va. 612)

KIDD et al. v. VIRGINIA SAFE DEPOSIT & TRUST CORPORATION et al.

(Supreme Court of Appeals of Virginia. June 13, 1912.)

1. CONTEMPT (§ 60*) — CRIMINAL OR QUASI CRIMINAL CONTEMPT—EVIDENCE—WEIGHT.

The rules of evidence applicable in criminal cases apply to a proceeding to punish for a criminal or quasi criminal contempt for the violation of a decree of court, and the offense must be proved beyond a reasonable doubt; and one cannot be punished summarily for contempt, without being brought clearly within Code 1904, § 3768, defining cases in which courts may punish for contempt.

[Ed. Note.—For other cases, see Contempt, Cent. Dig. §§ 182-187; Dec. Dig. § 60.*]

2. CONTEMPT (§ 23*)—VIOLATION OF DECREE.

A decree appointing a receiver of a bank, in a suit in which a depositor of a branch bank and her husband were not parties, contained no prohibition against the wife or husband. The manager of the branch was notified of the appointment and instructed to close the branch. The husband of the depositor, suspecting that something was wrong with the bank, sought out the manager, who told him that the bank was in trouble. The husband discovered that the manager had money enough to cash his wife's certificate, and obtained the cash therefor without any promise to refund the money. The wife had no knowledge of the transaction. *Held*, that the husband and wife were not guilty of contempt for violating the decree; it not appearing that the decree was personally served on defendants, or that they had actual notice of its rendition.

[Ed. Note.—For other cases, see Contempt, Cent. Dig. §§ 68-70; Dec. Dig. § 23.*]

3. CONTEMPT (§ 79*)—PUNISHMENT.

The court, in a proceeding to punish for contempt, based on obtaining payment of a certificate of deposit after the appointment of a receiver of the bank, has no jurisdiction, where the evidence does not show defendant guilty of contempt, to require the refund of the money and imprison him until payment; imprisonment for debt being abolished by Code 1849, c. 188, § 2.

[Ed. Note.—For other cases, see Contempt, Cent. Dig. §§ 270, 274; Dec. Dig. § 79.*]

Appeal from Corporation Court of Alexandria.

E. L. Kidd and others were convicted of contempt of court for violating a decree of court in a suit instituted by the directors of the Virginia Safe Deposit & Trust Corporation against the corporation, and E. L. Kidd and wife appeal. Reversed as to appellants.

Coleman, Easley & Coleman, for appellants. J. K. M. Norton and S. G. Brent, for appellee.

WHITTLE, J. This appeal is from the decree of July 21, 1911, directing appellants, E. L. Kidd and F. H. Kidd, his wife, and R. Lee Camden, who is not a party to this appeal, to restore and pay over to the receivers \$2,193.33, with interest from December 29, 1910, and costs. The decree furthermore provides that, unless said payment be made within 30 days from its date, the parties shall be attached and imprisoned until the

same be satisfied, unless sooner released by order of the court or judge.

The suit in which the foregoing decree was entered was instituted by the directors, who were also stockholders, of the Virginia Safe Deposit & Trust Corporation, against the corporation, alleging, among other things, that owing to the illness of the president of the corporation they were unable to carry on the business, though the assets were ample to meet all obligations, and praying for the appointment of a receiver or receivers, and that the assets be collected, and the affairs of the corporation wound up, under the orders of the court. The chief office of the corporation was in the city of Alexandria, but there were numerous branches in various parts of the state (one at Lovings-ton, Nelson county), where deposits of money were received and the corporation conducted business as a banking and bonding company.

On December 28, 1910, the court passed a decree appointing John S. Barbour and J. K. M. Norton receivers to take charge of the assets; and all officers, agents, and employees of the corporation and its branches were ordered to turn over to the receivers all property of the corporation in their possession or under their control.

The right of the plaintiffs to maintain this suit is strenuously controverted by the appellants, but in our view of the situation it is unnecessary to express any opinion on that branch of the case.

On June 10, 1911, the receivers filed a report, reciting that they had recently ascertained that after their appointment, and with full knowledge thereof by R. Lee Camden, manager of the Lovings-ton branch, and by appellants, he had paid to E. L. Kidd, as agent for his wife, F. H. Kidd, on two certificates of deposit, \$2,193.33. This report was made the ground for a proceeding against these parties for contempt. Rules were accordingly awarded against them, answers filed, and evidence taken, upon which the decree under review was entered.

[1] The object of this proceeding is to punish the appellants for an alleged contempt, and it is criminal or quasi criminal in its nature, and the rules of evidence applicable in criminal cases prevail. Mere preponderance of evidence is not sufficient to convict, but the offense charged must be proved beyond a reasonable doubt. See note to Wells v. Commonwealth, 62 Va. (Va. Rep. Ann.) 893. So that the parties must be brought clearly within the terms of the statute (Va. Code 1904, § 3768) before they can be punished summarily for contempt.

[2] Tested by the foregoing standard, the salient facts are these: On December 29, 1910, Camden received a telegram, signed C. J. Rixey, President, and J. K. M. Norton and John S. Barbour, Receivers (repeated

over the telephone from the railway station), advising him that receivers had been appointed for the parent bank the previous evening, and instructing him to close the doors of his branch, to receive no further deposits, and to transmit all funds on hand to the receivers. E. L. Kidd caught two words of the telephone message to Camden, namely, "Barbour, Receiver." These he testified had no significance to him, yet he afterwards overheard a conversation between Camden and Roberts with reference to the payment of two small checks, which arrested his attention and led him to suspect that something was wrong with the bank; but there was nothing in the conversation to induce the belief that suit had been brought or receivers appointed. He then sought Camden, who told him he thought the bank was in trouble. Kidd immediately asked the manager if he had money enough to cash his wife's certificates and would pay them. Receiving an affirmative reply to both questions, he went to his house, and, without mentioning the subject to his wife, got the certificates, returned to the bank, which was still open, and collected his wife's money. No promise was exacted and none given to refund this money. With respect to Mrs. Kidd, she neither knew nor had any reason to suspect that the bank was in trouble at the time her certificates were paid. At that time the record presents this situation: The appellants were not parties to the suit, and had no knowledge of its existence or the appointment of the receivers; and the decree appointing the receivers contained no direction, mandate, or prohibition to or against them, or either of them. The appellants, therefore, were not guilty of disobedience or resistance of the decree of the court.

In 9 Cyc. 12, it is said: "In order to punish a person for contempt of court for violation of an order, judgment, or decree, it must appear that such order, judgment, or decree has been personally served on the one charged, or that he has had actual notice of the making of such order or rendition of such judgment or decree." 7 Am. & Eng. Ency. of Law (2d Ed.) pp. 54, 55; Pettibone v. U. S., 148 U. S. 197, 13 Sup. Ct. 542, 37 L. Ed. 419.

In *Taliaferro v. Horde*, 22 Va. 242, it was held: "An attachment for contempt in disobedience of a decree * * * will only lie for what is decreed, and not for what may be decreed."

[3] We are of opinion that the evidence was not sufficient to find the appellants guilty of the contempt with which they were charged, and inasmuch as imprisonment for debt passed from our statute books with the abolition of the writ of *capias ad satisfaciendum* in 1849 (Va. Code 1849, § 2, p. 716), it was error to require them in this proceeding to refund the money in controversy.

The revisors, in referring to the measures to be substituted for the writ of *ca. sa.*, express the opinion that the rights of creditors will be better protected, "at the same time that we get rid of the system of imprisonment for debt, which is regarded by so many as inconsistent with the liberal and enlightened spirit of the age." Report of Revisors, p. 843.

Our conclusion upon this branch of the case is that the decree of July 21, 1911, so far as it affects the appellants, is erroneous, and must be reversed, and the contempt proceeding as to them dismissed.

Reversed in part.

(113 Va. 618)

LEE v. R. H. ELLIOTT & CO., Inc.

(Supreme Court of Appeals of Virginia. June 13, 1912.)

1. TRUSTS (§ 89*)—RESULTING TRUSTS—ESTABLISHMENT—PAROL EVIDENCE.

Though a resulting trust may be established by parol, the evidence must be clear and explicit, and such as to leave no doubt of the character of the transaction.

[Ed. Note.—For other cases, see *Trusts*, Cent. Dig. §§ 134-137; Dec. Dig. § 89.*]

2. TRUSTS (§ 77*)—RESULTING TRUSTS—PAYMENT OF PURCHASE MONEY.

Where it is sought to establish a resulting trust by the payment of purchase money, the trust must arise at the time of the execution of the conveyance by a payment in advance of the purchase money, before or at the time of the purchase, as a subsequent payment cannot by relation attach a trust to the original purchase; the trust arising out of the fact that the money of the real and not of the nominal purchaser formed at the time the consideration of the purchase and was converted into land.

[Ed. Note.—For other cases, see *Trusts*, Cent. Dig. § 109; Dec. Dig. § 77.*]

3. TRUSTS (§ 79*)—RESULTING TRUSTS—PAYMENT OF PURCHASE MONEY.

Where a resulting trust in land is sought to be established by a payment of a part of the consideration, the evidence must clearly show the exact portion of the whole price that was so paid.

[Ed. Note.—For other cases, see *Trusts*, Cent. Dig. §§ 111, 112; Dec. Dig. § 79.*]

4. TRUSTS (§ 89*)—RESULTING TRUSTS—PURCHASE OF LAND—CONTRIBUTION TO PRICE.

Where the only contribution made by complainant to the purchase of certain lands by E. and conveyed to defendant corporation was the proceeds of two notes made by E., indorsed by complainant and discounted by a bank, and it was shown that such money was borrowed for E.'s personal accommodation, and that defendant had no knowledge of any claim of complainant, or of business relations between complainant and E., until the suit was brought, the evidence was insufficient to charge the land with a resulting trust for complainant's benefit to the extent of the amount of such notes.

[Ed. Note.—For other cases, see *Trusts*, Cent. Dig. §§ 134-137; Dec. Dig. § 89.*]

5. CORPORATIONS (§ 428*)—OFFICERS—KNOWLEDGE—PERSONAL TRANSACTIONS.

Where the president of defendant corporation sold certain of his own property to it, and in such transaction acted for himself, and not for the corporation, and there was no showing that he was authorized to buy or sell real prop-

erty for or to the corporation, it was not charged with knowledge that complainant had contributed to the purchase of the land, so as to charge it with a resulting trust for complainant's benefit to the extent of his contribution.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1748-1761; Dec. Dig. § 428.*]

Appeal from Circuit Court, Norfolk County.

Suit by A. T. Lee against R. H. Elliott & Company, Incorporated. Decree for defendant, and complainant appeals. Affirmed.

John N. Sebrell, Jr., and J. Edward Cole, for appellant. Jeffries, Wolcott, Wolcott & Lankford, for appellee.

HARRISON, J. The record shows that for several years prior to 1905 R. H. Elliott and J. W. Hammond were partners under the firm name of R. H. Elliott & Co., in the business of oyster packing in the city of Norfolk. It further appears that on January 13, 1904, the Norfolk Willoughby Bay Company conveyed to R. H. Elliott and A. T. Lee a tract of 6 acres of land, the purchase price of which was \$6,250, and that on April 10, 1905, Edward Spalding, trustee, conveyed to R. H. Elliott 33 acres of oyster ground in Little Bay, Norfolk county, and on February 1, 1906, the Norfolk Willoughby Bay Company conveyed to R. H. Elliott 18 lots adjoining the 6 acres which had been conveyed by it to R. H. Elliott and A. T. Lee jointly. In 1904 or 1905 it was determined to convert the firm of R. H. Elliott & Co. into a corporation for the purpose of carrying on the oyster packing and oyster planting business. This was done, the name of the corporation being R. H. Elliott & Co., Incorporated. In 1907 the stock of the company was increased, and about that time A. T. Lee conveyed, unconditionally and without reservation, his undivided half interest in the 6-acre tract to R. H. Elliott, who in turn conveyed to the newly incorporated company the 6-acre tract, the 18 lots, and the 33 acres of oyster ground, the title to each of which was in him, for the price of \$12,000, which was paid to him as follows: Three thousand dollars in the stock of the company, \$5,000 in cash, and a note of the company payable to Elliott for \$1,800; the balance of the \$12,000 being represented by the indebtedness of R. H. Elliott to the company.

On the 5th day of September, 1907, the company borrowed from Miss Cutter \$5,000, secured by deed of trust on the 6-acre tract and the 33 acres of oyster ground. In addition to the expenditure of the money raised by the sale of its increased stock, the company borrowed from Miss Fitzgerald and Hammond, two of its stockholders, \$4,000 for its purposes.

R. H. Elliott was the president and general manager of the corporation, and was

allowed much latitude in the conduct of its affairs. About two years after the transactions mentioned it was found that the company was doing a losing business, its assets being dissipated, and that further effort to carry on the business would result in additional financial trouble. Thereupon the company determined to sell its property, pay its debts, and distribute any balance among its stockholders, and to this end advertised the property for sale.

When the property was advertised for sale, A. T. Lee filed the bill in this cause, alleging that he and R. H. Elliott had purchased the three pieces of property involved in this controversy jointly, and that one-half the consideration for all of the property had been paid by the complainant, and the title thereto conveyed to R. H. Elliott merely for convenience; that these facts created a resulting trust in favor of the complainant in all of the property, to the extent of an undivided one-half interest therein, and to an equitable lien upon all of the property for certain sums advanced by him upon the purchase price thereof. In response to the prayer of the bill an injunction was awarded, restraining the defendant company from selling the property until the cause was prepared and heard upon its merits, when a decree was entered dismissing the bill. From that decree this appeal has been taken.

The questions presented by the appeal are: (1) Do the facts and circumstances alleged in the bill and established by the evidence sustain the plaintiff's claim of a resulting trust in his favor? and (2) did the defendant corporation have notice thereof, when it purchased the property from R. H. Elliott?

[1, 2] It is well settled that, though a resulting trust may be established by parol evidence, it must be clear and explicit, and such as to leave no doubt of the character of the transaction. Where the trust does not arise on the face of the deed, but is raised upon the payment of the purchase money, which creates a trust which is to override the deed, the proof must be very clear, and mere parol evidence ought to be received with great caution. A resulting trust must arise at the time of the execution of the conveyance. Payment in advance of the purchase money, before or at the time of the purchase, is indispensable. A subsequent payment will not, by relation, attach a trust to the original purchase; for the trust arises out of the circumstance that the moneys of the real, and not the nominal, purchaser formed at the time the consideration of that purchase, and became converted into land. *Miller v. Blose*, 71 Va. 744; *Jesser v. Armentrout*, 100 Va. 686, 42 S. E. 681; *Coons v. Coons*, 106 Va. 572, 56 S. E. 576.

[3] In 3 Pomeroy's Eq. (3d Ed.) § 1040, the learned author says: "It is settled by a complete unanimity of decision that such evidence must be clear, strong, unequivocal, un-

mistakable, and must establish the fact of the payment by the alleged beneficiary beyond a doubt. Where the payment of only a part is claimed, the evidence must show, in the same clear manner, the exact portion of the whole price which was paid."

[4] In the case under consideration, the evidence wholly fails to measure up to the standard prescribed by the authorities cited. The only money which the bill alleges was paid by the complainant, and the only money the evidence attempts to show that he paid for any purpose, was the proceeds of two notes for \$3,000 each, made by R. H. Elliott and indorsed by the complainant, which were discounted by the National Bank of Commerce. These notes it is shown were made up of sundry smaller loans negotiated at different times and finally consolidated into the two notes mentioned. The bill alleges that the purpose of negotiating these notes was "to raise money to take up the floating indebtedness and assist the business of the corporation," and that complainant was "informed that the proceeds of said notes went to the credit of R. H. Elliott & Co., Incorporated, with the distinct understanding with R. H. Elliott, then president of the corporation, that as soon as the mortgage could be arranged this sum of \$6,000, representing part of the purchase price of the above real estate and the oyster grounds, should be taken up and paid for, and an accounting made with complainant for his interest in the property."

This is a vague and uncertain allegation to form the basis of the resulting trust claimed in his favor by the complainant. The evidence adduced in support of the alleged resulting trust is wholly inadequate to sustain the claim. The deposition of the complainant is obscure and uncertain, and shows the impossibility of ascertaining with any degree of accuracy how the proceeds of the money borrowed from the bank by R. H. Elliott, with the complainant as his indorser, was applied, or what part of it went into the land in which he claims a resulting trust. The complainant admits that no part of it went into the purchase price of the 18 lots, and there is nothing to show that any part of it went into the purchase price of the oyster grounds, nor is it made to appear how much, if any part thereof, was used to pay off the indebtedness against the 6-acre tract.

The only other witness introduced by the complainant was R. H. Elliott, whose evidence shows that the two notes of \$3,000 each, discounted by the bank, was a personal indebtedness of his own, with the complainant as his indorser; it being the consolidation of various sums borrowed by him on complainant's indorsement, some of it borrowed prior to the existence of the defendant corporation, and part of it afterwards. He states that the proceeds of these notes was used by him, either to purchase stock in the defendant corporation, or was used by

him in the affairs of that corporation, and that, whenever the same was used in the business of the defendant corporation, it was entered on their books to his credit, and was withdrawn from time to time and charged to his account; that none of said notes or checks have ever been payable to R. H. Elliott & Co., Incorporated, but have always been personal matters between himself and the complainant, A. T. Lee.

[5] The conclusion from this evidence is irresistible that this \$6,000, represented by the two notes, of \$3,000 each, indorsed by the complainant, was borrowed for the personal accommodation of the maker, R. H. Elliott, and that this effort to set up a resulting trust in the lands of the defendant corporation in favor of the complainant must fail for want of proof at all adequate to sustain the claim. The evidence satisfactorily shows that the defendant corporation had no knowledge of the claim of the complainant or of the business relations and transactions between himself and R. H. Elliott until after this suit was brought. Knowledge is sought to be imputed to the corporation because Elliott was its president. In the transactions herein involved, Elliott was not acting in the regular course of his business as the president of the company. There is no evidence that he was authorized to buy or sell real estate for or to the corporation. On the contrary, he was dealing for himself in selling his property to the company, and under such circumstances his knowledge cannot be imputed to the company.

In 10 Cyc. p. 1063, the law is stated as follows: Knowledge by an officer or agent, while acting for himself and adversely to the corporation, is not imputable to the corporation, for the reason that the officer or agent is interested in concealing it from his principal; and consequently the law will not presume that he has communicated it. Where an officer is acting for himself in a transaction with the corporation, he is regarded as a stranger to the corporation, dealing as if he had no official relation with it. When, therefore, an officer, director, or agent of a corporation deals with the corporation for himself, in his private capacity, any uncommunicated knowledge which he may have in respect of the transaction will not be imputed to the latter by reason of his possession of it.

It is contended that the books of the company showed that the complainant was connected with the matter. It clearly appears that the name of the complainant never at any time appeared on the books of the company, and the testimony shows conclusively that the books contained nothing to suggest that he had any interest whatever in the lands or business affairs of the company.

Upon the whole case, there is no error in the decree complained of, and it is affirmed.

Affirmed.

KEITH, P., absent.

(71 W. Va. 38)

STATE v. TYGARTS VALLEY BREWING CO.(Supreme Court of Appeals of West Virginia.
June 10, 1912.)*(Syllabus by the Court.)***1. INTOXICATING LIQUORS (§ 224*)—ILLEGAL SALE—BURDEN OF PROOF.**

On an indictment for unlawfully selling spirituous liquors without a state license therefor, it is not incumbent on the state to prove that defendant had no license to sell. If a sale be proven, it is presumed to have been made without license, and, to justify it, defendant must produce his license.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. §§ 275-281; Dec. Dig. § 224.*]

2. INTOXICATING LIQUORS (§ 148*)—LICENSES—SALES AT BREWERY.

License to carry on a brewery in a place where no license to sell intoxicating liquors can be lawfully granted does not authorize a sale of beer at wholesale at the brewery.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Dec. Dig. § 148.*]

Brannon, J., dissenting.

Error to Circuit Court, Taylor County.

The Tygarts Valley Brewing Company was convicted of an illegal sale of beer without a license, and brings error. Affirmed.

F. T. Martin, for plaintiff in error. William G. Conley, Atty. Gen., and J. O. Henson, Asst. Atty. Gen., for the State.

WILLIAMS, J. The Tygarts Valley Brewing Company was convicted of making an unlawful sale of beer, in wholesale quantity, without a state license therefor, in September, 1909, in the city of Grafton, Taylor county, and brings error.

[1] The state established a *prima facie* case by proving that defendant made a sale of eight gallons of beer at its brewery in the city of Grafton. It was then incumbent upon defendant to prove that the sale was lawful by proving that it had a license which authorized the sale. This is an exception to the general rule of evidence which requires the state to prove every material allegation of the indictment, and is founded on the inconvenience of proving a negative. If defendant wishes to justify the sale, it is easy for him to produce his license, if he has it. It is a matter peculiarly within his own knowledge. The exception to the rule rests on the convenience with which defendant can produce his evidence, and the inconvenience of requiring the state to prove that defendant did not have a license. 1 Greenl. Evl. (16th Ed.) § 29; 4 Wigmore, Evl. § 2512, and note 4; 2 Woollen & Thornton on Intoxicating Liquors, § 947.

The charter of the city of Grafton confers upon its council the power to grant or refuse license to sell intoxicating liquors in the city; and, if it grants a city license to sell intoxicating liquors, the county court is

also obliged, by the statute, to grant a state license for the sale thereof within the city. But the authority of the city council to grant the license is subject to the following qualification: The sense of the voters must be taken at every alternate city election respecting the granting of license; and, unless a majority of the votes for and against the same be cast in favor of license, the council shall not grant license. Section 28, c. 44, Acts 1899. At the city election next preceding the indictment a majority of the votes were cast against license. Hence the city council had no power to grant license to sell intoxicating liquor within the license year beginning July 1, 1909, the year in which the sale in this case was made. The council not having granted license to sell intoxicating liquors, and, in fact, having no power to do so, if it had so desired, the county court could not grant a state license to sell within the city. Section 10, c. 82, Acts 1907 (Code Supp. 1909, c. 32, § 10), amending and re-enacting section 10, c. 82, Code 1906.

But defendant had a license from both the city council and the county court of Taylor county to carry on the business of a brewer in the city of Grafton, and the case presents this question: Did such brewer's license confer upon defendant the right to sell beer, in wholesale quantities, at its brewery? The answer to the question depends upon the construction of section 74, c. 32, Code 1906, as modified by chapter 82, Acts 1907 (Code Supp. 1909, c. 32, § 74). As so modified, that section reads as follows, viz.: "The license for carrying on a distillery shall authorize the holder thereof to sell the product of such distillery at wholesale at the distillery, but shall not authorize any such holder to sell such product at retail at any place; and the shipment or delivery of any such product from any place of storage other than the distillery shall be deemed a sale without license at the place of such shipment, or delivery, unless a license to sell at wholesale at that place has been obtained under this chapter and shall be in force; but a license to carry on a brewery shall authorize the holder thereof to solicit and receive orders for, sell, offer and expose for sale the product of such brewery at wholesale only, in any and all of the counties and cities, towns and villages of this state *without additional tax: Provided, the county court first authorizes such a sale by a certificate duly entered of record which shall designate the places of said sales*; except in those counties where the county court or other license tribunal does not grant license to sell intoxicating liquors, and except also in cities, towns and villages where the council or other license tribunal does not grant license to sell intoxicating liquors; no city, town or village shall impose on the holder of a state

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

license to carry on a brewery any municipal license tax, unless he maintains a store house or place of business therein, and such municipal license tax shall not exceed two and one-half cents per barrel on the sales made at such store house or place of business; this, notwithstanding the provisions of chapter forty-seven of the code or of the charter of any city, town or village." The change made in the law by the act passed in 1907, is indicated by the words in italics. These words were first inserted in the act of 1907.

Prior to the passage of chapter 36, Acts of 1905, amending and re-enacting the whole chapter 32, on the subject of licenses, a license to carry on a brewery did not confer the right to sell the product, even at the brewery, without an additional license therefor. *State v. Schmulbach Brewing Co.*, 56 W. Va. 333, 49 S. E. 249. And section 74 of that act amended the law, as it had been interpreted by that decision, so as to confer the right to sell at wholesale, at the brewery, by virtue of the license to brew. The modification of the law was evidently intended to relieve a brewer from the necessity of obtaining two licenses, one to manufacture and another to sell his product at wholesale at the place of manufacture, and to confer the right to sell, not only at the place of manufacture, but also in all the wet counties and towns of the state, without an additional license therefor. But this act was construed in *City of Charleston v. Brewing Co.*, 61 W. Va. 34, 56 S. E. 198, not to relieve the brewer from the payment of a city license tax, notwithstanding it maintained in the city no other wholesale business place than its brewery; and the Legislature shortly thereafter again amended the statute to read as above quoted.

[2] Section 74, c. 32, Code 1906, as modified by chapter 32, Acts 1907, gives a licensed brewer the right to sell at wholesale, not only at the brewery, but in all other counties, without additional license, or license tax, except in counties and cities where licenses to sell are not expressly granted. The exception defeats defendant's right to sell at the brewery in this particular case, for the reason that neither the county court of Taylor county nor the city council of Grafton had the power to grant license to sell intoxicating liquors in the city within the license year beginning July 1, 1909. The last amendment of section 74 was clearly intended to relieve a brewer from the payment of more than one license tax, that of a brewer, unless he maintains a storehouse in a city. It also continued the right, previously given by the act of 1905, to sell in all the wet counties and towns of the state. But the right to sell in counties, other than the one in which the brewery is located, is so qualified by the act of 1907 that he must first obtain permission of the county court, by certificate entered of record, designating the place of sale.

The statute does not expressly authorize a brewer to sell at his brewery; but it does so by necessary implication, subject to the restriction presently to be pointed out. It first expressly authorizes a licensed distiller to sell his product at wholesale at the distillery, without regard to whether it is located in wet or dry territory, and then proceeds as follows: "But a license to carry on a brewery shall authorize the holder thereof to solicit and receive orders for, sell, offer and expose for sale the products of such brewery at wholesale only, in any and all of the counties and cities, towns and villages of this state without additional tax." Clearly, the legislative purpose was, not to give a brewer an equal right with the distiller in respect to selling his product at the place of manufacture, because the right of the latter seems not to be restricted, but to make his license to embrace a wider range of territory. A brewer's license authorizes him, without additional license or license tax, to sell at wholesale in all the wet counties, wherein the county courts give him permission and designate the places of sale; provided that, if a storehouse for selling the product is maintained in a city, town, or village, he may be required to pay a municipal license tax.

But it was not intended that a brewer's license should confer the right to sell at the brewery, if it happened to be located in a place where no license to sell could be lawfully granted. Neither the county court of Taylor county nor the city council had the power to grant license to sell intoxicating liquors in Grafton, where defendant's brewery was located, at the time when the sale in question was made. The city had been made dry territory by a vote of the citizens at the last preceding city election. If a license to sell could not be granted, it necessarily follows that a brewer's license could not confer the right to sell. That would be to accomplish by indirection what could not be done directly. Counties, cities, towns, and villages, wherein the county courts and municipal authorities do not grant license to sell, are expressly excepted from the territory in which a brewer is given a right to sell by virtue of his brewer's license. The excepted territory necessarily includes the place of the brewery, if it happens to be in a dry county or municipality. To construe the statute otherwise would, in this case, defeat the expressed will of the voters of the city of Grafton, the amended charter of which makes it optional with them whether liquor shall be sold in the city or not; and when they have declared that it shall not be sold in the city, their will on the subject is the law for the time being. Hence defendant's license to carry on the business of a brewer in Grafton did not authorize it to sell beer at its brewery.

Defendant's instruction No. 1, was proper-

ly refused. While it may be true, generally, that a brewer's license authorizes him to sell his product at the brewery at wholesale, it is not so in this case for the reasons above stated.

The judgment will be affirmed.

BRANNON, J., dissents.

(71 W. Va. 35)

MICHAELSON v. CITY OF CHARLESTON.

(Supreme Court of Appeals of West Virginia.
June 10, 1912.)

(Syllabus by the Court.)

1. NEGLIGENCE (§ 113*) — PLEADING — CONTRIBUTORY NEGLIGENCE.

In an action for tort causing personal injury, it is not necessary that the declaration aver that the plaintiff was not chargeable with contributory negligence; it being matter of defense.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 186-193; Dec. Dig. § 113.*]

2. MUNICIPAL CORPORATIONS (§ 816*) — DEFECTIVE SIDEWALKS—ACTION—PLEADING.

In an action against a city for personal injury caused by an obstruction of a sidewalk, it is not necessary that the declaration aver that it was the duty of the city to keep the sidewalk in good condition for public use and free of obstruction, as the law imposes that duty.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1711-1716, 1718, 1720, 1723; Dec. Dig. § 816.*]

3. PLEADING (§ 6*)—MATTERS OF LAW.

It is not necessary to allege matter of law in a pleading.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 8, 9; Dec. Dig. § 6.*]

4. MUNICIPAL CORPORATIONS (§ 759*) — STREETS AND SIDEWALKS—LIABILITIES.

Mere use by the public of a sidewalk or street will not make it a street or sidewalk, so as to charge a municipal corporation with liability for damage arising from its defective condition or obstructions on it.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1595-1600; Dec. Dig. § 759.*]

Error to Circuit Court, Kanawha County.

Action by Mary E. Michaelson against the City of Charleston. Judgment for plaintiff, and defendant brings error. Reversed and remanded.

Upshur Higginbotham, for plaintiff in error. Frank C. Burdette, U. S. Albertson, and J. B. Menager, for defendant in error.

BRANNON, P. Mary E. Michaelson sued the city of Charleston, and recovered judgment on a verdict for \$800 damages for personal injury from a fall on Smith street while walking on a rainy, dark December night, owing to some brick lying on the sidewalk. A pile of brick, 20 or 30 feet long, 4 to 5 feet high, was on the edge of the pavement, leaving only a walking space of a yard between it and the brick wall of a house;

and in this space, practically extending across it, in the middle of the pavement, were some dozen heavy brick in a pile, or scattered over the pavement, and the plaintiff in the dark stumbled over them, fell, and in trying to save herself clutched at the pile of brick, and shook more down from its top, falling on her arm. Whose brick, who piled them, is not shown.

[1-3] The first assignment of error is that the court overruled the demurrer to the declaration. The brief of the city's counsel points out that the declaration does not set out fully enough that the plaintiff was not negligent. Do we have to say again, and give authority to show, that the declaration need not negative contributory negligence and that it is a matter of defense? *Sheff v. Huntington*, 16 W. Va. 307. We should not respond to this suggestion. The brief points out that the declaration does not set out fully enough the city's duty as to the street. The law imposes a duty on a city to keep safe sidewalks free of obstruction, and it is not necessary to allege such duty, as it is never necessary in pleading to allege matter of law. *Thomas v. Electric Co.*, 54 W. Va. 395, 46 S. E. 217.

Another point made by counsel is that a witness, Dr. Mayer, who examined the injured wrist of the plaintiff, stated that it was discolored and swollen and she needed medical attention. There can be nothing in this point. Dr. Mayer was a physician, though then retired; but any one, though not a physician, could give such evidence.

The brief makes the point that Mrs. Michaelson did not avail herself of proper medical treatment in proper time. There can be nothing in this. The murderer cannot say that bad medical treatment contributed to death. To relieve from murder, the wound must be not mortal, and death must come from independent cause. *Livingston's Case*, 55 Va. 592; *Clark's Case*, 90 Va. 360, 18 S. E. 440; 2 *Bishop, Crim. Law*, § 638, 1 and 2. So with a tort-feasor. It can hardly be said that a city can say, when a person receives an injury from a defective street, that the person had not good medical aid, and thus exempt itself from liability. But there is no evidence to show that want of medical treatment caused or aggravated the injury. If there were, it is a jury matter. We need not have adverted to this feature of the case.

[4] The only question of import arises on the evidence as to whether the city is liable for the condition of the sidewalk. Mrs. Michaelson as a witness was asked whether the pavement on which she was walking when she fell was open to public travel, and answered: "Yes; when we could get through. Yes, sir; it was open to the public when we could go through there." She was asked if it was used by the public, and answered:

"Certainly; Smith and Capitol Streets are as public streets as there is known. All the people come that way to the hotels." Another witness, Cart, was asked if there was a public sidewalk there, and answered: "Yes, sir." It is beyond question that to hold a city liable for defect in its streets or sidewalks, it must be proven that it is a street or sidewalk constructed or recognized as such by the city authority. We have various decisions holding, with *Chapman v. Milton*, 31 W. Va. 384, 7 S. E. 22, that "to hold a city liable for defect the plaintiff must allege and prove that the street or sidewalk upon which the injury occurred was, at the time and place where the injury was sustained, controlled and treated by the town authorities as a public street or sidewalk, and opened as such." In *Talbott v. King*, 32 W. Va. 6, 9 S. E. 48, it is held: "Mere user of a road will not make it a public road, under section 31, c. 43, Code of 1887. The user must be accompanied by an order of the county court recognizing it in some way as a road, or the road must be worked by a surveyor as such." So in *Dicken v. Liverpool*, 41 W. Va. 511, 23 S. E. 582, and *Hast v. Railroad Co.*, 52 W. Va. 396, 44 S. E. 155. This oral evidence of mere user was not admissible. To prove the establishment or recognition of a street by council, its record must be produced. *Johnson v. City*, 16 W. Va. 402, 37 Am. Rep. 779; *Childrey v. Huntington*, 84 W. Va. 457, 12 S. E. 536, 11 L. R. A. 813. It is true that the *Talbott* Case above, and *Ball v. Cox*, 29 W. Va. 407, 1 S. E. 673, say that, if a road is worked under the direction of a public road surveyor, it is a public road. That is the lowest class of evidence admitted. If it had been introduced, likely that evidence of user would not have been error. A witness cannot declare a street a public street, and thus make it such. Evidence of mere use by the public will not charge the public with the street or sidewalk, as we endeavored to show in *Hast v. Railroad*. The public cannot be made liable for a road by the public use alone, without consent of the public authorities. There was no evidence of establishment or recognition by council of the street; no evidence that a street commissioner ever worked it; no evidence of any control of it by city authority. We find no error in the case save this (*Parrish v. Huntington*, 57 W. Va. 286, 50 S. E. 416), and are reluctant to reverse; but we cannot avoid it. For this reason, we must say that the court should have sustained the motion to strike out the plaintiff's evidence, the only evidence in the case, and the motion to set aside the verdict.

We find no error in plaintiff's instruction 1, the only one complained of in the city's brief.

Reverse the judgment, set aside the verdict, grant new trial, and remand.

(133 Ga. 314)

PETTY v. WESTERN UNION TELEGRAPH CO.

(Supreme Court of Georgia. June 13, 1912.)

(Syllabus by the Court.)

1. TELEGRAPHS AND TELEPHONES (§ 73*)— OPERATION—TRANSMISSION OF MESSAGES— ACTIONS.

The court erred in granting a nonsuit in this case.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. § 76; Dec. Dig. § 73.*]

2. TELEGRAPHS AND TELEPHONES (§ 54*)— OPERATION—TRANSMISSION OF MESSAGES— CLAIM FOR DAMAGES.

Even if the condition printed upon a telegraphic blank, stating that a telegraph company will not be liable for damages or statutory penalties in any case where the claim is not presented in writing within 60 days after the message is filed with the company for transmission, be valid and binding, still if the suit for the recovery of the penalty provided for in sections 2812, 2813, of the Civil Code, is brought within 60 days after the message is filed with the company for transmission, no other or further presentation of the claim is necessary.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. §§ 89-47; Dec. Dig. § 54.*]

Error from Superior Court, Bibb County; W. H. Felton, Judge.

Action by Mrs. A. M. Petty against the Western Union Telegraph Company. Judgment for defendant, and plaintiff brings error. Reversed.

H. F. Strohecker, of Macon, for plaintiff in error. Querry, Hall & Roberts, of Macon, for defendant in error.

BECK, J. Mrs. A. M. Petty brought suit against the Western Union Telegraph Company, under the provisions of sections 2812 and 2813 of the Civil Code, to recover the penalty of \$25. The evidence introduced on the trial was as follows:

The plaintiff is the wife of A. M. Petty. On March 8, 1910, she resided at No. 122 Washington avenue, within the corporate limits of Macon, Ga. On that date she was at home all day, and received no telegraphic message from A. M. Petty. She received no message by telegraph from her husband while he was absent about that time, and none has been delivered to her since as coming from him. On March 8, 1910, he was at Conyers, Ga. He went into the Western Union Telegraph Company's office there about 10 o'clock in the morning, wrote out a message to his wife at Macon, Ga., and gave it to the telegraph agent to send to her. He paid the agent 80 cents, the amount charged by him, and asked him to hurry the message. When he returned home, he called up the Macon office of the defendant on the telephone and asked about the message. (The court ruled out any conversation he had with the office by telephone.) He did

not go to the office personally after he came home. He had frequently been in this office. He has never brought any suit for the penalty. The telegraphic message, produced under notice, was written upon a printed form. The front thereof read as follows:

"The Western Union Telegraph Company.

"4 Co. JN AM P 11—10 11 Paid

"Mch. 8th, 1910.

"Send the following message, subject to the terms on back hereof, which are hereby agreed to:

"To Mrs. A. M. Petty,

"122 Washington Avenue, Macon, Ga.

"Delayed on business. Will hear from me later. Advise Johnson Bros.

"A. M. Petty.

"Original."

On the back, among many others, was the following stipulation: "This company will not be liable for damages or statutory penalties in any case where the claim is not presented in writing within sixty days after the message is filed with the company for transmission."

The defendant moved for a nonsuit upon the following grounds: (a) There was no proof that defendant had an office in the city of Macon at the time the message was sent. (b) There was no proof that the plaintiff lived within one mile of the office of defendant. (c) No written demand was filed with the company within 60 days after the message was filed with the company for transmission. The court sustained the motion, and the plaintiff excepted.

[1] We are of the opinion that the court erred in granting a nonsuit. Section 2812 of the Civil Code provides as follows: "Every electric telegraph company, with a line of wires wholly or partly in this state, and engaged in telegraphing for the public, shall, during the usual hours, receive dispatches or messages, whether from other telegraphic lines or from individuals, and, on payment or tender of the usual charge according to the regulations of such company, shall transmit and deliver the same with impartiality and good faith and with due diligence, under penalty of twenty-five dollars, which penalty may be recovered by suit in a court having jurisdiction thereof, by either the sender of the dispatch or message or the person to whom sent or directed, whichever may sue first." And section 2813 is in the following language: "Such companies shall deliver all dispatches or messages to the persons to whom the same are addressed or to their agents, on payment of any charges due for the same: Provided, such persons or agents reside within one mile of the telegraphic station, or within the city or town in which such station is located." Although it is not expressly stated in the evidence that the telegraphic station of the defendant company was located in the city of Macon, at the time

the message was sent, the jury might have inferred, from the fact that the agent of the defendant company at Conyers, Ga., the point from which the message was sent, received a message directed to Macon, Ga., that the station was then located within that city. Under the provisions of the statute which we have quoted, it was the duty of the company to deliver the message with due diligence under a penalty of \$25; and in case of failure to so deliver the message, where the person to whom the same is sent resides in the city in which the telegraphic station is located, the company becomes liable for the failure in the amount of the penalty.

[2] Even if the condition printed upon a telegraphic blank, stating that the company will not be liable for damages or statutory penalties in any case where the claim is not presented in writing within 60 days after the message is filed with the company for transmission, be valid and binding, we do not think that the failure of the plaintiff to present a claim in writing within 60 days after the message was filed with the company's agent for transmission will defeat the action in this case. The suit to recover the penalty was brought and served within 60 days, and we think that this was sufficient demand upon the company for the payment of the penalty.

Judgment reversed. All the Justices concur.

(128 Ga. 275)

WADLEY v. DOOLY.

(Supreme Court of Georgia. June 13, 1912.)

(Syllabus by the Court.)

1. PRINCIPAL AND AGENT (§ 159*)—DISMISSAL AND NONSUIT (§ 26*)—UNAUTHORIZED ACTS OF AGENT—DISMISSAL AS TO CODEFENDANT.

An agent is personally responsible for his own tortious act. Civil Code, § 3613.

(a) The action was for personal injuries sustained by the plaintiff by reason of the alleged negligence of the driver of an automobile in running it against and over her. The owner and the driver of the machine were joined as defendants, and the petition averred that all the alleged acts of negligence on the part of the driver were done by him as the servant and agent of the owner in operating the machine. Elsewhere in the petition it was set forth that the driver was "over the age of 14 years, and as such responsible for and liable to be sued for any tort committed by him," and that by reason of the allegations of the petition the defendants had damaged the plaintiff in a given sum. Process was prayed against both defendants, both were served, and both answered. On the trial, upon the conclusion of the evidence for the plaintiff, a nonsuit was granted as to the owner of the machine. The other defendant (the driver) then moved for a nonsuit, on the ground that no suit was filed against him individually, there being no allegation against him other than as agent for the owner of the machine; that the action was not against the defendants as joint tort-feasors; and that as the evidence did not authorize the verdict against the owner,

who was sued as principal, no verdict could be rendered against his mere servant and agent. This motion was overruled. The plaintiff was then allowed, over objection, to amend the petition by alleging that all acts of the driver of the machine, averred in the original petition to have been done by him as agent, were also done "in his individual capacity, and the injuries complained of were also the result of [his] negligence, and he is liable therefor." *Held*, that there was no error in refusing the nonsuit, nor in allowing the amendment, even if the original petition did not set forth a cause of action against the driver. See *Southern Ry. Co. v. Grizzle*, 124 Ga. 735, 53 S. E. 244, 110 Am. St. Rep. 191; *Baker v. Davis*, 127 Ga. 649 (1), 57 S. E. 62.

[Ed. Note.—For other cases, see *Principal and Agent*, Cent. Dig. §§ 599-612; Dec. Dig. § 159; * *Dismissal and Nonsuit*, Cent. Dig. §§ 46, 48-49; Dec. Dig. § 26.*]

2. TRIAL (§ 296*)—INSTRUCTIONS—CONSTRUCTION AS A WHOLE.

The court instructed the jury as follows: "The plaintiff cannot recover if she could by ordinary care have avoided the injury, or if the defendant has made it appear to your satisfaction that he exercised all ordinary and reasonable care." The last clause of this instruction was not aptly put, as the jury may have inferred therefrom that the burden was upon the defendant to make it appear to the satisfaction of the jury that he exercised all ordinary and reasonable care. When considered, however, in the connection in which it was given, and in view of the fact that the court specifically charged the jury that the burden of proof in the case was upon the plaintiff to prove to the satisfaction of the jury by a preponderance of the evidence every material allegation in the petition, it is not probable that the jury were misled by the instruction.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 706-713, 715, 716, 718; Dec. Dig. § 296.*]

3. APPEAL AND ERROR (§ 739*)—INSTRUCTIONS—ASSIGNMENTS OF ERROR.

The lengthy request to charge, set out in the tenth ground of the motion for new trial, was properly refused, as there was no evidence whatever that the plaintiff saw the automobile before it struck her. The assignment of error was upon the refusal to give the entire request, and, even if the balance of it was good, the assignment was nevertheless without merit.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3034-3036; Dec. Dig. § 739.*]

4. NEGLIGENCE (§ 141*)—ACTIONS FOR NEGLIGENCE—INSTRUCTIONS.

The court did not err in charging that "the rule which requires one to avoid the consequences of another's negligence * * * does not apply until such person sees the danger or has reason to apprehend it." *Central R. Co. v. Attaway*, 90 Ga. 656, 661, 16 S. E. 956, 958; *W. & A. R. Co. v. Ferguson*, 113 Ga. 708, 39 S. E. 306, 54 L. R. A. 802.

[Ed. Note.—For other cases, see *Negligence*, Cent. Dig. §§ 382-399; Dec. Dig. § 141.*]

5. NEGLIGENCE (§ 141*)—ACTIONS—INSTRUCTIONS.

In view of the evidence submitted upon the trial, the court erred in refusing to instruct the jury, in accordance with a timely written request, that "if you believe from the evidence that both the defendant and plaintiff were negligent, and that the plaintiff was equally negligent with the defendant, then I charge you the plaintiff cannot recover."

Pickett v. Central Ry. Co., 138 Ga. —, 74 S. E. 1027, and cases cited.

[Ed. Note.—For other cases, see *Negligence*, Cent. Dig. §§ 382-399; Dec. Dig. § 141.*]

6. TRIAL (§ 251*)—ISSUES—INSTRUCTIONS.

The action being for damages from personal injuries, based on negligence alone, and, under the pleadings and evidence, no question of willfulness, wantonness, malice, oppression, or conscious indifference to consequences being involved, it was error to charge that: "In every tort there may be aggravating circumstances, either in the act or the intention, and in that event the jury may give additional damages, either to deter the wrongdoer from repeating the trespass, or as compensation for the wounded feelings of the plaintiff." *Southern Ry. Co. v. Bankston*, 131 Ga. 604, 62 S. E. 1027; *Southern Ry. Co. v. Davis*, 132 Ga. 812 (3), 65 S. E. 131; *Southern Ry. v. Phillips*, 136 Ga. 282, 71 S. E. 414.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 587-595; Dec. Dig. § 251.*]

7. DAMAGES (§ 216*)—ASSESSMENT—INSTRUCTIONS.

As the suit was to recover damages for physical injuries, causing nervous shock, physical pain, permanent impairment of ability to work and labor in the plaintiff's profession, loss of time, impairment of health, and expenses in the way of physician's bills, it was inapt to instruct the jury that "in some torts the entire injury is to the peace, happiness, or feelings of the plaintiff; in such cases no measure of damages can be prescribed, except the enlightened conscience of impartial jurors." *Southern Ry. Co. v. Davis*, *supra*. While damages on account of pain and suffering are to be measured by the enlightened conscience of impartial jurors, the instruction above quoted was not strictly applicable to the case as tried, as a recovery was sought for damages, not alone for pain and suffering.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. §§ 548-555; Dec. Dig. § 216.*]

8. MUNICIPAL CORPORATIONS (§ 706*)—STREETS—USE FOR TRAVEL—ACTIONS FOR DAMAGES—INSTRUCTIONS.

The court did not err in refusing a request to give the following in charge: "If you believe from the evidence that the plaintiff in this case got off the street car, and did not see the approaching automobile, and did not look to see it, but that she was standing in the street with her back to the curbing, facing the street car from which she had alighted, and without looking she suddenly turned from her position towards the curbing and in the direction in which the automobile was coming, and that such action on her part was negligence, and that this negligence was the real and proximate cause of her injury, then I charge you that she cannot recover, even though you may believe from the evidence that the defendant was negligent in the manner alleged." The negligence alleged in the petition against the defendant was in substance as follows: Defendant was driving a very heavy and powerful automobile at a high rate of speed along the public street upon which plaintiff alighted from a street car. In passing the car, which had stopped to allow the plaintiff to alight therefrom, the defendant did not slow up after the car had stopped. Defendant had full opportunity to see the car and that it had stopped for such purpose. He blew no horn, nor gave any other signal of his approach, "but recklessly rushed by said car in said automobile, without regard to the safety of persons alighting therefrom or crossing therefrom to the sidewalk." Plaintiff was in plain view of the defendant, and he was either "negligently not looking out, or was recklessly

careless in not avoiding plaintiff, and in driving too close to her." If the defendant was negligent in the manner alleged, then, if the plaintiff was negligent as stated in the request to charge, such negligence on her part could not be "the real and proximate cause of her injury."

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1518; Dec. Dig. § 706.*]

9. REFUSAL TO CHARGE—NO ERROR.

In view of the whole charge, the refusal of the requests to charge, other than those hereinbefore dealt with, was not cause for a new trial.

Error from Superior Court, Monroe County; Robt. T. Daniel, Judge.

Action by Isma Dooly against Edward Wadley. Judgment for plaintiff, and defendant brings error. Reversed.

Smith, Hammond & Smith, of Atlanta, and Persons & Persons, of Forsyth, for plaintiff in error. King, Spalding & Underwood, of Atlanta, and Willingham & Willingham, of Forsyth, for defendant in error.

FISH, C. J. Judgment reversed. All the Justices concur.

(128 Ga. 317)

CARTER et al. v. DAVIDSON.

(Supreme Court of Georgia. June 13, 1912.)

(*Syllabus by the Court.*)

1. APPEAL AND ERROR (§ 336*)—PARTIES—AMENDMENT.

"If it appears from the record that one who should have been joined as a defendant in error to the bill of exceptions has not been named as such therein, he may be made a party by amendment, provided he is willing to waive service and consent that the case be heard on its merits."

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 1868-1876; Dec. Dig. § 336.*]

2. TRIAL (§ 193*)—INSTRUCTIONS—OPINION OF COURT.

The following charge is objectionable, on the ground that it contains an expression of opinion by the court: "Appraisers were appointed, who, I presume, viewed the property, took into consideration what they thought was best, and set apart as twelve months' support for these children certain property enumerated in these proceedings." (Fish, C. J., and Atkinson, J., dissenting as to the ruling.)

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 436-438; Dec. Dig. § 193.*]

3. EXECUTORS AND ADMINISTRATORS (§ 194*)—YEAR'S SUPPORT—AMOUNT—INSTRUCTIONS.

The court did not err in charging the jury as follows: "The law says that in doing that, whatever you do, in passing upon the sufficiency of their support and maintenance, you shall keep in view two things: First, you allow the support according to the circumstances of the family prior to the death of the father; then in doing that, in arriving at what you will do, or what you will allow, you shall keep in view the solvency or insolvency of the estate."

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 713-723; Dec. Dig. § 194.*]

4. TRIAL (§ 194*)—INSTRUCTIONS—PROVINCE OF COURT AND JURY.

It being a question, under the law and evidence in the case, whether the entire property of the decedent, or whether one or both of two lots of land, should be set aside for certain minor children, it was error for the court to charge the jury in the following language: "You may set apart the entire property, both pieces of real estate, say that they shall have both pieces—that is, the house and lot in Belton and the tract of land in Banks county"—without qualifying this by adding, if the jury should think that this was a proper allowance under the evidence in the case and the instructions of the court, or some similar qualification, which would have left the amount of the allowance for determination exclusively by the jury under the law as given them in charge by the court.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 413, 439-441, 446-454, 456-466; Dec. Dig. § 194.*]

5. APPEAL AND ERROR (§ 1078*)—REVIEW—ABANDONMENT OF ERROR.

Assignments of error in the bill of exceptions, not argued in the brief of counsel for plaintiff in error, will be regarded as abandoned in this court.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4256-4261; Dec. Dig. § 1078.*]

Error from Superior Court, Hall County; J. B. Jones, Judge.

Application by L. P. Davidson for a year's support for the minor children of Charles J. Pool, deceased. Mrs. A. J. Carter and others object. Judgment for the applicant, and the objectors bring error. Reversed.

Howard Thompson and Wm. M. Johnson, both of Gainesville, for plaintiffs in error. C. R. Faulkner, of Belton, and H. H. Dean, of Gainesville, for defendant in error.

BECK, J. L. P. Davidson made application for a year's support for the minor children of Charles J. Pool, deceased. Appraisers were appointed, and to their return setting apart the year's support certain creditors of the decedent filed a caveat, on the ground that the amount of property so set apart, the condition of the estate of the decedent being considered, was excessively large and disproportionate to the value of the estate, as the same would be rendered insolvent if the year's support set apart by the appraisers was allowed. The objections were heard in the court of ordinary. An appeal was entered by the caveators to the judgment there rendered. After trial and verdict in the superior court, the caveators made a motion for a new trial, which was overruled.

[1] 1. A motion was made to dismiss the bill of exceptions, upon the ground that the administrator was not a party defendant to the bill of exceptions. In response to this motion the plaintiffs in error filed their motion to have the administrator made a party in this court, and accompanied this motion with an acknowledgement of service and con-

sent that the case be heard at once, signed by the administrator himself. We are of the opinion that under these facts the administrator should be made a party, and the motion to dismiss overruled. *Sears v. Jeffords*, 119 Ga. 821, 47 S. E. 186.

[2] 2. The plaintiffs in error excepted to the following charge of the court: "Appraisers were appointed, who, I presume, viewed the property, took into consideration what they thought was best, and set apart as 12 months' support for these children certain property enumerated in these proceedings." This charge was erroneous. It invaded the province of the jury. The court was without authority under our law to intimate to the jury his opinion that the appraisers had "viewed the property and taken into consideration what they thought was best." Where the law upon a given state of facts raises a presumption, the court may so state to the jury; but he should not have expressed his own belief as to what the appraisers in this case had done. The expression "I presume" contains an expression of the court's belief in reference to the acts and doings of the appraisers in the premises, and such an expression or intimation of opinion is under the inhibition of our law.

[3] 3. It is provided in the law applicable to proceedings of this kind that "it shall be the duty of the appraisers * * * to set apart and assign to such widow and children, or children only, either in property or money, a sufficiency from the estate for their support and maintenance for the space of twelve months from the date of administration on the estate, to be estimated according to the circumstances and standing of the family previously to the death of the testator or intestate, and keeping in view also the solvency of the estate." This law was substantially embodied in the following charge of the court: "The law says that in doing that, whatever you do in passing upon the sufficiency of their support and maintenance, you shall keep in view two things: First, you allow the support according to the circumstances of the family prior to the death of the father; then in doing that, in arriving at what you will do, or what you will allow, you shall keep in view the solvency or insolvency of the estate." And the fact that the court, in cautioning the jury to consider the condition of the estate, instructed them that they should keep in view the solvency or insolvency of the estate, did not render the charge obnoxious to the provisions of the law which we have quoted above. The real meaning of the expression "keep in

view the solvency of the estate," as it is found in the statute, means nothing more than that the appraisers should keep in view the condition of the estate as to solvency or insolvency.

[4] 4. Complaint is made of the following charge of the court: "First, put a valuation upon the support and maintenance necessary for the minor children under the law; then you might place, if you want to do it, a valuation upon the entire piece of real estate, if you see proper to do it. You might say, then, if you want to do it, that you find it will take so much money to support and maintain these children under the law for and during the 12 months contemplated by law, and we find one piece of real estate, denominating it, describing it, worth so much, put the value on it, whatever the evidence authorizes you to put, and that piece of property shall be set apart at a certain valuation; that the other piece of property be sold, and from the proceeds of the sale of that piece of property that so much money may go to these minor children to complete the amount that you may decide they are entitled to under the law and evidence; or you may set apart the entire property, both pieces of real estate, say that they shall have both pieces—that is, the house and lot in Belton and the tract of land in Banks county." The instructions contained in this excerpt are not only somewhat vague and lacking in clearness, but the concluding part of it, "or you may set apart the entire property, both pieces of real estate, say that they shall have both pieces—that is, the house and lot in Belton and the tract of land in Banks county"—is objectionable on the ground that it invades the province of the jury, in that it contains an intimation of opinion by the court that under the evidence the jury might "set apart the entire property, both pieces of real estate," without referring to the question as to whether or not, under the evidence, this would be a sufficiency for the support and maintenance of the minor children for the space of 12 months, and a proper and reasonable allowance, in view of the condition of the estate as to solvency or insolvency.

[5] 5. The exception to the refusal of the court to dismiss the appeal from the judgment of the court of ordinary was not argued in the brief of counsel for plaintiff in error, and is therefore regarded as being abandoned.

Judgment reversed. All the Justices concur, except FISH, C. J., and ATKINSON, J., who dissent.

(133 Ga. 310)

BROOKS et al. v. RAWLINGS.

(Supreme Court of Georgia. June 13, 1912.)

*(Syllabus by the Court.)***PLEADING (§ 416*)—WAIVER OF OBJECTIONS—RULING ON DEMURRER.**

Where a demurrer was filed to an equitable petition seeking the reformation of a deed to land because of an alleged fraud in its procurement, which demurrer was overruled, but no exception was taken to this judgment, and the plaintiff offered evidence substantially proving the case as laid in the petition, it was reversible error for the court, at the conclusion of the plaintiff's evidence, to grant a nonsuit.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1397-1400; Dec. Dig. § 416.*]

Error from Superior Court, Washington County; B. F. Walker, Judge.

Action by Isabella J. Brooks and others against Charles G. Rawlings. Judgment for defendant, and plaintiffs bring error. Reversed.

Isabella J. Brooks, Ella Nora Brooks, and Leon Brooks filed their petition against Charles G. Rawlings, and alleged as follows: They were owners, as tenants in common, of two tracts of land. They owed money to various persons, including the defendant, and were being sued by some of their creditors. They appealed to the defendant for a loan sufficient to pay off their debts. He agreed to make the loan, but informed the plaintiffs that it would be necessary for them to execute and deliver to him an absolute deed to the lands before he would be authorized to take possession, rent the land, collect the rents, and apply the proceeds arising from the sale of such rents to the payment of the money which he was going to advance to them to pay off and discharge their several debts hereinbefore referred to. He declared he would not be able to rent the lands without such absolute deed. He proposed to hold said lands until the rents had fully paid the loan, and then would surrender possession of the land to them. He also agreed that they should have the right to pay him at any time, with 8 per cent. interest. He proposed to prepare the necessary papers to evidence and carry out the above stated contract between them. He professed great friendship for the plaintiffs on account of his friendship for their father, and said that he would treat them fairly and properly in the matter. They accepted his proposition and agreed to the foregoing terms. They were unlearned in legal matters, acted without the advice of counsel or others skilled in such matters, and left to Rawlings the preparation of the necessary papers to carry out their contract. They believed he was their friend, and did not believe he was seeking any advantage of them. On February 21, 1908, he had them execute and deliver to him an absolute deed to said lands, and they permitted their tenants to attorn to Rawlings. At this time they had

already rented the lands for 1908 for eight bales of cotton. In the fall of 1908 Rawlings collected these rents, of the value of \$400. He received the rents for 1909, of the value of \$500, and will receive the rents for 1910, of the same value. At the time they made their deed the lands were worth \$3,000—much more than the money borrowed from Rawlings. Their deed purports to be upon a consideration of \$1,861; but Rawlings paid out for them only \$972.92, besides some interest. After getting said deed from them, and after having gotten possession of the land, Rawlings began to assert that he bought said lands from them, and he now asserts that he is the absolute owner thereof. He procured said deed from them fraudulently, by taking advantage of their ignorance and of the confidence reposed in him by them, and by pretending that it was necessary for him to have an absolute deed and possession of said lands in order that he might be able to rent them out, receive the rents, and apply the same to the payment of the money which he would advance to pay off their debts. It was his intention and scheme to get an absolute deed from them, and have them surrender possession of the land to him, that he might wrongfully and fraudulently assert that he was the absolute owner of said property. As soon as they discovered that he claimed to be the owner of said lands, they offered to pay him back all the money he had paid out for them on their debts to him and to other creditors, and redeem said lands. They asked Rawlings to come to an accounting with them for the rents he had received. This he refused to do, asserting that he was the owner of said lands, and that they had no title to or interest therein. They offered to tender to Rawlings whatever amount might be due him on an accounting. The deed to Rawlings does not speak the real contract. Said deed was only made for the purpose of securing him for the money advanced to them, and to permit him to collect the rents and apply the same to the discharge of their indebtedness, etc. They prayed that the deed be declared to be simply a security deed, and that the same be so reformed as to speak the true contract and agreement between them and Rawlings, that an accounting be had between them, that the amount of money advanced by Rawlings for them be ascertained, that the amount of rents received by him be fixed, and that they be permitted to redeem said lands.

The defendant demurred to this petition. The demurrer was overruled, but no exception was taken to this judgment. The defendant answered, denying the material allegations of the petition, and also the right of the plaintiffs to make a tender. Plaintiffs introduced testimony which supported their petition substantially as laid. At the conclusion thereof the defendant moved for

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

a nonsuit. The court sustained the motion, and the plaintiffs excepted.

Hines & Jordan, of Atlanta, for plaintiffs in error. Hardwick & Wright, of Sandersville, for defendant in error.

HILL, J. (after stating the facts as above). To the judgment of the court overruling the demurrer to the petition in this case no exception was taken. It was, therefore, a conclusive determination that a right of action existed in favor of the plaintiffs, and they, subsequently to the overruling of the demurrer, having substantially proved their case as laid, were entitled to recover. The grant of a nonsuit was therefore reversible error. In the case of *Sims v. Georgia Ry. & Elec. Co.*, 123 Ga. 643, 644, 645, 51 S. E. 573, it is said: "The right of the plaintiff to recover upon proof of the allegations made in his petition was adjudicated favorably to him by the judgment overruling the demurrer. 'Until duly set aside, that decision is conclusive, and the question thereby settled is to be regarded as *res adjudicata*.' *Hollis v. Nelms*, 115 Ga. 7, 41 S. E. 263. In this judgment the defendant company acquiesced, neither filing exceptions pendente lite nor bringing it under review by a direct bill of exceptions to this court. On the trial of the case, therefore, the only question for determination was the amount of the damages suffered by the plaintiff, in the event he sustained by proof the allegations of fact on which he based his right of recovery. *Richmond Hosiery Mills v. W. U. Tel. Co.*, 123 Ga. 216, 51 S. E. 290. The defendant company was precluded from calling into question the right of the plaintiff to recover upon such proof being made. *Ga. Northern Ry. Co. v. Hutchins*, 119 Ga. 504, 46 S. E. 659. As was remarked by Mr. Justice Cobb in *Kelly v. Strouse*, 116 Ga. 891, 892, 43 S. E. 288: 'If the defendant calls in question the sufficiency of the petition by demurrer, as he has a right to do, and the court renders an erroneous decision holding that the petition sets forth a cause of action, when in truth it does not, and the defendant acquiesces in this decision, of course no one will contend that, after the time allowed by law has expired for bringing under review this erroneous decision, the defendant can be heard to say that the petition sets forth no cause of action.' When a case is in limine, the trial judge may of his own motion interpose to prevent a miscarriage of justice, provided 'there is no estoppel of which either party may take advantage.' 116 Ga. 874, 43 S. E. 280. But it is not within the power of the trial judge to give to either party the benefit of a contention which he is himself estopped to urge." Under the ruling in the case just cited, we think the court erred in granting the nonsuit in the present case.

Judgment reversed. All the Justices concur.

(138 Ga. 303)

LYNCH v. POOLE et al.

(Supreme Court of Georgia. June 13, 1912.)

(Syllabus by the Court.)

PRINCIPAL AND AGENT (§ 155*)—LANDLORD AND TENANT (§§ 22, 118*)—AUTHORITY OF AGENT—RECOVERY OF RENT.

Where an agent, without authority to execute a sealed instrument, signs a contract of lease under seal for his principal, the latter is not bound. Until the principal becomes bound, the contract, signed by the agent for him, lacks the element of mutuality between the principal and the lessee, and the latter may withdraw from it, and the lessee's holding is to be considered as a tenancy at will. In an action brought after the expiration of the term stipulated in the contract, for a sum alleged to be due on the contract, for a period during which it is not alleged that the lessee was in possession of the premises, the principal of the agent is not entitled to recover.

[Ed. Note.—For other cases, see *Principal and Agent*, Cent. Dig. §§ 574-582; Dec. Dig. § 155;* *Landlord and Tenant*, Cent. Dig. §§ 55-59, 402-415; Dec. Dig. §§ 22, 118.*]

Error from Superior Court, Fulton County; J. T. Pendleton, Judge.

Action by J. T. Lynch against T. O. Poole and others. From a judgment for defendants, plaintiff brings error. Affirmed.

R. B. Blackburn, of Atlanta, for plaintiff in error. Slaton & Phillips, of Atlanta, for defendants in error.

EVANS, P. J. The action was to recover an amount of money alleged to be due for the rent of premises by virtue of a contract of lease between the plaintiff's agent and the defendants. The contract of lease stated that it was entered into between John J. Woodside, agent for J. T. Lynch, party of the first part, and T. O. Poole and Atlanta Brewing & Ice Company, as surety, parties of the second part, and recited that the parties of the second part have this day rented from John J. Woodside, agent, certain premises for the term of three years, ending November 30, 1908, for which they agree to pay John J. Woodside, agent, \$75 per month in advance. The contract contained several covenants between the parties. It recited that it was executed under the seals of the parties, and was signed as follows: "T. O. Poole. [Seal.] Atlanta Brewing & Ice Company. [Seal.] Ira E. Steiner, Secty. and Treasurer. [Seal.] John J. Woodside, Agt. [Seal.]" The petition alleged that the defendants entered into possession of the premises under this contract of lease, and paid the petitioner the rent stipulated to be paid, in manner and form as prescribed, up to February 1, 1908, since which time they have not paid anything; that petitioner "did not receive possession of said premises from the defendants until November 30, 1908, at which time the lease contract declared upon was terminated; and on that date the defendants were indebted to petitioner in the

sum of \$750, under the terms of the contract herein referred to, as rent for the use of said premises from the 1st day of February, 1908, to the 30th day of November, 1908; that Woodside was the agent of petitioner, and, though the agent's authority was not disclosed in the contract under seal executed by him, petitioner ratified the contract and received rents accruing thereunder from its date to February 1, 1908, and the defendants are estopped in law from seeking any protection growing from the absence of such authority." The petition was dismissed on general demurrer.

The contract between the parties being a sealed instrument, executed by the petitioner's agent without authority under seal, it was contended by the defendants in their demurrer that it was not binding on the petitioner, and, being unilateral, it was not binding on the defendants, and therefore its only effect would be to create a tenancy at will between the parties. The rule is elementary that a power of attorney to execute a sealed instrument must be of the same solemnity, and possess the same general requisites, of the instrument to be executed. In most jurisdictions, contracts not required by law to be executed under the seal of the parties, in order to be valid and binding, if executed under seal, are nevertheless to be treated as simple contracts, and the seal is considered as surplusage. But such a rule does not obtain in this state; and if an instrument executed by an agent be under seal, the agent's authority to make it must likewise be under seal, although it may evidence a contract not required to be under seal to give it validity. *Pollard v. Gibbs*, 55 Ga. 45. As it is admitted that the agent was without authority under seal to execute the lease contract, it was not binding on his principal. Being unilateral, it is not binding on the defendants, and they would not be liable for its breach. Until the principal becomes bound, the contract signed by the agent lacks the element of mutuality between the principal and the lessee, and the latter may withdraw from it, and the lessee's holding would be considered as a tenancy at will, and he would not be subject to suit on the contract brought after the expiration of the term. *Potts-Thompson Liquor Co. v. Potts*, 135 Ga. 457, 69 S. E. 734.

To escape this consequence the petitioner alleges that he ratified the contract by receiving the rents accruing under the contract. The general rule is that a contract may be ratified by words or conduct, but it does not apply to a contract under seal. Such contracts cannot be ratified, except by a writing under seal. *McCalla v. American Freehold, etc., Co.*, 90 Ga. 113, 15 S. E. 687. The petitioner also invokes the doctrine of estoppel in aid of his contract. The doctrine of estoppel in pais is predicated upon a

change of position to the hurt of one of the parties, acting on the representations or conduct of the other. If the petition had alleged that the defendants retained possession of, and occupied, the premises for the time for which rent is claimed, the defendants, having received the full benefit of the contract for the contract time, would be estopped from denying the authority of the agent to make the contract. *Harrison v. Wilson Lumber Co.*, 119 Ga. 6, 45 S. E. 730. But the petition contains no such allegation. The action is based on the contract alone. It is sought to make the defendants liable on their supposed contractual obligation, under the contract. As the contract is not binding on them, they are not liable thereon.

Judgment affirmed. All the Justices concur.

(138 Ga. 305)

NEELY & CO. v. STEVENS.

(Supreme Court of Georgia. June 13, 1912.)

(Syllabus by the Court.)

1. PRINCIPAL AND AGENT (§§ 117, 167*)—EXISTENCE OF AGENCY—AUTHORITY UNDER SEAL—RATIFICATION.

The authority of an agent to execute a sealed instrument must itself be under seal, although the instrument may evidence a contract not required by law to be under seal; and ratification of such instrument, to be binding upon the principal, must also be under seal. *Overman v. Atkinson*, 102 Ga. 750, 29 S. E. 758, and citations; *Lynch v. Poole*, 75 S. E. 158, this day decided, and citations.

[Ed. Note.—For other cases, see *Principal and Agent*, Cent. Dig. §§ 378-390, 634, 635; Dec. Dig. §§ 117, 167.*]

2. PRINCIPAL AND AGENT (§ 155*)—VALIDITY OF CONTRACT—MUTUALITY.

By the terms of a contract under seal N. & Co. purchased from S., who signed the contract and agreed to deliver, at a certain price, 50 bales of cotton within a given time and at a stated place. The contract was executed on behalf of N. & Co. by W., without authority under seal. S. delivered 25 bales to N. & Co. in accordance with the contract, and received from them the stipulated price therefor, but refused to deliver the balance. N. & Co. brought an action against S. for a breach of the contract, in which damages were laid in the amount of the difference between the contract price of the cotton not delivered and its market value at the time and place of delivery. On the trial it appeared that there was no ratification by N. & Co., under seal, of the execution of the contract by W., nor did it appear what the market value of the 25 bales was at the time it was delivered, accepted, and paid for, whether it was more or less than the contract price. *Held*, as N. & Co. were not originally bound under the contract, because of want of authority under seal in their agent to execute it under seal, and as they never ratified it under seal, the contract was unilateral, and was as to S. nothing more than an offer to make a contract (*Sivell v. Hogan*, 119 Ga. 167, 46 S. E. 67; *Huggins v. Southeastern Cement Co.*, 121 Ga. 311, 48 S. E. 933); and the plaintiff was therefore not entitled to recover.

[Ed. Note.—For other cases, see *Principal and Agent*, Cent. Dig. §§ 574-582; Dec. Dig. § 155.*]

Error from Superior Court, Schley County; Z. A. Littlejohn, Judge.

Action by Neely & Co. against J. H. Stevens. Judgment for defendant, and plaintiffs bring error. Affirmed.

E. A. Hawkins, of Americus, for plaintiffs in error. Geo. P. Munro, of Buena Vista, for defendant in error.

FISH, C. J. Judgment affirmed. All the Justices concur.

(11 Ga. App. 318)

CAGE v. STATE. (No. 3,893).

(Court of Appeals of Georgia. July 10, 1912.)

(Syllabus by the Court.)

INTOXICATING LIQUORS (§ 236*)—ILLEGAL SALE—EVIDENCE.

While there was no direct evidence of a sale of intoxicating liquor, there were circumstances proved from which the jury had a right to infer that such a sale was made by the accused, either for cash or on credit.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. §§ 300-322; Dec. Dig. § 236.*]

Russell, J., dissenting.

Error from City Court of Newnan; W. A. Post, Judge.

Levi Cage was convicted of an illegal sale of intoxicating liquors, and brings error. Affirmed.

W. G. Post, of Newnan, for plaintiff in error. W. L. Stallings, Sol., of Newnan, for the State.

POTTLE, J. The accused was seen by the state's witness coming through a cotton patch on a dark night, carrying a lantern. He reached a somewhat secluded spot, where one Arnold and three other negroes were sitting on the ground. The accused pulled out of his pocket three pints of whisky, and handed one pint to each of the negroes, except Arnold. As he was pulling out the fourth pint, the state's witness stepped up and remarked, "I will take that one." Thereupon the four men who were sitting on the ground fled. The accused remained a few minutes and ran off. The state's witness ran after him, but could not catch him. It does not appear whether they took the liquor with them, but it may be safely assumed that they did, in absence of proof to the contrary. No money was seen to pass, but when the witness walked up the accused had \$1 in his hand. A negro church association was in session at Grantville, and a large crowd was there. The transaction above described took place about 300 yards from the church. When arrested the accused had \$1.30 on his person. He claimed that the whisky belonged to Arnold, and that he brought it to Arnold at the latter's request, for which service Arnold was to give him one of the pints. He

further claimed that the dollar which he had in his hand had been given him by a woman with whom he lived, to be used in purchasing provisions.

Evidently the jury did not credit this rather lame explanation of the transaction. Just why, if the whisky belonged to Arnold, the accused should have given everybody except Arnold a pint of it and retained the fourth for himself, is not made clearly to appear. It may be that the accused was acting as agent for Arnold in making a sale. If so, he is equally guilty. If the whisky was his, as the jury had a right to believe, then there were circumstances authorizing a legitimate inference that a sale was intended. A sale may be shown by circumstantial as well as by direct evidence, and it is not necessary that any particular price should be agreed on. *Smith v. State*, 9 Ga. App. 230, 70 S. E. 969. A sale on credit is as much a violation of the law as a sale for cash. *Finch v. State*, 6 Ga. App. 338, 64 S. E. 1007. The secretive method employed, the dark night, the unusual place, the dollar in the hand, the flight of the four negroes, were all circumstances pointing very strongly to a criminal transaction, and the jury had a right to infer that a sale, rather than a gift, was intended.

Judgment affirmed.

RUSSELL, J. (dissenting). The evidence against the defendant depends entirely upon circumstances, and to my mind they are too slight and inconclusive to authorize conviction. I do not think that circumstances of similarly frail character could have induced a verdict of guilty, had the defendant been accused of a more heinous crime. No man can stand more strongly than I for the principle that the jury is the final arbiter as to the facts, and that their finding upon facts should be absolutely binding upon the courts; but the security of human liberty and the safety of the innocent, as well as the punishment of the guilty, depend upon the salutary rule that no one shall be convicted of crime solely upon circumstantial evidence, unless the only reasonable hypothesis which can rationally be deduced from the circumstances proved is inconsistent with innocence. Where a conviction rests upon circumstantial evidence alone, and the inference that the defendant is innocent is just as reasonable as that he is guilty, the defendant is entitled to an acquittal, and yet the prerogative of the jury to find the facts is not in the least interfered with or abridged. In such an instance (and I think in the case at bar) the jury are as much the exclusive judges of the facts as in any other case; but as the law will not permit a jury to supply, in any case, facts that are not proved, so it is equally inexorable in refusing to allow a hypothesis or inference of guilt to be preferred to a sup-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

position or hypothesis of innocence which is undeniably equally reasonable and equally well supported by the very testimony upon which the jury was obliged to base its finding. The crux of the matter, in a case in which guilt depends entirely upon circumstances which tend to prove by suggestion what there is a failure to show by direct proof, and where two equally reasonable theories, one of guilt and the other of innocence, are presented, and the jury find the defendant guilty, is that the error of the jury consists in disregarding the rule of law applicable to those criminal cases in which proof of guilt is wholly dependent upon circumstantial evidence. It has never been an abridgment of the right of the jury to pass upon the facts when a verdict, either in a civil or a criminal case, was set aside as contrary to law because there was no sufficient evidence to authorize the finding. It is likewise no interference with the prerogative of the jury to set aside their finding where it is palpably plain (after viewing all the facts in the record in their strongest light) that the jury disregarded a cardinal rule of law imposed for their guidance in weighing the evidence and giving it proper effect.

There are some circumstances in the record besides those stated in the opinion of the majority of the court; but I shall not refer to them, because they may not have been credited by the jury, and I think it can safely be assumed that Arnold was a violator of the prohibition law. It can be suspected that he was the violator upon the occasion in question. The defendant, if an agent of Arnold in making an unlawful sale, would be equally as guilty as he. In this latter statement of the opinion of the majority of the court I concur. I participated in the decisions in *Smith v. State*, 9 Ga. App. 230, 70 S. E. 969, and *Finch v. State*, 6 Ga. App. 338, 64 S. E. 1007, and fully agreed to the rulings announced in each case; but the facts in those cases bear no resemblance to those in the present record. In the *Smith Case* it was plain that the purchaser intended to pay and did pay for the whisky he got, and, as long as Smith never offered to return the money, it was equally plain that his insistence that he was not going to sell the whisky was a mere ruse. Other evidence in the record showed that it was generally known in the community that whisky could be bought at Smith's house. Smith's Case was not one of circumstantial evidence. The state's witness made out the case by direct proof, except the possible doubt as to the seller's intention to take the money, and this was removed by the fact that the accused never offered to return the money that the purchaser left in his presence on his table, and which he must reasonably be presumed to have appropriated to himself as payment for the whisky. In the *Finch Case* we held merely that, where the contract between the

parties provided for future payment for whisky, the law was as much violated as if it were a cash transaction, for the reason that in either event it was a sale forbidden by law, and, if a sale be shown, the terms of purchase are immaterial.

To my mind the mere fact that a negro delivers three pints of whisky to three persons, when there is no evidence that he received any money for it, does not any more reasonably establish the proposition that he was selling the whisky or was the agent of an undisclosed seller than that he brought the persons to whom he delivered the whisky their own whisky that they had purchased from some one else, and was a mere errand boy, or that as agent of these purchasers he had bought the whisky for them. It does not appear that the location was at all secret. If there is any place that is public during a negro church association, it would be the crossing of the road and the railroad described in the evidence as being within 300 yards of the church where the association was going on. The adjacent grounds were not in the woods, but were a cotton patch, and it was a "moonshiny" night. The marshal of Grantville swears that the railroad crossing in question is a very public crossing, and in sight of the church, at which there was a very large number of negroes. It is possible, of course, that the defendant may be guilty. The fact that he delivered three pints of whisky is suspicious. The fact that he happened to have as much as a dollar in the month of September is also another very suspicious circumstance, indicating that perhaps he got it from the sale of liquor. But the law does not authorize conviction upon suspicion, and in the evidence there is nothing to contradict the defendant's explanation that he had gone to a cotton patch and gotten the liquor for Arnold, where Arnold left it, upon Arnold's promise that he would give him a pint of it for his trouble. The state's witnesses all testified positively that no money was paid at the time of the delivery, and that they did not hear anything said that indicated a sale. It is uncontradicted that the dollar was given to the accused by an old negro woman to buy some domestic supplies.

It appears to me that, in the absence of any direct evidence that there was a sale, the bare circumstance of one person's handing to another a bottle of whisky (even if it had not been explained) was not sufficient to authorize the conclusion that the person handing the whisky to the other was selling it to him, and, unless the theory of a sale is the most reasonable conclusion that can be drawn from the occurrence, the finding of the jury was unauthorized. To hold that the circumstance of one's handing another a bottle of whisky is *prima facie* sufficient to authorize conviction of a violation of the law would, in some instances, penalize a gift of wine or

other intoxicating liquor, where its use might be necessary as medicine, or required for sacramental purposes. I admit that the circumstance, colored by its surroundings, might authorize the conclusion that the delivery was made for the purpose of a sale, and not as a gift; but generally this would not be the case, because, where either a guilty or innocent intent may attach to an act, the law always prefers to ascribe an innocent intention. In a case where one delivers an intoxicant to another in a place evidently provided for the common and usual dispensing of such articles, I think it could very well be assumed that a sale was intended; but where it appears merely that the defendant handed three other parties a pint of liquor, and it is undisputed that no money was paid, and the explanation is given, and not denied, that he rendered this service in expectation of getting a pint for himself, I do not think the case is strong enough to say that the defendant is guilty beyond any reasonable doubt.

(11 Ga. App. 323)

WICK v. CENTRAL OF GEORGIA RY. CO.
(No. 4,037.)

(Court of Appeals of Georgia. July 10, 1912.)

(Syllabus by the Court.)

RAILROADS (§ 326*)—ACCIDENT AT CROSSING—CONTRIBUTORY NEGLIGENCE—PROXIMATE CAUSE OF INJURY.

As a matter of law, for a grown man in full possession of his faculties to attempt in the nighttime to climb over the bumpers between two cars attached to a long freight train, without ascertaining whether an engine is attached to the train of cars, or is so near to them on the track as to be immediately coupled to them, is such gross negligence as will preclude a recovery for injuries received on account of an engine being suddenly backed up against the cars and causing the person attempting to cross to be thrown down upon the track. In such a case the facts that the train was obstructing a public crossing in a city in violation of a municipal ordinance, and that the train had no lights to indicate that it was likely to move, or that no watchman was present to warn pedestrians not to attempt to cross, or that no bell or whistle was sounded to indicate preparation to move, afford the person injured no cause for complaint. The proximate cause of the plaintiff's injury was, not the alleged negligent acts and omissions of the defendant, but his own rash act. The case is in principle controlled by the decisions of the Supreme Court in *Andrews v. Central R. Co.*, 86 Ga. 192, 12 S. E. 213, 10 L. R. A. 58, Mont-

gomery v. Railway Co., 94 Ga. 332, 21 S. E. 571, and *Russell v. Central Ry. Co.*, 119 Ga. 705, 46 S. E. 858.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1037-1042; Dec. Dig. § 326.*]

Error from City Court of Savannah; Davis Freeman, Judge.

Action by Nicholas Wick against the Central of Georgia Railway Company. Judgment for defendant, and plaintiff brings error. Affirmed.

Osborne & Lawrence and Bonhan & Herzog, all of Savannah, for plaintiff in error. Lawton & Cunningham and H. W. Johnson, all of Savannah, for defendant in error.

POTTLE, J. Judgment affirmed.

RUSSELL, J. (specially concurring). Personally I am of the opinion that the allegations of the plaintiff present an issue of fact for the exclusive determination of the jury, but in view of the rulings of the Supreme Court in *Andrews v. Central Railroad & Banking Co.*, 86 Ga. 192, 12 S. E. 213, 10 L. R. A. 58, and cases therein cited, I am compelled to concur in the judgment.

(11 Ga. App. 305)

GROOVER v. STATE. (No. 3,766.)
(Court of Appeals of Georgia. July 10, 1912.)

(Syllabus by the Court.)

CRIMINAL LAW (§ 945*)—NEW TRIAL—NEWLY DISCOVERED EVIDENCE.

The newly discovered testimony is such as would produce a different result on another investigation, and for this reason requires grant of a new trial.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 2324-2327, 2336; Dec. Dig. § 945.*]

Error from Superior Court, Tattnall County; W. W. Sheppard, Judge.

John Groover was convicted of crime, and brings error. Reversed.

A. S. Way, W. T. Burkhalter, and S. B. McCall, all of Reidsville, for plaintiff in error. N. J. Norman, Sol. Gen., of Savannah, for the State.

RUSSELL, J. Judgment reversed.

POTTLE, J., not presiding.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

(11 Ga. App. 325)

LEGERE v. BLAKELY GIN CO.

(No. 4,130.)

(Court of Appeals of Georgia. July 10, 1912.)

*(Syllabus by the Court.)***1. APPEAL AND ERROR (§ 78*)—FINAL JUDGMENT—DIRECTED VERDICT.**

The direction of a verdict is in no sense interlocutory, but is a final judgment, from which a writ of error will lie.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 428, 434, 464-477, 480, 481; Dec. Dig. § 78.*]

2. TROVER AND CONVERSION (§ 66*)—DIRECTED VERDICT—CONFLICTING EVIDENCE.

This was an action of trover, where the evidence of the plaintiff proved title, value, conversion, and demand and refusal before suit, and the defendant admitted these elements of the case, except conversion, as to which the evidence was in conflict. Consequently the direction of a verdict for the defendant was erroneous.

[Ed. Note.—For other cases, see Trover and Conversion, Cent. Dig. §§ 288-294; Dec. Dig. § 66.*]

Error from City Court of Blakely; L. M. Rambo, Judge.

Action by J. R. Legere against the Blakely Gin Company. Judgment for defendant, and plaintiff brings error. Reversed.

W. W. Wright, of Blakely, for plaintiff in error. Glessner & Park, of Blakely, for defendant in error.

HILL, C. J. The plaintiff in error brought trover against the Blakely Gin Company to recover a bale of cotton. At the conclusion of the evidence the court directed a verdict for the defendant, and this is the error assigned. When the case was called in this court a motion was made to dismiss the writ of error, on the ground that there was no exception to any final judgment, "but only to the interlocutory action of the judge in directing the jury to return a verdict."

[1] 1. There is no merit in this motion. It has been repeatedly held by the Supreme Court and this court that the direction of a verdict is such a final judgment as will support a bill of exceptions. *Meeks v. Meeks*, 5 Ga. App. 394, 63 S. E. 270; *Duggan v. Monk*, 5 Ga. App. 206, 62 S. E. 1017, and citations; *Howell v. Pennington*, 118 Ga. 494, 45 S. E. 272; *Scarborough v. Holder*, 127 Ga. 256, 56 S. E. 293.

[2] 2. The undisputed evidence shows that the bale of cotton was delivered by the plaintiff to the defendant for the purpose of having it ginned, and that the plaintiff made a demand on the defendant for the cotton, and the defendant refused to deliver it to him or to pay him its value. Indeed, the defendant admits these facts, but defends on the ground that it had nothing to do with the cotton, except to gin it, and, after it was ginned, to place it on a platform, from which it was to be afterwards hauled by a drayman of the Farmers' Warehouse to the ware-

house, where it was to be held subject to the order of the plaintiff; and in support of this defense evidence was introduced to the effect that the plaintiff, when the cotton was delivered to the defendant, instructed the defendant to send to the Farmers' Warehouse, when the cotton was ginned and baled, the coupons calling for it. The plaintiff denied that he had given any such instructions. Under these facts, the defendant insisted in the court below, and insists here, that no conversion of the cotton was shown, and that the plaintiff failed to carry the burden which the law imposed upon him of proving the conversion; that the proper remedy was an action on the case, for a breach of contract, and that trover did not lie; in other words, that the bailor should have brought an action *ex contractu* against the bailee, based on the implied contract to return the cotton to the plaintiff as its owner after the purpose of the bailment had been accomplished. *Bates v. Bigby*, 123 Ga. 727, 51 S. E. 717.

Now, the undisputed evidence showed title to the bale of cotton in the plaintiff, and that its value was \$35.75, and the plaintiff testified that he delivered this bale of cotton to the defendant for the purpose of having it ginned; that after doing so, and before this suit was filed, he demanded its return, and the defendant refused to deliver it to him. There was conflict in the evidence as to whether the cotton should be returned to the plaintiff when ginned and baled, or whether, when ginned and baled, the defendant fully performed the purpose of the bailment when it placed the cotton on the platform. The evidence also showed that the bailee not only refused, on demand, to deliver the cotton to the plaintiff, but refused to account for it to him. Under these facts, we think a conversion by the defendant could be implied, and the bailor had the right to sue in trover on the contract of bailment and recover the market value of the property. *Lightsey v. Lee*, 8 Ga. App. 762, 70 S. E. 179; *Wilson Coal & Lumber Co. v. Hall & Brown Woodworking Machine Co.*, 97 Ga. 330, 22 S. E. 530. In short, the plaintiff proved title, value, conversion, and demand and refusal before the suit was instituted. This was sufficient to make out his right to recover, in the absence of any defense. *Pryor v. Brady*, 115 Ga. 850, 42 S. E. 223. The defendant conceded all the elements of a trover suit, except the fact of conversion, and, as stated, we think that a conversion could be implied, under the facts sworn to by the plaintiff. The action of trover is founded upon a concurrent right of property and possession, and any act of the defendant which negatives or is inconsistent with this right amounts in law to a conversion. *Roper Wholesale Grocery Co. v. Faver*, 8 Ga. App. 178, 68 S. E. 883. Certainly the

law would cast upon the bailee the duty of exercising due care and diligence in keeping and protecting the property intrusted to him by the bailor, and there was evidence from which the jury could well have inferred that this duty of diligence had not been fully performed by the gin company in reference to the bale of cotton.

We conclude that the evidence, instead of demanding a verdict for the defendant, if sufficient to have justified the direction of a verdict at all, demanded that the verdict be for the plaintiff. Certainly there was such conflict on the question of conversion as would have required a submission of the case to the jury.

Judgment reversed.

POTTLE, J., disqualified.

(11 Ga. App. 278)

FLORIDA CENT. R. CO. v. CHEROKEE SAWMILL CO. (No. 4,005.)

(Court of Appeals of Georgia. July 2, 1912.)

(Syllabus by the Court.)

SET-OFF AND COUNTERCLAIM (§ 33*)—PLEADING—SUFFICIENCY.

The allegations in the answer showed a valid set-off, and the court erred in striking it.

[Ed. Note.—For other cases, see Set-Off and Counterclaim, Cent. Dig. §§ 54, 55; Dec. Dig. § 33.*]

Error from City Court of Thomasville; W. H. Hammond, Judge.

Action by the Cherokee Sawmill Company against the Florida Central Railroad Company. Judgment for plaintiff, and defendant brings error. Reversed.

The Cherokee Sawmill Company brought suit against the Florida Central Railroad Company on a promissory note. The defendant admitted the execution of the note, but filed a plea of set-off, alleging, in substance, that it delivered at a designated time to the plaintiff nine flat cars, to be used in the plaintiff's sawmill operations; that the plaintiff used the cars, and by reason of usage and rough wear they became worn out and of no value, and the plaintiff was therefore indebted to the defendant in the value of the cars at the time of delivery to the plaintiff, to wit, \$3,857, with interest; also that the plaintiff after it had used these cars as above stated, agreed to pay the full value thereof—the plea being based both upon an implied contract to pay for the cars and upon an express promise to pay for them,

made after their destruction. The plaintiff moved to strike the answer, and contended that the matters alleged therein as a defense sounded in tort, and could not properly be pleaded as a set-off against a suit on a note. The court passed an order striking the answer "for its insufficiency in law," and rendered judgment in favor of the plaintiff for the principal, interest, and costs. The case is here on exceptions to the order striking the plea, and to the final judgment upon the note.

Branch & Snow, of Quitman, and Theodore Titus, of Thomasville, for plaintiff in error. Roscoe Luke, of Thomasville, for defendant in error.

HILL, C. J. (after stating the facts as above). The judge erred in striking the plea. The allegations of the plea do not sound in tort, but are based upon an implied contract, which arose between the plaintiff and the defendant at the time of the delivery of the cars. This implied contract was to pay to the plaintiff the value of the cars, if they were destroyed by any act of the defendant which in law amounted to a conversion, or to pay the reasonable hire of the cars, although they might not have been converted, but were eventually destroyed by the ordinary and natural wear and tear. The plea seems however, to contemplate the first contingency mentioned, and not the latter. Even if the cause of action had partaken both of the nature of a tort and of a contract, the defendant had the right to waive the tort involved in the destruction or use of the cars, and to sue for their value, basing its claim upon an implied promise to pay for them in the one case, or to pay the reasonable value of their hire in the other case. Under these circumstances the law presumes a promise to pay. Civil Code 1910, § 4406; Buchanan v. McClain, 110 Ga. 477, 35 S. E. 665. Besides, the plea contains the further allegation that the plaintiff expressly agreed to pay to the defendant the value of the cars after they had been rendered worthless by usage. This express promise to pay constituted a contract which could be set off against the note, and the demurrer to the plea admits that this promise was made. For both reasons, therefore, we think it clear that the defense relied upon arose ex contractu, and not ex delicto, and the court erred in striking the answer and entering up judgment on the note.

Judgment reversed.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

(11 Ga. App. 206)

BISHOP v. STATE. (No. 4,178.)

(Court of Appeals of Georgia. July 2, 1912.)

*(Syllabus by the Court.)***1. CRIMINAL LAW (§ 1023*)—APPEAL—DISMISSAL.**

Where the only assignment of error in a bill of exceptions brought to the Court of Appeals is upon the refusal to allow a demand for trial in a criminal case, no question is presented which the reviewing court can determine, and the writ of error will be dismissed.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2583-2598; Dec. Dig. § 1023.*]

*(Additional Syllabus by Editorial Staff.)***2. CRIMINAL LAW (§ 576*)—TRIAL—REFUSAL OF DEMAND—DISCHARGE.**

Where a demand for a criminal trial has been regularly made, and two regular terms of court are thereafter held, and accused is not placed on trial, his discharge results automatically, provided qualified juries were impaneled, and the failure to try is not due to the voluntary absence of accused, or to some other conduct on the part of himself or counsel.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1297-1304; Dec. Dig. § 576.*]

Error from Superior Court, Whitfield County; A. W. Fite, Judge.

Harry Bishop was convicted of burglary. Conviction was set aside, and new trial ordered. From an order refusing a demand for trial, defendant brings error. Dismissed.

Maddox, McCamy & Shumate and Geo. G. Glenn, all of Dalton, for plaintiff in error. T. C. Milner, Sol. Gen., of Cartersville, and Geo. W. Stevens, of Atlanta, for the State.

POTTLE, J. The accused was indicted for burglary. On June 8, 1910, his demand for trial was allowed and entered of record. On December 5, 1910, he was convicted, and on April 11, 1911, the conviction was set aside by the Court of Appeals and a new trial ordered, upon the ground that the evidence, resting solely upon the testimony of an accomplice, was not legally sufficient to support the verdict. *Bishop v. State*, 9 Ga. App. 206, 70 S. E. 976. At the July term, 1911, at the October term, 1911, and at the January term, 1912, the case was continued upon motion of the state, over the objection of the accused, who was present in court at each of the three terms, demanding a trial. At the January term, 1912, exceptions pendente lite were duly certified and filed, complaining of the refusal of the trial court to "grant said demand [for trial] and allow the same to be entered of record." At the April term, 1912, the case was again called for trial, whereupon the accused announced ready, and moved that he either be tried or discharged and acquitted. At all of the terms above specified juries were regularly impaneled and qualified to try the accused. It does not appear what disposition was made of the case after the April term, 1912.

The trial judge certifies that "there is no doubt of the guilt of movant, but as yet the state has not been able to get additional evidence sufficient to sustain a verdict of guilty under the ruling of the Court of Appeals, and, besides, movant is a 'dope fiend' and needs restraint." The bill of exceptions contains an assignment of error upon the exceptions pendente lite filed at the January term, 1912, but does not contain any exception to the refusal of the court to discharge the prisoner at the April term, 1912. A motion to dismiss the writ of error has been filed by the solicitor general, upon the ground that there is no exception to any final judgment, and that the case is still pending in the trial court.

There being no exception to the refusal of the court to discharge the accused, but only an exception to the refusal to grant a demand for trial, there is no exception either to a final judgment or to a judgment which would have been final if rendered as claimed. The question sought to be made is therefore not regularly before the court. *Sharpe v. State*, 10 Ga. App. 212, 73 S. E. 83; *Maples v. State*, 10 Ga. App. 786, 74 S. E. 89. But as the accused can still raise the point, and from an adverse decision prosecute to this court another writ of error, we will indicate our views, in order to obviate the necessity of another appeal. Where a demand has been regularly made and allowed, and two regular terms of court are thereafter held, and the accused is not placed on trial, no motion to acquit is necessary, but the discharge of the accused results automatically, by operation of law, provided qualified juries were impaneled competent to try the case, and the failure to try is not due to the voluntary absence of the accused, or to some other conduct on the part of himself or his counsel. *Flagg v. State*, 74 S. E. 562. The demand of the accused was not satisfied by the trial, the conviction in which was set aside by the Court of Appeals and a new trial awarded; but the demand stood over to be complied with at the next term after the remittitur from this court was entered in the trial court. *Gordon v. State*, 106 Ga. 121, 82 S. E. 82.

The effort of the learned trial judge to vindicate the majesty of the law, and his reluctance to permit one clearly guilty of a crime to escape upon a mere technicality, are to be commended; but we think the law is equally clear that the prisoner was entitled to his discharge. The statute requiring the state to place the accused on trial at the second term after demand therefor has been allowed was passed in aid of the constitutional guaranty of a speedy trial. If the accused is guilty, the failure of the state to obtain evidence necessary to convict, under well-settled rules of law, furnishes no

justification for disregarding the plain requirements of the statute. Cases may arise in the future where innocent men may suffer from the announcement of a precedent which in a particular case would seem to bring about substantial justice, and this furnishes the chief argument in favor of a rigid adherence to the rules and principles which have been prescribed for the government of all trials; nor should we lose sight of the fact that under our system there can be no legal determination of guilt until after a fair trial and a conviction upon sufficient evidence by an impartial jury. Until this result is reached the accused is presumed by the law to be innocent, and, unless one charged with crime is to receive the benefit of this presumption, he need only be accused to be condemned. The accused is entitled to his discharge. Indeed, under the facts appearing in the record, he is already discharged, and no action of the court is necessary to bring about this result.

Writ of error dismissed.

(10 Ga. App. 852)

TAYLOR et al. v. MATTHEWS et al.
(No. 3,327.)

(Court of Appeals of Georgia. Feb. 24, 1912.)

(Syllabus by the Court.)

1. SCHOOLS AND SCHOOL DISTRICTS (§§ 65, 79, 114*)—OFFICERS—POWERS.

The trustees of the school districts created under the provisions of section 1531 of the Political Code of 1910, are empowered to make contracts in relation to school matters, and to acquire and hold land and other property for school purposes, and are invested with capacity to sue and be sued where their rights or liabilities as school trustees are involved.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. §§ 162-167, 188-191, 271; Dec. Dig. §§ 65, 79, 114.*]

2. SCHOOLS AND SCHOOL DISTRICTS (§ 111*)—OFFICERS—POWERS.

In the absence of express legislation to the contrary, sound public policy requires that the exercise by the board of trustees of a school district of its discretion as to the expenditure of funds raised by taxes from the citizens of the district for educational purposes should not be interfered with or controlled, unless there is a manifest abuse of discretion, or an expenditure of the funds for some purpose wholly disconnected therefrom.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. §§ 265-268; Dec. Dig. § 111.*]

3. SCHOOLS AND SCHOOL DISTRICTS (§ 79*)—OFFICERS—POWERS.

School funds derived from local taxation within a school district may properly be expended by the trustees of the district in protecting or preserving the right of local taxation for educational purposes, by the employment of an attorney, or in other legitimate expenses, necessary for presenting their rights in the adjudication of the case.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. §§ 188-191; Dec. Dig. § 79.*]

4. SCHOOLS AND SCHOOL DISTRICTS (§ 159*)—TUITION—AUTHORITY OF TRUSTEES.

It is within the power of trustees of any school district in this state to provide means by which all children of school age in that district may receive the benefit of the school fund belonging to the district. And to that end they may either contract with the trustees of an adjoining school district for the payment of the tuition of nonresident pupils to themselves, or agree to pay to the trustees of an adjoining school district, whether in the same or in an adjoining county, the tuition of resident pupils when they determine that these pupils can more advantageously or conveniently attend the school of the adjoining district than the school of the district in which they reside.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. §§ 330, 331; Dec. Dig. § 159.*]

5. SCHOOLS AND SCHOOL DISTRICTS (§ 110*)—FUNDS—STATUTORY PROVISIONS—REPEAL.

The title to public school money paid into the hands of trustees of a school district while local taxation for school purposes was in force is unaffected by the fact that the local tax law was thereafter repealed or abolished by the provisions of section 1536 of the Political Code of 1910.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. §§ 261-264; Dec. Dig. § 110.*]

6. SCHOOLS AND SCHOOL DISTRICTS (§ 63*)—OFFICERS—ACTIONS ON BOND—EVIDENCE.

The judgment was authorized by the evidence.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. §§ 149-160; Dec. Dig. § 63.*]

Error from City Court of Carrollton; Jas. Beall, Judge.

Action by W. A. Taylor and others, trustees, against G. S. Matthews and others. Judgment for defendants, and plaintiffs bring error. Affirmed.

Taylor and Brooks, as trustees of Wesley Chapel school district in Carroll county, sued Matthews, as principal, and Griffin, as surety, on a bond given by Matthews as treasurer of a former board of trustees of the school district. The petition alleged a breach of the bond, and a consequent indebtedness to the petitioners as trustees in the sum of \$106.35, with interest, by reason of the fact that Matthews, as treasurer, had failed to turn over to his successor in office, or fully account for, that amount of the funds intrusted to him. It alleged that the sum sued for was paid out illegally, in that Matthews paid from the school fund \$50 to an attorney as a fee for resisting proposed legislation affecting Wesley Chapel school district, \$6.35 for railroad fare and expenses of certain persons coming to Atlanta to resist the proposed legislation, and \$50 to a teacher whose school was in Paulding county for teaching children who resided in Wesley Chapel school district. The bond of Matthews as treasurer contained the condition that: "Whereas the said obligees [J. W. Brooks, W. E. Smith and G. S. Matthews as trustees of the Wesley Chapel local tax school district] elected said Matthews, prin-

cipal, treasurer of said board of trustees, now, should he fully discharge the duties of said office and faithfully account to said obligees for all funds coming into his hands as treasurer, and return such as may be in hand when his term expires to his successor, then this bond to be void, otherwise of full force and effect."

Matthews pleaded that he had fully discharged his duties as treasurer, and had fully accounted to the proper authorities for all money received. He admitted the payment of the attorney's fee of \$50, and defended upon the ground that the payment was in pursuance of a contract made with the attorney by his associates and himself as trustees under the following circumstances: "The people of said district had voted the local tax law in, and the trustees had successfully resisted their efforts to set aside the law in the courts by securing a decision in favor of the school in the Supreme Court, Mr. Holderness being of counsel for said trustees in said litigation, and the movants in said litigation then proposed to have passed by the Georgia Legislature a local bill, which was drafted and presented to the proper committee, abolishing the school district, and he was employed by the board to make an argument on the constitutionality of said bill before a house committee. The committee took the view he presented, and killed the bill." As to the payment of the \$6.35, the defendant pleaded that "the trustees thought that said legislation was vicious. They knew that quite a number of people would testify before said committee in favor of the bill. Therefore it was suggested by the board that Mr. Matthews, Mr. Smith, and Prof. Ira Williams should also appear before said committee, which they did, and the actual expenses of said trip charged, all of which was in the interest of the school as they conceived it. After the killing of the bill, the defendant Matthews was directed by the president of the board to issue a draft in favor of Mr. Holderness, and to issue a draft covering the expenses of the said parties who testified before said committee. They plead and insist that the same was in the interest of the school, and insist that they had a legal right to make such an expenditure for the protection of the school interests of said district." The defendants admitted, also, that Matthews paid \$50 to J. R. Cole, teacher of the county of Paulding, in settlement of the tuition of children living in Wesley Chapel school district who attended the Cole school, but pleaded as justification of his action that he was instructed by the county board of education of Carroll county to make the payment. It was pleaded, further, that at the time a settlement was demanded of Matthews by Taylor, one of the plaintiff trustees, an election had been held which had resulted against local taxation; the elec-

tion being held in December, 1909, and Taylor not being commissioned by the county board of education until January 6, 1910; also, that, after the repeal of the local tax law, the trustees of the school district had no right to receive the funds in the hands of Matthews, but that the county board of education of Carroll county alone had the right to receive the funds in his hands, and that Matthews made a full and complete settlement with the county board. It was also pleaded that, before making the settlement with the county board of education, Matthews consulted the Attorney General and the state school commissioner, and was directed to settle with the county board of education of Carroll county, and required by law not to settle with Taylor, and that in the settlement with the county board the authority of the trustees of the school district to employ counsel and send witnesses before the legislative committee to testify in behalf of the school was recognized.

The bond signed by Matthews was put in evidence, and the case was submitted to the decision of the trial judge, without the intervention of a jury, upon the following agreed statement of facts: "Plaintiffs in this case are the only trustees of Wesley Chapel school district in said county. J. F. Brooks was elected and qualified as such trustee in December, 1908. W. A. Taylor was elected in December, 1909, and qualified in February, 1910. J. F. Brooks succeeded J. W. Brooks as trustee. Taylor succeeded G. S. Matthews. W. E. Smith was third trustee, and resigned after Taylor qualified. No successor has been elected. On December 12, 1907, J. W. Brooks, G. S. Matthews, and W. E. Smith were trustees of said local school district. Previous thereto said Matthews was elected secretary and treasurer of said board, and executed and delivered the bond sued on on December 12, 1907, with M. E. Griffin as security. On July 27, 1908, said Matthews paid out of the funds in his hands as secretary and treasurer \$6.35 railroad fare to Atlanta and return for three men to testify before a house committee in behalf of the school in resisting a local bill affecting said school district, looking to the abolishment of local tax; also, March 11, 1909, paid S. Holderness out of said funds \$50 for appearing before said legislative committee in opposition to said local bill, he having advised that said local bill was unconstitutional. The bill did not pass. On January 3, 1910, said Matthews, as said treasurer, paid out of said fund to J. R. Cole, a teacher of Paulding county, \$50 for teaching the pupils of Wesley Chapel school district attending said Cole's school in Paulding county, in pursuance of the following order of the county board of education: 'December 28, 1908. The trustees of Wesley Chapel local tax school district and some of the citizens of said district appeared be-

fore the board, asking that this board relieve the situation in said district by cutting the lines in said district or recommending the paying of teachers in other contiguous schools the pro rata part of the school fund for said pupils, or the location of another school in said district. Upon consideration this board of education recommend that the local trustees of Wesley Chapel local district transfer such pupils as are too inconveniently situated to attend the Wesley Chapel school to such other schools as they may see proper, paying for same out of the appropriations made by the board of education to said district and out of the local tax collected in said district.' The \$6.85 above referred to was paid by order of the majority of the local board of trustees; J. W. Brooks being absent. The said \$50 paid S. Holderness was paid in pursuance of a contract made by a majority of the local board of trustees; Brooks not being present. On the 1st of February, 1910, J. F. Brooks, as treasurer of said local board, demanded the aforesaid sums of money of said G. S. Matthews, and he refused to pay the same to him. Prior to said demand said J. F. Brooks had been elected secretary and treasurer, and qualified as such by giving bond. On December 7, 1909, there was an election held in said district on the question as to whether or not local tax should continue or be abolished, which resulted in the abolition of local tax for said district. On the 17th of February, 1910, the board of education of Carroll county authorized the county school commissioner to have a settlement with G. S. Matthews, treasurer of said local tax school district, and to take charge of such funds as may be in his hands as such treasurer, and also to receive as such county school commissioner such funds as may be in the hands of M. E. Griffin, tax collector, of local tax collected by him and now in his hands, this action taken in pursuance of a ruling of the Attorney General. On February 26, 1910, in pursuance of said action of said county board of education, J. S. Travis, as county school commissioner, had a settlement with the said G. S. Matthews as said treasurer, and approved his accounts, paying out said items, receiving from him \$62.47, and receipting him in full for all funds in his hands as treasurer."

The court rendered judgment in favor of the defendants, and the plaintiffs assign error upon the judgment.

W. F. Brown and C. E. Roop, both of Carrollton, for plaintiffs in error. S. Holderness, of Carrollton, for defendants in error.

RUSSELL, J. (after stating the facts as above). [1] 1. Under the pleadings and the evidence the first question which arises is as to the power of the trustees of a school district, and especially as to their power and

authority to bring a suit. We deal with this phase of the case first, because the defendant in his plea questions the right of the present trustees to pursue the instant action, and also because it seems to us that, if the trustees of the school districts provided for by law can employ counsel and maintain an action brought upon a breach of their treasurer's bond, perhaps the trustees of the same district would be authorized, in their discretion, to employ counsel to invoke the protection of their rights in another proceeding and in a different forum, and even to appear before a legislative committee in opposition to proposed legislation directly affecting the trust with the preservation and administration of which the trustees are charged. By the terms of Political Code 1910, §§ 1531, 1532, 1533, provision is made for the creation of school districts into which the law requires each county to be subdivided, for the election of three trustees for each school district, and for the election of a secretary and treasurer, who must be a member; and section 1537 prescribes the powers and duties of the trustees and of the secretary. Some of the duties of the trustees are specifically defined in the Code, but many of their duties and powers must be implied from the nature of the office and the trust imposed upon them. In the absence of an express definition of their powers, or of any limitation upon them in the statute, it must be assumed that there is an implied grant of enough power to enable these trustees to discharge the duties and to effectuate the trust imposed upon them. This view has been taken in other jurisdictions. The trustees of school districts are generally vested with the power of making contracts in relation to school matters. They have been empowered by statute, in this state, to borrow money for certain purposes, and usually they have power to acquire and hold land and other property for school purposes, and are invested with capacity to sue and be sued where the rights of their trust are involved. 25 Am. & Eng. Enc. of Law (2d Ed.) 44, 45, and citations. We may remark, in passing, that the rights of the plaintiffs to bring the present suit depend upon the assertion of this principle.

[2] 2. It is apparent from consideration of the various sections of the Code which deal with the organization and administration of our public school system that it was the intention of the Legislature to deal with the subject in a broad, general way, leaving matters of detail largely to the discretion of those specially charged with the conduct of our public school system. See Political Code 1910, tit. 11, c. 4, art. 9, which article deals with the formation of school districts, the election of trustees, and the levy of local tax for public schools both by counties and by school districts. It is declared, in section 1545, that "it is the purpose and spirit of

this article to encourage individual action and local self-help upon the part of the school districts," but "it is expressly understood that the general school laws of this state as administered by the county board of education shall be observed." We apprehend this section to mean that as the county board of education is subordinate to the state board of education and to the state commissioner of education, who is its chief executive officer, so the authorities of a school district laid out according to law is to be subordinate to the regulations of the county board of education, and nevertheless individual action and local self-help on the part of the school district is to be given the fullest recognition by those charged with administration of our public school system who are superior in authority to the school district authorities. Naturally this would call for an application of very liberal rules when the exercise of the discretion of the local board in the expenditures of the funds entrusted to them is to be reviewed. Of course, the expenditure of school money for any purpose foreign to the school, and not connected with its maintenance, would be contrary to law. On the other hand, occasions might arise in which the interest of the school would be subserved by the use of a portion of its funds for other purposes than the mere payment of its teachers or even the building or repairing of schoolhouses. The safety of funds already in hand might be involved, or the power to raise any funds in the future might be threatened. In such case it cannot be said that any expense necessary to preserve unimpaired the trust delegated could not be properly made by the school trustees from the school funds. To hold otherwise would be to say that in a supposable case those who are charged with the administration of the school interest of a school district must stand idly by and lose all, for want of power to save their rights by the use of those means, which must be employed by others under similar circumstances. In the absence of express legislation to the contrary, sound public policy requires that the exercise by the board of trustees of a school district of its discretion as to the expenditure of the funds raised by taxes from the citizens of the district should not be controlled or interfered with, unless there is a manifest abuse of discretion, or unless funds raised by taxation for educational purposes for some purpose wholly disconnected therefrom.

[3] 3. It would seem to be implied from the language used in section 1547 that it is the policy of the state to encourage individual action and local self-help in the school districts, and this can best be done by allowing the greatest possible freedom of action on the part of the local trustees, especially in the expenditure of funds raised by local taxation. It would seem to be in consonance with the spirit of our institutions to allow

the chosen representatives of those who paid the local tax to control the disposition of the funds, with the single reservation that the money thus raised by taxation must be expended in the maintenance of a local school for whose support it was designed by the voters. It is true that public school money is a trust fund, and cannot be applied except for educational purposes, but it would never do to give so strict a construction to this language as to confine the expenditure to the payment of teachers and nothing else. All language is to be given a construction which will effectuate the purpose sought to be accomplished; and so, while money raised for the maintenance of a public school may in one sense be said to be money raised for educational purposes, it is not raised for all educational purposes, but only for the benefit of pupils in strictly public or common schools. Public school funds cannot be expended for the support of a strictly private school; that is, a school from which children legally entitled to enjoy the benefits of the public school funds may be excluded. But, while the expenditure of public school funds is confined to public schools, we are of the opinion that in the conduct of the public schools the proper authorities (such as the trustees of a school district) may, in their discretion, make any expenditure of the funds which is absolutely necessary for the proper maintenance of the school intrusted to their charge. They might properly expend a portion of the money in repairing or improving the school building, or in fitting it with proper appliances and conveniences. They might insure the school property against loss by fire, and pay the premium from the school fund. By a parity of reasoning we have no hesitation in holding that funds derived from local taxation within a school district may properly be expended by the trustees of the district in protecting or preserving the right of local taxation for educational purposes by the employment of an attorney, or in other legitimate expenses necessary for presenting their rights in the adjudication of the case. This ruling disposes of the alleged breach of the bond in the payment of the attorney's fee and of traveling expenses of witnesses before the legislative committee. The trustees of Wesley Chapel school district contracted to pay the attorney's fees and the expenses of the witnesses. They had the right to make the contract if the expenditure was necessary, and, according to the evidence in the record, the trial judge was authorized to conclude that the expenditure was necessary.

[4] 4. Regardless of the authorization of the county board of education, and the settlement with the county school commissioner, the treasurer was authorized, upon the order of the trustees of the school district, to pay the tuition of those children of school age residing in Wesley Chapel school district.

who attended the school in Paulding county. As provided in section 1537 of the Political Code, the trustees have the right to fix the tuition for nonresident pupils. The power of fixing the rate of tuition for pupils not residing in the district naturally implies the power of the trustees of the district in which the nonresident pupils reside to agree upon their part to pay this tuition, because each child of school age (with some exceptions) is equally entitled to receive the benefit of the common school fund apportioned by the state. It would be mockery to hold that the law, while devolving upon trustees of the common schools the solemn and responsible duty of providing means for the education of children of school age within their district, denies them the power to perform this duty. It is within the power of trustees of any school district in this state to provide means by which all children of school age in every school district may receive the benefit of the school fund belonging to that district. And to that end the trustees may either contract with the trustees of an adjoining school district for the payment of the tuition of nonresident pupils to themselves, or may agree to pay to the trustees of an adjoining school district, whether in the same or in an adjoining county, the tuition of resident pupils when they determine that these pupils can more advantageously or conveniently attend the school of the adjoining district than the school of the district in which they reside.

[5] 5. The point is raised by the plaintiff in error that, upon the repeal of the local tax law in Wesley Chapel school district, it was the duty of Matthews, as treasurer of the local board of trustees, to pay over any funds in his hands to his successor as treasurer of the local board of trustees, and not to the county school commissioner. We think this position is well taken, but it does not affect the decision of the case, for the suit in the present instance does not declare a breach of the bond, except in the three payments to which we have referred, and, consequently, any payment made by Matthews to the county commissioner in settlement of his accounts is not involved. The only questions raised are as to the validity of the payment of the attorney's fees, the expense of the witnesses, and the payment of the tuition of pupils entitled to the benefit of the school fund in Wesley Chapel district to a school in an adjoining county. The title to public school money paid into the hands of trustees of a school district while local taxation for school purposes was in force is unaffected by the fact that the local tax law was thereafter repealed or abolished by the provisions of section 1536 of the Political Code of 1910. The repeal of the local tax in Wesley Chapel school district did not abolish the office of

treasurer of the board of trustees of that school district; and by his bond Matthews was bound to pay over any funds in his hands to his successor in office; and, if he paid anything to the county commissioner, the payment would seem to be unauthorized. Certainly, if any of the funds paid by him to the county commissioner had been raised by local taxation and paid by the taxpayers of Wesley Chapel school district, it should have been expended solely for the benefit of that school, but the present suit is not brought to recover any money paid out by Matthews as treasurer other than the three items enumerated above. As to this the payment in each instance was authorized by the local board of trustees, and therefore the principal sum of \$106.35 sued for was properly accounted for according to the terms of the bond, and, having been legally expended by him, could not be paid over to his successor.

[8] 6. The judgment of the court below under our view of the law was required by the evidence. The payment of each of the sums expended by the treasurer was authorized by the trustees of the school district, and, as the spending of the money was necessary in the proper administration and preservation of the school fund with which the trustees were charged, it is needless to determine how far the mere order of the majority of the board of trustees would have protected the treasurer in making the payments, if they had been less closely connected with the proper maintenance and improvement of the educational facilities of the school district.

Judgment affirmed.

POTTLE, J., not presiding.

(91 S. C. 568)

MATTHEWS v. INDUSTRIAL LUMBER CO.

(Supreme Court of South Carolina. July 9, 1912.)

1. APPEAL AND ERROR (§ 1094*)—REVIEW—FINDINGS OF FACT.

A judgment of a magistrate, founded on facts, affirmed in the circuit court, will not be disturbed by the Supreme Court, if supported by any evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4322-4352; Dec. Dig. § 1094.*]

2. MASTER AND SERVANT (§ 73*)—RULES OF EMPLOYER—EFFECT ON EMPLOYÉ.

An employé, even if knowing of, not having assented to, a rule of the employer, requiring employés to punch a mechanical time clock to evidence their hours of service, is not bound thereby, as regards right to recover for services rendered.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 90-102; Dec. Dig. § 73.*]

Appeal from Common Pleas Circuit Court of Aiken County; Geo. E. Prince, Judge.

Action by J. F. Matthews against the Industrial Lumber Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Geo. T. Jackson, of Augusta, Ga., for appellant. E. Foster Brigham, of Augusta, Ga., for respondent.

WATTS, J. This is an appeal from judgment in magistrates' court in favor of plaintiff, affirmed in the circuit court by the presiding judge. There is no conflict in the evidence, the facts being admitted, and it is so conceded by appellant's and respondent's attorneys. The appeal really presents a question of law. The plaintiff brought his action against defendant to recover the sum of \$2.10 for one day's work at 20 cents an hour, earned by him as a frame builder for which payment was demanded and refused. The defendant admitted that the plaintiff worked on the day in question, December 20, 1910, the number of hours shown by his shop time card, and the only ground upon which they refused to pay was that plaintiff had failed to punch on that day a mechanical time clock device installed by the defendant which all employes were required to punch when going on and off duty by a rule posted on said clock. The rule read: "All employes must note that this time clock is for their individual protection, and should any one be so careless as to neglect their own interest, by failing to register in and out, there is no one connected with this company, that has the authority to make corrections and from this day on, a man's time card will be taken as evidence of his time, unless he is sent out by the superintendent of his department, who, in that event, will record for his time. [Signed] T. G. Philpot, V. P." There was another rule or regulation of the company posted at the drinking places which was: "Mr. Redfern, Supt. It seems impossible to get your men to appreciate the importance of turning in their time cards. In future any one neglecting to turn in their time cards, will not consider the clock cards as sufficient evidence of his time. [Signed] T. G. Philpot, V. P." There was no written contract between the parties. Upon verdict for the plaintiff in the magistrates' court, defendant appealed to circuit court and alleged error in not granting nonsuit, as moved for by defendant, and alleged certain errors of law by the magistrate in his charge to the jury. His honor, Judge Prince, overruled the exceptions and dismissed the appeal, whereupon defendant appeals and asks for a reversal on the grounds that his honor erred in not sustaining defendant's appeal on each and every ground in not sustaining defendant's motion for a nonsuit, in that the evidence showed that there was a regulation of defendant, known to the plain-

tiff, requiring employes to punch the clock to indicate the time for which they were to receive pay, and showed, further, that on the day in question, December 20, 1910, plaintiff failed to punch the clock at all, and there was no clock record of any time put in by him that day, and that there was no evidence to support the verdict. Here we have a finding of fact in the magistrates' court, concurred in by the circuit judge on appeal.

[1, 2] We have held repeatedly that a judgment founded on facts in the magistrates' court, affirmed by the circuit court, will not be disturbed by this court if there is any testimony to support it. *State v. Powell*, 91 S. C. 5, 73 S. E. 1017, and cases therein cited. There is such testimony here, but, as the defendant seems to want this court to indicate some rule by which such business can be governed, any company can adopt such reasonable rules for the conduct of their business as they see fit and proper and as seems expedient to them, provided they are not in contravention of public policy or the law of the land. If the plaintiff violated the reasonable rules of defendant, and defendant had not waived its rules, the plaintiff could have been discharged by the defendant. Parties can contract mutually with each other and be bound mutually by the terms of the contract. There is no testimony in this case that shows that there was any agreement between the plaintiff and defendant that a sum should be forfeited by the plaintiff if he should violate any of defendant's rules, even if those rules were reasonable. "Acts of an employe sufficient to justify a dismissal will not justify a refusal to pay less than the stipulated price for the work, where such acts produce no pecuniary loss to the employer, who did not discharge the employe although aware thereof." *McCracken v. Hair*, 2 Speers, 256.

In this case there is no testimony that the plaintiff had assented to the rules, even though he knew of them or his attention had been especially called to them. He was not bound by any rules that he had not contracted to observe or was not incident to or assumed by him in the general scope of his employment. This court held, in *Norman v. Southern Ry. Co.*, 65 S. C. 517, 44 S. E. 83, 95 Am. St. Rep. 809: "That a passenger paying full fare for a general ticket is not bound by limitations printed thereon unless his attention has been especially called to them and he has assented thereto." Here plaintiff performed work required and was entitled to be paid.

Appeal dismissed.

GARY, C. J., and WOODS, HYDRICK, and FRASER, JJ., concur.

(93 S. C. 287)

**FONVILLE v. ATLANTA & C. AIR LINE
RY. CO. et al.**

(Supreme Court of South Carolina. July 5, 1912.)

1. WITNESSES (§ 48*)—COMPETENCY—CONFESSION OF CRIME.

Where, in an action for the death of a locomotive engineer in a derailment caused by an open switch, the company offered evidence that about two hours before the accident a third person broke the switch lock and threw the switch, the confession of the third person convicted of murder for his wrongful act was inadmissible; his confession disqualifying him as a witness.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 109-115; Dec. Dig. § 48.*]

2. JUDGMENT (§ 648*)—CONCLUSIVENESS—JUDGMENT IN CRIMINAL PROCEEDING.

The records in a criminal case are as a general rule inadmissible in civil cases as evidence of the facts on which a conviction in the criminal case was had because of want of mutuality of the parties.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1309, 1310; Dec. Dig. § 648.*]

3. MASTER AND SERVANT (§ 264*)—DEATH OF SERVANT—COMPLAINT—EVIDENCE—ADMISSIBILITY.

A complaint in an action for the death of an engineer in a derailment caused by an open switch, which alleges that the switch light could have been so placed as to be seen by engineers, and that a failure to do so was negligence, and that the switch light was carelessly placed so that it could not be seen by approaching engineers and could not warn them when the switch was thrown, etc., is sufficient to justify evidence of negligence for failure to place a distant signal light where it could have been seen by engineers in time to stop before running into the switch.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 861-876; Dec. Dig. § 264.*]

4. MASTER AND SERVANT (§ 285*)—DEATH OF SERVANT—PROXIMATE CAUSE—EVIDENCE—QUESTION FOR JURY.

Whether the proximate cause of the death of a locomotive engineer in a derailment caused by an open switch was the negligence of the railway company or the malicious act of a third person throwing the switch *alid*, under the evidence, for the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1002, 1003, 1007, 1008, 1010, 1035, 1043, 1053; Dec. Dig. § 285.*]

5. NEGLIGENCE (§ 136*)—PROXIMATE CAUSE—QUESTION FOR JURY.

The question of proximate cause is for the jury, and is for the court only where the evidence is susceptible of only one rational inference.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 277-353; Dec. Dig. § 136.*]

Woods, J., dissenting in part.

Appeal from Common Pleas Circuit Court of Greenville County; Ernest Gary, Judge.

Action by Georgie E. Fonville, as administratrix of William J. Fonville, deceased, against the Atlanta & Charlotte Air Line Railway Company and another. From a judgment for plaintiff, defendants appeal. Affirmed.

Cothran, Dean & Cothran, of Greenville, for appellants. Haynsworth & Haynsworth, of Greenville, and John Gary Evans, of Spartanburg, for respondent.

HYDRICK, J. This action was brought to recover damages for the alleged wrongful death of Wm. J. Fonville. The cause and circumstances of his death are set forth in the complaint as follows:

"(5) That plaintiff's intestate was on the 24th day of September, 1908, and had been for some years, an engineer in the employment of the defendant Southern Railway Company, and on said date was operating an engine drawing train No. 41, a regular passenger train, on defendants' main line from Charlotte, N. C., to Seneca, S. C.

"(6) That on said main line, at a point about one mile south of Wellford, S. C., a spur track, known as Gross' Siding, leaves the main line and extends in a southeasterly direction to Gross' oil mill, and, after passing said mill, it again connects with the main line. That the movement of the spur track at the points of intersection with the main line are controlled by a switch at each connection with the main line. That the switch has connected with it a lantern so placed that it will in the nighttime show a white light when the switch is closed and the main line clear, and a red light when the switch is open and the main line not clear. That some such arrangement is necessary in order to provide for the safety of the employees operating trains in the nighttime, and it is necessary that the light be so placed that it may be seen by the persons in charge of the approaching train.

"(7) That for some distance north of said point the track is curved, and runs through a deep cut and under an overhead bridge, causing the view of an engineer on a south-bound train to be obstructed, so that the signal light placed as it was at Gross' Siding is concealed from view, except for a very short distance. That the said light could have been easily so placed or arranged as to be seen by those in charge of approaching south-bound trains, and that the failure to so place or arrange it was negligence on the part of the defendant.

"(8) That the train in charge of the plaintiff's intestate, at about 40 minutes after 8 o'clock on the evening of said date, approached said siding. That the switch connecting said spur track with the main line had been carelessly left unlocked and open, so that the train operated by plaintiff's intestate ran upon said spur track for about 250 feet, where the engine and two of the coaches were derailed, overturned, and wrecked, and plaintiff's intestate was caught under said engine, and so badly mangled, crushed, and scalded that he died a few minutes thereafter.

"(9) That the death of plaintiff's intestate was caused by the joint and concurrent negligence of the defendants, as follows: That the said switch was carelessly left unlocked or open, or was not provided with a safe and suitable lock, so as to secure it from outside interference, and that at the time of the approach of said train it had been, through the negligence of the defendants, thrown so as to connect the spur track. That the switch light was carelessly placed, so that it could not be seen by the approaching south-bound trains, and could not warn those operating said trains when the switch was thrown. The spur track was carelessly and negligently constructed and maintained, the rails were too light and improperly secured or fastened, the ties defective, the roadway not properly ballasted, or graded, so as to enable trains to pass over it in safety."

The allegations of the fifth paragraph were admitted. All others were denied.

[1] The plaintiff introduced testimony tending to prove all the material allegations of the complaint. Besides relying upon their denial of the material allegations of the complaint, the defendants undertook to prove that Fonville's death was caused by the malicious act of a negro boy, named Clarence Agnew, who, according to their contention, broke the switch lock, and threw the switch. The train was wrecked between 8 and 9 o'clock at night, at Gross' Siding, which is about half way between Duncan and Wellford. Defendants introduced testimony tending to prove that the switch lights were burning, and that the switch was properly set about 6 o'clock that evening, and that about that time, or a little later, Agnew was seen on the railroad going from Duncan towards Wellford; that he was seen knocking at the switch; that he was arrested the next morning at the scene of the wreck and carried to jail, charged with having maliciously caused the wreck; that on the next day—that is, the second day after the disaster—he was taken to the scene by the sheriff, who, following Agnew's directions, found an iron bolt and a part of the switch lock some distance from the switch, and another part of the lock was pointed out to the sheriff by him at or near Wellford, where Agnew was seen about dark on the evening of the disaster. Defendants offered to prove that Agnew had confessed to the sheriff and others that he broke the lock and threw the switch, and they also offered to prove, by the record thereof, his conviction, in the court of general sessions for Spartanburg county, of murder in causing the wreck of the train and the death of Fonville, and that he had been sentenced thereupon to imprisonment in the penitentiary for life. The court excluded the record of his conviction and the evidence of his confession. We think the ruling was correct.

[2] The general rule that the records in criminal cases are not admissible in civil cases as evidence of the facts upon which a conviction was had is well settled. There are some exceptions, but the general rule is as stated and it is founded upon sound principles, to wit, the want of mutuality, arising out of the fact that the parties to the record are not the same, and the fact that the course of the proceedings and the rules of decision in the two courts are different. A higher degree of proof is required in criminal than in civil cases. 1 Gr. Ev. § 537; 7 Enc. Ev. 850; Miller v. Sou. Pac. R. Co., 20 Or. 285, 28 Pac. 70; Chamberlain v. Pierson, 87 Fed. 420, 31 C. C. A. 157. Appellant insists that the confessions of Agnew should have been admitted on the authority of Coleman v. Frazier, 4 Rich. 146, 53 Am. Dec. 727. The action in that case was to recover of defendant, who was postmaster at Edgefield, a sum of money contained in a letter mailed by the plaintiffs and addressed to a firm in Charleston. The contents of the letter were stolen while it was in the post office at Edgefield by one Meigs, who was allowed access to the post office. The declarations of Meigs, who was dead, made in the presence of the defendant, that he had stolen the money, were admitted in evidence. Its admission was placed on two grounds: "(1) That the defendant was present, heard it, and received it as true; and (2) that it was the admission of an act, committed by the party making it, against his interest, and subjecting him to infamy and heavy penal consequences, and who was dead at the trial." It will be observed at once that two features distinguish that case from this: (1) In that case, Meigs was dead; in this Agnew is alive. (2) In that, it does not appear that Meigs had been convicted of larceny; in this, it does appear that Agnew had been convicted of murder, and was therefore disqualified as a witness. It is contended, however, that Agnew was civilly dead, because of his conviction of murder. But it must not be forgotten that his conviction disqualified him as a witness; and, as he would not have been allowed to testify under oath against objection, a fortiori, his declarations are inadmissible.

[3] The next assignment of error that will be considered is in admitting evidence that the proper arrangement of the switch would have been to have placed what is known as a distant signal light at the north end of the curve from the switch toward Wellford, where it could have been seen by trains going south in time to stop before running into the switch, such signal light to be connected with the switch by means of rods and cables so as to be worked by the movement of the switch. Appellant contends that the negligence specified in the complaint was that the light was so placed at the switch that it could not have been seen, and that

there is no allegation of negligence in not also placing a distant signal light. We think a liberal construction of paragraphs 7 and 9 of the complaint warrants the admission of the testimony complained of.

[4] The court properly submitted to the jury the question whether the defendants' negligence or Agnew's malicious act was the proximate cause of Fonville's death.

[5] The question of proximate cause is ordinarily one for the jury. It may be decided by the court only when the evidence is susceptible of only one rational inference.

The remaining exceptions relate to the charge and refusal to charge. We have carefully examined the charge in connection with the requests, and we are satisfied that the issues were fairly and correctly submitted to the jury.

Judgment affirmed.

WATTS and FRASER, JJ., did not participate.

WOODS, J. I concur in the result and in the views expressed in the opinion, except as to the exclusion of evidence of the confession of the negro, Agnew, that he broke the lock and turned the switch. On the issue whether the wreck of the train was caused by the negligence of the defendants' agents in the management of their trains, lights, and switches, or by the criminal act of a third party, there cannot be doubt that such confession would have great probative value. The confessions of Agnew were against his interest, and his conviction of murder disqualified him and made him unavailable as to the defendants as a witness just as if he had been dead. The admission or confession of one who dies after making it is held admissible because of its manifest probative value, and because it is impossible to obtain the direct evidence of such person. *Coleman v. Frasier*, 4 Rich. 146, 53 Am. Dec. 727. The same reasoning applies as to the admissions and confessions of persons whose direct evidence has become unavailable by causes other than death, such as insanity or conviction of an offense which renders them incompetent as witnesses. Where the confession of a convict was made before conviction, the principle seems clearly applicable. The principle is well illustrated in *Griffith v. Sauls*, 77 Tex. 630, 14 S. W. 230, where the declarations of one Avery were received because he was rendered incompetent to testify by the loss of the power of speech and other infirmities of age. The Supreme Court of Texas in holding the declarations competent said: "If Avery had been dead, there could be no question as to the admissibility of his statements about which the witnesses testified, and this would be so because of the inability to produce the witness. If the party whose statements would

be admissible if he were dead, from advanced age, or other irremediable cause, has lost the power of speech, and the ability to testify either orally or by deposition, what good would it do to produce him? In what would he be better than a dead man in so far as the production of his testimony is concerned? We think the circumstances and condition of Avery, as shown by the record, furnish as satisfactory reason for admitting his statements as proof of his death would afford."

I agree, however, that the exclusion of this evidence is not sufficient ground for reversal because the record shows that the breaking of the lock and interference with the switch by Agnew was proved beyond doubt by other evidence, and was assumed as a fact by the circuit judge in his charge to the jury. The real issue was whether there was negligence of the defendants in not properly safeguarding their trains by placing of their lights and switches, and on the trial of that issue I agree that there was no error.

(91 S. C. 551.)

STATE v. RAY.

(Supreme Court of South Carolina. July 5, 1912.)

1. FORGERY (§ 7*)—WHAT CONSTITUTES—INJURY TO ANOTHER.

Where defendant signed another's name to an order on an express company requesting it to deliver to him a package of whisky which he had ordered in the other's name without his consent, he was guilty of forgery, since his act was calculated to injure the other in his rights, and put him in danger of being prosecuted for violation of the liquor law.

[Ed. Note.—For other cases, see *Forgery*, Cent. Dig. §§ 2, 3, 8-15; Dec. Dig. § 7.*]

2. CRIMINAL LAW (§ 369*)—EVIDENCE—ADMISSIBILITY—SIMILAR ACTS.

In a trial for forging an order on an express company, evidence was admissible to show that the defendant had at different times presented similar orders to the express company purporting to have been signed by different persons, and received packages of whisky shipped in their names.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 822-824; Dec. Dig. § 369.*]

3. CRIMINAL LAW (§ 1036*)—APPEAL—PRESENTATION BELOW—ADMISSION.

The admission of evidence not objected to is not reviewable.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 1631-1640, 2639-2641; Dec. Dig. § 1036.*]

Appeal from General Sessions Circuit Court of Anderson County; G. E. Prince, Judge.

"To be officially reported."

T. P. Ray was convicted of forgery, and he appeals. Affirmed.

Proctor A. Bonham, Sol., for the State. Boggs & Dickson, of Anderson, for appellant.

HYDRICK, J. Defendant was convicted of forgery in signing the name of S. D. Gil-

lard to an order addressed to the Southern Express Company, requesting the company to deliver to him a package of whisky which he had ordered in the name of Gillard, without his consent.

The exceptions raise only two points:

[1] 1. Error in holding that defendant could be convicted, since there was no proof of intention to defraud either Gillard or the express company. This point is controlled by the case of *State v. Webster*, 88 S. C. 56, 70 S. E. 422, 32 L. R. A. (N. S.) 337.

[2, 3] 2. Error in admitting other orders of like import, signed by other persons; that is, orders to which the names of other persons had been signed. It appears from the record that testimony was admitted without objection that defendant had at different times presented to the express company orders purporting to have been signed by different persons, and received packages of whisky shipped in their names. As this testimony was not objected to, the appellant cannot complain of its admission. But it was unobjectionable. *State v. Allen*, 56 S. C. 495, 35 S. E. 204; *State v. Talley*, 77 S. C. 99, 57 S. E. 618, 11 L. R. A. (N. S.) 938, 122 Am. St. Rep. 559.

Affirmed.

GARY, C. J., and WOODS, WATTS, and FRASER, JJ., concur.

(91 S. C. 559)

TAYLOR et al. v. STRAUSS.

(Supreme Court of South Carolina. July 5, 1912.)

PARTIES (§ 51*) — AMENDING COMPLAINT — ADDING PARTY—DISCRETION.

Under Code Civ. Proc. 1902, § 143, as to bringing in other parties, section 194 as to amending a pleading by adding the name of a party, section 195 as to permitting an amendment of a proceeding for nonconformity to code provisions, and section 198 as to allowing a supplemental complaint, the court, in an action to recover real property, on plaintiffs' motion to amend the complaint, to make one a party, learned by plaintiffs since commencement of the action to be in possession under an unrecorded agreement, may in its discretion allow an amended and supplemental complaint for such purpose.

[Ed. Note.—For other cases, see *Parties*, Cent. Dig. §§ 77-82; Dec. Dig. § 51.*]

Appeal from Common Pleas Circuit Court of Sumter County; John S. Wilson, Judge.

Action by Maud O. Taylor and others against Isaac Strauss. From an order allowing an amended and supplemental complaint, defendant appeals. Dismissed and affirmed.

Lee & Moise and H. D. Moise, all of Sumter, for appellant. A. B. Stuckey, of Sumter, for respondents.

WATTS, J. This was an action brought to recover real estate and for damages; the complaint and summons being served upon Strauss on April 15, 1911. He answered the same on May 1, 1911. On December 15, 1911, plaintiffs served upon defendant notice of a motion to amend their complaint, based upon an affidavit of Mr. Stuckey, plaintiff attorney, to the effect that since the service of the original complaint it had come to his knowledge that Taylor Goodman was in possession of the land sued for under a written agreement, not recorded, and he was a necessary and proper party to the suit, and he desired to amend his complaint by making Goodman a party and also amend as to the amount of damages claimed. Along with this notice was served a copy of the affidavit of Stuckey and a copy of the proposed amended complaint. The motion was heard by Hon. John S. Wilson, judge of the Third circuit, at which hearing the plaintiffs and defendants appeared by counsel, and defendants resisted the motion upon the ground that the matter was not proper for amendment, but must be brought by supplemental pleadings. Over the objection of the defendant, Judge Wilson granted an order allowing "that the plaintiff have leave to file an amended and supplemental complaint in the form requested in the notice and mentioned herein, and that Taylor Goodman be made a party to this action, and that a copy of the amended and supplemental summons and complaint herein be served upon the said Taylor Goodman, and also upon the defendant, Isaac Strauss, or his attorney, within 10 days hereafter, etc."

From this order defendant appeals, and asks reversal upon the same grounds taken before Judge Wilson at hearing. There is nothing in the exceptions. They are technical, strained, hairsplitting, and absolutely without merit. It was a matter purely within the discretion of the judge to allow or refuse the motion or to impose terms. He had authority under sections 143, 194, 195, and 198 of the Code of Laws to grant the order appealed from.

Appeal dismissed and judgment affirmed.

GARY, C. J., and HYDRICK, J., concur. FRASER, J., concurs in the result. WOODS, J., disqualified.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

(91 S. C. 542)

LITTLE BROS. v. BROCK.

(Supreme Court of South Carolina. July 1, 1912.)

1. DEPOSITIONS (§ 83*)—MOTION TO SUPPRESS—DENIAL.

Where the exceptions assigning error to the denial of defendant's motion to suppress depositions on the ground that at the time they were taken he was engaged in a trial did not show that defendant's attorney, but for such engagement, would have appeared at the making of the depositions, nor that other counsel could not have been engaged to represent him in the taking thereof, nor that defendant was prejudiced thereby, the denial was not error.

[Ed. Note.—For other cases, see Depositions, Cent. Dig. §§ 219-226; Dec. Dig. § 83.*]

2. DEPOSITIONS (§ 83*)—SUPPRESSION—DISCRETION OF COURT.

The matter of the suppression of depositions is largely within the discretion of the trial court.

[Ed. Note.—For other cases, see Depositions, Cent. Dig. §§ 219-226; Dec. Dig. § 83.*]

Appeal from Common Pleas Circuit Court of Anderson County; R. W. Memminger, Judge.

Action by Little Bros. against T. H. Brock. Defendant's motion to suppress depositions overruled, and he appeals. Affirmed.

A. H. Dagnall, for appellant. Bonham, Watkins & Allen, for respondent.

GARY, C. J. [1] This is an appeal from an order refusing to suppress certain depositions. The action was commenced on the 18th of December, 1911. On the 24th of January, 1912, notice was served upon defendant's attorney that the testimony of certain witnesses would be taken de bene esse at Knoxville, Tenn., on the 5th of February, 1912. The following statement appears in the record: "Court of common pleas for An-

derson county convened February 5, 1912, and attorney for defendant had other cases set for trial on this day. When the case was called for trial, attorney for defendant moved the court to suppress the depositions of N. T. Little and J. W. K. Brown, pursuant to the notice served on plaintiff's attorneys January 25, 1912. The defendant urged in the support of the motion to suppress the depositions that reasonable notice had not been given of the taking of the depositions, as the depositions had been taken while the court of common pleas was in session, which court had jurisdiction of the action, that it was impossible for defendant attorney to be present and cross-examine the witnesses, as he was engaged in the trial of other cases in court of common pleas at the time the depositions were being taken. The court overruled the motion to suppress the depositions, and allowed same to be used in evidence. Defendant's attorney excepted to the ruling of the court."

In the exceptions assigning error in this ruling, it was not made to appear that but for the defendant's attorney being so engaged he would have appeared at the taking of the depositions; nor that other counsel could not have been engaged to represent him in the taking of the depositions, nor that the defendant was prejudiced by refusing the motion.

[2] Such questions are necessarily largely within the discretion of the trial court. The case of *Gibson v. Railroad Co.*, 88 S. C. 360, 70 S. E. 1030, is conclusive of the question raised by this appeal.

It is the judgment of this court that the judgment of the circuit court be affirmed.

WOODS, HYDRICK, WATTS, and FRASER, JJ., concur.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

(91 S. C. 572)

KAMMER v. SUPREME LODGE K. P.

(Supreme Court of South Carolina. July 10, 1912.)

1. INSURANCE (§ 815*)—FRATERNAL BENEFIT INSURANCE—ACTION ON CERTIFICATE—COMPLAINT—SUFFICIENCY.

A complaint on a fraternal beneficiary life certificate, alleging that defendant is a fraternal order, and has an insurance department for the purpose of insuring the lives of its members, sufficiently shows that defendant had capacity to issue the certificate.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1996-1998; Dec. Dig. § 815.*]

2. CORPORATIONS (§ 388*)—FRATERNAL BENEFIT INSURANCE—CAPACITY TO ISSUE POLICY—ESTOPPEL.

By receiving premiums for the insurance, a fraternal order is estopped to deny its capacity to issue a beneficiary life certificate.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1556-1567; Dec. Dig. § 388.*]

3. INSURANCE (§ 718*) — FRATERNAL BENEFICIARY INSURANCE—RIGHT TO PROCEEDS.

Provision in a fraternal benefit life certificate insuring a member of a particular class that after "this" certificate has been in force three years "from the date hereof" it shall be noncontestable is not controlled by a by-law restricting the benefits where a member of that class commits suicide or dies from intoxication, etc., except as to members who have been in good standing for three years before their death, thus restricting recovery on a certificate which had not been in force three years, though the member had been in continuous good standing in the insurance department for three years, having been transferred from another class when the certificate issued.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1854; Dec. Dig. § 718.*]

Appeal from Common Pleas Circuit Court of Barnwell County; S. W. G. Shipp, Judge.

"To be officially reported."

Action by Catharine W. Kammer against the Supreme Lodge Knights of Pythias. Judgment for plaintiff, and defendant appeals. Reversed, and new trial granted.

Bates & Simms, of Barnwell, for appellant. James E. Davis and R. C. Holman, both of Barnwell, and W. H. Townsend, of Columbia, for respondent.

GARY, C. J. [1, 2] This is an action by the plaintiff, as beneficiary in a certificate of membership, issued to Henry Kammer, her husband, by the Supreme Lodge Knights of Pythias.

The allegations of the complaint which we deem it necessary to reproduce (as there was a demurrer) are as follows:

"First. That the defendant above named is a fraternal order, and is incorporated under the laws of one of the United States of America, and has for its corporate name the 'Supreme Lodge Knights of Pythias.'

"Second. That, among other things, the said defendant corporation has an insurance department for the purpose of insuring the lives of its members, who are in good standing in said order.

"Third. That Henry Kammer, late of the

county and state aforesaid, before and at the time hereinafter mentioned, was a member of said order (in good standing), to wit, of Blackville Lodge No. 18, one of defendant's local lodges, located at Blackville, S. C., where the said Henry Kammer resided.

"Fourth. That on the 1st day of November, A. D. 1908, the defendant above named for and in consideration of the payment to it by the said Henry Kammer of the sum of \$3.16 monthly premiums, insured the life of the said Henry Kammer in plan 'D,' class 5, in its insurance department for the sum of \$2,000, and thereby issued to him its certain certificate of membership No. 256,323 (otherwise called its policy of insurance), made payable to the plaintiff above named, who was the wife of the said Henry Kammer, at the head office of its board of control, upon the death of the said Henry Kammer, and upon the receipt and approval of satisfactory proofs, of the fact and cause of the death of said member, while the aforesaid certificate is in full force.

"Fifth. That on the 24th day of August, A. D. 1910, the said Henry Kammer died, having fulfilled all the conditions on his part, and the plaintiff has fully complied with all the conditions of said certificate, or policy of insurance on her part.

"Sixth. That no part of said insurance has been paid, and the said sum of \$2,000 is now due this plaintiff (beneficiary) upon said certificate or policy as herein before set forth."

The defendant demurred to the complaint, on the ground that it did not state facts sufficient to constitute a cause of action, in that "it does not allege defendant's capacity to make the contract set forth in the complaint, and the purpose for which it was incorporated." In disposing of this ground, his honor, the presiding judge, said: "I think the allegations in the first and second paragraphs of the complaint are sufficient to show that the defendant had the capacity to issue the policy." Not only was this ground of demurrer properly overruled, for the reasons just stated, but the case of *Williamson v. Association*, 54 S. C. 532, 32 S. E. 765, 71 Am. St. Rep. 822, shows that the defendant, after receiving the benefits mentioned in the complaint, was estopped from relying upon such fact.

There was a second ground of demurrer, but his honor, the presiding judge, allowed the plaintiff to amend her complaint so as to remedy the alleged defect. The demurrer was therefore properly overruled.

[3] The defendant, after admitting certain facts, alleged as a defense: "That amongst the various privileges and requirements of the said fifth class are especially these agreements contained in the fourth, tenth, and eleventh paragraphs of said certificate, and a part of said application for transfer, to wit: '(4) After this certificate

has been in full force for thirty-six consecutive months (three years) *from the date thereof*, it shall be incontestable.' * * * [Italics ours.] That notwithstanding that the said certificate was not in force for 36 consecutive months from its date, and notwithstanding the agreement of said Henry Kammer that, 'if his death be caused or superinduced by the use of intoxicating liquors, narcotics or opiates,' the said Henry Kammer's death, as alleged in the complaint, was caused or superinduced by the use of intoxicating liquors, narcotics, or opiates, as this defendant is informed and believes; and under the terms of said certificate the amount 'to be paid on this certificate, if any, shall be a sum only in proportion to the whole amount thereof as the member's matured life expectancy is to his entire expectancy at the date of this certificate.' * * * That, if there be anything due under this certificate of membership, the amount is \$152.03. The defendant introduced in evidence, for the purpose of sustaining said defense, section 32 of the by-laws, which was as follows: "If the death of any member of the fourth class heretofore admitted, or hereafter admitted, to said class, or if the death of any member of the fifth class shall result from suicide, either voluntary or involuntary, whether such member shall be sane or insane at the time, or if such death shall be caused or superinduced by the use of intoxicating liquors, narcotics, or opiates, or in consequence of a duel or at the hands of justice, or in violation, or attempted violation, of any criminal law, then the amount to be paid upon such member's certificate shall be a sum only in proportion to the whole amount, as the matured life expectancy is to the entire expectancy, at date of admission to the insurance department, the expectation of life based upon the American Experience Table of Mortality in force at the time of such death to govern; provided, that in the case of members transferred to the fourth class, from either of the former first, second or third classes, the date of such transfer shall be taken, as the date of admission to the insurance department, in computing the amount to be paid as aforesaid: Provided, that this section shall not apply to any member of the fifth class, who has, at the time of his death, been in continuous good standing in the insurance department for thirty-six months consecutively

immediately preceding his death." After reading said section to the jury, his honor, the circuit judge, thus charged them: "I want you to notice these provisions: 'Provided that in case of parties transferred to the fourth class, from either of the first, second, or third classes, the date of such transfer shall be taken as the date of the admission to the insurance department,' etc. I charge you that this section does not apply in the case of a member of the fifth class, such as is sued on in this case. It does not apply if the person insured has been in good standing in the insurance department, either the fourth class or fifth class, for 36 months immediately preceding the time of his death. * * * My reason for making this ruling is: You will notice in the first proviso it is provided, in case of a transfer into the fourth class from the first, second or third classes, it says the date of the transfer shall be taken as the date of admission to the insurance department. But in the next proviso there is no such thing as that. There is no such language as that used, but it is provided that this section shall not apply to any member of the fifth class, who has at the time of his death been in continuous good standing in the insurance department for 36 months." If his honor, the presiding judge, had only been called upon to consider section 32 of the by-laws, it may be that he properly construed it. But his construction is inconsistent with the provisions of the certificate, quoted in the answer of the defendant. The words in the fourth paragraph of the certificate which we italicized show that the 36 consecutive months therein mentioned were to commence from the date of the certificate transferring Kammer to the fifth class. Furthermore, if section 32 of the by-laws was properly construed by the circuit judge, then there was no necessity to insert in the certificate the provisions set out in the answer. The writings which form the contract must be construed together, and the construction which we have placed upon them is the only one that will give force and effect to every part thereof. The exceptions raising this question are sustained. These views practically dispose of all questions involved.

Judgment reversed, and new trial granted.

WOODS, HYDRICK, WATTS, and FRASER, JJ., concur.

(31 S. C. 557)

In re MOSLEY'S ESTATE.

(Supreme Court of South Carolina. July 5, 1912.)

GUARDIAN AND WARD (§ 151*)—SERVICES OF GUARDIAN—COMMISSIONS.

Under the rule allowing guardians $2\frac{1}{2}$ per cent. commissions for all money received and the same rate for all money paid out, where the guardian of certain minors received and paid out certain funds belonging to the minors for which he was required to increase his bond from \$800 to \$4,500, he was entitled to commissions thereon.

[Ed. Note.—For other cases, see Guardian and Ward, Cent. Dig. § 501; Dec. Dig. § 151.*]

Appeal from Common Pleas Circuit Court of Greenville County; Geo. W. Gaze, Judge.

In the matter of the Estate of Henry Mosley, deceased. From a circuit court order reversing a probate order allowing H. S. Boulware, as general guardian of Rachel Mosley and Henry Mosley, commissions on a portion of the estate, he appeals. Reversed.

J. J. McSwain, of Greenville, for appellant Boulware. L. O. Patterson and B. M. Shuman, both of Greenville, for appellees Rachel and Henry Mosley.

WATTS, J. This is an appeal from an order of Judge Gage made at March term of court, 1911, for Greenville county, reversing an order of the probate court for said county allowing the appellant, as general guardian for Rachel Mosley and Henry Mosley, commissions on the sum of \$2,095.50, amounting to the sum of \$104.77. Henry Mosley, the father of Rachel and Henry, died testate in Greenville county on April 30, 1908, leaving real and personal property in Greenville county and real estate in Atlanta, Ga. His personal property was insufficient to pay his debts, and an order was taken in probate court for Greenville county to sell certain real estate in Greenville county and the personal property, which was done, and the proceeds arising therefrom was insufficient, and a further order was taken to sell more real estate. The appellant, Boulware, had been duly appointed general guardian for Rachel Mosley and Henry Mosley, and entered into bond in the sum of \$800 conditioned for the faithful performance of his duties as said guardian. In the meanwhile certain real estate in Georgia of the testator had been sold, and the net proceeds of that sale, amounting to \$2,200.50 belonging to the minors, Rachel and Henry, was in the hands of the Georgia court ready to be turned over to them or their legally appointed guardian. On August 19, 1909, John T. Bramlett, Esq., as judge of probate for Greenville county, upon Boulware executing a bond in the sum of \$4,500, with sufficient surety, passed the necessary orders for Boulware to receive the funds, and the Georgia funds were accordingly turned over to Boulware, and he disbursed the funds

under a decree of the probate court for Greenville county, and was allowed commissions for receiving and paying out, by an order of that court, which order was appealed from and reversed by the circuit judge.

The judgment of the circuit court should be reversed. Executors, administrators, guardians, etc., are allowed $2\frac{1}{2}$ per cent. commissions for all money that they shall receive, and $2\frac{1}{2}$ per cent. for all money that they may pay out. Boulware received the money as guardian of the minors, and paid it out as such. In order to get the money, he was required to increase his bond from \$800 to \$4,500. This fund was in another jurisdiction. He brought it in South Carolina and is entitled to his commissions.

Judgment of the circuit court reversed.

GARY, C. J., and WOODS, HYDRICK, and FRASER, JJ., concur.

(113 Va. 567)

DIME DEPOSIT & DISCOUNT BANK OF SCRANTON, PA., v. WESCOTT et al.

(Supreme Court of Appeals of Virginia. June 13, 1912.)

1. LANDLORD AND TENANT (§ 269*)—LEASES—CONSTRUCTION.

C. and his wife and three others granted to S. and B. the sand located on a tract of land at a fixed price per cubic yard, with the right of ingress and egress and to locate buildings, etc. The grantees assigned their interest to a company, to which C. and his wife by a later agreement granted the right to build wharves, etc., and leased 4 acres; it being recited that it was desirable to extend the terms of the previous contract to secure the land necessary for wharves, etc. Held, that the agreements cannot be regarded as one contract; and hence, under Code 1904, §§ 2791, 2962, personal property which had been removed from the land covered by the first agreement to the 4-acre tract more than 30 days was not subject to levy under a distress warrant for rent accruing under the first agreement.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 1083-1097; Dec. Dig. § 269.*]

2. CONTRACTS (§ 164*)—SEPARATE AGREEMENTS—CONSTRUCTION.

Where two papers are executed at the same time between the same parties in reference to the same subject-matter, they must be regarded as parts of the same transaction, and receive the same construction as if their several provisions were in one and the same instrument.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 746-748; Dec. Dig. § 164.*]

Appeal from Circuit Court, Northampton County.

Action between the Dime Deposit & Discount Bank of Scranton, Pa., and Mary E. Wescott and others. From the judgment, the Dime Deposit & Discount Bank appeals. Reversed.

This is a controversy between creditors of the Old Dominion Granite Brick Company, an insolvent corporation. The appel-

lant claims that it has the superior lien on the proceeds of certain personal property by virtue of a fieri facias levied upon it prior to the levy of a distress warrant and attachment sued out by the appellees. The latter insist that their lien is superior to that of the appellant, although the levy under which they claim was later in date, because the relation of landlord and tenant existed between them and the debtor company. The appellant denies that the demand of the appellees is for rent, and insists that, if it were, the property levied on was not on the leased premises, and, so far as it ever had been, had been removed therefrom for more than 30 days prior to the levy.

The commissioner who took the account in the case reported that the property levied on was on a 4-acre parcel of land upon which the debtor company had erected its factory and other buildings, which land was not within the boundaries described in the agreement of May 14, 1906, the original lease, as claimed by the appellees, and that the sand levied on, which came from lands described in that agreement, had been removed therefrom more than 30 days before the levy.

The 4 acres upon which the property was when levied on is land embraced in an agreement dated February 14, 1907. These two writings, it is claimed by the appellees, must be construed together, and constitute one entire lease, and that property on lands described in either writing was liable for the rent claimed.

The agreement of May 14, 1906, is as follows:

"This agreement, made this 14th day of May, A. D. 1906, between Mary E. Wescott, Anna Cora Wescott, William H. Wescott, E. W. Custis, and Mary E. Custis, his wife, hereinafter called the 'vendors,' of the first part, and L. M. Sturgis and John P. Butler, hereinafter called the 'purchasers,' of the other part,

"Witnesseth: That the said vendors, in consideration of the sum of ten cents (\$.10) per cubic yard, to be paid them by the said purchasers or their assigns, as hereinafter provided, and of the agreements and covenants as hereinafter contained to be done and performed on the part of the said purchasers, do by these presents agree to sell unto the said purchasers and their assigns all the sand being on that certain tract of land lying and being in Savage's Neck, in Northampton county, Virginia, beginning at the southwestern corner of the land of Mrs. F. G. Mapp, and running along the bay shore at ordinary high-water mark to Sandy Point, and lying between said bay shore and a certain line of marked trees on the east, with full and free liberty of entry and right of way for the said purchasers, their assigns, their servants, agents, workmen, and teams, in, through, over, and upon said premises, for the purpose of taking and removing and

carrying away the said sand and manufacturing the same; the said purchasers to take not less than twelve hundred cu. yds. (1,200 cu. yds.) of sand per month, unless prevented by act of God or unavoidable accident from so doing. It is understood that the fee-simple title in said lands do not pass to the purchasers or their assigns under this agreement. It is further agreed, by and between the said parties, that the said purchasers shall cut no timber and shall injure no crops, nor interfere with any rights of fishing and oystering now owned by said vendors. It is further agreed, by and between the said vendors and said purchasers, that the said purchasers shall have the right of ingress and egress, to and from said land, over the lands of the said vendors for all lawful purposes, as may be designated by the said vendors, and that they, the said purchasers and their assigns, shall have the privilege of putting upon the lands of the said vendors all necessary buildings, and factories which may be necessary for them to erect, in order to properly use and manufacture said sand, the points at which said buildings and factories to be erected to be designated by said vendors; and it is also agreed that said purchasers shall have the right to build along the said bay shore such wharves and boat landings as they deem necessary to properly conduct their business, and that the said vendors shall have the right and privilege to use said wharves and boat landings so built by said purchaser, free of charge.

"In consideration whereof, the said purchasers do by these presents agree to pay unto the said vendors, their executors, administrators, or assigns, the sum of ten cents (\$.10) per cubic yard of sand without deduction, the method of estimating a cubic yard to be in such a manner as may be satisfactory to the said E. W. Custis and Wm. H. Wescott, payment for all sand used during any month on or before the 10th day of the succeeding month. It is further agreed, by and between the aforesaid parties, that the said parties of the second part, or their assigns, shall begin taking the same on or before the 1st day of December, A. D. 1906. This contract is executed in triplicate."

In November of the same year Sturgis and Butler, parties of the second part to that agreement, assigned all their right, title, and interest in it to Brundage and Knapp, trustees, who acquired the same for the benefit of the Old Dominion Granite Brick Company (the debtor corporation), and afterwards, in April, 1908, assigned the same to that company.

In February, 1907, E. W. Custis and Mary E., his wife, two of the five parties of the first part to the agreement of May 14, 1906, entered into the following agreement with the debtor company:

"This agreement, made this 14th day of

February, A. D. 1907, between E. W. Custis and Mary E. Custis, his wife, of Eastville, Northampton county, Virginia, parties of the first part, and the Old Dominion Granite Brick Company, Incorporated, a corporation of the state of Virginia, party of the second part:

"Whereas, by the terms of a certain contract dated the 14th day of May, A. D. 1906, the said E. W. Custis and wife, joined by others, did agree with L. M. Sturgis and John P. Butler, giving and granting unto the said Sturgis and Butler the exclusive right to take all the sand being in and upon that certain tract of land in Savage's Neck, Northampton county, Virginia, in said contract fully described, and for the purposes and at the rates of compensation fully set forth in said contract, which said contract is duly recorded in the proper office for the recording of deeds and other documents in Northampton county, Virginia, to which reference is hereby made, and by the terms of said contract, it was further agreed, that the said Sturgis and Butler should have the privilege of putting upon the lands of the said Custis and wife, and others aforesaid, all necessary buildings and factories, which may be necessary for them to erect and maintain in order to properly use and manufacture said sand, the points at which said buildings should be located, erected, and maintained to be designated by said Custis and wife, and others aforesaid, also that the said Sturgis and Butler should have the right to build along the bay shore such wharves and bay landings as they might deem necessary to properly conduct their business; and whereas, all the title, right, and interest of the said Sturgis and Butler in said contract has heretofore been assigned unto F. E. Brundage and H. A. Knapp, trustees for the Old Dominion Granite Brick Company, Incorporated, which said assignment has been duly recorded in the same office for recording deeds aforesaid; and whereas, the said parties of the first part hereto are the owners of that portion of Savage's Neck upon which the said Old Dominion Granite Brick Company, Incorporated, desire to erect, construct, and maintain their factory and build their wharf for the shipping of their products, and it is deemed desirable to have a modification or extension of the terms of said contract so far as concerns the landing necessary for wharves, piers, factories, buildings, and plans of said brick company, which modification or extension has been agreed upon by the parties hereto:

"Now, therefore, in consideration of the premises and of the sum of one (\$1.00) dollar, by each of the parties hereto unto the other in hand well and truly paid, the receipt whereof is hereby acknowledged, it is hereby agreed as follows, to wit:

"First. The brick company shall have the right to build a wharf or pier at Sandy

Point into Cherrystone creek, near the end of the said point, and to occupy as much land as may be necessary for that purpose, and also to extend a track or tracks in as nearly a straight line as practicable from this point to the sand deposit, situate about one mile in a northerly direction, and to use, occupy, and maintain said tracks with as much land as may be necessary for the same, not to exceed ten feet in width at any point where it runs through the timber of the parties of the first part north of field where the plant of said brick company is to be constructed, during the entire life of said contract of May 14, 1906.

"Second. The said brick company shall have the right to use and occupy for the construction and maintenance of their factory and buildings appurtenant thereto, which may be necessary in the proper conduct of their business, a piece of land as follows: Starting at an iron pin driven in the ground at a corner of the woods of the parties of the first part, as designated by said parties; thence in an easterly direction, about 240 feet, to a corner; thence in a southerly direction, about 750 feet, to a corner; thence in a westerly direction, skirting a small pond, about 430 feet, to a corner; thence in a northerly direction to the iron pin, place of beginning, containing four acres of land as thereabouts.

"Third. In consideration of those additional privileges herein extended to the said brick company, it is agreed that five hundred dollars of the preferred stock in said brick company and \$1,000 of the common stock of said brick company shall be issued unto the said Custis and wife. The Old Dominion Granite Brick Company doth hereby constitute and appoint Henry A. Knapp to be its attorney for it and in its name, and as for its corporate act and deed, to acknowledge this agreement before any persons having authority, under the laws of the state of Pennsylvania, to take such acknowledgment, to the intent that the same may be duly recorded.

"In witness whereof, this contract has been executed by the said parties hereto on the day and year first above written."

Starke, Venable & Starke and Kendall & Daniel (S. T. Stancell, of counsel), for appellant. Otho F. Mears, for appellees.

BUCHANAN, J. (after stating the facts as above). If it be true, as contended by the appellant, that the property on which the distress warrant and attachment were levied was not on the premises for which the rent was claimed to be due, and had been removed therefrom for more than 30 days prior to the levy, then it is wholly immaterial whether the relation of landlord and tenant existed between the appellees and the debtor company; for, even if such relation did exist, the

appellant's claim would be superior to that of the appellees.

[1] It is clear, we think, that the agreements of May, 1906, and February, 1907, cannot be considered as constituting one contract. While the latter recites in substance the provisions of the former writing, and states that the brick company desires to erect its factory and build its wharf on property owned by Custis and wife, and that it is deemed desirable to have a modification or extension of the terms of the agreement of May, 1906, "so far as concerns the landing necessary for wharves, piers, factories, buildings, and plans" of the brick company, the parties to the two agreements are different and the subject-matter is not the same. There were five persons parties of the first part to the agreement of May, 1906. Of these only two were parties to the agreement of February, 1907. The four acres of land which the brick company acquired the right to use and occupy for the construction of its plant by the latter agreement were not within the boundaries described in the agreement of May, 1906. The consideration paid for it was stock in the brick company, issued to the two parties of the first part in the February agreement, and not to the five persons who were parties of the first part in the May agreement.

[2] Where two papers are executed at the same time, or simultaneously, between the same parties in reference to the same subject-matter, they must be regarded as parts of the same transaction and receive the same construction as if their several provisions were in one and the same instrument. *Portsmouth Refining Co. v. Oliver Refining Co.*, 109 Va. 513, 520, 64 S. E. 56, 32 Am. St. Rep. 924, and authorities cited; *Nye v. Lovitt*, 92 Va. 710, 714, 24 S. E. 345. But we know of no rule of law that would authorize or justify the court in construing as one instrument two writings executed under the circumstances disclosed by this record.

The rent or royalty, for the collection of which the distress warrant and attachment were sued out, was due or to become due under the agreement of May, 1906, was payable jointly to all five of the persons who were parties of the first part to that agreement, and the said proceedings for its collection were in the name of and for the benefit of all of them. The property levied on under the distress warrant and attachment not being on the premises described in that agreement (the leased premises, if the agreement were a lease, as to which we express no opinion), and none of it having been on said premises for more than 30 days prior to the levy, it was not subject to such levy; for there is no authority for levying either a distress warrant or an attachment for rent upon property which has been removed from

the leased premises more than 30 days. Code, §§ 2791, 2962.

It follows, from what has been said, that we are of opinion that the circuit court erred in holding that the lien of the appellant was inferior to the claim of the appellees, and that its decree so holding must be reversed, and this court will remand the cause to the circuit court for further proceedings in accord with the views expressed in this opinion.

Reversed.

(113 Va. 709)

WHITE et al. v. OLD et al.

(Supreme Court of Appeals of Virginia. June 13, 1912.)

1. WILLS (§ 456*)—CONSTRUCTION—MEANING OF WORDS.

Words in a will which have a definite primary meaning must be understood to be used in such sense, unless an intention to use them in another sense manifestly appears.

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. § 974; Dec. Dig. § 456.*]

2. WILLS (§ 499*)—CONSTRUCTION—MEANING OF WORDS—"NIECE" OR "NEPHEW."

Testator gave a legacy to his niece Kate, daughter of Dr. H. W., and to Dr. H. W. a specified sum for himself and his other children, and he gave legacies to any niece or nephew whom he had omitted, excepting the children of Dr. H. W., for whom he had made provision. Testator was a widower, who had never had any children, and left surviving him a number of nieces and nephews, and grandnieces and grandnephews, descendants of sisters who died before the execution of the will. There were two Drs. H. W., father and son; the father being the father of the niece Kate. Testator had a niece Mrs. P., who was omitted from the will, and the legacy to her was on her death paid to her children. *Held*, that the words "niece or nephew" did not embrace grandnieces and grandnephews.

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. § 1067; Dec. Dig. § 499.*]

For other definitions, see *Words and Phrases*, vol. 5, pp. 4775, 4776, 4807, 4808.]

3. WILLS (§ 483*)—CONSTRUCTION—PROPERTY DEVISED—EFFECT.

Testator provided that if, under the decision of the Supreme Court of Appeals recently rendered in a suit involving the construction of his wife's will, he should receive his distributive share of her estate free from claims, he desired his executor to purchase a lot in the city of Norfolk to erect thereon a public library building, and he devised to the Norfolk Public Library, a domestic corporation, such lot, provided it would erect a public library building thereon. The executor was unable to carry out the provision immediately, and subsequently another donated a lot as a site for a public library building, and the library corporation, with funds furnished by a third person, erected a public library thereon. The library corporation insisted that the lot devised by testator was necessary to meet the growing needs of the city for another library building, and insisted on its capacity to hold, and its ability and readiness to erect thereon a suitable library building. *Held*, that the devise was valid.

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. § 1014; Dec. Dig. § 483.*]

Appeal from Law and Chancery Court of City of Norfolk.

Suit by W. W. Old, executor of Henry Dubois Van Wyck, deceased, against one White and others, to construe the will of the deceased. From a decree construing the will, certain defendants appeal. Reversed in part, and affirmed in part.

N. T. Green and Maryus Jones, for appellants. J. B. Jenkins, W. W. Old, Jr., G. Tayloe Gwathmey, and A. B. Seldner, for appellees.

WHITTLE, J. This bill was filed by W. W. Old, executor of Henry Dubois Van Wyck, deceased to construe two clauses of testator's will. The first of these clauses is as follows:

"To any niece or nephew of mine whom I have omitted or neglected in making the above provisions (excepting the children of Dr. Howell White, for whom I have provided as hereinbefore set out) the sum of three thousand dollars."

The testator was a widower, who had never had any children and left surviving him a brother, and nieces and nephews, and grandnieces and grandnephews, descendants of four sisters who died before the execution of the will. Dr. Howell White, here mentioned, was a nephew, and appellees' contention is that the effect of the parenthetical language employed in the foregoing clause referring to the children of Dr. White, who were grandnieces and grandnephews of the testator, manifests a purpose to enlarge the primary meaning of the words "any *niece* or *nephew*," so as to include *grandnieces* and *grandnephews*. The trial court so construed the clause, and from that ruling the residuary legatees appealed.

The provision for the White children referred to occurs in a previous clause of the will as follows: "To my niece Kate Bartow, daughter of Dr. Howell White and Helena White, the sum of two thousand dollars; and to Dr. Howell White the sum of ten thousand dollars for himself and his other children." There were two Drs. Howell White, father and son. That the first part of the preceding clause refers to the elder White is made plain by the fact that he is the father of Kate Bartow; and that the subsequent bequest of \$10,000 to Dr. Howell White, "for himself and his other children," has reference to Dr. Howell White, Jr., is shown by the circumstance that the only children of the elder Dr. White are Mrs. Kate Bartow and Dr. Howell White, Jr. Besides, the pleadings show that the father predeceased the testator. The adjective "other," which precedes "children," has no significance; and the conclusion that its insertion was a mere inadvertence gains color from the fact that prior to the execution of the present will the testator had, at different times, prepared three drafts of wills

along the same general line, and in the corresponding clause in each of these drafts the word "other" is omitted.

We pass, then, to the consideration of the concrete question involved in this branch of the controversy, namely, whether testator, in using the words "niece" and "nephew," intended to include grandnieces and grandnephews.

[1] It is a canon of construction that words in a will or other written instrument which have a definite primary meaning must be understood to be used in that sense, unless an intention to use them in some other sense manifestly appears. *Nye v. Lovitt*, 92 Va. 710, 24 S. E. 345; *Vaughan v. Vaughan*, 97 Va. 322, 33 S. E. 603; *Brett v. Donaghe*, 101 Va. 786, 45 S. E. 324; *Roberson v. Wampler*, 104 Va. 380, 51 S. E. 835, 1 L. R. A. (N. S.) 318; *Roanoke v. Blair*, 107 Va. 639, 60 S. E. 75.

In 3 Jarman on Wills (5th Am. Ed., from 4th London Ed., notes by Randolph & Talcott) p. 707, rule XVI, the principle is thus stated: "That words, in general, are to be taken in their ordinary and grammatical sense only, unless the clear intention to use them in another can be collected and that other can be ascertained."

In *Wootton v. Redd*, 53 Va. 196, Judge Lee, at page 206, observes: "Conjecture cannot be permitted to usurp the place of judicial conclusion, nor to supply what the testator has failed sufficiently to indicate." *Waring v. Bosher*, 91 Va. 286, 21 S. E. 464; *Allison v. Allison*, 101 Va. 537, 44 S. E. 904, 63 L. R. A. 920. See, also, the opinion of Mr. Justice Blackstone in *Perrin v. Blake* (1771) *Hargrave's Law Tracts*, 489-510; s. c. 10 Eng. Rul. Cases, 689.

In *Crook v. Whitely*, 7 De G., M. & G. 490 (44 Eng. Reprint, 191), Lord Chancellor Cranworth remarks: "According to the ordinary rule of construction, the word 'niece' as used in this will must be taken in its natural sense, which means the children of a brother or sister."

In *Schouler on Wills*, § 536, it is said: "Notwithstanding the equivocal sense of 'nepos,' in Roman jurisprudence, 'nephew' means in English law the son, and 'niece' the daughter, of a brother or sister, and great-nephews and greatnieces are not embraced by the term."

So, in *Lomax on Executors*, 36, subsec. 15: "'Nephews' and 'nieces' will not, upon the principles already stated with respect to the construction and enlargement of the term 'children' and 'grandchildren,' ordinarily comprehend grandnephews and grandnieces."

The rule that "children means generally issue in the first degree, and does not embrace grandchildren," has been repeatedly decided by this court. *Smith v. Chapman*, 11 Va. 246; *Thomason v. Anderson*, 31 Va. 127, 128; *Moon v. Stone*, 60 Va. 130; *Waring v. Waring*, 96

Va. 641, 32 S. E. 150; *Vaughan v. Vaughan*, supra; *Brett v. Donaghe*, supra.

[2] Looking, therefore, to the will as a whole, we find nothing upon which to lay hold as a safe guide to indicate an intention on the part of the testator to use the words "any niece or nephew of mine" in other than their primary or ordinary sense. It will be noted that, exclusive of the clause under interpretation, testator employs the word "niece" only twice in his will. He speaks of his "niece" Mrs. Van Gelsen and of his "niece" Kate Bartow, and in each instance applies the word in its primary sense. On the other hand, the words "grandniece" and "grandnephew" do not occur in the entire will, but legatees of that class are designated either by name or as the "children" of their parents.

In *Re Woodward*, 117 N. Y. 522, 23 N. E. 120, 7 L. R. A. 367, the court uses this language: "As to the appellants, they are called by the testator, not 'nephews' or 'nieces,' but 'children' of his deceased 'niece,' and in the same clause are twice referred to in that manner—a discrimination in language and choice of words of description which indicate no intention to include the persons named with nephews and nieces, but the contrary. It is obvious that testator had in his mind the different degrees of relationship of his various beneficiaries, and the selection of different words to describe them cannot be attributed to mistake or inadvertence."

It moreover appears that testator had a niece, Mrs. Catherine Parks, who was omitted from his will, and that fact satisfies the language of the clause in judgment, other than the parenthetical proviso. Mrs. Parks having died, her legacy was paid to her children. Yet, if the construction given to the clause be correct, each of these children of Mrs. Parks, in addition to their mother's portion, is entitled to receive a legacy of \$3,000, which could hardly have been testator's intention.

In *Shelly v. Bryan* (1821) *Jacobs*, 207 (37 Eng. Reprint, 824), a leading case on the meaning of "nieces" and "nephews," Sir Thomas Plummer, M. R., says: "But it would be contrary to the authorities to interpret a term having a proper application to one class as extending to two classes, comprising both parents and children."

And in *Crook v. Whitely*, supra, Lord Chancellor Cranworth observes: "But I do not know any case in which it has been held that the same words can be construed to include persons of different degrees in the same class."

This brings us to the consideration of the force to be given the parenthetical words, upon which the decision of the court of law and chancery seems to have been rested, in the clause under construction: "To any niece or nephew of mine whom I have omitted or neglected in making the above provisions (excepting the children of Dr. Howell White,

for whom I have provided as hereinbefore set out) the sum of three thousand dollars."

The argument is based on the ground that as Dr. Howell White was himself a nephew of testator, and his children grandnieces and grandnephews, the parenthetical words would be useless unless the testator intended to include grandnieces and grandnephews in the expression "any niece or nephew of mine."

The clause as a whole is at most only a precautionary one, intended to avoid the possibility of premitting any of a named class. But in no aspect of the situation is the parenthetical exception necessary to effectuate any intention of the testator. It in terms applies only to "omitted or neglected" nieces and nephews, and (even if grandnieces and grandnephews were intended to be included) it could by no possibility have affected the rights of the children of Dr. Howell White, who were neither "omitted" nor "neglected," but had already been provided for. So that the contention amounts to this: That a useless provision in a precautionary clause in a will shall, by implication, be given the effect of introducing a new class of beneficiaries, embraced by no other language of the will. Such a deduction from an implication affords a most unsafe guide in the exposition of wills or other writings.

In this connection it would be wise to keep in mind the admonition of Sir William James, L. J., in *Re Blowers Trust* (1870) L. R. Ch. App. Cases, 350 (a case like the instant case, where it was sought to vary the ordinary meaning of the words "nephews and nieces," so as to include "grandnephews and grandnieces"): "But before we alter the meaning of words in obedience to a supposed indication of intention of the testator—before we deviate from the direct path in order to follow a light which appears to be held out by the testator—we must take care to be reasonably sure that it is a genuine light, and that we are not following the glare of a will-o'-the-wisp into a morass."

The effect of provisos and exceptions in a statute was luminously considered by the House of Lords in *Guardians of the Poor v. Metropolitan Life Assurance Society, A. C.* (1897) 647, a number of their lordships delivering opinions. Lord Chancellor Halsbury says: "It [his construction of the act] satisfies the words, whilst the other view [that the proviso enlarged the enacting clause] gives to the proviso a meaning which I think would be most formidable, not merely with reference to the question which is now under debate before your lordships, but also as a matter of construction, that a proviso could be so read as to suggest that the previous part of the section of which it is a proviso should imply by law the existence of words there of which there is not a trace in the previous words of the section itself."

My lords, that certainly would be a very serious invasion upon any rule of construction by which any document, whether an act of Parliament or anything else, has ever been construed, and I should be very much averse indeed to lend any countenance to such a mode of construing a proviso."

Lord Davey said the whole argument was based on "the old and apparently ineradicable fallacy of importing into an enactment which is expressed in clear and apparently unambiguous language something which is not contained in it, by what is called implication from the language of a proviso which may or may not have a meaning of its own." Sutherland, Stat. Constr. § 222; Tinkham v. Tapecott, 17 N. Y. 141, 152; Baggaley v. Pittsburg & L. S. I. Co. (C. C. A.) 90 Fed. 636, 36 C. C. A. 202.

The provision of the will construed in *Cromer v. Pinckney*, 3 Barb. Ch. (N. Y.) 466, cited in the opinion of the trial court, was essentially different from the clause before us. The language of the bequest in that case was: "To the children of my nephew John Cromer." John Cromer, though a grand-nephew, was described as a "nephew," which showed conclusively that the word "nephew" was not used by the testator in its primary sense.

Our conclusion, therefore, upon this branch of the case, is that testator used the words "niece" and "nephew" in their ordinary sense, and that the court of law and chancery erred in holding that those words embraced greatnieces and greatnephews.

[3] The other clause of the will involved in this appeal is as follows: "If under the decision of the Supreme Court of Appeals of Virginia recently rendered in the suit therein pending involving the construction of my wife's will, I shall receive my distributive share of her estate free from the claims of fees of the attorneys asserted therein, then I desire my executor to purchase a lot in the city of Norfolk, Virginia, for the purpose of having erected thereon a building for a public library, he to use and invest the money necessary to purchase the said lot as he may think best, and such lot so purchased I devise and bequeath to the Norfolk Public Library, a corporation chartered by the state of Virginia, if the said corporation will erect or have erected a suitable building thereon for a public library, and desire my executor to make or have made the proper conveyance of the said lot to the said corporation."

The decree appealed from upholds this provision of the will. The executor was not able to carry out the provision immediately upon taking charge of the estate; and subsequently the family of the late Dr. William Selden donated a lot as a site for a library building, and the corporation, with funds furnished for the purpose by Andrew Car-

negie, erected a public library thereon. Nevertheless the corporation insists that it is not limited to a single library building, and that the lot in question is necessary to meet the growing needs and demands of the citizens of Norfolk for another library building in the interest of literary improvement. And it insists upon its capacity to take and hold the lot donated by the testator, and its ability and readiness to erect or cause to be erected thereon a suitable building for a public library, as provided for in testator's will.

In these circumstances, there was plainly no error in the decree appealed from, sustaining the devise.

Upon the whole case, the decree must be reversed in part and affirmed in part, as outlined in this opinion.

Reversed in part; affirmed in part.

KEITH, P., absent.

(112 Va. 635)

MONK et al. v. BARNETT et al.

(Supreme Court of Appeals of Virginia. June 13, 1912.)

1. CORPORATIONS (§ 232*) — ISSUANCE OF STOCK—PAYMENT—RIGHTS OF CREDITOR.

Under Const. 1902, § 167 (Code 1904, p. cclxi), and Code 1904, § 1105e, par. 9, providing that corporate stock may be issued in exchange for anything which the board of directors may determine to accept and at any price agreed upon, provided an accurate and verified statement of the transaction be filed with the State Corporation Commission, creditors of a corporation could not complain that \$40,000 of stock had been paid for with certain options and contracts not exceeding \$4,000 in value, where no fraud or deception had been practiced, and the requirements of the constitutional and statutory provisions as to filing of the statement or financial plan had been complied with, and they had no right of action against the holders of such stock.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 879, 880, 883, 884, 987; Dec. Dig. § 232.*]

2. CORPORATIONS (§ 232*) — ISSUANCE OF STOCK—STATEMENT OF FINANCIAL PLAN—SUFFICIENCY.

Though a statement of financial plan filed to comply with such constitutional and statutory provisions was indefinite, vague, and unsatisfactory in its specification and description of the options and contracts exchanged for stock, yet where it was filed with the Corporation Commission, and was in the form prescribed by the Commission, and was permitted, approved, and ordered to be filed by the Commission, it was sufficient to comply with these provisions and protect the holders of the stock from personal liability to creditors of the corporation.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 879, 880, 883, 884, 987; Dec. Dig. § 232.*]

Appeal from Circuit Court, Norfolk County.

Action by John Monk and another against O. M. Barnett and others. From a decree for defendants, plaintiffs appeal. Affirmed.

Jeffries, Wolcott, Wolcott & Lankford, for appellants. Robt. W. Shultice and Williams & Tunstall, for appellees.

CARDWELL, J. This case, which is now before us for the second time, originated in a bill in equity filed by appellants against the Exposition Deepwater Pier Corporation and appellees, C. M. Barnett, J. W. Hough, and H. B. Goodridge, who were the only stockholders and incorporators of said corporation; the purpose of the bill being to enforce the mechanic's lien of the appellants against the pier and land of the Exposition Deepwater Pier Corporation, and to require the stockholders of the corporation to pay in full their subscriptions to the capital stock of the company.

There were two questions presented upon the former appeal, and upon the first of these questions this court reversed the decree of the circuit court appealed from, and remanded the cause, declining to pass upon the second question, for the reason that it appeared from the evidence in the record that the property of the corporation was sufficient to pay appellants' lien debt thereon; but the opinion added: "If, however, the real estate should prove inadequate to satisfy the lien, the appellants are not to be concluded by the decree under review from seeking such relief as they may be entitled to, if any, against the stockholders. *Monk v. Exposition Deepwater Pier Corp.*, 111 Va. 121, 68 S. E. 280.

It appears that when the evidence in the cause was taken the pier was comparatively new, and was supposed to be worth the amount named by the witnesses—\$10,000; but from various causes operating during the delay because of litigation as to the rights of the respective creditors in the property, it, after full advertising and active bidding, brought at public auction on September 17, 1910, only \$2,400, leaving about \$4,000 still due appellants. Thereupon appellants proceeded in their effort to obtain a decree against said stockholders for an amount sufficient out of what remained unpaid of their subscriptions to discharge the balance of the debt alleged to be due appellants; but upon a final hearing of the cause the circuit court entered its decree now under review, holding that said stockholders had substantially complied with the provisions of the Constitution and statutes of the state "enacted for the formation and regulation of corporations in this state, and that said stockholders [appellees here] had paid in full their subscriptions to the stock of the Exposition Deepwater Pier Corporation, and that there was no further liability upon them, or either of them," dismissing appellants' bill as to said stockholders.

Appellees, Barnett, Hough, and Goodridge, who, as has been stated, were all the stock subscribers and incorporators of said Deepwater Pier Corporation at the time of its

organization filed with the State Corporation Commission, in March, 1907, a statement of the financial plan upon the basis of which the stock or bonds of the corporation were to be issued, and the contention of appellants is that said statement filed by appellees was not such a compliance with the provisions of section 167 of the Constitution of Virginia (Code 1904, p. cclxi) and of section 1105e, par. 9, of the Code of 1904, as would avail appellees of the privilege extended by the statute of avoiding their common-law liability to pay into the treasury of the company so much of their stock subscriptions, up to the par value thereof, as might be necessary to discharge the indebtedness of the corporation.

[1] Section 167 of the Constitution, *supra*, confers upon the General Assembly power to make general laws regulating and controlling all issues of stock and bonds by corporations, and further provides:

"Whenever stock or bonds are to be issued by a corporation, it shall before issuing the same file with the State Corporation Commission a statement (verified by the president or secretary of the corporation, and in such form as may be prescribed or permitted by the Commission), setting forth fully and accurately the basis, or financial plan, upon which such stock or bonds are to be issued; and where such basis or plan includes services or property (other than money), received or to be received by the company, such statement shall accurately specify and describe, in the manner prescribed or permitted by the commission, the services and property, together with the valuation at which the same are received, or to be received; and such corporation shall comply with any other requirements and restrictions which may be imposed by law."

Said section of the Constitution then required the General Assembly to provide adequate penalties for the violation of the section, or any laws passed in pursuance thereof.

The statute (paragraph 9, § 1105e, *supra*) provides:

"Subscriptions to the capital stock of any corporation may be paid in money, land, or other property, real or personal, leases, options, mines, minerals, mineral rights, patent rights, rights of way, or other rights or easements, contracts, labor, or services; and there shall be no individual or personal liability on any subscriber beyond the obligation to comply with such terms as he may have agreed to in his contract of subscription; and any corporation may adopt such plan of financial organization and may dispose of its stock or bonds for the purposes of its incorporation at such prices, for such consideration, and on such terms and conditions as it sees fit: Provided, however, that before making any issue of its stock or bonds it shall file with the State Corporation Commission a statement (verified by oath of the

president or secretary of the corporation, and in such form as may be prescribed or permitted by the Commission), setting forth fully and accurately the basis or financial plan upon which such stock and bonds are to be issued; and where such basis or plan includes services or property (other than money) received or to be received by the corporation, such statement shall accurately specify and describe in the manner prescribed or permitted by the Commission the services and property, together with the valuation at which the same are received, or to be received, and the judgment of the directors as to the value of such land or other property, real or personal, leases, options, mines, mineral rights, patent rights, rights of way, or other rights or easements, contracts, labor, or services, in the absence of fraud, participated in by both parties to the transaction, shall be conclusive.

"For any violation of this section the offending corporation shall be liable to a fine of not exceeding one thousand dollars, to be imposed and judgment entered therefor by the State Corporation Commission, and shall be enforced by its process."

The financial plan filed with the State Corporation Commission in this instance is as follows: "Four hundred shares, valued at \$4,000, are to be issued to J. W. Hough, H. B. Goodridge, and C. M. Barnett as fully paid in consideration of their turning over to said company their options, rights, and contracts to acquire land and build a pier near the Exposition Grounds, and their contracts with various steamboat lines to use said pier exclusively in taking passengers to said grounds, and contracts with said steamboat companies and with the Jamestown Exposition Company to take and pay cash for certain bonds of this company; said rights, options, and contracts being valued at four thousand dollars."

It appears that appellees subscribed to \$40,000 of the stock of the Deepwater Pier Corporation, and paid for it with the contracts and options named in said plan of organization, all of which were worth, according to their own valuation, but \$4,000; and it is conceded in the argument of this appeal that "the very object of section 187 of the Constitution was to do away with the common-law liability of stockholders," under which they could be required to pay (in money) for their stock up to the par value thereof until the debts of the company were satisfied.

Very clearly the provisions of the Constitution and statute change the former rule, and persons organizing a corporation can subscribe to its capital stock and pay therefor in anything which the board of directors may determine to accept, and at any price which may be agreed upon, and the stock may be paid for at any price at which it may be offered by the company, and no one can complain, provided the requirements of

the Constitution and statute are complied with. Therefore the sole question for our determination in this case is: Where no fraud or deception has been practiced, does the financial plan of organization in question meet the requirements of the provisions of the Constitution and statute, and thereby relieve the appellees of their common-law liability to pay for the stock subscribed to by them up to the par value thereof until the debts of the company are satisfied?

It is very true, as appellants contend, that the statute, *supra*, enacted pursuant to section 187 of the Constitution, with respect to the liability of subscribers to the capital stock of a corporation chartered under the laws of this state, is in derogation of the common law and has to be given a strict construction; but it will readily be observed that the statute, in language plain and unambiguous, provides that subscriptions to the capital stock of any corporation may be paid, not only in money, but in every or any species of property or property rights that could be suggested, including leases, options, contracts, labor, or services, etc., and there shall be no individual or personal liability on any subscriber beyond the obligation to comply with such terms as he may have agreed to in his contract of subscription; that any corporation may adopt such plan of financial organization, and may dispose of its stock or bonds for the purposes of its incorporation at such prices, for such consideration, and on such terms and conditions as it sees fit, provided a statement of its financial plan of organization is first filed with the State Corporation Commission, in such form as may be *prescribed or permitted* by the Commission, setting forth fully and accurately the basis or financial plan upon which such stock or bonds are to be issued; and where such basis or plan includes services or *property* (other than money), received or to be received by the corporation, such statement shall accurately specify and describe in the manner *prescribed or permitted* by the Commission the services and *property*, together with the value at which the same are received, or to be received, and the judgment of the directors as to the value of the services or *property*, real or personal, leases, options * * * contracts, etc., in the absence of fraud, *shall be conclusive*.

In this case appellees subscribed to \$40,000 of the stock (400 shares) of the Exposition Deepwater Pier Corporation, and agreed with themselves as the incorporators and directors of the company that said stock be issued to them *fully paid* in consideration of their turning over to the company "their options, rights, and contracts to acquire land and build a pier near the Exposition Grounds, and their contracts with various steamboat lines to use said pier exclusively in taking passengers to said grounds, and contracts with said steamboat companies

and with the Jamestown Exposition Company to take and pay cash for certain bonds of this company, said rights, options and contracts being valued at four thousand dollars."

[2] A more indefinite, vague, and unsatisfactory specification and description of the options and contracts agreed to be turned over to the company by appellees in payment for the \$40,000 of stock fully paid to be issued to them by the company is hardly to be conceived; but the statement of the financial plan of the organization of the corporation filed with the Corporation Commission was in the form prescribed by the Commission, and was by the Commission *permitted* when it received, approved, and ordered the same to be filed and to become a matter of record in the office of the Commission.

By the adoption of our present Constitution, and the enactment of statutes pursuant thereto, relating to the issue of stocks and bonds by corporations, the policy of granting charters of incorporation to almost every conceivable business undertaking then in existence, or that might be undertaken within the state, was inaugurated, and though the policy may be fraught with ever so many possibilities, indeed probabilities, of fraud and imposition upon individuals, firms, or other corporations dealing with or becoming creditors of a corporation chartered in the state, the courts, in the absence of the charge and proof of fraud in the obtaining of the charter or the organization of the corporation, or the issuing of its stock, are powerless to prevent or to redress such wrongs or impositions.

This new policy now in vogue in this state has not only in view the granting of a charter to any three or more individuals to conduct, as a corporation, any business that might be conducted by an individual or individuals within the state, but invites the application for such charters, and provides that all persons, firms, partnerships, or other corporations contracting with the corporation chartered in the state must look to the records of the State Corporation Commission for information there to be found, or suggested, as to the character, location, and value of the assets of the corporation, and if they fail to look to said records, or fail to make proper inquiry along lines suggested by these records, and sustain a loss or injury in consequence of such neglect of duty, they shall have no remedy in the courts against the stockholders having certificates of fully paid stock for such loss or injury.

One who is advised or might have been advised as to the character and value of the assets of a corporation, and extends credit to the corporation, cannot, in the absence of fraud in the organization of the company, or the issuing of its stock or bonds, complain

that the assets of the company were not as valuable as he expected them to be, and he has no remedy or right of action against the stockholders of the corporation holding its fully paid stock.

Such is the case before us, and we are of opinion, therefore, that the decree appealed from is right, and it is affirmed.

Affirmed.

(113 Va. 511)

BURGWYN v. JONES et al.

(Supreme Court of Appeals of Virginia. June 13, 1912.)

1. FRAUDS, STATUTE OF (§ 76*)—PAROL PARTNERSHIP AGREEMENT.

A parol agreement, which creates a partnership for the purchase and sale of real estate for speculation and for the division of the profits among the partners, is valid, notwithstanding the statute of frauds, and the existence of the firm and the interests of the partners may be proved by parol.

[Ed. Note.—For other cases, see *Frauds*, Statute of, Cent. Dig. §§ 135-139; Dec. Dig. § 76.*]

2. FRAUDS, STATUTE OF (§ 76*)—PAROL PARTNERSHIP AGREEMENT—"AGREEMENT FOR THE SALE OF REAL ESTATE."

A parol agreement, creating a partnership and giving the partners an interest in real estate owned by a partner at the time of the formation of the firm, is an agreement for the sale of real estate, within the statute of frauds, and is void.

[Ed. Note.—For other cases, see *Frauds*, Statute of, Cent. Dig. §§ 135-139; Dec. Dig. § 76.*]

Appeal from Circuit Court, Nottoway County.

Suit by C. P. E. Burgwyn against W. I. Jones and others. From a decree of dismissal, plaintiff appeals. Affirmed.

Chas. E. Plummer, for appellant. W. Moncure Gravatt, T. Freeman Epps, and H. H. Watson, for appellees.

BUCHANAN, J. The decree appealed from held that the agreement upon which the appellant, who was the complainant in the circuit court, based his right to the relief sought, was one providing for the sale of an interest in real estate, and, not being in writing, was invalid under clause 6 of section 2840 of the Code. The agreement relied on was made in August, 1906, and, as set out in the bill, is as follows:

"The property known as the 'Fitzgerald Mill Property,' situated in Nottoway county, Virginia, near Nottoway Courthouse (the legal title to which at the time said agreement was made being in the said M. W. Gill, E. F. Peirce, and W. I. Jones as aforesaid), was to be examined by your complainant, and a report on said property, dealing with its possibilities as a power plant and its availability for furnishing electric light power to the neighboring towns, was to be made by your complainant to said M. W. Gill, E.

F. Peirce, and W. I. Jones, or to any one of them, and your complainant was to perform such other services as would naturally be performed by an engineer, such as surveying, making estimates of the cost of development, etc.; that as soon as your complainant made such examination, submitted such report, and performed such other services as would naturally fall to him, all of said parties, to wit, M. W. Gill, E. F. Peirce, W. I. Jones, and your complainant, were to endeavor to sell said property at the best price and on the best terms that could be secured, said property to be sold as a whole, and each of said parties to deal with said property as to them might seem best, the one object being to secure a purchaser at a price which would yield a profit upon the money invested and the services performed; and that as soon as said property should be sold, the profits realized on said transaction should be equally divided between the four parties above mentioned.

"(6) Your complainant avers that said agreement was in effect a partnership agreement, and that said parties were, as between themselves, copartners; that it was mutually understood and verbally agreed by and between said parties that your complainant, by reason of the services to be rendered by him for the benefit of said undertaking, was to have an interest in the said property equal to that of any of said parties, after the purchase price of said property and the expense of maintaining the same had been deducted, and that all of the said parties would work together for their common benefit."

As appears from the allegations of the bill filed in September, 1908, Jones, Peirce, and Gill were the fee-simple owners of the real estate at the time the alleged partnership agreement between them and the complainant was made, by which he was "to have an interest in the said property equal to that of any of said parties after the purchase price of said property and the expense of maintaining the same had been deducted." It was further alleged in the bill that in the year 1907 Gill sold and conveyed all his interest in the said land to Peirce and Jones, and that later in the same month Peirce sold and conveyed all his interest therein to Jones, the vendee in such sale assuming the liability then resting on the vendor; that in the same year Jones sold and conveyed an undivided one-half interest in the land to Carter, White, and Epes, who were purchasers without notice of the appellant's rights; that the appellant, therefore, only had an equitable interest in the undivided half of the property owned by Jones, but was entitled to have an accounting from him for the proceeds arising from the sale of the other half, and was entitled to one-fourth of all the profits that have been or may be realized on the sale of the property. It was prayed that there might be a settlement of the part-

nership accounts, that his equitable interest in this undivided half of the land standing in Jones' name be established and protected, that his share in the profits which have accrued from the transaction be ascertained and decreed him, and for general relief.

In the year 1911 the appellant filed his amended and supplemental bill, of which he made the original a part, and in which he alleged that since the filing of the original bill the whole of the land had been sold to the Norfolk & Western Railway Company (the latter having knowledge of his rights), reiterated the allegations of his original bill that he is the owner of an equitable interest in the land so sold, and prayed that the Norfolk & Western Railway Company be made a party defendant to the bill (which was done), and for substantially the same relief that he sought by his original bill.

[1, 2] It is well settled in this state that a partnership for the purchase and sale of real estate for speculation, the profits to be divided among the partners, is valid when verbally made, and the existence of the partnership and the extent of the interest of the partners may be shown by parol. *Miller v. Ferguson*, 107 Va. 249, 250-252, 57 S. E. 649, 122 Am. St. Rep. 840, 13 Ann. Cas. 138, and authorities cited. But the precise question in this case seems not to have been involved in any of the cases cited and decided by this court. In those cases the partnership formed was for the future purchase and sale of lands for profit. In this case the land in which or in the proceeds of which, the appellant claims an interest, was at the time the partnership was formed the property of the members of the firm other than the complainant.

It is insisted by the appellee Jones that there is a wide distinction between an agreement to acquire an interest in or to share the profits of lands thereafter to be acquired and an agreement to become interested in and to share the profits from lands already purchased and owned by a member or members of the firm when the partnership is formed. Upon this question the authorities are not agreed.

Browne, in his work on the Statute of Frauds (section 261a), is inclined to the opinion that the weight of authority is in favor of the view that it is not material, where the land is used for partnership purposes, "whether the partnership was already established and engaged in its business when the land was acquired and brought into the stock, or whether it was established and the land acquired and put in contemporaneously, or whether the partnership was established for the purposes of some other trade or business, or for the special purpose of dealing in and making a profit out of the very land itself which is in question."

Our cases, as before stated, fully recognize and enforce the rule as stated by the learn-

ed author, so far as it applies to the purchase of lands made subsequent to the formation of the parol partnership for dealing in real estate; but they have not gone to the extent of holding that an agreement is not within the statute of frauds which includes also an agreement for the purchase and sale of an interest in lands then owned by one of the partners, or to be subsequently acquired by him.

While the precise question involved in this case has not been passed upon by this court (and seems not to have often arisen in any jurisdiction), we have decisions which seem in principle to limit the rule to purchases of land or interests therein subsequent to the formation of such partnership.

In *Henderson v. Hudson*, 15 Va. 510, the complainant relied on a verbal agreement between himself and the defendant that the latter should associate the former as partner with him in the purchase of a certain parcel of land, and sought to have a one-half interest therein decreed to him. The statute of frauds was relied on by the defendant. Chancellor Wythe, who presided in the trial court, was of opinion that the statute applied to contracts and actions upon them between the buyer and seller of land, and not to a contract between the purchaser and a third person that such person should be admitted as a partner in the purchase, and granted the relief sought; but upon appeal it was held that the statute did apply, the decree of the trial court was reversed, and the bill dismissed.

In *Walker v. Herring*, 62 Va. 678, 8 Am. Rep. 616, that decision was approved; it being held that the statute of frauds and perjuries applied to a parol contract entered into between the plaintiff and defendant, by which the former agreed to purchase, and did purchase, certain lands at a trustee's sale for himself and the defendant, the terms of which the latter refused to comply with.

These cases are in conflict with the broad doctrine laid down by Mr. Browne in his work, and are so regarded by him, especially the latter decision. These cases in principle are in accord with decisions in other jurisdictions.

In *Caddick v. Skidmore*, 2 De G. & J. 51, the defendant owned a colliery, and he and the plaintiff made an oral agreement to become partners in the colliery for the purpose of leasing it upon royalties which were to be divided between them. The colliery was demised upon a royalty on account of which the defendant made certain payments to the plaintiff, and afterwards the defendant sold the original term. The bill prayed for an accounting and for payment for what was due to the plaintiff, apparently both back royalties and his share of the proceeds of sale. Lord Chancellor Cranworth dismissed the bill for a want of a sufficient memo-

randum in writing, saying that "an agreement to the effect that plaintiff and defendant were to become partners in a colliery for the purpose of demising it upon royalties, which were to be divided in some proportion between them," was in his opinion "an agreement not capable of being enforced unless proved by such evidence as is required by the statute of frauds."

In the case of *Goldstein v. Nathan*, 158 Ill. 641, 42 N. E. 72, it was held that a parol contract between the owners of separate tracts of land, by which they agreed to sell them and divide the profits equally, was void under the statute of frauds. Both parcels of land were sold, and suit was brought by one of the parties to enforce the agreement against the other. In that case it was contended that, since it appeared from the bill that the lots had been sold, nothing remained but to account for the profits, and it was denied that the statute of frauds in any way controlled the question. The Supreme Court of Illinois, fully recognizing the doctrine, prevailing in that jurisdiction as well as in this state, that a partnership may be formed for the purpose of dealing in lands for profit, and that the existence of such partnership and the extent of the interests of the respective partners may be shown by parol, said in discussing that case that there was a wide distinction, however, between "an agreement for one to become interested in the profits of certain land already purchased and owned by another, and an agreement to share in the benefits to be thereafter acquired. Where lands are purchased by a partnership and paid for with the moneys thereof, or acquired as partnership property in the usual course of such partnership, a court of equity may treat such real estate as partnership funds, and as a consequence personal property. This rule grows out of the nature of the partnership relation, and is rendered necessary for the purpose of doing justice between the parties, or between the firm and others doing business and having dealings therewith. *Black v. Black*, 15 Ga. 445. In this case the land was not purchased by the appellant in the name of the appellee and the purchase money paid by the appellant. It is not a case of a purchase of lands paid for out of partnership funds and a deed taken to appellee. No partnership funds existed. There was, therefore, no resulting trust in appellant, and whatever interest he is alleged by the bill to have acquired was by virtue of his contract. The lot was owned by the appellee at the time of the contract, and paid for by his money, and any interest in the land or the proceeds growing out of the alleged contract cannot be secured and made to apply to the profits as distinct from the land itself. If appellant acquired an interest in appellee's lot by virtue of his contract, it attached upon the contract being made. If such interest attached,

and the land had not been sold, the appellant would have been entitled to his moiety therein. Had the appellee died before sale, and appellant had an interest in the lot, he would have had the right to sell and wind up the partnership affairs. It is only by having acquired an interest in the lot that he could have acquired an interest in the proceeds of the sale. We hold that where two separate owners of real estate, purchased by their separate funds, enter into a copartnership with reference to a sale thereof by a parol contract, such contract is within the statute of frauds."

One of the cases referred to as sustaining the conclusion reached in that case was McCormick's Appeal, 57 Pa. 54, 98 Am. Dec. 191. In that case Judge Strong, afterwards Justice Strong of the Supreme Court of the United States, in delivering the opinion of the court, said: "Undoubtedly a partnership may hold real estate, and they may have a resulting trust where the partnership funds have paid for them. Such was Erwin's Appeal, 39 Pa. 535, 80 Am. Dec. 542. So there may be a constructive trust in favor of the firm, as was held in *Lacy v. Hall*, 37 Pa. 360; but these come within the exceptions to the statute of frauds. In both cases the lands were acquired after the partnerships had been formed and while the joint business was in progress. But here there is no resulting or constructive trust. The agreement, if there was any, to put the land into the joint stock, was made before the firm had any being, and the partnership funds did not pay for it. A parol agreement to put land into a firm, or to consider it as firm property, made before the firm exists, is wholly ineffectual to pass any title either in law or in equity."

The court is of opinion that the verbal agreement set up by the appellant in his pleadings was one providing for the sale of an interest in real estate, and within the statute requiring the same to be in writing, and that the circuit court did not err in refusing the relief prayed for, and dismissing his bills.

Affirmed.

CARDWELL, J., absent.

(113 Va. 686)

N. J. STEIGLEDER & SON v. ALLEN.

(Supreme Court of Appeals of Virginia. June 13, 1912.)

1. MECHANICS' LIENS (§ 3*)—SUBCONTRACTOR—PRIVITY.

At common law, there being no privity between an owner of property and a subcontractor, who had agreed with the general contractor alone to construct a portion of a building for the owner, such subcontractor had no legal claim which he could maintain against the owner for work done or materials furnish-

ed under his contract with the general contractor.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. § 4; Dec. Dig. § 3.*]

2. MECHANICS' LIENS (§ 99*) — BUILDING CONTRACT—RIGHTS OF SUBCONTRACTOR—OWNER'S LIABILITY—STATUTES—NOTICE.

Code 1904, § 2479, provides that any subcontractor may give written notice to the owner, or his agent, stating the nature of his contract and the probable amount of his claim, and if the subcontractor shall, after the work is done or materials furnished by him, and within 30 days from the time the building is completed or his work thereon is terminated, furnish the owner, or his agent, and the general contractor a correct, verified account of his claim against the general contractor, the owner shall be personally liable to the claimant for the amount due to such contractor by the general contractor, provided the same does not exceed the sum in which the owner is indebted to the general contractor, etc. *Held*, that the subcontractor's right to recover against the owner was purely statutory; and hence, where the subcontractor's notice to the owner of the nature of his contract and the probable amount of his claim was not given until after the work was completed and the materials furnished, it was insufficient to charge the owner.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. §§ 131, 132; Dec. Dig. § 99.*]

Error to Circuit Court, Henrico County.

Action by N. J. Steigleder & Son against Joseph E. Allen. Judgment for defendant, and plaintiffs bring error. Affirmed.

O'Flaherty & Fulton, for plaintiffs in error. Allen G. Collins, for defendant in error.

CARDWELL, J. This action of debt was brought by plaintiffs in error, N. J. Steigleder & Son, a partnership, against defendant in error, Joseph E. Allen, to recover of the latter the sum of \$1,039, a balance alleged to be due from the defendant to the plaintiffs, as subcontractors with one R. H. Walton, a general contractor, who had contracted with the defendant to build and construct upon the latter's lot of land in Ginter Park, Henrico county, Va., a certain house. The declaration in the case, *inter alia*, charges that the defendant, as owner, on September 1, 1909, contracted with said Walton, general contractor, to build a concrete block house in Ginter Park for the defendant, for the sum of \$8,000; that Walton, general contractor, on September 6, 1909, contracted with plaintiffs, as subcontractors, to do the entire cement and concrete work in said house for the sum of \$1,989; that plaintiffs completed their said work on January 31, 1910, and on February 18, 1910, gave notice in writing of said contract, and the work they had done, to the defendant, owner of said house, and that on June 20, 1910, before the expiration of 30 days after the completion of said building, the plaintiffs also gave another written notice to the defendant, and served upon him a verified copy of the account, showing that there was a balance of \$1,039 then due by Walton to the

plaintiffs for doing said cement and concrete work on the defendant's house; that at the time of the service of the first notice the defendant, Allen, had in his hands the sum of \$8,000 due to Walton, the general contractor, under his aforesaid contract; and further alleged that by reason of said facts the defendant became and was, under section 2479 of the Code of 1904, personally liable and indebted to the plaintiffs for the said sum of \$1,039, the balance due them for said work.

The defendant, on October 29, 1910, appeared and filed a written demurrer to said declaration, and set forth therewith in writing the grounds of the demurrer, among which, and the only one that we deem it necessary to consider, is that the notice of February 18, 1910, was not given by the plaintiffs to the defendant until after the plaintiffs had completed their part of the work, and that section 2479 of the Code required this notice to be given before or while the work was being done, and that it could not be given after the plaintiffs had completed their part of the work.

The defendant also, on October 29, 1910, filed a special plea and the "particulars of his defense"; but the circuit court, without ruling on the special plea or the "particulars of defense," entered the judgment to which this writ of error was awarded, sustaining the demurrer to the declaration, and giving judgment for the defendant for costs against the plaintiffs.

The question presented is whether the notice given by the plaintiffs, after their work was completed and their materials furnished, was a sufficient compliance with the provisions of section 2479 of the Code to bind the defendant personally for the debt asserted by the plaintiffs.

[1] At common law there was no *privity* of contract between the owner of property and a subcontractor with a general contractor, who had alone contracted with such owner to construct a building or other improvements upon his property, and therefore such subcontractor had no legal claim which he could maintain in a court of law or equity against the owner for work done or materials furnished under his (the subcontractor's) contract with the general contractor; but by our statute, originating in the act appearing in Acts 1869-70, p. 444, the common-law rule was abrogated and a right of action in the subcontractor against the owner of the property built upon or improved was provided in certain circumstances and upon well-defined conditions. Up to the enactment of the statute as amended, appearing in the Code of 1887 as section 2479 (Code 1904, p. 1241), it was not very clearly determinable whether the notice required of the subcontractor to be given to the owner of the work to be done or material to be furnished by the subcontractor was to be done before the work was done or the materials

furnished by him, as a condition precedent to his right to demand and have of the owner pay for the work done and materials furnished, or whether such notice after the work was completed was sufficient; but by section 2479 of the Code of 1887 the subcontractor might give notice of the "nature and character of his contract and the probable amount of his claim," and after he had performed his work and furnished the material, and the structure was completed, or the work thereon otherwise terminated, he was required to furnish the owner with a "correct account, verified by affidavit, of his claim against the general contractor for the work done or materials furnished and of the amount due," and to furnish a like account to the general contractor, which account was to be furnished to the owner and the general contractor within 30 days from the completion of the building or structure, or the work thereon otherwise terminated.

When the Legislature came to re-enact said statute, it by an act approved February 28, 1894 (Acts 1893-94, p. 523), framed it as follows: "Any subcontractor may give notice in writing to the owner or his agent, stating the nature and character of his contract and the probable amount of his claim; and if such subcontractor shall at any time after the work done or material furnished by him and before the expiration of thirty days from the time such building or structure is completed or the work thereon otherwise terminated furnish the owner thereof or his agent and also the general contractor with a correct account, verified by affidavit, of his claim against the general contractor for the work done or materials furnished and of the amount due, the owner shall be personally liable to the claimant for the amount due to said contractor by said general contractor: Provided the same does not exceed the sum in which the owner is indebted to the general contractor at the time the notice is given or may thereafter become indebted by virtue of his contract with said general contractor."

That statute, which is now section 2479 of the Code of 1904, and controls this case, may have been intended by the Legislature, as plaintiffs contend, "to broaden and widen the scope of the statute, and to give the subcontractor additional rights to any of those that had been conferred upon him by or under any of the former laws, and sought to give him a remedy which would be adequate to his varying needs"; but clearly it was not intended to put the owner, contracting with a general contractor for improvements on his property, at a greater disadvantage by allowing the subcontractor for a part of the work or materials himself to give the owner notice of his demand against the general contractor either before, during, or after the performance of the work. While it was the object of the statute, under certain conditions, to make "the owner personally

liable to the subcontractor for the amount due him by the general contractor," it was also intended that the owner should be apprised of the probable amount of the subcontractor's claim against the general contractor, so that the owner, as said by this court in *Shenandoah Valley R. Co. v. Miller*, 80 Va. 826, might protect himself by not paying to the general contractor an amount exceeding the sum due him at the time the subcontractor's notice was given, or he would thereafter become indebted to the general contractor by virtue of the owner's contract with him.

How unfairly the statute might be made to operate against the owners of property designing to put improvements thereon under contract with that large class of persons engaged as general contractors in such business, if the interpretation of the statute contended for by the plaintiffs in this case could be sustained, cannot be better illustrated than by reference again to the facts appearing in the record.

On June 20, 1910, plaintiffs served upon the defendant a second notice, setting forth that they furnished their material and completed their work on January 31, 1910, and that they gave their first notice February 18, 1910. After this second notice was given the defendant, the plaintiffs, on June 23, 1910, filed a mechanic's lien against the defendant's lot and building. Other subcontractors with Walton, the general contractor, filed notices with the defendant, and some of such subcontractors filed mechanics' liens against defendant's house and lot, and the Miller Manufacturing Company filed a bill in chancery to enforce against said house and lot a lien filed by it, which bill was for the benefit of all other subcontractors who had filed liens to the extent of the amount then due by defendant, Allen, to Walton, the general contractor. The defendant had with Walton, on June 20, 1910, a settlement by which it was ascertained that he (defendant) was indebted to Walton in the sum of \$1,196.68, while the claims asserted by the subcontractors amounted to \$3,496.84.

[2] It will be observed that the statute, *supra*, requires (1) a notice from a subcontractor to the owner of the "nature and character of his contract and the probable amount of his claim"; (2) within 30 days after the materials are furnished or the work to be done by the subcontractor is completed, he is to furnish the owner with "a correct account, verified by affidavit, of his claim against the general contractor for the work done and materials furnished, and of the amount therefor due"; and (3) serve upon the general contractor a like account. If the service upon the owner of the required verified account of the subcontractor could be considered as sufficient to make the owner personally liable to the subcontractor for the amount of the latter's claim against

the general contractor, then it would have been needless to require a notice from the subcontractor to the owner before he performed the work or furnished the material required under his contract with the general contractor. The language of the statute unmistakably indicates that the notice must be given before the actual amount of the claim is ascertained, before the material is furnished or the work completed, to apprise the owner of the nature of the contract under which the subcontractor will have a debt due to him; while the requirement that the subcontractor shall, within a prescribed period, serve the owner and general contractor with a verified account, etc., was intended to have the owner informed as to the actual amount of the subcontractor's claim against the general contractor.

The right of the subcontractor to recover of the owner, personally, in such a case, like the right of such a contractor to enforce a mechanic's lien against the owner's property, is purely the creation of the statute, and it must be availed of, if at all, upon the terms and conditions which the statute prescribes. Section 2479 of the Code prescribes in express, plain, and unmistakable language the way, and the only way, in which an owner of property can be bound personally to a subcontractor for a debt due him from the general contractor, with whom the owner alone contracted for improvements upon his property. As was said by this court in *Shackelford v. Beck*, 80 Va. 573, with reference to certain portions of the mechanic's lien statutes: "As the law calls for nothing unreasonable at the hand of him who would fasten an incumbrance upon the property of his neighbor, no just ground of complaint is afforded by insisting upon a rigid adherence to its provisions."

The declaration in this case does not set out facts sufficient to entitle the plaintiffs to a personal judgment against the defendant for the amount of the demand made upon him, or for any part thereof, and therefore the judgment of the circuit court, sustaining the demurrer thereto, is right, and is affirmed.

Affirmed.

(113 Va. 787)

MULLINS v. COMMONWEALTH.

(Supreme Court of Appeals of Virginia. June 18, 1912.)

1. CRIMINAL LAW (§ 366*)—EVIDENCE—ADMISSIBILITY—RES GESTÆ.

The declarations of deceased, shortly before leaving home on a trip, during which it was claimed he was murdered, that he was going for whisky, and that accused was going with him, not made in the presence of accused, were incompetent, not being a part of the *res gestæ*.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 806, 811, 814, 819, 820; Dec. Dig. § 366.*]

2. HOMICIDE (§ 166*)—EVIDENCE—MOTIVE.

Testimony that accused had been indicted for another crime, and that the prosecutor intended to call deceased as a witness on the trial of that case, was incompetent to show motive for a homicide, in the absence of evidence that deceased had been summoned as a witness, or that accused knew deceased was to be a witness, or knew that deceased knew anything about the case.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 320-331; Dec. Dig. § 166.*]

3. HOMICIDE (§ 166*)—EVIDENCE—MOTIVE.

Where it was claimed that the motive for a homicide was to prevent deceased testifying against accused in another case, testimony that accused's wife said to him that "he" would be the hardest witness against accused, and that accused replied that he would not be at court, was incompetent, where the witness did not know of whom they were talking, and no offer to show later that it referred to deceased was made.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 320-331; Dec. Dig. § 166.*]

4. CRIMINAL LAW (§ 1169*)—APPEAL—HARMLESS ERROR—RULINGS ON EVIDENCE.

Error in admitting testimony relative to a conversation between accused and his wife concerning a third person was not cured by an instruction to disregard, unless the jury found that the conversation referred to deceased, where there was no evidence on which the jury could base such a finding, since it was for the court, and not for the jury, to determine the competency of the testimony.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 754, 3088, 3180, 3137-3143; Dec. Dig. § 1169.*]

5. CRIMINAL LAW (§ 719*)—TRIAL—CONDUCT OF COUNSEL—COMMENTS ON EVIDENCE.

A remark of the prosecuting attorney that in his opinion a conversation between accused and his wife, shown by the evidence, referred to deceased, was prejudicial to accused, where there was no evidence on which such an opinion could be properly based.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1669; Dec. Dig. § 719.*]

6. HOMICIDE (§ 223*)—EVIDENCE—PROCEEDINGS AT INQUEST—STATEMENT OF ACCUSED.

Under Code 1904, § 3901, providing that in criminal prosecutions, with certain exceptions, statements by accused upon a legal examination shall not be given in evidence against him, unless made when examined as a witness in his own behalf, statements by accused on his examination at the coroner's inquest were improperly admitted at the trial.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 466; Dec. Dig. § 223.*]

7. CRIMINAL LAW (§ 789*)—TRIAL—INSTRUCTIONS—REASONABLE DOUBT.

An instruction that a reasonable doubt is such a doubt as may be honestly and reasonably entertained, and must be based on the evidence, that it must not be an arbitrary doubt, but must be serious and substantial, and must be a doubt of a material fact necessary for the jury to believe to find a verdict of conviction, and not of immaterial and nonessential circumstances, while possibly of little aid to the jury, could not have misled them, when considered in connection with another instruction that the jury should not go beyond the evidence to hunt up doubts, nor entertain doubts merely chimerical or conjectural, that a doubt justifying the acquittal must arise from a candid and impartial investigation of the evidence, and is insufficient unless it is such that, if in-

terposed in the graver transactions of life, it would cause a reasonable and prudent man to hesitate, and that if, after considering all the evidence, the jury could say that they had an abiding conviction of the truth of the charge, they would be satisfied beyond all reasonable doubt.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1846-1849, 1851, 1880, 1904-1922, 1960, 1967; Dec. Dig. § 789.*]

Appeal from Circuit Court, Wise County.

Morgan Mullins was convicted of murder in the second degree, and he appeals. Reversed.

Instruction No. 9, given by the court and referred to in the opinion, was as follows:

"The court instructs the jury, as a matter of law, in considering the case, the jury are not to go beyond the evidence to hunt up doubts, nor must they entertain such doubts as are merely chimerical or conjectural. A doubt to justify an acquittal must be a reasonable doubt, and it must arise from a candid and impartial investigation of all the evidence in the case, and unless it is such that, were the same kind of doubt interposed in the graver transactions of life, it would cause a reasonable and prudent man to hesitate and pause, it is insufficient to authorize a verdict of not guilty. If, after considering all the evidence, you can say that you have an abiding conviction of the truth of the charge, you are satisfied beyond all reasonable doubt. On the other hand, the jury must not go beyond the evidence to hunt up inferences of guilt."

Vicars & Peery and A. A. Skeen, for appellant. Samuel W. Williams, Atty. Gen., for the Commonwealth.

BUCHANAN, J. The accused, Morgan Mullins, was indicted for the murder of Ark. W. Howell, and upon his trial convicted of murder in the second degree and sentenced to the penitentiary for 10 years.

It appears that the deceased left home on the morning of the 6th of February, 1911, for the purpose of going after whisky, and that on the 17th of that month his body, with the head cut or beaten off, was found on the side of the mountain about 1½ miles from his home. The evidence relied on by the commonwealth to show that the accused murdered the deceased is entirely circumstantial.

[1] Ten of the errors assigned are based upon the action of the trial court in the admission of evidence. Two witnesses, Laura Mullins and George Flemming, were permitted, over the objection of the accused, to detail conversations with the deceased, had the evening before and the morning of the day upon which the deceased left home on the errand or trip from which he never returned. Those witnesses testified that in the conversations had with them, respectively, the deceased stated that the object of his trip was to get whisky, and that the accused

was going with him. The accused was not present at either of these conversations.

The evidence of these witnesses as to what the deceased stated in reference to the accused was clearly inadmissible. The declarations of a person before his death, which are so connected with the act as to form a part of the same transaction, and which illustrate and explain the homicide, are admissible as part of the *res gestæ*; but declarations or statements not constituting a part of the *res gestæ*, and not made in the presence of the accused, are not competent evidence.

In *McBride's Case*, 95 Va. 818, 30 S. E. 454, it was held that on a trial for murder the statements of the deceased, made on the day before the homicide to a third person, in the absence of the prisoner, as to where the deceased was then going, were irrelevant, and should not be received in evidence.

[2] The commonwealth introduced a witness named Davis, who testified that the accused had been indicted in Dickenson county, more than a year before Howell's murder, for sending a threatening letter through the mail; that he (the witness, who seems to have been the prosecutor, or active in that prosecution) intended to have the deceased introduced as a witness against the accused in that case. The deceased had never been summoned as a witness, and there was no evidence that the accused knew that he was to be a witness, or that he knew anything about the case. The prisoner objected to the evidence of Davis that the deceased was to be a witness against him in that case, but the court overruled his objection.

If the prisoner had known that Howell was to be a witness against him, the evidence would have been admissible as tending to show a motive for the murder of Howell; for where the motive of a party is a material inquiry in a cause, whether civil or criminal, any evidence which tends in any degree to throw light upon that question is admissible. *Parsons v. Harper*, 57 Va. 64; 1 *Wigmore on Ev.* § 389. But before a fact or circumstance is admissible in evidence against a party to show motive, such fact or circumstance must be shown to have probably been known to him; otherwise, it could not have influenced him. For a man cannot be influenced or moved to act by a fact or circumstance of which he is ignorant. 1 *Wigmore on Ev.* § 389, and authorities cited.

It not appearing that the accused had any knowledge or reason to believe that the deceased was to be a witness against him, or that he even knew that the deceased knew anything about the case, the court ought not to have permitted the evidence of Davis, which was objected to, to go to the jury.

[3, 4] A witness named Puckett was permitted to testify, over the prisoner's objection, that she was at the home of the accus-

ed some two months before the homicide, when the deceased came there to get meal, and that about half an hour after the deceased had left she heard part of a conversation between the accused and his wife in which the latter said, "He would be the hardest witness against you," and the accused replied, "Never mind, he would not be at court." The witness stated that she did not know to what case the accused and his wife were referring, that no names were called, and that she did not know who they were talking about. Thereupon the accused, by counsel, moved the court to exclude the said evidence from the jury, because it did not appear that the alleged conversation between the accused and his wife had reference to the deceased, and was, therefore, incompetent and irrelevant. The court overruled the motion, but afterwards, during the cross-examination of the witness, said to the jury: "In reference to the statement of this witness, the commonwealth must convince you beyond all reasonable doubt that it referred to the defendant there, meaning that Howell would be a witness against the defendant; if it fails to convince you, you must disregard the witness' evidence."

There being no evidence showing that the conversation between the accused and his wife was in reference to the deceased, the court ought to have sustained the accused's objection to it, in the absence of the assurance of counsel that other evidence would be duly presented during the progress of the trial which would show its admissibility, or at least ought to have admitted it only upon the condition that the commonwealth would subsequently offer evidence showing that it was admissible. No such assurance being given, and no such evidence being introduced during the trial to show that the conversation in question was in reference to the deceased, the evidence was improperly before the jury, and the action of the court in leaving the question to them to determine whether or not they should consider it did not cure the error in permitting the evidence to go before the jury.

"Questions as to the competency or admissibility of testimony," as was said in the *Vass' Case*, 30 Va. 786, 791 (24 Am. Dec. 695), "at whatever stage of the trial they may be raised (though regularly they ought to precede the introduction of the testimony objected to) are referred to the decision of the judge. 'As it is the province of the jury to consider what degree of credit ought to be given to evidence, so it is for the court alone to determine whether a witness is competent or the evidence admissible. Whether there is any evidence is a question for the court; whether it is sufficient is for the jury. And whatever antecedent facts are necessary to be ascertained for the purpose of deciding the question of competency—as, for example, whether a child understands

the nature of an oath, or whether the confession of a prisoner was voluntary, or whether declarations offered in evidence as dying declarations were made under the immediate apprehension of death—those and other facts of the same kind are to be determined by the court and not by the jury.” *Claytor v. Anthony*, 27 Va. 299; *Smith's Case*, 51 Va. 734, 737; 4 *Wigmore on Ev.* § 2550; 1 *Thompson on Trials* (2d Ed.) § 318.

The action of the court in leaving the evidence objected to provisionally to the jury, to be considered or rejected by them, as they might determine its admissibility or inadmissibility under the instruction given by the court, was not the proper practice, as the jury had nothing to do with the admissibility of the evidence. *Wigmore on Ev.* §§ 497, 861, 1451, 2550; 1 *Thompson on Trials* (2d Ed.) § 318.

[5] The impropriety of such a practice is illustrated by the use made by the attorney for the commonwealth of that evidence. In the closing argument for the commonwealth he stated to the jury that *in his opinion* the conversation related by Miss Puckett referred to the deceased, because he was a witness against the accused in the prosecution against him in Dickenson county, and the deceased had been killed before the term of court at which the defendant was to be tried. If the court had excluded that conversation, as it ought to have done, instead of letting it go before the jury for them to pass upon its admissibility, there would have been nothing in the case upon which the attorney for the commonwealth could have based the argument and opinion which he was permitted to make and express over the objection of the accused.

It cannot be said that the accused was not prejudiced by the argument made and the opinion expressed when there was no evidence in the case upon which to base either. *Jessie's Case*, 112 Va. 887, 71 S. E. 612.

[6] The action of the court in permitting Larkin Combs to testify to a statement made by the accused in his examination at the inquest before the coroner's jury is assigned as error.

Section 3901 of the Code provides that “in a criminal prosecution, other than for perjury or in an action on a penal statute, evidence shall not be given against the accused of any statement made by him as a witness upon a legal examination, unless such statement was made when examined as a witness in his own behalf.”

The introduction of the evidence in question was forbidden by the section of the Code quoted, and the objection of the accused ought to have been sustained. *Kirby's Case*, 77 Va. 681, 690, 46 Am. Rep. 747.

The other assignments of error, based upon the action of the court in the admission of

evidence, need not be considered separately and in detail. It is sufficient to say that the evidence objected to was for the most part admissible, and where it was not it consisted of expressions of opinion, hearsay, and other irrelevant matter, which, while it should not have gone to the jury, yet was of such a character that its admission could not have prejudiced the accused.

[7] The action of the court in giving the following instruction is assigned as error: “The court instructs the jury that a reasonable doubt is such a doubt as may be honestly and reasonably entertained as to the offense charged. Reasonable doubt must be based upon the evidence, any substantial and material fact essential to prove the offense, or that is suggested by the evidence, or grows out of the evidence itself. It must not be arbitrary doubt, without evidence to sustain it. It must be serious and substantial, in order to warrant an acquittal. It must be a doubt of material fact or facts necessary for the jury to believe to find a verdict of conviction, and not of immaterial and non-essential circumstances.”

That instruction, it must be admitted, is not a model definition, either in brevity or clearness, and perhaps was of little aid to the jury upon the question upon which it was given. Indeed, it may be safely said, we think, that it is very doubtful whether what is meant by the term “beyond a reasonable doubt” can be made clearer by attempted definition and explanation. Like other language which is in common use and within the comprehension of persons of ordinary intelligence, it can seldom be made plainer by further definition or refinement, and in the opinion of many judges and some of our ablest text-writers the effort to define it should be abandoned altogether. 4 *Wigmore on Ev.* § 2497; 2 *Chamberlayne on Modern Ev.* §§ 996b, 1016; 2 *Thompson on Trials* (2d Ed.) §§ 2, 463.

While the instruction complained of may not have aided the jury, it cannot be said that, when read in connection with instruction No. 9 given by the court, it could have misled them. Both of them were identical with instructions Nos. 8 and 9 given in the *McCue Case*, 103 Va. 870, 912, 1002, 49 S. E. 623, and held to be sufficient guides to the jury upon the subject of reasonable doubt.

The assignment of error based on the action of the court in refusing to set aside the verdict because not sustained by the evidence, and for after-discovered testimony, need not be considered, since the judgment will have to be reversed, the verdict set aside, and a new trial granted for the erroneous rulings of the court as hereinbefore discussed.

Reversed.

(71 W. Va. 21)

**POINT MOUNTAIN COAL & LUMBER CO.
v. HOLLY LUMBER CO. et al.**

(Supreme Court of Appeals of West Virginia.
June 10, 1912.)

(Syllabus by the Court.)

1. ADVERSE POSSESSION (§ 65*)—OPERATION AND EFFECT—MISTAKE—EXTENT OF POSSESSION.

While the general rule is, that one who by mistake enters lands of another not covered by his title papers will be limited in his adversary possession to the land actually enclosed or of which he has had the *pedis possessio*; yet, if his title papers do cover the land entered, and the entry be with the purpose and intent of holding the same to the limits of the boundaries described in his deed or title papers, and as surveyed, and located on the ground by natural and fixed objects called for, he may by such entry and adversary possession and color of title, continued openly, notoriously and exclusively for the requisite period acquire title to all the land comprehended in his title papers, although such land may have been located and entered, by mistake as to the true location of original lines and corners called for in some prior or ancient patent, deed or title paper, by which he traces his title to the commonwealth.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 385-370; Dec. Dig. § 65.*]

2. ADVERSE POSSESSION (§ 1*) — OPERATION AND EFFECT—SETTLEMENT OF BOUNDARIES.

One of the objects of the statute of limitations is to settle disputed boundaries, as well as disputed claims of ownership, regardless of what the true boundary or better right may turn out to be.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 10, 12-65, 67-76; Dec. Dig. § 1.*]

3. ADVERSE POSSESSION (§ 70*)—OPERATION AND EFFECT — EXTENT OF POSSESSION — "COLOR OF TITLE."

Color of title, for the purposes of the statute of limitations as to land, is that which has the semblance or appearance of title, legal or equitable, but which in fact is no title.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 394-414; Dec. Dig. § 70.*]

For other definitions, see Words and Phrases, vol. 2, pp. 1264-1273; vol. 8, p. 760.]

4. ADVERSE POSSESSION (§ 100*)—OPERATION AND EFFECT—EXTENT OF POSSESSION—COLOR OF TITLE.

The same kind of adversary possession which by *pedis possessio* will ripen into good title to land actually occupied and enclosed under a claim of title, will if under color of title give good title to the occupant to the limits of the boundary covered by his deed or title papers, the boundaries thus called for being in such cases equivalent to actual enclosure and occupancy under claim of title.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 547-574; Dec. Dig. § 100.*]

5. ADVERSE POSSESSION (§ 48*)—NATURE AND REQUISITES—CONTINUITY—INTERRUPTION OF POSSESSION.

By section 19, chapter 90, Code 1906, adversary "possession of any part of the land in controversy under such patent, deed or other writing, for which some other person has the better title" is "taken and held to extend to the boundaries embraced or included by such patent, deed or other writing unless the person having the better title shall have actual ad-

verse possession of some part of the land embraced by such patent, deed or other writing"; and the fact that some stranger to the better title, not shown to have entered under or by authority or sufferance of the owner of the better title may have cropped or otherwise used and had enclosed by an indifferent fence or barrier a small portion of the disputed boundary, does not interrupt the operation of the statute of limitations in favor of one in possession of the residue of the disputed boundary, occupying and claiming the whole thereof by color of title, or render the possession of the latter less exclusive of the owner of such better title.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 236, 237; Dec. Dig. § 48.*]

6. LANDLORD AND TENANT (§ 68*)—LANDLORD'S TITLE—INTERRUPTION OF POSSESSION.

Recognition of title or attornment to another by the tenant of such adversary claimant, will not by section 4, chapter 93, Code 1906, interrupt the continuity of such claimant's possession, but will be void, "unless it be with the consent of the landlord of such tenant, or pursuant to, or in consequence of, the judgment, order, or decree of a court"; or such claimant otherwise have notice or knowledge of such recognition or attornment by his tenant.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 158, 210-214; Dec. Dig. § 68.*]

7. LANDLORD AND TENANT (§ 68*)—LANDLORD'S TITLE—INTERRUPTION OF POSSESSION.

If such tenant of an adverse claimant take a secret lease from a third person claiming to be the owner, without the knowledge of his landlord, the character of his possession will not be changed thereby.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 158, 210-214; Dec. Dig. § 68.*]

Error to Circuit Court, Webster County.

Action by the Point Mountain Coal & Lumber Company against the Holly Lumber Company and others. From a judgment for defendants, plaintiff brings error. Reversed, and new trial awarded.

Haymond & Fox and Linn & Byrne, for plaintiff in error. Morton & Wooddell, J. S. Cogar, W. G. Bennett, Jake Fisher, and Hall Bros., for defendants in error.

MILLER, J. In ejectment plaintiff claims lot No. 19, of 2,000 acres; defendant lot No. 18, of 3,000 acres, of the Pennell chain of surveys, the latter laying immediately Northeast of the former.

One of the questions of fact presented was as to the true location of the original division line between these two lots. Plaintiff's contention was that this line began at a rock and two beeches, thence North 40 degrees West crossing Back Fork of Elk River at 212 poles, 455 poles to a chestnut. Defendant contended that the line began at a Cucumber, as called for in the original survey and patent, located 150 poles or more Southwest of the rock and two beeches, and thence according to the calls of the original patent

North 40 degrees West, with proper variation, 455 poles to the chestnut called for. The land in controversy covers some 400 acres.

Though not admitting the correctness of the jury's finding, plaintiff concedes that it is probably bound by the verdict, on conflicting evidence, locating the original division line between these lots, as claimed by defendant. But on the question of title by adversary possession it makes no such concession. On the contrary it insists that by such adverse possession under color of title, it has acquired good and indefeasible title to the disputed boundary, entitling it as matter of law to a verdict and judgment; or, if not this, that it was entitled to have the question of fact of such adverse possession submitted to the jury, uninfluenced by and wholly apart from the question of the true location of the original boundary line between the two lots, and not as was done by defendants' instructions, and particularly by its instructions numbered 4 and 5, given on its behalf, confused therewith.

Originating with a decree of partition of lots numbered 12 and 19, made upon the report of commissioners in 1871, it is conceded that this decree and all subsequent deeds down to and including the immediate deed to plaintiff describe said lot No. 19, as beginning at a large rock and two beeches, and a corner to lot 18, and thence for the division line, North 40 degrees West crossing Back Fork of Elk River at 212 poles, 455 poles to a chestnut, and from thence calling for courses and distances and natural and fixed objects, to the beginning, and thereby definitely and conclusively locating plaintiff's land on the ground substantially as described in the declaration. The evidence, oral and documentary, leaves no room for controversy on this point. Furthermore, the uncontroverted evidence is, that plaintiff and its predecessors in title have persistently, since the decree of partition of 1871, claimed the land within the boundary fixed by that decree, and described in the subsequent deeds, including the disputed boundary, to the exclusion of all other claimants; that in August, 1895, Frederick S. Stevens and others, then owners of the 2,000 acres, known as lot No. 19, found one John McClanahan on the land claimed by them and within the boundary or interlock now in controversy; that on that day they sold and conveyed to him by metes and bounds a tract of twenty acres, more or less, in the Northeast corner of said tract, and within the boundary now in controversy; that on the same day they leased to him two small pieces of said land South of said Back Fork, and within the disputed boundary, one called the Corn lot, of about three acres, the other a triangular piece about the same size, all described as belonging to the Stevens tract, for the term of five years, the lessee covenanting and agreeing,

in consideration of the premises, to keep a watch over the entire Stevens tract so called, to keep off trespassers, prevent cutting of timber, and make reports as to boundary lines, &c., to H. G. Thurmond, the lessor's local attorney. The record also shows that on October 4, 1897, McClanahan and wife, for the consideration recited, reconveyed to said Stevens, the land conveyed by the latter and others to him in 1895, reciting in the deed that at the time of the former conveyance it was supposed this tract conveyed contained about twenty acres, but that it had been found to contain some eighty acres, more or less. After this conveyance McClanahan, as he admits and swears, continued as before to reside on the land and to occupy it as the tenant of plaintiff and its predecessors and was so occupying it at the date of this suit, openly, notoriously, and exclusively, and reporting to the owners and their attorney to the exclusion of all other persons, unless it be a little patch of about a half acre, within the boundary in controversy, enclosed by a log or brush fence, and sometimes cultivated by one David McClanahan. Under whom or by whose authority or by what claim, if any, David McClanahan so occupied this land is not definitely shown.

Defendants controvert plaintiff's claim of title by adversary possession, on two grounds: First, that the calls in the decree of partition and subsequent deeds relied on, for a rock and two beeches, as the beginning corner, being mistaken for the cucumber called for in the original grant, and from thence, by like mistake, for the other boundaries, and together mistaken for the true boundary lines of said lot No. 19, plaintiff was without color of title to any of the land in controversy; and that as the land actually enclosed and occupied by McClanahan for ten years prior to the suit, was not definitely located on the ground and described and shown to the jury, no recovery thereof could be predicated on mere claim of title, and that the general verdict for defendant is clearly right: Second, that conceding possession by John McClanahan, under plaintiffs, his possession within the disputed boundary was not exclusive, (a) because David McClanahan, who lived on a portion of defendants' land not within the disputed boundary, for some years had occupied and cultivated a portion of the disputed strip, and who on November 24, 1905, by deed of that date conveyed the land claimed by him, about one hundred acres, together with all possessions and rights of possession owned or claimed by him, etc., to defendant; (b) because, on January 1, 1904, John McClanahan and Charlott, his wife, plaintiff's tenants, accepted from E. A. Beckley, one of the defendants, a lease for part of the 3,000 acre tract, and claimed to cover the land then occupied by them under the prior lease

from plaintiff, this lease, among other things, reciting: "It is further understood that the possession of the second parties heretofore had of the said 3,000 acre Haines tract, or any part thereof has been under and with the consent, sufferance and authority of the said E. A. Beckley and those under whom he holds, and that such possession has been for the use and benefit of said owners of the said tract of land."

[1] Adverse possession by John McClanahan for ten years prior to ouster by defendants, the facts not being controverted, we think, clearly entitled plaintiff, as matter of law, to a verdict and judgment for the land sued for, unless defeated in these rights for the reasons assigned by defendant.

[2-4] First, among defendants' contentions, did plaintiff and its predecessors have color of title? Defendants answer No, because the location on the ground by the report of the commissioners and the decree of partition of 1871, and the subsequent title papers, was by mistake, the evidence as claimed tending to show intention of the owners to claim only to the true boundary lines of said lot No. 19, and not to the actual boundaries described in said decree and deeds. Plaintiff's counsel do not controvert the general proposition relied on by defendants' counsel, supported as it is by *Heavner v. Morgan*, 41 W. Va. 428, 23 S. E. 874, *Jackson v. Land Association*, 51 W. Va. 482, 41 S. E. 920, and *Schaubuch v. Dilleuth*, 108 Va. 86, 60 S. E. 745, 15 Ann. Cas. 825, that if one by mistake enter on the lands of another, his title papers not actually covering the land entered, he can not by adverse possession under color of title acquire title to the land not actually covered by his title papers, but will be limited to the land actually enclosed and of which he has the *pedis possessio*. But they say this proposition has no application to the case in hand, for the reason as they contend, plaintiff's title papers do actually cover the land in controversy, by actual survey and location on the ground, with manifest and fixed purpose and intent on the part of plaintiff and its predecessors to claim the land covered by the decree of partition and subsequent deeds. In the case at bar plaintiff's dwelling house, that occupied by its tenant, is actually on the land in controversy, and so are the enclosed fields, and as if to make no mistake as to plaintiff's intention and purpose, it or its predecessors had the land surveyed, the boundaries marked not only by corner trees and line trees, but by the rivers and other water courses crossed, and by painting the trees along the lines so as to give notice of their claim on the ground; and although we concede the fact to be that boundaries thus described and called for in deeds and other title papers may have been made by mistaking them for original lines and corners the statute of limitations is not thereby robbed of its effica-

cy, and a claimant of the land by color of title and possession defeated of his rights acquired by such adversary possession. Where land is thus held in adverse possession for the requisite period, although it be under a mistake as to the true location of the lines the statute operates to give good title and to bar the rights of the original owner. *Teass v. St. Albans*, 38 W. Va. 1, 13, 17 S. E. 400, 19 L. R. A. 802, citing *Buswell on Adverse Possession*, § 250; *Burrell v. Burrell*, 11 Mass. 294; *Brown v. McKinney*, 9 Watts (Pa.) 567, 36 Am. Dec. 139; *Clark v. Tabor*, 28 Vt. 222; *Robinson v. Phillips*, 65 Barb. (N. Y.) 418, and *Alexander v. Wheeler*, 69 Ala. 332. In the principal case, at same page, Judge Holt says: "It is one of the objects of the statute to settle disputed boundaries, as well as disputed claims of ownership, regardless of what the true boundary, or better right, may turn out to be." And where one is in possession under a deed or other instrument purporting to convey title, however defective, and whether in good or bad faith, he has color of title, entitling him if continued for the statutory period, to hold the land as against the true and real owner or recover it from him, if after ouster by the latter he has by adverse possession ripened his bad title into a good one, to recover it by suit in ejectment, to the extent of the boundaries in his deed or title paper. As many times decided by this and other courts, color of title for the purposes of adverse possession under the statute of limitations as to land, is that which has the semblance or appearance of title, legal or equitable, but which in fact is no title. *Core v. Faupel*, 24 W. Va. 247; *Adams v. Alkire*, 20 W. Va. 480; *Swann v. Thayer*, 36 W. Va. 46, 14 S. E. 423, and many cases collated in 1 Ency. Dig. Va. & W. Va. Reports, 206, et seq. And the same kind of adverse possession, which by *pedis possessio* will ripen into good title to land actually occupied and enclosed under a mere claim of title, will give good title to the occupant under color of title to the entire boundary covered by his deed or title papers, the boundaries in the deed in such cases being equivalent to actual enclosure under a claim of title. See cases already cited. And if the occupant intends to claim the land the fact that such possession originated in a mistake as to the true boundary of some prior grant or title paper, will not prevent the running of the statute. *Rudolph v. Peters*, 35 App. D. C. 438, 22 Ann. Cas. 446, and note 450. Plaintiff certainly proved color of title.

But was the continuity of plaintiff's adverse possession by John McClanahan broken, or rendered inoperative by the alleged possession of David McClanahan, or by John McClanahan, under the lease of January 1, 1904?

[5] First, as to the possession by David

McClanahan. He did not live on the disputed boundary. The only land claimed to have been occupied by him in any way within the disputed boundary was about half an acre, which appears to have been enclosed by an indifferent fence or barrier. Defendants' witness says he had it enclosed by "some rails on the lower side of it, and I think some logs on the upper side of it. It was a fence sufficient to hold his stuff there." Other witnesses for defendant say this patch was so enclosed and that they saw crops in this patch some years. It does not very distinctly appear who built the fence, nor that David McClanahan originally made the improvement, nor that it was he who cropped the place. And it certainly does not appear under whom, if ever, he made entry in 1895, when the evidence tends to show it was first noticed. The deed from David McClanahan and wife to Beckley of November 24, 1905, one of the deeds offered in evidence by defendant, describes the tract of one hundred acres more or less as the same conveyed to McClanahan by C. P. Dorr and wife, January 21, 1891, but we do not understand from the evidence this land to be identified as any part of the disputed boundary, or as covering the small entry or enclosure referred to. Nor does this deed from McClanahan to Beckley purport to convey any other land, unless it be by another clause, which undertakes to grant all rights of possession owned or claimed by McClanahan "in and to what is known as the Sheffy tract, the Haynes tract, the Goff tract and any and all of the tracts of land owned or claimed by the said E. A. Beckley on Back Fork of Elk River or its tributaries." No other reference to right of title or possession in David McClanahan to this small piece within the disputed land is made in this or any other title paper. Nor does it otherwise appear under whom or by what authority David McClanahan cropped or occupied the land, or that his possession or occupancy was open, notorious and exclusive of others. Certainly it nowhere appears that David McClanahan occupied the land, under defendant or any one under whom it claims, prior to his deed to Beckley. John McClanahan who occupied the land some twenty-five or thirty years, and who in August, 1895, took a deed for the twenty acres referred to, from Frederick S. Stevens, on that day by lease in writing became lessee of Stevens of other lands within the disputed boundary and agreed to hold, watch and care for the residue of the tract, and to ward off all trespassers thereon, so that at the date of the deed from David McClanahan to Beckley in November, 1905, unless the former's possession of the small patch defeated it, John McClanahan's possession for plaintiff and its predecessors had matured into good title. But upon what principle can David McClanahan's possession of the small lot defeat the operation of the

statute of limitations under John McClanahan's possession? As already noted it is not clear that he occupied and cultivated the land every year. Indeed the evidence is very uncertain about this; but how did he occupy the land and whose tenant was he? For aught that appears he may have been tenant at will or sufferance of plaintiff or some one under it; or he may have been a mere trespasser. By section 19, chapter 90, Code 1906, adversary "possession of any part of the land in controversy under such patent, deed or other writing, for which some other person has the better title," is "taken and held to extend to the boundaries embraced or included by such patent, deed or other writing *unless the person having the better title shall have actual adverse possession of some part of the land embraced by such patent, deed or other writing.*" In *Industrial Co. v. Schultz*, 43 W. Va. 470, 472, 27 S. E. 255, it is said: "If he have a writing, giving color of title, his possession goes to the extent of the boundaries specified in it, where there is no actual adverse possession under the better title within it." Citing the section of the Code, and *Oney v. Clendennin*, 28 W. Va. 34. It is argued that the possession or occupancy of David McClanahan, such as it was, must be presumed to have been under the good or better title. But is this so? John McClanahan having been in possession and actually residing on the land in controversy with enclosed and cultivated fields, if defendant relied on the protection of the statute was not the burden on it to show that David McClanahan was occupying the land for it or under it? Would his occupancy as a stranger to the title claimed by it interrupt the continuity of John McClanahan's possession, or render it less exclusive of the owner of the better title? We think a proper construction of our statute requires an answer in the negative. If David McClanahan's occupancy of the little patch in question was not under the better title of defendant, if his possession was that of a stranger, John McClanahan's possession was exclusive of the superior title of defendant, and as against that title the statute gave him possession to the limits of the boundaries described in plaintiff's deeds for the purposes of the statute of limitations. In *Core v. Faupel*, 24 W. Va. 238, 245, speaking of the quality, exclusiveness of possession, necessary to give one title by adversary possession, the court says: "To give that effect to his possession of a part of the land, the possession must be exclusive; *for if the true owner* is in the actual possession of any part of the land the dispossessor will be confined to his enclosure or actual possession and he will not be considered as in possession to the boundaries of his deed or writing." But will the trespass or indifferent occupancy by a stranger, to the title of the true owner, under our statute, work the same result to the other claimant's pos-

session? The character of the possession of John McClanahan, under the statute, we think, rendered it exclusive, within the meaning of *Ketchum v. Spurlock*, 34 W. Va. 597, 599, 12 S. E. 832; *Maxwell v. Cunningham*, 50 W. Va. 298, 316, 40 S. E. 499; *Wilson v. Braden*, 56 W. Va. 372, 49 S. E. 409, 107 Am. St. Rep. 927. The fact that the possession is continued, hostile, actual, visible, exclusive, and adverse to the owner of the legal or better title is the test of our statute, and is emphasized by our cases just referred to. In 2 Am. & Eng. Ency. Pl. & Pr. (3d Ed.) 386, 387, it is said: "In order that the possession of the claimant may ripen into title, the doctrine has been frequently announced that it must be exclusive. To render one's possession exclusive he is not, of course, required to exclude every one from all entry on the land, but merely from all possession of the land." The same book at the latter page says, that the exercise by the public, or by the owner, of an easement or way over land will not necessarily prevent the possession from being exclusive. The rule that possession follows the title, much relied on by defendant, seems from the same authority to be applicable only where the possession of the claimant is in common with the owner of the land, not to the case of a stranger to the title. The many cases on the question of exclusiveness of possession are collated in note 23, at page 386, of the authority just cited. One case, *Ward v. Cochran*, 150 U. S. 597, 608, 14 Sup. Ct. 230, 37 L. Ed. 1195, may seem to imply that possession to be exclusive must be exclusive of all others and not to be limited to the true owner of the legal title. That was a case from Nebraska, not controlled by any statute, as the court observes, 150 U. S. at page 605, 14 Sup. Ct. 230, 37 L. Ed. 1195. It depended for its decision on the rule applied in the courts of that state, in the federal courts, and other courts not controlled by statute. One of the cases cited, *French v. Pearce*, 8 Conn. 439, 440, 21 Am. Dec. 680, limits the exclusive occupancy to the true owner. Two or three of the Nebraska cases cited seem to hold that the possession must be exclusive of all other persons. But we do not think our statute should receive an interpretation extending it to other than the owner of the legal title, and certainly not to the character of possession held or claimed by David McClanahan, the real point for decision in this case. We have already alluded to the size and character of David McClanahan's possession and enclosure—a small patch of half an acre within the four hundred acres involved. If this was a contest between plaintiff and David McClanahan could the latter prevail over the former, even as to the small lot occupied by him? David McClanahan did not reside on the land in controversy. John McClanahan did—had his house there, as

well as enclosed and cultivated fields. Our cases following decisions in other states hold that the enclosure, which will amount to exclusive possession and bar the true owner, must be a substantial one, that partial enclosure, or enclosure by felling trees and lapping them around the land, or enclosure by brush fences, is, as a general rule, too loose and indefinite. See *Industrial Co. v. Schultz*, supra, and cases reviewed therein. Such, to a large extent, seems to have been the character of possession and enclosure by David McClanahan, and would not be good as against the true owner of the land, and we do not think it should be regarded as interrupting the exclusiveness of the possession of John McClanahan for plaintiff. Such was evidently the view taken by the court below and covered by plaintiff's instruction to the jury No. 8.

[8] But was plaintiff's possession interrupted and its rights by adversary possession defeated by the act of John McClanahan in accepting the lease from Beckley of January 1, 1904? While this lease is offered in evidence and is copied into the record, it was rejected, and was not before the jury, and it constitutes no part of the record, not being made so by a proper bill of exceptions. But suppose it was a part of the record, was it properly rejected? We think it was, unaccompanied as it was with any evidence of notice by McClanahan to his landlord thereof, or of adverse holding by him. The lease does not appear to have been recorded so as to give even constructive notice. John McClanahan denies that he ever accepted a lease from Beckley for any land within the boundary claimed by plaintiff. His evidence is that he leased from Beckley the Ditzel place outside the blue line, not within the disputed boundary. But whatever be the fact as to the contents of the lease, it is immaterial if notice of the lease and of adverse holding thereunder, and termination of his tenancy under his lease from Stevens, was not given plaintiff by McClanahan. Defendants' counsel argue there is evidence tending to show such notice to plaintiff, and they rely on *Voss v. King*, 33 W. Va. 236, 10 S. E. 402. No such evidence is pointed out, it is denied by plaintiff's counsel, and we have not found it in the record. The only evidence which we find relating to the subject is that of John McClanahan himself. On cross-examination he was asked: "You did tell the Point Mountain people or their agent, that you were holding under the Holly Company or E. A. Beckley? A. I told them I was holding that Ditzel place. Q. Tell them you were holding that land? A. Yes sir. Q. Did you tell them you had a contract? A. Yes sir, for the Ditzel place. Q. Tell them it was on record? A. I don't know whether I did or not. I told them that I had a lease for the Ditzel place." But on re-direct examination he swears that he never so told plaintiff or Martin, plaintiff's representative, until

after this suit was brought. Such notice, of course, would not bring the case within the principles of *Voss v. King*. While the principles of this case are recognized in 2 Am. & Eng. Ency. Law & Pr. (3d Ed.) 435, it is there said: It has been held, however, that the recognition of title or attornment by the tenant of the adverse claimant, if done without the latter's knowledge, would not necessarily interrupt the continuity of such claimant's possession. But does not our statute, section 4, chapter 93, Code 1906, settle this question? It provides: "The attornment of a tenant to any stranger shall be void, unless it be with the consent of the landlord of such tenant, or pursuant to, or in consequence of, the judgment, order, or decree of a court."

[7] And in *Swann v. Young*, 36 W. Va. 57, 14 S. E. 426, this court said, point 1 of the syllabus: "In this state the tenant may in some cases assert his adverse colorable title against his landlord without first restoring the possession; but his possession will not be adverse, until and unless notice of his disclaimer has been distinctly and unequivocally brought home to the landlord; and having entered under his landlord's title he cannot dispute it, in the sense of putting him to the proof of title." To the same effect is *Voss v. King*, supra. Point 2 of the syllabus of this case is: "If a tenant takes a secret lease or conveyance for land from a third party claiming to be the owner, without the knowledge of his landlord, the character of his possession will not be changed."

Remaining for consideration are plaintiff's exceptions to defendants' instructions to the jury numbers 4 and 5. The effect of these two instructions was to tell the jury that by the true construction of the decree of partition, and of the several subsequent deeds under which plaintiff claims the intention was to assign and convey lot No. 19, of the Pennell surveys, and that if by mistake or otherwise that was inserted in said decree and deeds a misdescription thereof, conflicting in any way with the original boundaries of said lot, such erroneous description must be rejected and said lot located by the true and actual boundaries thereof as such boundaries originally existed. The main criticism of these instructions is that they ignore or minimize the fact, that the error, if any, in description, originated with the report and survey of the commissioners and the decree thereon in the partition suit, carried into all the subsequent deeds, and which actually located this lot on the ground, with reference to natural objects called for and marked, and under which the decree and deeds as claim and color of title possession was taken and held for sufficient time to ripen into good title regardless of the true location of the original corners and lines of lot No. 19.

The true location of the original lines and corners of the two lots was one of the issues

before the jury though not controlling. Plaintiff contended that the original lines and corners were located as surveyed and described in the decree of partition and subsequent deeds; the defendant that they were elsewhere; but as the rights of plaintiff did not depend alone on the true location of these original lines and corners, but on adversary possession, the location of the original lines and corners was really immaterial. The instructions are not binding instructions however. The court fully instructed the jury by other instructions given at the instance of the plaintiff, on the question of adverse possession, and as the true location of the original patent lines and corners was presented as an issue by both parties, and the instructions complained of, we think, properly propounded the law on that subject, and we do not see that plaintiff was materially prejudiced thereby, although the issue covered by the instructions under the evidence was in fact uncontrolling and really immaterial.

On the real merits of the case, however, as presented, and for the reasons given, we think, the verdict unwarranted by the evidence, contrary to the law, and that judgment thereon is erroneous, and ought to be reversed, the verdict set aside and a new trial awarded the plaintiff, and the judgment here will so order.

(133 Ga. 248)

HUTCHINSON v. SCHNAUSS et al.
(Supreme Court of Georgia. July 9, 1912.)

(Syllabus by the Court.)

DISCRETION OF COURT — ENJOINING ORDER — NO ERROR.

The judge did not abuse his discretion in granting an order enjoining both the plaintiff and the defendants, which order tended to preserve the status until final trial.

Error from Superior Court, Berrien County; W. E. Thomas, Judge.

Action between J. A. Hutchinson and F. W. Schnauss, administrator, and others. From the judgment, Hutchinson brings error. Affirmed.

O. M. Smith, of Valdosta, and Twiggs & Gazan, of Savannah, for plaintiff in error. W. D. Bula, of Nashville, and Denmark & Griffin, of Valdosta, for defendants in error.

ATKINSON, J. Judgment affirmed. All the Justices concur.

(133 Ga. 248)

DE NIEFF et al. v. HOWELL et al.
(Supreme Court of Georgia. June 12, 1912.)

(Syllabus by the Court.)

1. APPEAL AND ERROR (§§ 664, 1058*)—RECORD—CONFLICT—HARMLESS ERROR.

Where a movant in a motion for new trial complains of a ruling excluding certain testimony, and this testimony, in substance, ap-

pears in the approved brief of evidence, the apparent conflicting statements will be harmonized by holding that, notwithstanding the ruling, the court at some other stage of the witness' testimony allowed the evidence. Under such facts the ruling will not require a new trial, even if the evidence was admissible.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2856-2859, 4195, 4200-4204, 4206; Dec. Dig. §§ 664, 1068.*]

2. DEEDS (§§ 200, 203*)—EVIDENCE—ADMISSIBILITY.

In an action to cancel a deed on the grounds of mental incapacity of the grantor, undue influence exercised by the grantee, and nondelivery of the deed, it is not error to exclude the testimony of a witness that he did not know anything concerning the making of the deed until after the grantor's death, notwithstanding the witness may have testified that he was intimate with the grantor, and had frequently heard him say that he intended to give his property to others.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 601, 602, 604-611; Dec. Dig. §§ 200, 203.*]

3. CANCELLATION OF INSTRUMENTS (§ 46*)—EVIDENCE—ADMISSIBILITY.

In the trial of an action to set aside a deed from a husband to his wife, brought after the grantor's death, it is not erroneous to exclude testimony that the widow had asserted her intention to claim a child's part in lieu of dower, and also a year's support out of the remainder of his estate.

[Ed. Note.—For other cases, see Cancellation of Instruments, Dec. Dig. § 46.*]

4. WITNESSES (§ 159*)—COMPETENCY—TESTIMONY AS TO TRANSACTIONS WITH PERSONS SINCE DECEASED.

In an action by children of a former marriage against the widow of a deceased grantor to cancel a deed on the ground, inter alia, of its nondelivery, a defendant, who is a child of the grantor and the grantee, is not incompetent to testify that he saw the deed in possession of the grantee, for the reason that he is interested and his testimony concerns a declaration by conduct of the grantee of the deceased grantor. This is so, notwithstanding the grantor's administrator may be a party to the case.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 664, 666-669, 671-682; Dec. Dig. § 159.*]

5. DEEDS (§ 68*)—MENTAL CAPACITY.

On the issue of incapacity to contract, it was not error to charge: "It does not require a high degree of mental power to make a binding contract. One who has enough of mind and reason to a clear and full understanding of the nature of the consequences of his act in making a deed is to be considered sane. One who lacks this capacity is to be considered insane. For one who has not strength of mind and reason equal to a clear and full understanding of his act in making a contract is one who is afflicted with an entire loss of understanding."

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 149-155; Dec. Dig. § 68.*]

6. CANCELLATION OF INSTRUMENTS (§ 51*)—INSTRUCTIONS—UNDUE INFLUENCE.

In view of its context and of the evidence, the following instruction to the jury was not cause for a new trial: "A person standing in confidential relation to another is not prohibited from exercising any influence whatever to obtain a benefit to himself. The influence must be what the law regards as undue influence; such influence that is obtained by flattery, importunity, superiority of will, mind, or character, which would give dominion over the will to such an extent as to destroy free agency, or

constrain one to do against his will what he is unable to refuse. Such is the kind of influence which the law condemns as undue."

[Ed. Note.—For other cases, see Cancellation of Instruments, Cent. Dig. § 108; Dec. Dig. § 51.*]

7. TRIAL (§ 251*)—INSTRUCTIONS—APPLICABILITY TO CASE.

Where plaintiffs seek to cancel a deed for certain specific causes, it is no ground for new trial that the court omits an instruction that the deed may be canceled for a cause not set up in the pleadings, and as to which no contention is made at the trial, even if such cause be ground for invalidating a deed.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 587-595; Dec. Dig. § 251.*]

8. REQUESTS COVERED BY GENERAL CHARGE.

The requests to charge were covered by the general charge.

9. REVIEW OF EVIDENCE.

The trial was without substantial error, a verdict was rendered on disputed evidence, the verdict has the approval of the trial judge, and we see no reason for disturbing his discretion.

(Additional Syllabus by Editorial Staff.)

10. WILLS (§ 155*)—VALIDITY—"UNDUE INFLUENCE."

Under Civ. Code 1910, § 3834, "undue influence," which operates to invalidate a will, is such an influence as amounts to deception.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 375-381; Dec. Dig. § 155.*]

For other definitions, see Words and Phrases, vol. 8, pp. 7166-7172; vol. 8, pp. 7823, 7824.]

Error from Superior Court, Fulton County; Geo. L. Bell, Judge.

Action by Mrs. J. J. De Nieff and others against S. E. Howell and others. Judgment for defendants, and plaintiffs bring error. Affirmed.

J. F. Golightly and W. E. Suttles, both of Atlanta, for plaintiffs in error. Malvern Hill, Rosser & Brandon, and Anderson, Felder, Rountree & Wilson, all of Atlanta, for defendants in error.

EVANS, P. J. The children and representatives of children of A. H. G. Howell by a former marriage brought their action against his widow and a child of the last marriage to cancel a deed to realty and a bill of sale to personalty executed by A. H. G. Howell to the second wife. It was alleged that the instruments should be set aside, because the maker was non compos mentis, because of undue influence exercised by the grantee, and because the instruments were never delivered to the grantee. Pending the case the administrator of A. H. G. Howell was made a party plaintiff. The defendants prevailed at the trial, and the bill of exceptions is to the judgment refusing a new trial.

[1] 1. Four of the special grounds for new trial complain that the court declined to allow a witness, after stating the facts upon which he based it, to give his opinion that the grantor of the deed was not capable of transacting important business; that he was

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

not a man equal to a clear and full understanding of the making of a deed; that he was a man of "borrowed ideas." The court ruled that the witness would be permitted to state his opinion, from the facts and circumstances enumerated by him, whether the grantor was of sound or unsound mind, but that his opinion as to the grantor's mental capacity to do particular acts was irrelevant. It appears from the approved brief of evidence that the witness did testify in substance to his opinion, which was alleged to have been excluded. In such cases this court cannot hold that the brief of evidence is incorrect, but must reconcile the two statements on the theory that, while at one time the court made the ruling stated in the motion for new trial, at some stage of the examination the testimony was admitted. Under such facts the ruling will not require a new trial, even if the evidence was admissible. *Woods v. State*, 137 Ga. 85, 72 S. E. 908.

[2] 2. A nephew of the grantor, after testifying that he knew his uncle for many years and had heard him frequently say that he intended to give his property to two of his children, offered to testify that he knew nothing of the making of this deed until after the grantor's death. The court excluded so much of his testimony as related to his ignorance of the deed until after the grantor's death. The testimony was wholly irrelevant on any issue made by the pleadings.

[3] 3. It was sought to show that the widow had asserted her intention to take a child's part and a year's support in the remainder of the grantor's property. The validity of the deed in question did not depend upon the widow's intention of asserting her legal rights in the estate of the grantor.

[4] 4. The defendants were the widow of the grantor and her son. The son was not a party to either instrument. He was made a defendant on the theory that all the heirs of the grantor were necessary parties to cancel the grantor's deed. The son was permitted to testify that he saw the deeds in the hands of his mother, the grantee, during the life of his father. This testimony was excepted to, on the grounds that he was interested, and that the declarations by conduct of his mother were inadmissible. Interest does not disqualify a witness. The witness was not testifying to any declaration of his mother in her favor, but to the physical fact that he saw the deeds in his mother's possession during his father's lifetime. This testimony was clearly admissible.

[5] 5. On the issue of total incapacity to contract the court instructed the jury as stated in the fifth headnote. The criticism is upon the last sentence of the instruction. This language was taken from the opinion of the Supreme Court in *Barlow v. Strange*,

120 Ga. 1015, 48 S. E. 844. In that case, as well as in the cases cited, it is pointed out that a person who is non compos mentis, in the legal acceptance of the term, is one who is entirely bereft of understanding, and that in order to avoid a contract on account of mental incapacity there must be an entire loss of understanding. The charge is not inaccurate, and the context shows that it was given on the phase of the case relating to the plaintiffs' allegation that the deed was void because of the mental incapacity of the grantor.

[6, 10] 6. The excerpt from the charge contained in the sixth headnote is said to be erroneous, because in effect it amounts to an instruction that, if the grantor was not so overcome as to be unable to refuse to make the deed, it would be good. Undue influence which operates to invalidate a will is such influence as amounts to deception, or to force and coercion, destroying free agency. *Bohler v. Hicks*, 120 Ga. 800, 48 S. E. 306; Civil Code, § 3834. There can be no fatally undue influence without a person incapable of protecting himself as well as a wrongdoer to be resisted. Undue influence, which overturns an otherwise legal contract, is the exercise of sufficient control over the person, the validity of whose act is brought in question, to destroy his free agency and constrain him to do what he would not have done if such control had not been exercised. Fraud and undue influence are not equivalent terms. Undue influence may be a species of fraud, or it may exist without any positive fraud. The undue influence which will annul a deed must be of that potency which substitutes somebody else's will power for that of the grantor. It was in this connection that the court delivered the charge which is criticised.

[7] 7. The petition was constructed on the theory that the wife paid nothing for the land. The deed recited a consideration of \$10 and love and affection. Complaint is made that the court failed to charge on the effect of the statute invalidating any sale by a wife of her separate estate to her husband without the approval of the superior court of the wife's domicile. Civil Code, § 3009. In the first place, we do not think the statute applies to the facts of this case; and, in the next place, it is a rule of procedure that, where a plaintiff seeks to cancel a deed because of specific defects, the court is not bound to charge that the deed may be void for another cause, as to which no contention is made either in the pleadings or on the trial.

[8, 9] 8, 9. The requests to charge were covered in the general charge. The rulings of the court were not open to the objections taken to them, and the verdict is supported by the evidence.

Judgment affirmed. All the Justices concur.

(133 Ga. 321)

BRYAN v. TATE et al.

(Supreme Court of Georgia. June 13, 1912.)

*(Syllabus by the Court.)***VENDOR AND PURCHASER (§ 100*)—VALIDITY OF CONTRACT—RESCISSION.**

An owner of an undivided interest in land was induced to sell the same at a gross under-value on the false representation of the purchaser that he had been advised that the title was not good and that the land was barren and of little value, whereas the title was good and the land was very valuable, because of its marble deposit, and ten years thereafter instituted an equitable action to rescind the sale. As excusing his delay, he alleged that he had no reason to suspect the truthfulness of the representations, that he lived more than 140 miles away; that the cost of investigation would have exceeded the purchase price, that an investigation would not have revealed a marble deposit on the land, and that he had no knowledge of the fraud complained of until three years before bringing suit. *Held*, that the plaintiff's voluntary failure to bring suit for three years after being fully cognizant of the fraud, committed seven years before that time, is such laches as will bar him of his action.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 170; Dec. Dig. § 100.*]

Error from Superior Court, Pickens County; N. A. Morris, Judge.

Action by B. C. Bryan against W. B. Tate and others. Judgment for defendants, and plaintiff brings error. Affirmed.

Dorsey & Shelton and Stevens & Ogburn, all of Atlanta, for plaintiff in error. S. H. Sibley, of Union Point, Wm. Butt, of Blue Ridge, and Howard Tate, of Atlanta, for defendants in error.

EVANS, P. J. The petition was dismissed on general demurrer. It alleged as follows: The petitioner is a grandnephew of Stephen Griffith, who died in 1873, seised and possessed of certain land in Pickens county, Ga., leaving a will wherein the land was devised to L. and A. for the life of L., with remainder to A.; but if they should both die without leaving child or grandchild, then the property not disposed of by his executor should revert to those who would be entitled to the same as if the testator had made no will. The devisee A. died in 1902, without child or grandchild, and the devisee L. had no child or grandchild at the death of A., and she is now more than 85 years of age, and without possibility of issue. The executor died in 1907, without having exercised the power of sale. The plaintiff is a remainderman under the will, being one of the heirs at law of Stephen Griffith. It is alleged that W. B. Tate, who had acquired the interest of the life tenants, procured P. F. M. Furr to fraudulently secure petitioner's interest, which was $\frac{1}{2}$ of the whole. Furr, on December 23, 1899, induced petitioner to make him a deed to his interest in the land for and in consideration of \$13.89, by falsely representing that he had been ad-

vised that the heirs of Griffith had no claim to the property, and that the proposed purchase price would have been petitioner's share if he had been an heir, and that the land was almost a barren field, of little or no value. It is alleged that the land conveyed contained valuable marble deposits, which were undeveloped and their existence was unknown to petitioner, and that petitioner relied on the truth of Furr's statements, and did not suspect, nor have reason to suspect, anything to the contrary; nor did any circumstances exist which would lead him to investigate the truthfulness of Furr's representations. Petitioner was also deceived by the representation that he had no interest under his granduncle's will. At the time he resided in the county of Banks, 140 miles away from the land, and a journey to the land would have cost him more than the sum he received for his interest, nor could he by investigation have learned anything as to the mineral value of the land. The real value of the whole property was from \$400,000 to \$500,000. Petitioner did not learn until 1907 of the fraud which had been practiced upon him. Furr conveyed the land to W. B. Tate on January 2, 1900, in pursuance of the scheme of Tate to acquire petitioner's interest. Tender of the amount was alleged to have been made to Furr, and the prayer was to cancel the deeds from petitioner to Furr and from Furr to Tate. The action was begun in 1910.

We think that the petitioner was in such laches that he lost whatever equitable right of rescission he may have had. As bearing upon his excuse for failing to sooner bring his action, it may be proper to remark that the will in controversy is that construed by this court in *Satterfield v. Tate*, 132 Ga. 256, 64 S. E. 60. As there construed, the will gave a joint life estate to L. and A. during the life of L., and a defeasible vested remainder to A., subject to be divested upon her dying without child or grandchild during the life of L., and upon the divesting of the remainder the property would go to the heirs of the testator as executory devisees. So that, when petitioner conveyed his interest while A. and L. were both in life, he had only a contingent interest in the land, contingent upon A. and L. dying without issue. Assuming that the allegations of the petition make a case of fraud, petitioner waited over ten years since the perpetration of the fraud, and three years after its discovery, before he appealed to the courts for relief. It does not appear when he tendered the purchase price to Furr.

No principle is more firmly imbedded in our equitable jurisprudence than that which requires a suitor who seeks equitable relief to move with diligence and without delay. "Vigilantibus non dormientibus jura subveniunt." Limitation of actions apply equal-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

ly to courts of law and equity; but in addition the courts may impose an equitable bar whenever, from the lapse of time and laches of the complainant, it would be inequitable to allow a party to enforce his legal rights. Civil Code, § 4369. Long acquiescence or laches by parties out of possession is productive of much hardship and injustice to others, and cannot be excused but by showing some actual hindrance or impediment caused by the fraud or concealment of the party in possession. *Woolfolk v. Beatly*, 18 Ga. 520. No confidential or fiduciary relation existed between Furr and the petitioner because of their relationship. *Crawford v. Crawford*, 134 Ga. 114, 87 S. E. 673, 19 Ann. Cas. 932. So far as the record discloses, Furr and the petitioner were dealing at arm's length, and petitioner asks to be excused of diligence in detecting the fraud because he had no reason to suspect the verity of Furr's representations; that he lived 140 miles away, and could not by investigation have known of the existence of the marble deposits. He does not state why an investigation would not have revealed a marble deposit, nor why Furr and Tate had superior knowledge of the marble deposit. He now knows of the marble deposit, but he fails to disclose the source of his information. Was the existence of the mineral apparent from surface outcroppings, or from its development by the purchaser? If an inspection of the premises would have disclosed the existence of marble, then a most casual investigation would have revealed it. If the marble deposits were revealed by the defendant's development of the property, then it would be inexcusable laches for the petitioner to wait ten years, three years of which time he had knowledge of all the facts, before moving to rescind his deed. Even if the petitioner be excused of laches for the seven years' delay, nevertheless, at the end of that period, when fully cognizant of the alleged fraud, he deliberately waited three years longer before appealing to a court of equity. The voluntary delay of three years, after knowledge of a fraud perpetrated seven years before that time, is inexcusable, and bars petitioner of any right of action which he might have had. *Reynolds v. Martin*, 116 Ga. 495, 42 S. E. 796.

Judgment affirmed. All the Justices concur.

(138 Ga. 324)

SHOCKLEY v. TATE et al.

(Supreme Court of Georgia. June 13, 1912.)

(*Syllabus by the Court.*)

OTHER DECISION CONTROLLING.

This case is controlled by the decision this day rendered in the case of *Bryan v. Tate*, 75 S. E. 205.

Error from Superior Court, Pickens County; N. A. Morris, Judge.

Action by Elizabeth Shockley against W. B. Tate and others. From the judgment, plaintiff brings error. Affirmed.

Dorsey & Shelton and *Stevens & Ogburn*, all of Atlanta, for plaintiff in error. S. H. Sibley, of Union Point, Wm. Butt, of Blue Ridge, and Howard Tate, of Atlanta, for defendants in error.

EVANS, P. J. Judgment affirmed. All the Justices concur.

(11 Ga. App. 304)

LAMAR et al. v. COOPER. (No. 3,723.)

(Court of Appeals of Georgia. July 10, 1912.)

(*Syllabus by the Court.*)

APPEAL AND ERROR (§ 588*)—RECORD—BRIEF OF EVIDENCE.

All the questions presented for determination depend upon a consideration of the evidence. The oral evidence is brief, and not very material to the issues involved. These issues depend almost wholly upon the construction to be placed upon an extended correspondence between the parties. This correspondence consists of about 50 letters. Fully half of them are wholly irrelevant and immaterial, many were not even introduced in evidence, and those that are relevant and material contain much irrelevant and immaterial matter. No attempt whatever was made to comply with the mandatory requirements of the statute relating to briefs of evidence in motions for new trials. Civil Code 1910, § 6093. All of the letters are copied literally and in extenso, with no effort at abridgment or condensation. This court is reluctant to refuse to consider a case because no proper brief of the evidence has been made, and will not do so unless the violation of the statute is flagrant and palpable. When such violation occurs, the explicit terms of the statute, and the uniform practice of the Supreme Court and of this court, demand an affirmance of the judgment, where the only questions made depend upon a consideration of the evidence. *Durden v. De Loach*, 9 Ga. App. 396, 71 S. E. 493; *Howard Piano Co. v. Brown*, 8 Ga. App. 426, 69 S. E. 495, and citations.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2607-2610; Dec. Dig. § 588.*]

Russell, J., dissenting.

Error from City Court of Macon; Robt. Hodges, Judge.

Action between Mrs. Jack Lamar and others, executors, and Kate O. Cooper, administratrix. From the judgment, Mrs. Lamar and others bring error. Affirmed.

Gueerry, Hall & Roberts, of Macon, for plaintiffs in error. W. D. McNeill, of Macon, for defendant in error.

HILL, C. J. Judgment affirmed.

RUSSELL, J. (dissenting). In my opinion the ruling requiring dismissal for failure to properly brief testimony should not be enforced in the present case to the utmost degree of strictness, for the reason that, while the letters are not briefed, in my judgment

those that are material could not be briefed, so as to convey their meaning as accurately as if the entire letter were copied. A number of letters entirely impertinent in their contents appear in the record, but each of them is prefaced by the statement that they were not introduced by the plaintiff. The appearance of these letters in the record is a violation of the letter of the rule, but, in my judgment, does not affect its spirit, for the reason that it is perfectly plain that they are nothing more than that much waste paper would be; a mere glance of the eye disclosing the fact that it is not necessary for the court to peruse them, or to inquire as to the materiality of their contents. Under my conception of the requirements of section 5527 of the Code of 1895 (Code 1910, § 6139), the court of review should not seek for excuses to dismiss the writ of error or even place itself in the position of appearing to do so; for, in the language of that statute, if there is enough in the bill of exceptions and the record to enable the court to determine the point at issue, it is its duty to do so. In view of the fact that the letters that have found their way into this record, so far as they are immaterial, are plainly marked, I do not think the writ of error should be dismissed; and in so far as the evidence itself is concerned, as it does not appear that there was any individual undertaking on the part of the decedent, but rather that he acted as a representative of a corporation, the judgment refusing new trial, in my opinion, should be reversed.

(11 Ga. App. 238)

YESBIK v. MACON, D. & S. R. CO.
(No. 4,180.)

(Court of Appeals of Georgia. July 2, 1912.)

(Syllabus by the Court.)

1. CARRIERS (§ 185*)—SHIPMENT OF FREIGHT—DAMAGES IN TRANSPORTATION.

Where goods received by a common carrier are in due course of transportation delivered to a connecting carrier, and reach the point of destination in a damaged condition, a recovery may be had against the delivering carrier, unless it shows that it did not receive the goods "as in good order," or, if so, that the goods were damaged before delivery to the initial carrier, or that, if the damage occurred in the course of transportation, it was due to no fault on the part of any of the carriers that handled the shipment.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 835-850; Dec. Dig. § 185.*]

2. CARRIERS (§ 49*)—FRUIT SHIPMENT—NOTATION ON BILL OF LADING.

A notation, on a bill of lading issued for a car load of fruit, that the vents on the car are to be closed, will not be construed as a direction from the shipper to the carrier to close the vents, in the absence of proof that the shipper knew of and assented to such notation.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 142-147; Dec. Dig. § 49.*]

3. CARRIERS (§ 177*)—CONNECTING CARRIERS—INJURY TO FREIGHT—LIABILITY OF DELIVERING CARRIER.

Where it is shown that a connecting carrier either actually or presumptively received as in good order a shipment of goods, which arrived at destination in a damaged condition, proof of the issuance by the initial carrier of a bill of lading containing an undertaking to deliver the goods at destination, over the line of the connecting carrier, will not defeat the right of the owner to recover the damages from the latter carrier.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 775-803; Dec. Dig. § 177.*]

Error from City Court of Dublin; H. R. Daniel, Judge.

Action by Acy Yesbik against the Macon, Dublin & Savannah Railroad Company. Judgment for defendant, and plaintiff brings error. Reversed.

The action was to recover for damages to a car load of bananas, alleged to have been caused partly by an unreasonable delay in transportation and partly on account of the negligent manner in which the goods were handled by the carrier. The plaintiff was nonsuited. It appears, from the evidence, that the Fruit Dispatch Company delivered the fruit to the Louisville & Nashville Railroad Company at New Orleans, to be shipped to the plaintiff at Dublin, Ga. The company issued its bill of lading, wherein it was recited that the goods were received in apparent good order, to be delivered to the Seaboard Air Line at Montgomery, Ala., and by it to the defendant at Vidalia, for transportation to destination. Following the description of the goods was the notation: "All vents closed; all plugs out and sealed." The bill of lading was dated at the top February 15th, but at the bottom appeared the following: "Signed Feby. 16. Louisville & Nashville R. R. Co., per O. B. Bonner." The bill of lading was signed only by the initial carrier. The plaintiff testified that the car of fruit was delivered to him by the defendant on Monday, February 20th, in a worthless condition, caused from decay; that two days was a reasonable time for the car to have been transported from New Orleans to Dublin, and it should have reached destination on February 17th; that the vents on the car were closed, the effect of which was to steam the bananas and "get them cooked"; that hot air will affect bananas in from 10 to 12 hours. He further testified that he went to the depot at Dublin on Sunday, February 19th, and was informed that the car had arrived; that, if the vents had been opened, the fruit would have been in good condition when it arrived at destination. There was no evidence to show when the car was actually delivered to the initial carrier, nor when it was received by the defendant. There was evidence that the bananas were sound and in good condition when delivered to the first carrier at New

Orleans. There was some other evidence for the plaintiff, but it is immaterial, since the nonsuit was wrong if the plaintiff by his testimony made a prima facie case.

Counsel for the defendant in error seek to sustain the nonsuit upon three grounds: (1) Because the evidence demanded a finding that there was no unreasonable delay in handling the shipment; (2) because, if the fruit was decayed on account of the closing of the vents, the plaintiff cannot recover, since this was done pursuant to the direction of the shipper, as shown by the bill of lading; (3) because the suit is upon the common-law liability of the defendant, and the evidence discloses an express contract with the initial carrier to deliver at destination, and it alone can be held liable.

Davis & Sturgis, of Dublin, for plaintiff in error. Chas. Akerman, of Macon, and J. S. Adams, of Dublin, for defendant in error.

POTTLE, J. (after stating the facts as above). [1] There being no allegation that the defendant receipted for the car of bananas as in good order, the petition will be construed as an effort to recover upon the implied obligation of the carrier to deliver safely and promptly, and not upon the statutory liability set forth in section 2752 of the Civil Code of 1910. It appearing that the shipment was delivered to the defendant as a connecting carrier in due course of transportation, and, nothing to the contrary appearing, the presumption is that the bananas were received as in good order. The onus is upon the defendant to show that they were not so received. *Hartwell Ry. Co. v. Kidd*, 10 Ga. App. 771, 74 S. E. 310; *Forrester v. Ga. Railroad Co.*, 92 Ga. 699, 19 S. E. 811. Until this presumption is rebutted, the defendant stands as though it had actually received the goods as in good order, and its liability is the same as that fixed by the section of the Code. It can defend by showing that, when received by it, the goods were in the same condition as when tendered to the plaintiff at Dublin; but, if received by it without exception, only those defenses are open which could be made by the initial carrier, such as that the bananas were damaged when delivered to the first carrier in New Orleans, or that, after shipment, they became damaged without fault on the part of any of the carriers. The plaintiff made a prima facie case by showing the receipt of the bananas by the defendant as a common carrier and the damage to the fruit.

[2] The evidence on the subject of delay is

indefinite and probably not sufficient to show an unreasonable delay in transportation. But this becomes immaterial, in view of the plaintiff's testimony that the closing of the vents, and not the delay, caused the damage. A carrier is bound to follow shipping directions given by the apparent owner of the goods shipped, and will not be liable for damages consequent upon obedience to such instructions. *Hutchinson, Carriers* (3d Ed.) § 69. But there is no evidence that the shipper directed the initial carrier to close the vents. There was no express contract, but a bill of lading in the nature of a receipt for the goods, signed by the carrier alone. The mere notation on the receipt, after the description of the goods, "all vents closed" is not sufficient, standing alone to prove that the carrier had been directed by the shipper to keep the car in this condition. There was no proof of the shipper's assent, or even knowledge; and, for aught that appears, the carrier closed the vents on the car in the exercise of its own judgment.

[3] The defendant having been named in the bill of lading as one of the carriers over whose line the goods were to be transported, the decisions in *East Tenn. Ry. Co. v. Johnson*, 85 Ga. 497, 11 S. E. 809, and *Almand v. Georgia R. Co.*, 95 Ga. 775, 22 S. E. 674, have no application. Besides, in neither of those cases was the suit for damage to goods in transit.

Judgment reversed.

(11 Ga. App. 328)

FEHN v. STATE. (No. 4,217.)

(Court of Appeals of Georgia. July 10, 1912.)

(Syllabus by the Court.)

CRIMINAL LAW (§ 945*)—NEW TRIAL—NEWLY DISCOVERED EVIDENCE.

The alleged newly discovered evidence not being merely cumulative or impeaching in its nature, and being of such character as on a second trial would likely produce a different result, the trial court erred in overruling the motion for a new trial.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 2324-2327, 2386; Dec. Dig. § 945.*]

Error from Superior Court, Walker County; J. W. Maddox, Judge.

Martin Fehn was convicted of crime, and brings error. Reversed.

J. E. Rosser, of La Fayette, and W. M. Henry, of Rome, for plaintiff in error. John W. Bale, Sol. Gen., for the State.

HILL, C. J. Judgment reversed.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

(92 S. C. 101)

MEYER et al. v. ATLANTIC COAST LINE R. CO.

(Supreme Court of South Carolina. July 20, 1912.)

CARRIERS (§ 408*)—BAGGAGE—LOSS—BURDEN OF PROOF.

Where a carrier received and checked as baggage goods delivered to it by a passenger and failed to deliver the same on demand, the burden was on it to escape liability to explain why the goods were not delivered, though it received them as a bailee or warehouseman, and whether the goods were baggage or not.

[Ed. Note.—For other cases, see Carriers. Cent. Dig. §§ 1557-1571; Dec. Dig. § 408.*]

Appeal from Common Pleas Circuit Court of Richland County; T. H. Spain, Judge.

Action by J. B. Meyer and another against the Atlantic Coast Line Railroad Company. From a judgment of nonsuit, plaintiffs appeal. Reversed, and new trial granted.

D. W. Robinson, of Columbia, for appellants. Barron, Moore, Barron & McKay, of Columbia, for respondent.

WATTS, J. This was an action by the plaintiffs against the defendant to recover the value of certain dry goods and notions contained in a telescope which had been delivered to the defendant for transportation and checked by defendant as baggage from Columbia, S. C., to Sumter, S. C. There was also a small amount of wearing apparel with it as to which there was no dispute. The complaint alleges that the telescope was filled with dry goods and notions which was the property of the plaintiff Meyer, which was being carried by the plaintiff Bunn, a salesman, to Sumter, S. C., for sale, the profits to be divided between them. The complaint alleges that the telescope, with its contents, was received by the defendant, which gave its check for the same, and undertook to transport and deliver the same promptly and safely. The plaintiffs further allege that the defendant failed to deliver the goods to plaintiffs or either of them at any time, and that it had lost or miscarried the same. The defendant entered a general denial. On the trial the plaintiffs offered evidence to sustain the allegations of the complaint. They also offered in evidence the check they had received for the telescope from the defendant, which had on it a printed clause limiting the responsibility for baggage to personal effects of the passenger necessary for his journey. It was testified that the plaintiff Bunn purchased a ticket and went on the same train his baggage was supposed to go on. Testimony was given as to the cost price of articles in the telescope and their sale price at Sumter, S. C.; also the correspondence between attorney for plaintiffs and the passenger agent of the defendant in January and March, 1911, in regard to the loss, in which plaintiffs set forth an itemized statement of goods con-

tained in the telescope and the statement was verified; also a letter from the defendant January 26, 1911, acknowledging the receipt of the claim and a promise to look into it and advise further; a similar letter in March, 1911. At the close of plaintiffs' testimony, the defendant moved for a nonsuit, which was granted by the court as to all but the small amount of personal baggage of the value of \$4.65. Plaintiffs appeal, and ask reversal on the following grounds: (1) That his honor erred in granting a nonsuit in this case, and in holding and ruling that the plaintiff was not entitled to recover the value of the goods lost by the defendant, upon the ground that the same was not personal baggage, because: (a) The defendant, having undertaken to transport the said goods, was charged with the duty of exercising care and skill in regard thereto, and was responsible for its negligence in losing the said goods, whether baggage or any other class of goods. (b) Because the defendant had not set up in its answer any claim or pretense that any fraud was committed on it that it was misled in checking said baggage, the contents of said telescope having been fully set forth in the complaint in this case. (c) That the uncontradicted evidence showed that the defendant had undertaken to trace and return said goods to said plaintiff, and wholly failed and neglected to do so. (d) That the uncontradicted evidence in the case tended to show that the defendant was guilty of gross negligence in failing to transport and deliver the said goods or find and return the same to plaintiff, and no excuse or explanation of said negligence and delay was given or admitted by the defendant.

We think the exceptions should be sustained, and the order of nonsuit set aside. The plaintiffs show beyond question that the defendant received the property, and has failed to account for the same. It has failed to deliver it to the plaintiffs, and gives no manner of explanation whatsoever as to what became of it, whether lost by it negligently or whether lost without any negligence on its part. To permit a nonsuit under such circumstances would be to allow the defendant to confiscate the plaintiffs' property. In any aspect of the case, the defendant, **having received the property from the plaintiffs, and taken custody of it, has no right to keep and retain it or to convert it.** On proof of delivery to the carrier and demand for it, the burden is on the defendant to explain why it has not delivered it, even though it received it as a mere bailee or warehouseman. This principle is fully discussed and established in *Fleischman v. Railway*, 76 S. C. 237, 56 S. E. 974, 9 L. R. A. (N. S.) 519. It was the duty of the court at close of plaintiffs' case to refuse the motion for nonsuit, as the burden was then on the defendant to explain and show the failure to deliver the telescope was through no negligence

or want of due care on its part. The defendant having received the baggage and having failed to account for it is liable for a conversion. *Fleischman v. Railway*, 76 S. C. 237, 56 S. E. 974, 9 L. R. A. (N. S.) 519; *Wall v. Atlantic Coast Line Railroad*, 71 S. C. 337, 51 S. E. 95. As to whether the articles in the telescope were baggage or such articles as are generally carried by a traveling salesman, it is unnecessary to consider now, and as to whether the defendant was an insurer of it or not, as the case will have to go back for a new trial.

Judgment reversed and new trial granted.

GARY, C. J., and WOODS, HYDRICK, and FRASER, JJ., concur.

(92 S. C. 214)

TRAPP v. WESTERN UNION TELEGRAPH CO.

(Supreme Court of South Carolina. July 19, 1912.)

1. TRIAL (§ 194*)—INSTRUCTIONS—CHARGING ON FACTS.

In an action against a telegraph company for delay in delivery of a message due to its wrong delivery to a neighbor of the addressee, the court charged that there was no evidence that anybody told the messenger to deliver it to the neighbor, and that, if there was no evidence from which the jury could conclude that by implication he was authorized to so deliver it, such delivery was wrongful, and amounted to no delivery. There was no attempt to show that the neighbor had any authority to receive the message. *Held*, by a divided court, that such charge was not improper as being a charge on the facts, since the court may tell the jury that facts are admitted, or that there is no controversy about them.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 413, 436, 439-441, 446-454, 456-466; Dec. Dig. § 194.*]

2. TELEGRAPHS AND TELEPHONES (§ 73*)—DELIVERY OF MESSAGES—ACTIONS FOR DAMAGES—EXEMPLARY DAMAGES.

In an action for delay in delivery of a telegram, where a messenger, not finding the addressee at home, left it with a neighbor, the question of willfulness was for the jury, and hence the denial of a nonsuit as to punitive damages and the refusal to set aside so much of the verdict as awarded punitive damages was proper.

[Ed. Note.—For other cases, see Telegraphs and Telephones, Cent. Dig. § 76; Dec. Dig. § 73.*]

3. EVIDENCE (§ 317*)—DELIVERY OF MESSAGES—ACTIONS FOR DAMAGES—HEARSAY.

In an action for delay in delivery of a telegram causing the addressee to lose a position which was open to her, testimony of the sender that the prospective employer stated to him that the position would continue 10 or 12 weeks at \$25 a month was not hearsay, where it was not claimed that the offer of employment was in writing.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1174-1192; Dec. Dig. § 317.*] Fraser and Woods, JJ., dissenting in part.

Appeal from Common Pleas Circuit Court of Laurens County.

Action by Mrs. Ella Trapp against the

Western Union Telegraph Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Ferguson, Featherstone & Knight, of Laurens, for appellant. Simpson, Cooper & Babb, of Laurens, for respondent.

HYDRICK, J. I cannot concur in the opinion of Mr. Justice FRASER in holding that the fourth exception of appellants should be sustained on the ground that it was a charge on the facts, and that the judgment should be reversed. I concur in so much of his opinion as overrules the other exceptions.

[1] I think the fourth exception should be overruled and the judgment affirmed. There was no error in the judge's charge. He did not invade the province of the jury by charging on the facts. There is no violation of this provision of the Constitution for the circuit judge to state to the jury what facts are admitted by the pleadings, what facts are admitted in evidence, and the evidence about which there is no controversy. There certainly was no testimony from any source that Mrs. Peterson had any authority to receive this telegram. She said no one had authorized her to receive it. There is no attempt on the part of the defendant to show that she was authorized to receive it. The defendant, in delivering the telegram to a person other than the one to whom it is addressed, or one authorized to receive it, does so at their peril. A careful reading of Judge Gage's charge as a whole will show that he committed no error. "Statement of judge in charge of undisputed evidence is not a charge on facts in violation of the Constitution." *Turner v. Lyles*, 68 S. C. 395, 48 S. E. 301; *Jennings v. Manufacturing Co.*, 72 S. C. 419, 52 S. E. 113.

As two of the justices concur in this opinion, the judgment is affirmed.

GARY, C. J., concurs.

FRASER, J. (dissenting). This is an action by the respondent against the appellant for failure to deliver promptly the following telegram: "Come to Atlanta by first train—report 92 Luckie St. Good position open for you." The testimony tended to show that the telegram was received by the agent of appellant at Laurens, S. C., and turned over to the messenger boy to be delivered about 2 o'clock on the 2d of June, 1910. The messenger, after some search, succeeded in finding where Mrs. Trapp lived. Mrs. Trapp was not at home when the messenger went to her house. He delivered the message to a neighbor to be delivered to Mrs. Trapp when she should return. The neighbor did not deliver the message until after midday of June 3d. The information was received too late to enable Mrs. Trapp to secure the good position, and she brought this suit for actual and

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

† Rehearing denied August 7, 1912.

punitive damages. The cause was tried before his honor, Judge Gage, and a jury. The jury rendered a verdict for both actual and punitive damages.

The exceptions are as follows: "(1) Because, it is respectfully submitted, the presiding judge erred in refusing the motion by the defendant, at the close of all the testimony, to direct a verdict for the said defendant with reference to punitive damages, there being absolutely no testimony to show willfulness or wantonness on the part of the defendant, the testimony showing, on the contrary, that the defendant made an earnest, honest effort to deliver the telegram. (2) Because, it is respectfully submitted, that the presiding judge erred in refusing to grant a new trial, or to set aside so much of the verdict as finds punitive damages for the plaintiff, when there is absolutely no testimony to sustain such a finding. (3) Because it is respectfully submitted that his honor erred in admitting, against the objection of the defendant, so much of the testimony of Dr. Ham, as follows: 'The party desiring said services stated that the position would continue 10 or 12 weeks at \$25 per month and board.' It being respectfully submitted that said testimony was hearsay, and should have been rejected. (4) Because it is respectfully submitted that his honor erred in charging the jury as follows: 'There is no evidence that anybody told him to deliver it to Mrs. Peterson. Is there any evidence to justify the jury in concluding that by implication the boy was authorized to deliver it to Mrs. Peterson? If not, then the delivery to Mrs. Peterson was a wrongful delivery, and just as if it had not been delivered at all. If a telegraph boy takes and delivers a telegram addressed to one person to another person unauthorized to receive it, he might as well go and put it in a stump.' The error being that in so charging the jury the circuit judge charged upon the facts as to the breach of duty on the part of the defendant when he should have left it for the jury to say from all of the facts and circumstances as to whether or not the defendant made an honest effort to deliver the message." The first and second exceptions will be considered together.

[2] There was evidence to carry the case to the jury on the question of willfulness. In the case of *Glover v. Telegraph Co.*, 87 S. C. 509, 59 S. E. 529, this court says: "It was for the jury to say whether the delivery to Royal under misleading information as to the contents of the message was mere inadvertence or was the result of a willful disregard of duty. A telegraph company having delivered a message to a person not authorized by the sender or addressee to receive it is responsible for the consequence of any delay by such person in delivering to the addressee, just as if such third person had been authorized by the company to deliver it as

its agent." This court has never said that a telegraph company may search for the addressee until it knows where to find him, and then abandon all efforts to deliver, and rely upon its previous efforts as a protection from punishment for its conduct, which from that time on may become willful. All this court decides is that there was some evidence to go to the jury.

I think the fourth exception ought to be sustained. This was equivalent to saying that defendant was guilty of a willful disregard of duty in not delivering the telegram itself to the addressee and therefore a charge on the facts.

[3] The third exception is overruled. The question was: "What was the nature of this position, for what length of time was it to continue, and what compensation was Mrs. Trapp to receive?" There was no intimation that the offer of employment was in writing, and the only possible answer to the question was what the employer said.

I think the judgment of circuit court ought to be reversed, and the case remanded for a new trial.

WOODS, J., concurs.

(94 S. C. 40)

Ex parte YORKE.

SOUTHERN RY. CO. v. WEAVER.

(Supreme Court of South Carolina. July 16, 1912.)

ATTACHMENT (§ 308*)—APPEAL AND ERROR (§ 1010*)—EVIDENCE—SUFFICIENCY.

In an action by a railway company to establish a lien against property transported for the difference between the charge demanded and paid and the rate fixed by law, where a third party intervened and claimed to have purchased the property, and the evidence showed that the sale was kept quiet, and that the seller, with the connivance of the buyer, continued to enjoy the privileges of ownership, a finding that there was no sale was supported by the evidence, and hence the Supreme Court had no jurisdiction.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. §§ 1102-1109, 1111-1113; Dec. Dig. § 308;* Appeal and Error, Cent. Dig. §§ 3979-3982, 4024; Dec. Dig. § 1010.*]

Appeal from Common Pleas Circuit Court of Richland County; T. H. Spain, Judge.

Action by the Southern Railway Company against D. A. Weaver, in which H. E. Yorke intervened. From a judgment for plaintiff, the intervener appeals. Appeal dismissed.

Lyles & Lyles, of Columbia, for appellant. J. Waites Thomas, of Columbia, for respondent.

FRASER, J. The defendant, D. A. Weaver, shipped two horses, one a stallion and the other a filly, from Fairfield, Ill., to Columbia, S. C., and paid the sum of \$48.65, the freight demanded for two horses. It seems that the freight charges fixed by the commission on

stallions was higher, and it was agreed that the correct charges were \$132.80. The transportation company brought this action for \$84.15, the difference, as they are required to do by law, and attached the filly as Weaver was a nonresident. The horses were shipped as the property of Weaver, but the stallion belonged to H. E. Yorke, and it is claimed that, just after the arrival of the horses, Weaver sold the filly to Yorke, and gave him a written bill of sale for it. Yorke entered the stallion as his own with the racing association, and entered the filly as the property of Weaver. Yorke then got two owner's badges, one for himself and one for Weaver. Weaver used his badge. The action was brought against Weaver alone, but Yorke intervened. The action was tried before a magistrate, who found as follows: "I find judgment for plaintiff against defendant for eighty-four and 15/100 (\$84.15) dollars, and that the filly Ina Lee, claimed by H. E. Yorke, so far as this judgment is concerned, is the property of the defendant, D. A. Weaver, and that plaintiff has a lien thereon for freight; the plaintiff never having parted with possession unconditionally." The magistrate's report of the case contains the following: "The claimant, H. E. Yorke, put in evidence an alleged bill of sale, but from an inspection of the same and from the evidence submitted I found as a matter of fact that the bill of sale was not supported by the evidence and the circumstances surrounding the transaction."

The circuit judge sustained the magistrate. The intervenor, Yorke, appeals to this court with the following exceptions: "(1) That his honor erred, because the evidence admitted only of the inference that there had been a bona fide transfer of title and possession of the filly Ina Lee from D. A. Weaver to H. E. Yorke on December 14, 1911, free and clear of any lien in favor of the Southern Railway Company, without any notice to the said H. E. Yorke of any claim by the Southern Railway Company, and he should have adjudged that as such the said filly Ina Lee was not subject to attachment as the property of D. A. Weaver, and he should have reversed the magistrate's judgment in so far as the same held that the said filly could be so attached. (2) That his honor should have held that the evidence admitted only of the inference that the Southern Railway Company had voluntarily parted with possession of the said filly before December 14, 1911, and had thereby lost its lien, and that there was a bona fide transfer of title and possession of the said filly, without notice of any claim of the Southern Railway Company, to H. E. Yorke, on the 14th day of December, 1911; and he should have adjudged that the said filly was not subject to attachment as the property of the said D. A. Weaver. (3) That his honor should have held that the evidence admitted only of the inference that the Southern

Railway Company had lost its lien on the said filly Ina Lee by issuing the process of attachment, and attaching her, and he should have adjudged that the filly was the property of the said H. E. Yorke, and not subject to attachment as the property of the said D. A. Weaver." All of these exceptions are overruled.

As soon as this court finds that there is any evidence to support the judgment in a case like this, its jurisdiction is at an end. When the owner of personal property sells it and gives written evidence of the sale, and keeps it quiet and continues to enjoy the privileges of ownership until it is to his and the buyer's advantage to disclaim ownership, and the buyer secures the insignia of ownership for the seller and connives at its use, then neither the buyer nor the seller can successfully maintain that there is no evidence that there has been a sale. It is not even claimed that the "bill of sale" is a correct statement of the facts.

There being some evidence to support the finding, the appeal is dismissed.

GARY, C. J., and WOODS, HYDRICK, and WATTS, JJ., concur.

(22 S. C. 61)

STATE v. WOOTEN.

(Supreme Court of South Carolina. July 15, 1912.)

1. CRIMINAL LAW (§ 1169*)—HARMLESS ERROR—EVIDENCE.

In a trial for violating the dispensary law (Act March 2, 1909 [26 St. at Large, p. 60]; Act Feb. 23, 1910 [26 St. at Large, p. 572]), any error in permitting the state to show a former conviction on rebuttal was harmless, where accused was permitted to reply thereto.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 8088, 8137-8143; Dec. Dig. § 1169.*]

2. INTOXICATING LIQUORS (§ 242*)—DISPENSARY LAW—VIOLATION—PUNISHMENT.

Under the dispensary law (Act March 2, 1909 [26 St. at Large, p. 60] and Act Feb. 23, 1910 [26 St. at Large, p. 572]), whether one convicted for violating it shall be fined or imprisoned rests within the trial court's sound discretion.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. §§ 856-861; Dec. Dig. § 242.*]

Fraser, J., dissenting.

Appeal from General Sessions Circuit Court of Spartanburg County; Ernest Gary, Judge.

Ed Wooten was convicted of violating the dispensary law, and he appeals. Affirmed.

C. P. Sims and Nicholls & Nicholls, all of Spartanburg, for appellant. J. C. Otts, Sol., of Spartanburg, for the State.

WATTS, J. The defendant-appellant was indicted and convicted at November term of court, 1911, for Spartanburg county, for vio-

lation of the dispensary law (Acts 1909 and 1910) upon three counts, to wit: First, for the sale of alcoholic liquor in violation of section 1 of the act of 1909 (26 St. at Large, p. 60); second, for maintaining a common nuisance in violation of section 1 of the act of 1910 (26 St. at Large, p. 572); third, for storing alcoholic liquors for unlawful purposes in violation of section 1 of the act of 1909, and sentenced by his honor, Judge Ernest Gary, to be confined at hard labor on the public works of Spartanburg county, or in the state penitentiary, for one year on the first count of the indictment, and at the expiration of that time to be confined at hard labor on the public works for a period of six months each, respectively, on the second and third counts of the indictment.

[1] Thereupon defendant appealed, and asks reversal of the same upon four grounds, to wit: (1) The court erred in admitting a record purporting to be a record showing that the defendant had been convicted and sentenced in 1901 for selling liquor, over objection of defendant's counsel, without proving by the proper officer that the said record was a record in the office of the clerk of the court of general sessions of Spartanburg county, or any other county in the state. (2) The court erred in overruling objection of defendant's counsel to the admission of the record, purporting to be a record showing that the defendant was convicted and sentenced in 1901 for violation of the dispensary laws; the error being that the introduction of said record was incompetent by way of reply. (3) The introduction of the record purporting to show that defendant was convicted and sentenced in 1901 for violation of the dispensary laws was erroneous, in that (a) it was an improper method of attacking defendant's character as a witness, and (b) was irrelevant to the issue involved in the case, for the reason that evidence of a conviction prior to 1909 had no bearing upon the prosecution for an offense against which an indictment had been preferred, based on the act of 1909; and (c) it was never proven that the record in question disclosed a prior conviction of the defendant at bar, in that the record of 1901 disclosed the conviction of one "W. E. Wooten," whereas the defendant in the instant case was indicted under the name of "Ed Wooten," who denied that the conviction of W. E. Wooten applied to him. (4) The court erred in imposing upon the defendant the increased sentence which section 11 of the act of 1909 provides in case of a second conviction of violation of the dispensary laws, the error being that there was no evidence of a previous conviction of defendant under the act of 1909, which evidence was the sine qua non to the application of the increased penalty of the act.

As to exceptions 1, 2, and 3, which question his honor's ruling in admitting in evi-

dence the record of the court of general sessions, purporting to be a former conviction of the defendant-appellant, the record shows the following: "The solicitor offered to introduce a record of sentence against the defendant of 1901. Mr. Sims, for the defense, objected to its being introduced in evidence in reply." After ruling by the court that it was competent, "Mr. Sims objects on the ground that the indictment referred to is against W. E. Wooten, and not Ed Wooten." These are the only grounds of objection made and the only one ruled upon by his honor, and the exceptions cannot be sustained, as an examination of the record will disclose that the introduction of what purports to be the record of a former conviction was directly in reply to the evidence given by the defendant in his examination in chief, brought out by his attorney. But, further, his honor allowed the defendant to go back on the stand and testify, after this record had been introduced in reply by the state, and defendant has no right to complain. It is very difficult for the trial judge to carry all of the testimony in a case in his head, and frequently he is in doubt as to what is strictly in reply, and valuable time would be consumed in ascertaining what has been testified to when that is the case. I see no reason why the judge should not allow the testimony to be introduced and the other side allowed to reply to it. This certainly would cure any objection to it and render the admission to it harmless, as to it being in reply. The defendant when recalled to the witness stand admitted that one of the records introduced was against him and that he had paid the fine.

[2] As to exception 4, the acts of the Legislature leave it discretionary with the trial judge in sentencing a party convicted as to whether he will impose a fine or sentence of imprisonment, and his honor imposed a sentence that was within his wise discretion, and this exception must be overruled. *State v. Boyd*, 35 S. C. 269, 14 S. E. 620.

Judgment affirmed.

GARY, C. J., and WOODS and HYDRICK, JJ., concur.

FRASER, J. (dissenting). I dissent. It seems to me that the records of former convictions were not admissible. The names were similar, but it is necessary to show that the persons were the same. Records of a court prove themselves, but they do not and cannot identify the person on trial with the defendant in former trials, and until some evidence is introduced to show that the two were the same, the records are not admissible. In this case there was not a word of proof until the defendant, after evidence was already in, was practically forced to be a witness against himself. Besides this, the defendant was not charged

with a second offense. I do not think it is good practice to allow the state, while the presumption of innocence is still with the defendant, to prove that some one with the same name, and assumed to be the defendant, is an old offender.

(92 S. C. 1)

HUGHES v. SOUTHERN RY. CO. et al.
(Supreme Court of South Carolina. July 10, 1912.)

JUDGMENT (§ 588*)—CONCLUSIVENESS—VALIDITY OF RELEASE.

An unappealed judgment of nonsuit, in a personal injury action wherein plaintiff treated a release as valid, bars subsequent action brought on the theory of invalidity of the release.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1062, 1090; Dec. Dig. § 588.*]

Appeal from Common Pleas Circuit Court of Richland County; T. H. Spain, Judge.

Action by B. D. Hughes against the Southern Railway Company and another. Judgment for defendants, and plaintiff appeals. Affirmed.

The complaint reads as follows:

"The plaintiff above named, complaining of the defendants above named, alleges:

"(1) That upon information and belief the defendant Southern Railway Company is now, and was at the times hereinafter mentioned, a corporation duly chartered and organized under and by virtue of the laws of the state of Virginia, and at the times hereinafter mentioned owned and operated, and now owns and operates, a certain line of railroad, together with tracks, trains, engines, and other appurtenances thereto belonging, railroad yards, roundhouses, machine shops, situated in the city of Columbia, in the said county and state of South Carolina; and that the defendant R. B. Watts was at the times hereinafter mentioned, and is now, a resident and citizen of the state of South Carolina, county of Richland.

"(2) That on the 4th day of November, 1907, the plaintiff, B. D. Hughes, was in the employ of the said defendant Southern Railway Company as assistant foreman of the roundhouse in the said yard of the defendant, situated, as aforesaid, in the city of Columbia; and that on the said date above mentioned, while in the discharge of his duty as assistant foreman, an engine belonging to the said defendant Southern Railway Company, and in charge of and operated by the defendant the said R. B. Watts, an agent, servant, and employé of the said railway company, approached and ran into the said roundhouse in a careless, negligent, and reckless manner and knocked down one of the posts or pillars thereof, precipitating upon the plaintiff portions of the said roundhouse, throwing him to the ground, cutting a long

gash across the top of his head, bruising his back, neck, shoulder, chest, side, and head, and causing a number of bruises on different parts of his body, and seriously and permanently injuring him so that he became ill and sick, and has suffered intense pain from his injuries, and has been put to great expense for medicine and medical attention, and has been informed and believes that he will never be well again.

"(3) That the said engine of the defendant Southern Railway Company was being run into the roundhouse for repairs by the defendant R. B. Watts, who was at the time the agent, servant, and employé of the defendant Southern Railway Company. That, as said engine moved along the track into the roundhouse, a bar of iron or other obstruction extending outward from said engine struck with violent force against an upright post which was standing near the said track and supported the ceiling and roof of the roundhouse. That the said upright post was of defective material, the same being unsound and rotten; and the said roundhouse being old and worn and of defective material; and in maintaining a defective turntable; and the upright post being placed too close to the track leading into the roundhouse; and the construction of the said building being unsuitable, out of date, and too small to allow the large modern engines now owned and used by the defendant Southern Railway Company to pass in and out of the said building with safety. That by reason of the upright post being struck as aforesaid, and it being unsound and too close to the track, it was broken and knocked to the ground, and the ceiling and roof being thus left unsupported, fell with it. That the ceiling and roof, consisting of girders, beams, and other materials and debris, came down and fell without warning upon the plaintiff and knocked him senseless, bruised and injured him in his head and body, and inflicted upon him permanent bodily injuries, as above described. That the said injuries received by the plaintiff were caused by the joint and concurrent negligence, carelessness, recklessness, and wanton conduct of the defendants, in causing said engine to be run into the roundhouse with a bar of iron or other obstruction extending outward therefrom; in causing said bar or other obstruction to strike with violent force against said post; and in not providing a post of good material; and in causing said post to be broken; and in causing the ceiling and roof, girders, beams, and other materials and debris to be precipitated downward without warning upon the plaintiff, as aforesaid; and in not providing a safe place for plaintiff to work; and in maintaining and operating an old and worn turntable; and in maintaining and operating a defective roundhouse; and in allowing the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

upright post to remain too close to the track leading into the roundhouse, to take in and out the large modern engines with safety.

"(4) That by reason of the said joint and concurrent carelessness, negligence, reckless and wanton conduct of the defendant Southern Railway Company, and the said R. B. Watts, agent and employé, as aforesaid, in causing the said engine to be run into the roundhouse with the bar of iron or other obstruction extending outward therefrom; and in causing said bar of iron or other obstruction to strike with violent force against said post; and in not providing a post of good material; and in causing said post to be broken; in causing the ceiling and roof, girders, beams, and other materials and debris to be precipitated downward, without warning, upon the plaintiff as aforesaid; and in not providing a safe place for plaintiff to work; and in allowing the upright post of the roundhouse to remain too close to the track leading into the roundhouse and in maintaining and keeping an old, defective, out of date roundhouse, too small to allow the large, modern engines, owned by the defendant Southern Railway Company, to go in and out with safety; and in maintaining and operating a defective turntable.

"(5) That as a result of the said joint and concurrent carelessness, negligence, recklessness and wantonness of the defendants, as aforesaid, the plaintiff has been injured in the sum of twenty thousand (\$20,000.00) dollars.

"Wherefore plaintiff demands judgment in the sum of twenty thousand (\$20,000.00) dollars, and for the costs of this action.

"W. Boyd Evans, Plaintiff's Attorney."
(Verified.)

The following is the answer of the defendant Southern Railway Company, together with exhibits attached thereto:

"The defendant Southern Railway Company, answering the complaint herein:

"For a first defense:

"(1) Admits the allegations of paragraph 1.

"(2) As to the allegations of paragraphs 2, 3, 4, and 5, this defendant admits that on the date named in the complaint the plaintiff, B. D. Hughes, was in the employ of this defendant as acting assistant foreman of the roundhouse, and that on said date the plaintiff received some injuries by reason of one of the posts of the said roundhouse being knocked down by one of the defendant's engines, for which accident plaintiff was responsible. As to the extent of the injuries, this defendant alleges, upon information and belief, that they were slight and temporary. Denies each and every allegation of said paragraphs 2, 3, 4, and 5 not hereinabove admitted.

"(3) Denies each and every allegation in said complaint contained not herein above specifically admitted or denied.

"For a second defense:

"Alleges that the plaintiff, at the time of entering upon said services as alleged in the complaint, and thereafter, knew of the risks ordinary or otherwise incident thereto, including the alleged risk alleged to have resulted in the injury of which he complains, and that with said knowledge he fully assumed the said risks and thereby waived any right on his part to hold this defendant liable to him therefor.

"For a third defense:

"Alleges, on information and belief, that, on the occasion referred to in the complaint, plaintiff was himself guilty of carelessness, negligence, and recklessness in giving signals to the engineer in charge of said engine, said engineer being at the time under the direct control and management of the plaintiff herein, and in carelessly, negligently, and recklessly allowing the said engineer to proceed with the said engine into the said roundhouse when he knew the same could not be done without injury to himself and others, and that such carelessness, negligence, and recklessness on his part contributed to a proximate cause of his injury, without which same would not have occurred.

"For a fourth defense:

"(1) The defendant alleges that after the time of the alleged injury and before the commencement of this action, to wit, on the 18th day of November, 1907, in consideration of the payment of \$1 to the plaintiff by this defendant, the said plaintiff executed and delivered to this defendant a written release in full satisfaction and discharge of all claims for damages resulting from the injury alleged in the complaint herein.

"(2) This defendant further alleges that subsequent to the execution of the said release, to wit, on the 28d day of April, 1908, the plaintiff herein, B. D. Hughes, commenced in the court of common pleas for Richland county an action against the said defendant Southern Railway Company, as will appear by the record in said cause, and in said complaint alleged substantially the same facts as to the said accident as are set out in the above-entitled action, and further alleged plaintiff's injury in said accident and the execution and delivery of a release to the defendant Southern Railway Company by plaintiff of all claims against it on account of said alleged injuries. Said complaint was duly answered, and thereafter, on the 15th day of June, 1910, the said cause proceeded regularly to trial in said court before his honor, J. W. De Vore, presiding judge, and a jury, resulting in an order of nonsuit. Attached hereto, and made a part hereof, are the complaint, answer, and order of nonsuit, marked, respectively, Exhibits 'A,' 'B,' and 'C.' That no appeal was ever taken from said order of nonsuit. This defendant now pleads that the validity of said release has been adjudicated in the

aforesaid action and plaintiff is now estopped from maintaining this action.

"[Signed] E. M. Thomson,

"Attorney for Defendant Southern Railway Co.

"Columbia, S. C., March 20th, 1911."
(Verified.)

Exhibit A.

"The plaintiff above named, complaining of the defendant above named, alleges:

"(1) Upon information and belief, that the defendant Southern Railway Company is now, and was at the times hereinafter mentioned, a corporation duly chartered and organized under and by virtue of the laws of the state of Virginia, and at the times hereinafter mentioned, owned and operated, and now owns and operates, a certain line of railroad, together with tracks, trains, engines, and other appurtenances thereto belonging, railroad yards, roundhouses, machine shop, situated in the city of Columbia, in the said county of Richland, in the said state of South Carolina.

"(2) That on or about the 4th day of November, 1907, the plaintiff, B. D. Hughes, was in the employ of the said defendant as assistant foreman of the roundhouse in the said yard of the said defendant, situated as aforesaid, in the city of Columbia. That while in the discharge of his duties as assistant foreman, an engine belonging to the said defendant ran into the said roundhouse and knocked down one of the pillars thereof, precipitating upon the plaintiff portions of the said roundhouse, thereby seriously injuring him. That on or about the 16th day of November, 1907, the plaintiff entered into an agreement with the defendant that he would release to the defendant all claims he had against the defendant, resulting from the said injuries to him; and the said defendant, in consideration of the said release, would pay to the plaintiff the sum of \$1, and restore the plaintiff, without any loss of time, to his said position as assistant foreman of the said roundhouse.

"(3) That in performance of the said agreement, the plaintiff did on or about the said 18th day of November, 1907, execute and deliver unto the said defendant a release of all claims against the said defendant on account of the said injuries, and the defendant in part performance of the said agreement, paid to the plaintiff the said sum of \$1 and soon thereafter restored the plaintiff to his said position as assistant foreman of the said roundhouse; and the plaintiff duly entered into the performance of said duties as said assistant foreman, on or about the 19th day of November, 1907.

"(4) That soon after entering upon the performance of his said duties, to wit, about one week thereafter, the plaintiff was removed from said position by the defendant, without cause and with intent to violate said

agreement, and said position given to another person. That plaintiff thereupon demanded that the said position be restored to him under the terms of said agreement, but the said defendant wantonly and willfully failed and refused and still refuses to restore the same to him under the terms of the said agreement, and the plaintiff alleges that by reason of the refusal of the said defendant to carry out the terms of the said agreement, and on account of the breach thereof, as aforesaid, he has been damaged in the sum of \$17,000.

"Wherefore, plaintiff demands judgment against the defendant in the sum of \$17,000.

"[Signed] Melton & Evans,

"Geo. R. Rembert,

"Plaintiff's Attorneys.

"February 5, 1908."

(Verified.)

Exhibit B.

"The defendant Southern Railway Company, answering the complaint herein:

"(1) Admits the allegations of paragraph 1, unless the property or any part thereof referred to is included in the lease from Southern Railway, Carolina Division to Southern Railway Company, of date June 30, 1902, in which event it denies the allegations as to ownership of same.

"(2) As to the allegations of paragraph 2, admits that on the date mentioned, plaintiff, while in the employ of the defendant in the capacity of acting assistant foreman of the roundhouse, was injured in consequence of an engine running into said roundhouse (for which accident plaintiff was responsible). It denies that said injuries were serious; on the contrary, alleged in information and belief that they were very slight. It admits further that plaintiff thereafter executed a written release to defendant of all claims arising against it or growing out of the said accident, and that plaintiff thereupon resumed his duties as acting assistant foreman of the roundhouse, without any loss of time; in other words, no reduction was made from his salary or wages on account of two weeks' time lost in consequence of said accident. Denies each and every allegation of said paragraph 2, not hereinabove specifically admitted or denied.

"(3) As to allegations of paragraph 3, admits that plaintiff executed a release to defendant on or about the date stated in full of all claims against defendant on account of said injuries; and that plaintiff thereafter, on the 19th day of November, 1907, resumed his duties as acting assistant foreman of the roundhouse. Denies each and every allegation of said paragraph 3 not herein specifically admitted.

"(4) As to the allegations of paragraph 4, admits that about a week after plaintiff had resumed his work as acting assistant foreman of the roundhouse, on account of his

unsatisfactory work and failure to perform the duties of that position, he was given a position of machinist, having had several years' experience as machinist. Defendant alleges that plaintiff, after a week's work as machinist, quit its service. Denies each and every allegation of said paragraph 4, not above specifically admitted.

"(5) As to each and every allegation of said complaint not hereinabove specifically admitted or denied, defendant denies the same.

"For a second defense:

"The defendant alleges that although the alleged agreement upon which this action was brought by its terms was not to be performed within the space of one year from the making thereof, neither said agreement nor any note or memorandum thereof was ever in writing and subscribed by the said Southern Railway Company, which it ought to be charged therewith, or some person thereto by its lawful authority.

"[Signed] E. M. Thomson,

"Attorney for Defendant."

(Verified.)

Exhibit C.

"This case came on for trial June 15, 1910.

"After the plaintiff had been sworn and commenced his testimony, it was sought by his attorneys to prove a parol agreement about the same subject-matter made prior to the execution of the written agreement referred to in the complaint. The written agreement (release) was exhibited to the plaintiff by defendant's attorney and plaintiff admitted the execution thereof and the receipt of the consideration, viz., \$1, and said release was admitted in evidence. Defendant's attorney then objected to any testimony tending to show the alleged prior oral agreement referred to in the complaint, on the grounds taken down by the court stenographer: First, that if there is such an oral agreement it was merged in the written release; second, that it was obvious to the statute of frauds; and, third, that it was void, being indefinite as to time, terms, or conditions.

"After hearing argument the objections were sustained; plaintiff's attorney thereupon stated that they would have to submit to a nonsuit in view of such ruling, and a nonsuit is accordingly granted.

"J. W. De Vore, Presiding Judge.

"Columbia, S. C., June 16, 1910."

The answer of the defendant R. B. Watts is practically identical with that of the Southern Railway Company, with exception that the allegations of the fourth defense are made on information and belief.

W. Boyd Evans, of Columbia, for appellant. E. M. Thomson, of Columbia, for respondents.

WATTS, J. This was an action in the court of common pleas for Richland county

to recover the sum of \$20,000 damages for alleged careless, reckless, and wanton conduct of defendants for alleged injuries received by the plaintiff on November 4, 1907, while in the employment of the Southern Railway Company. The defendants answer, and in their fourth defense allege that on the 22d day of April, 1908, the plaintiff, Hughes, commenced an action in the court of common pleas for Richland county against the defendant, Southern Railway Company, as will appear by the record in said cause, and in that complaint alleged substantially the same facts as to the said accident as are now set out in the pending action, and allege further plaintiff's injury in said accident and the execution and delivery of a release to the Southern Railway Company by the plaintiff to all claims against it on account of said alleged injuries. Complaint was duly answered, and on June 15, 1910, the cause proceeded regularly to trial before Judge De Vore and a jury, resulting in an order of nonsuit. Attached to this answer and made a part thereof are the complaint, answer, and order of nonsuit, marked "Exhibits A, B, and C"; that no appeal was taken from this order of nonsuit. The defendant pleads that the validity of said release has been adjudicated in the former action and plaintiff is now estopped from maintaining this action. For a proper understanding of the issues, the complaint in this case, together with the answer and exhibits, will be reported with the case. The plaintiff interposed a demurrer to the fourth defense in the case at bar on the following grounds: The plaintiff above named demurs to the allegations of paragraph 2 in the above-entitled action: That upon the face thereof, together with Exhibits A, B, and C, annexed to the answer, and a part thereof, it does not constitute a defense to this action upon the grounds: (1) That the complaint herein does not allege substantially the same facts as the said complaint in the former action. (2) That this action is entirely a different cause of action than the one sued on in the former action. The cause of action sued on in this cause being one founded upon the delict wrong done by the defendant to plaintiff, where the former action was founded upon and growing out of a contract between the plaintiff and the defendant, and therefore that action or action in the former suit cannot be pleaded in bar of this action. (3) That the question of validity of the said release was unadjudicated in the former action and does not constitute an estoppel herein. The demurrer was heard and overruled by Judge Spain, and the plaintiff appealed on the following grounds: That his honor erred in overruling the demurrer: (1) Because his honor held the allegations of the fourth defense constituted a bar to the action herein, whereas he should have held that the complaint herein does not allege

substantially the same facts as set forth in the former action. (2) That he should have held that this action is entirely a different cause of action than the one sued on in the former action; that the action sued on in this action is one founded upon the delict and wrong done by the defendants to the plaintiff, and that the former action was founded and grew out of a breach of contract between the plaintiff and the defendant Southern Railway Company, and therefore the former action could not be pleaded a bar to this action. (3) That he should have held that the validity of the said release was not adjudicated in the former action, and does not constitute an estoppel herein.

The question raised by the order overruling the demurrer and exceptions thereto is whether the order of nonsuit in the former action constitutes an estoppel in this action and rendered the matter *res adjudicata* and constitutes a bar to the present action. In the former action plaintiff elected to treat the contract of release as valid and based his right to recover upon its validity and admitted it when exhibited to him on trial. In the present action he attempts to treat the release as invalid and avoid it and bases his right to recover upon the invalidity of the release. In one action plaintiff alleges the release is valid, and in the second action he alleges it is invalid. In the first action Judge De Vore construed the written contract of release as concluding the plaintiff from claiming that the terms of the contract were in any way different from those in writing and barring the right of action for the alleged breach, or that the evidence showed no breach of the written contract. The plaintiff submitted to a nonsuit, which was ordered, and that order was not appealed from. After that this action was commenced to recover damages which the plaintiff in the former action alleged he had released. The commencement of the first action based on the validity of the contract of the release, was a decisive act and constituted an election on the part of the plaintiff to test the validity or invalidity of that release, and it seems to us that the contract of release was conclusively adjudicated in that action between the parties to it to be valid, and is such an adjudication of the subject-matter of controversy in both actions to bar the plaintiff's recovery of the damages released. "A nonsuit is not usually a judgment upon the merits. It was originally given against the plaintiff when he introduced insufficient evidence to support a verdict or when he refused or neglected to proceed to the trial of the cause after it had been put at issue. It is different, however, where the plaintiff is nonsuited or a verdict is directed because the evidence introduced by the plaintiff proves affirmatively as a mat-

ter of law that he is not entitled to recover. The difference is that in one instance the plaintiff fails to make out his case; in the other instance, he proves affirmatively facts which as a matter of law show that he is not entitled to recover. *Jenkins v. A. C. L. R. R. Co.*, 89 S. C. 408, 71 S. E. 1010, and cases cited therein; *Morrow v. Railway Co.*, 84 S. C. 224, 66 S. E. 186, 19 Ann. Cas. 1009. "So a nonsuit based upon the construction of a deed and unappealed from is *res adjudicata* in a subsequent action involving the same matter." *Cartin v. Railroad Co.*, 43 S. C. 221, 20 S. E. 979, 49 Am. St. Rep. 829; *Hodge v. Lumber Co.*, 90 S. C. 231, 71 S. E. 1009. "A matter involved in a cause and finally disposed of by a circuit decree from which no appeal is taken becomes *res adjudicata*." *Symmes v. Symmes*, 18 S. C. 602. The plaintiff by his former action asserted that the release was valid. Defendant admitted that it was. Plaintiff claimed damages under it, but lost his case by being nonsuited. The validity of the contract of release is *res adjudicata*.

Judgment affirmed.

GARY, C. J., and WOODS, HYDRICK, and FRASER, JJ., concur.

(91 S. C. 562)

STATE v. GLOVER.

(Supreme Court of South Carolina. July 6, 1912.)

1. CRIMINAL LAW (§§ 1141, 1163*)—EVIDENCE—RULINGS—REVIEW.

Accused complaining of the admission of evidence, must show error and that it was prejudicial to him.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 3014, 3015, 3090-3099; Dec. Dig. §§ 1141, 1163.*]

2. CRIMINAL LAW (§ 730*)—TRIAL—ARGUMENT OF COUNSEL—INSTRUCTIONS.

Where the court charged that it should not weigh with the jury that accused did not testify, and that, if the jury should be under the impression that the solicitor commented on accused's failure to testify, it must not weigh with the jury, an exception that the court erred in permitting the solicitor to call the jury's attention to the fact that there was no testimony introduced by the defense could not be sustained.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 1693; Dec. Dig. § 730.*]

3. CRIMINAL LAW (§ 789*)—REASONABLE DOUBT—INSTRUCTIONS.

An instruction that a reasonable doubt does not mean a fanciful or imaginary doubt but means a good, strong, substantial doubt, was not prejudicial to accused.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 1846-1849, 1904-1922, 1960, 1967; Dec. Dig. § 789.*]

4. STATUTES (§ 64*)—VALIDITY—RIGHT TO RAISE QUESTION.

Where, on a trial for assault with intent to ravish, the prosecutrix testified in open court, and the provisions of Act March 3, 1909 (26

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

St. at Large, p. 206), authorizing the taking of depositions, were not resorted to, accused could not question the constitutionality of such provisions unless the section of the act prescribing the punishment was unconstitutional on the ground that the whole act was invalid.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 58-66, 195; Dec. Dig. § 64.*]

5. STATUTES (§ 64*)—INVALIDITY IN PART—EFFECT.

The validity of Act March 3, 1909 (26 St. at Large, p. 206) § 1, prescribing the punishment for rape or assault with intent to ravish, is independent of the balance of the act authorizing prosecutrix to testify by deposition, and providing for the destruction of such deposition after the trial in case no appeal is taken, and the invalidity of the latter provisions do not affect the validity of section 1.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 58-66, 195; Dec. Dig. § 64.*]

Appeal from General Sessions Circuit Court of Dorchester County; J. W. De Vore, Judge.

"To be officially reported."

Clinton Glover was convicted of assault with intent to ravish, and he appeals. Affirmed.

The following are the exceptions:

"(1) Because his honor, the circuit judge, erred in overruling defendant's objection to the question: 'Q. Describe the tracks and what the blood hounds did?' The objection was as follows: It seems that before any testimony as to the tracks and the blood hounds can come out that it must be shown when the measure of the tracks was taken and where they were. We object to the testimony on that ground.

"(2) The circuit court erred in overruling defendant's objection to the testimony of the witness Shep Hutto as to tracks and the drawing of tracks after the solicitor had withdrawn the drawing from the record (a) and in refusing to strike out said testimony. (b) The circuit court further erred in refusing defendant's motion to restore the whole testimony as to the tracks and drawing subject to defendant's objection as a whole.

"(3) The circuit court erred in overruling the following objection to the testimony of the witness U. S. Way. We object to the witness testifying on the ground that he says that he does not know what it means to swear in court.

"(4) Circuit court erred in overruling defendant's objection to the following questions: 'Q. You live on one side of the school grounds and she lives on this side?' Objected to on the ground the same as leading. The circuit court erred in overruling defendant's objection to the following question and answer thereto: 'Q. You have got a water-closet back there where you go out? A. Yes, sir. Jacob Mooror, Esq.: We do not think that ought to go in, your honor. How is that relevant to this case?' We object to the testimony on the ground that it is not in line

with the crime charged. This is not the character of offense which is before the court, and, where testimony of one's previous conduct is attempted to be shown, it must be in line with previous acts of the same kind. Going in a closet is not in line with the kind of crime charged here.

"(5) The court erred in overruling the following objections: 'We object to the testimony about the tracks, your honor has ruled that out? The Court: I ruled just the other way.'

"(6) The circuit court erred in overruling the following motion: 'The motion, your honor, is to direct a verdict of not guilty on the ground that the defendant has not been identified as the party who committed the crime charged, and that there is no evidence to connect him, or to show whose tracks the dogs trailed from this house. The evidence is insufficient to sustain any verdict against him whatever.

"(7) The circuit court erred in permitting solicitor to draw to the attention of the jury the fact that there was no testimony introduced by the defense.

"(8) The circuit court erred in charging the jury as follows: 'Now a reasonable doubt, as I have stated time and again in this courtroom, don't mean some fanciful or imaginary doubt, like a person might doubt whether the sun would rise to-morrow morning and not be able to give any reason for it—it does not mean that kind of a doubt, it means a good, strong, substantial doubt.' This definition of a reasonable doubt misled the jury and fixed the limits for finding a reasonable doubt beyond reason."

Moorer & Summers, of St. George, for appellant. Solicitor Hildebrand, of Orangeburg, for the State.

GARY, C. J. This is an appeal from the judgment of the circuit court imposing the sentence of death upon the defendant, who was convicted of assault with intent to ravish. The appellant's exceptions will be reported and considered in their regular order.

[1] First, second, third, fourth, and fifth exceptions: In the first place, the appellant has failed to show that there was error; and in the second place, even if there was error, it has not been made to appear that it was prejudicial.

Sixth exception: We do not deem it necessary to discuss the testimony in detail to show that this exception is not well founded.

[2] Seventh exception: It is only necessary to refer to the following charge of his honor, the presiding judge, to show that this exception cannot be sustained: "Mr. Foreman and gentlemen—At the outset I wish to say to you that it should not weigh one iota with you that the defendant did not take the stand and testify. Counsel for the

defense seems to be under the impression that the solicitor commented on that fact, but I did not so understand it. He did not refer to the defendant. If you should be under the impression that he did comment on it, it should not weigh with you. According to my judgment, he did not comment on it under the meaning of the law. If you think that he did, you should not let it weigh with you, and you should not let it weigh that he did not go on the stand."

[3] Eighth exception: We are unable to discover in what respects this charge was prejudicial to the rights of the appellant.

The next question for consideration is whether there was error on the part of his honor, the presiding judge, in overruling the motion for a new trial and in arrest of judgment. The contention of the appellant that there was no testimony to support the verdict of the jury has already been disposed of.

[4] The contention that the act of 1909 (26 St. at Large, p. 206) is unconstitutional on the ground that it is in violation of article 3, § 17, of the Constitution, cannot be sustained for the reasons stated in the case of *Jellico v. Commissioners*, 83 S. C. 481, 65 S. E. 725.

[5] The ground that said act is unconstitutional because it requires the destruction of the record in such cases, whether the defendant be convicted or acquitted, cannot be sustained, as the provisions of the statute have no application to this case, as will appear from the following statement of his honor, the presiding judge, in overruling this ground of the motion: "As to the second ground, it will be necessary to state the facts as they occurred in the court at trial. The prosecutrix and party, upon whom the assault was alleged to have been committed, was put upon the witness stand in open court and in public, just as all witnesses are sworn, and examined; in other words, the provisions of the act of 1909 were not resorted to or taken advantage of, hence there is no reason for passing on the constitutionality of the act unless defendant's contention is that, if a part of the act is unconstitutional, the whole act is. If this be his position and contention, it cannot be sustained, for the reason that the first section of the act fixes the punishment, and that section is independent of the balance of said act and can stand alone, even if the other portion of said act be unconstitutional, about which I express no opinion, as it is not necessary in this case to do so." The ruling of the circuit judge is sustained by the case of *Ex parte Florence School*, 43 S. C. 11, 20 S. E. 794. The appellant has failed to show in what respects the other constitutional provisions mentioned by him have been violated.

It is the judgment of this court that the judgment of the circuit court be affirmed,

and that the case be remanded to that court for the purpose of having another day assigned for the execution of the sentence of the court.

WOODS, HYDRICK, WATTS, and FRASER, JJ., concur.

(113 Va. 643)

PASCHALL & GRESHAM v. GILLISS.
(Supreme Court of Appeals of Virginia. June 13, 1912.)

1. BROKERS (§ 88*)—COMMISSIONS—TERMINATION OF AUTHORITY—BAD FAITH—QUESTION FOR JURY.

Where plaintiff was employed to sell certain timber land for \$200,000 on a commission of 5 per cent., and the land was subsequently sold to a purchaser whom plaintiff had procured for \$180,000, because the purchaser claimed plaintiff had misrepresented the amount of the timber on the land, plaintiff's bad faith, if any, was a question for the jury.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. §§ 121, 123-130; Dec. Dig. § 88.*]

2. WORK AND LABOR (§ 29*)—EXPRESS CONTRACT—QUANTUM MERUIT.

Where plaintiff was employed to sell certain timber land for \$200,000 on a 5 per cent. commission, and the owners thereafter sold the land to a purchaser procured by plaintiff for \$180,000, the plaintiff's right of action to recover commissions was not limited to an action on the express contract; but he was entitled to sue on a quantum meruit and prove the express contract as evidence of the value of his services.

[Ed. Note.—For other cases, see *Work and Labor*, Cent. Dig. §§ 56-58; Dec. Dig. § 29.*]

3. BROKERS (§ 69*)—COMMISSIONS—INTEREST.

Where, after a broker had been employed to sell timber land, the owners sold the land for a less price than the broker was authorized to accept to a purchaser procured by the broker, and then wrote the broker that the land had been sold and that he was not entitled to commissions, his right of action for commissions then accrued, and he was entitled to interest on the amount found to represent the reasonable value of his services from that date.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. § 55; Dec. Dig. § 69.*]

4. BROKERS (§ 69*)—RIGHT TO COMMISSIONS—SALE AT DIFFERENT PRICE.

Where a broker contracts to furnish a purchaser for timber lands at a stipulated price, and furnishes a purchaser to whom the owner sells at a less price, the broker is entitled to recover such compensation for his services as would be reasonable under all the facts and circumstances of the case.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. § 55; Dec. Dig. § 69.*]

Error to Law and Equity Court of City of Richmond.

Action by J. I. Gilliss against J. R. Paschall and Thomas Gresham, partners as Paschall & Gresham. From a judgment for plaintiff, defendants bring error. Affirmed.

The following are the instructions given for plaintiff:

1. "If the jury believe from the evidence (1) that the defendants employed the plaintiff, Gilliss, to sell the timber on the Lofton

tract; (2) that the plaintiff, Gilliss, brought the said property to the attention of Mr. and Mrs. Johnson; (3) that the defendants, in the absence of the plaintiff (Gilliss), attempted to sell said property to the said Johnsons; (4) that the said Johnsons told the defendants that the plaintiff, Gilliss, had informed them (the said Johnsons) that he (Gilliss) thought the aforesaid tract of land contained not more than 90,000,000 feet of timber; (5) that the said Johnsons also told the defendants that they, the said Johnsons, were unwilling to pay more than \$2 a thousand feet, based on the aforesaid estimate of the plaintiff, Gilliss, or a total sum of \$180,000; (6) that the said Johnsons offered the defendants the sum of \$180,000 for the aforesaid timber, and informed the defendants that the amount of said offer was calculated by allowing \$2 a thousand feet for the quantity of timber stated in the aforesaid estimate of the plaintiff, Gilliss; (7) that, after receiving the aforesaid information, the defendants accepted the aforesaid offer of the said Johnsons, and sold and conveyed said property to said Johnsons; (8) that the plaintiff, Gilliss, although absent at the time such sale was actually made, had originally brought said property to the attention of said Johnsons, and was the procuring cause of said sale—then the court instructs the jury that, even though they may believe from the evidence that the plaintiff, Gilliss, had not been authorized to sell said property for any sum less than \$200,000, nevertheless the plaintiff Gilliss is entitled to recover from the defendants, unless the jury believe it is shown, by a preponderance of the evidence to the satisfaction of the jury, that prior to the aforesaid sale the plaintiff, Gilliss, informed the defendant Paschall, expressly or in substance, that he (Gilliss) abandoned the aforesaid employment by the defendants to sell said timber for them, or unless the jury believe from the evidence that Gilliss, although claiming to act for Paschall & Gresham, was the actual representative of Mr. and Mrs. Johnson."

2. "That the plaintiff was the procuring cause of said sale, if said sale was brought about by the plaintiff's exertions in presenting the property to the attention of the purchasers, or by his introducing the purchasers to the defendants, or by his giving to the defendants as possible purchasers the names of the said Mrs. Jessie C. Johnson and Ira Johnson."

3. "That if the jury believe from the evidence that the plaintiff was authorized or requested by the defendants to sell the Lofton tract for them, and that pursuant thereto the plaintiff brought the property to the attention of the purchasers, Mr. and Mrs. Johnson, and was the means of putting the defendants into communication with them, then the jury are instructed that it was not necessary that the plaintiff should have personally participated in the actual negotia-

tions which ended in the sale, and his right to recover commissions cannot be defeated because of his failure to personally participate in said negotiation."

4. "If the jury find for the plaintiff, Gilliss, they should award him the principal sum of \$9,000, and should state, in their verdict, that the said sum is to bear interest from September 10, 1909."

5. "The court instructs the jury that, even though they believe from the evidence that at one time J. I. Gilliss, the plaintiff in this case, had a contract with the defendants for the sale of their property, known as the 'Lofton tract,' nevertheless, if they believe from the evidence that the plaintiff abandoned the said contract and ceased in his efforts to sell the same, and informed Mr. Paschall expressly or in substance that he (Gilliss) abandoned the employment by the defendants to sell the Lofton timber for them to Mr. and Mrs. Johnson, they must find for the defendants."

6. "The court instructs the jury that if they believe from the evidence that said J. I. Gilliss, while claiming to represent the said Paschall & Gresham, the defendants in this case, was actually representing Mr. and Mrs. Johnson, the purchasers of said timber, they must find for the defendants. But the fact that Gilliss was the estimator and agent of the Greenleaf Johnson Company, a corporation in which Mrs. Johnson and her son were stockholders, would not constitute Gilliss as personally representing Mr. and Mrs. Johnson as the purchasers of said timber in the meaning of these instructions; for, to defeat the claim of Gilliss to his commissions on this ground, the jury must be satisfied from the preponderance of the evidence, either direct or circumstantial, that Gilliss was actually the personal representative of Mr. and Mrs. Johnson in the transaction of the negotiations for the sale of the timber, although claiming to represent Paschall & Gresham."

The following are those refused to defendant:

1. "The court instructs the jury that the contract entered into between the parties in this suit was a contract for the payment of a commission in the event of a sale at the fixed price of \$200,000; and if they believe from the evidence that said timber was sold for less than \$200,000, then they must find for the defendants."

2. "The court instructs the jury that for the plaintiff, J. I. Gilliss, to recover in this case, he must show by a preponderance of evidence that he found a purchaser ready and willing to purchase the timber of the defendants upon the terms and price at which the defendants authorized him to sell; and if they believe from the evidence that J. I. Gilliss failed to produce such a purchaser, they must find for the defendants."

3. "The court instructs the jury that, even though they believe from the evidence that

at one time J. I. Gilliss, the plaintiff in this case, had a contract with the defendants for the sale of their property, known as the 'Lofton tract,' nevertheless, if they believe from the evidence that the plaintiff abandoned the said contract and ceased in his efforts to sell the same, they must find for the defendants."

4. "The court instructs the jury that if they believe from the evidence that said J. I. Gilliss, while claiming to represent the said Paschall & Gresham, the defendants in this case, was actually representing Mrs. Johnson, the purchaser of said timber, then they must find for the defendants."

5. "The court instructs the jury that if they believe from the evidence that the said J. I. Gilliss had estimated said Lofton tract of timber, and had made a written estimate thereof showing 112,000,000 feet of timber thereon, and that, while claiming to act as the agent of said Paschall & Gresham, he represented to a proposed purchaser that there was only 90,000,000 feet of timber on said tract, then the said Gilliss acted contrary to his duty to the said Paschall & Gresham, and they must find for the defendants."

6. "The court instructs the jury that the utmost good faith is required of an agent or broker, and if they believe from the evidence that the said J. I. Gilliss, plaintiff herein, at the time it is alleged he was acting as the agent of Paschall & Gresham, the defendants herein, was likewise acting for the vendees, the Johnsons, or that he gave the said Johnsons private information without the knowledge of Paschall & Gresham, or that Paschall & Gresham were prevented from receiving their price through the misrepresentation of the said Gilliss, they must find for the defendants."

7. "The court instructs the jury that the relation of principal and agent is a confidential one, and requires the utmost good faith from the agent to his principal, and that it is the duty of an agent to disclose to his principal promptly, frankly, and fully his (the agent's) relations to the subject of his agency, and all information coming to his knowledge affecting the subject of his agency, and that if they believe from the evidence that the said J. I. Gilliss, while claiming to act as agent for the said Paschall & Gresham, did not exercise towards them the utmost good faith, or did not disclose promptly, fully, and frankly to said Paschall & Gresham his relations to, or information in his possession materially affecting, the sale of said Lofton property to Mrs. Johnson, or the information or reports given or made by him to the said Mrs. Johnson in regard to said property, then the said Gilliss forfeited any right he may have had to commissions, and they must find for the defendants."

8. "The court instructs the jury that it was the duty of the said Gilliss, if they believe he was acting as an agent of the defendants, to make a full, frank, and prompt

disclosure of his relations to the transaction, and of any information furnished by him to the Johnsons, and the said Gilliss had no right to leave these matters to conjecture and inference, and that unless he made such full, frank, and prompt disclosure to Paschall & Gresham, the defendants in this case, then he forfeited any right to commissions that he might have had, and they should find for the defendants. And the court further instructs the jury that the law does not inquire whether or not a principal was injured by reason of such failure on the part of the agent to disclose his relations to the subject of his agency, but that it is only sufficient to show such failure to deprive the agent of any right to commissions."

9. "If the jury believe from the evidence that the plaintiff is entitled to recovery, not under the contract, but on account of services, then such amount must be based upon the value of the plaintiff's services, less any loss that may have been caused by the failure of the plaintiff to carry out the special contract proved in this case."

Williams & Mullen, for plaintiffs in error.
Braxton & Eggleston and R. W. Tomlin, for defendant in error.

CARDWELL, J. This action of assumpsit was brought by the plaintiff, J. I. Gilliss, to recover of the defendants, J. R. Paschall and Thomas Gresham, partners in business under the firm name of Paschall & Gresham, commissions alleged to be due the plaintiff upon a sale alleged to have been made by him, or through his instrumentality, of a certain tract of timbered land belonging to the defendants. The declaration filed contains a special count, and also the common counts in assumpsit, to which the defendants pleaded the general issue of non assumpsit, and to a judgment for \$9,000 in favor of the plaintiff this writ of error was awarded.

The material facts in the case are as follows:

In May, 1909, the defendants were the owners of a certain tract of timbered land, situated in Charleston county, S. C., containing about 10,000 acres, and known as the "Lofton tract." At that time the defendants were engaged in negotiating with one Bolce and associates, of Ashville, N. C., for the sale of said land and timber, and, at the request of Bolce, Paschall employed for Bolce and associates Gilliss, who was a resident of Norfolk, Va., to estimate said tract of timber. Bolce met Gilliss in Charleston, and took him upon the property, where he instructed Gilliss to make and furnish him (Bolce) an estimate of the standing timber thereon. After remaining on the land for a week or more, Gilliss went to Savannah and furnished Bolce a written estimate of said timber, putting it at 112,000,000 feet.

Gilliss, being impressed with the fine quality of the timber, asked Paschall, if for any

reason Boice did not buy it, to let him (Gilliss) try to sell it, and inquired upon what price he would allow him a commission, to which Paschall replied that, if the pending deal did not go through, he would let him (Gilliss) make an attempt to sell it, and in the event of a sale at the price of \$200,000 his commission should be 5 per cent. Boice and associates were unable to make their financial arrangements to purchase the property, and about the 1st of July, 1909, Gilliss asked Paschall to meet, in Suffolk, Va., one W. B. Phillips with a view of a sale to him; but Phillips wanted an option on the property at \$180,000, which Paschall refused to give, nor would he lower his price of \$200,000, and thereupon the negotiations with Phillips also terminated.

About the middle of August, 1909, Gilliss asked Paschall to put in writing their agreement, and in compliance with this request Paschall, on August 14, 1909, wrote Gilliss a letter in which he said: "Confirming my conversation with you, I hereby agree to pay you five per cent. commission for the sale of the tract of timber known as the 'Lofton tract,' for the price of \$200,000. Your commissions to be paid at such time and in such manner as I receive the money from said sale. I am at Ocean View Hotel, and would like to see you. If this letter reaches you in time, please call me about 7 o'clock this p. m. and I will come up to Norfolk to see you."

Gilliss was, and had been for 12 or more years, in the employ of the Greenleaf Johnson Lumber Company, of Norfolk, Va., as its timber estimator and buyer, which corporation was owned or controlled by a Mrs. J. C. Johnson and her son, Ira Johnson, both of Baltimore, Md.; she being the secretary and treasurer and he the general manager of the company. Soon after Gilliss received the above-mentioned letter from Paschall, Mrs. Johnson wrote Paschall, whom she knew and had had business transactions with for several years, stating that she had understood this (the "Lofton tract") to be a very fine body of timber, and requesting Paschall to come to see her about purchasing it. Prior to this Gilliss had taken up with Mrs. Johnson the question of her purchasing the said tract of timber, advising her that it was for her interest to buy it, and had written her letters with respect to the timber.

Paschall, upon being requested to do so by Mrs. Johnson, went at the end of August, 1909, to Baltimore to see her, stating to her there were 112,000,000 or 120,000,000 feet of timber on the property, and that his price was \$200,000. Mrs. Johnson was interested in the property, saying she was willing to purchase it if the timber proved as fine quality as represented, and that she would send her son (Ira Johnson) and Gilliss to look at the timber at an early date. She did not, it seems, at that time, raise any question about the price or the estimate of the timber, or

disclose to Paschall any information that had been furnished her by Gilliss or anyone as to the quantity of timber upon the land.

During the first week in September following, Mrs. Johnson sent her son and Gilliss down to look at the property, and after spending a day or two upon it Ira Johnson returned to Baltimore, and Paschall, who had met Johnson and Gilliss in South Carolina, went to Atlanta, Ga. Paschall states that he first told Gilliss of his intention to go to Baltimore the next week to close the transaction with the Johnsons, and requested Gilliss to accompany him for that purpose; that Gilliss notified him (Paschall) that he did not wish to have anything to do with the transaction and was through with it, and that Gilliss got out of reach and kept out until he (Paschall) went to Baltimore; but this statement was flatly contradicted by the plaintiff, Gilliss. At all events, Paschall and Gresham went to Baltimore on September 8, 1909, for the purpose of closing up the transaction at the price they had named, \$200,000, as they (according to their version of what had transpired) understood that the quality of the timber had shown up all right, but, as they claim, were there (in the absence of the plaintiff, Gilliss) told by the Johnsons that they would only give \$180,000 for the timber, for the reason that Gilliss had advised them that there were only from 85,000,000 to 90,000,000 feet of timber on the property, and that \$2 per 1,000 feet was the best price that could be given by them for that timber, and that they would not give any more because of said estimate. Paschall & Gresham then refused to sell at the price offered by the Johnsons, and returned to their hotel and endeavored (as they say) to get into communication with Gilliss over the long-distance telephone, to notify him of the situation and that he had not produced a purchaser according to his contract, but found that Gilliss was out of Norfolk and could not be reached. That night, however, Paschall & Gresham, still in the absence of and without communication with Gilliss, traded said property to the Johnsons at a valuation of \$180,000, receiving from them a satisfactory settlement of the purchase price agreed upon. Gilliss knew nothing of the price for which the property was actually sold until the sale had been consummated, and Paschall wrote him as to what had occurred and claimed that he was entitled to no commission on the sale. Gilliss also flatly denies that he made the statements and estimate which Paschall claims that Mrs. Johnson used in inducing the defendants to take a less price for the property than that originally fixed upon it by them.

There is no room to question that the plaintiff, Gilliss, pursuant to his contract with the defendants, was the "efficient" or "procuring" cause of the consummated sale of the property to the Johnsons—indeed,

there is practically no conflicting testimony on this point; and the contention that the plaintiff abandoned his employment to find a purchaser of the property before the sale thereof was consummated by the defendants is equally groundless.

The contention of the defendants is that the letter of August 14, 1909, evidences the contract between them and the plaintiff, and provides, in effect, that the plaintiff was to receive no commission or compensation, even though the property was actually sold, because the sale was not at the price of \$200,000, but at the price of \$180,000. On the other hand, the plaintiff contends that, as he procured the purchasers of the property, ready, and willing to purchase, and the defendants accepted said purchasers and concluded a sale of the property to them, though at a less price than \$200,000, he, the plaintiff, is entitled to the stipulated commission of 5 per cent. on the price agreed upon and received by the defendants from said sale.

[1] The question as to bad faith on the part of the plaintiff, urged by the defendants, was one of fact, fairly to be submitted to the jury, which was done, and was determined by the jury adversely to the defendants' contention, and need not be here further considered.

[2] The first assignment of error by the defendants is to the refusal of the court to exclude from the jury all evidence introduced by the plaintiff to prove a claim under the common counts, or quantum meruit, in his declaration.

We do not see any merit in this assignment of error. The action is to recover compensation earned and due for services that had been rendered, and the declaration was so framed, and in accordance with a common practice in such cases, as to support a recovery in favor of the plaintiff for the price and value of the work he had done, either upon the theory that the money was due on an express contract or on an implied contract. *Brown & Rives v. Ralston, etc.*, 36 Va. 532; 4 Minor (3d Ed.) 695, 699, 700.

Moreover, the express contract alleged provided for a commission of 5 per cent., and the verdict and judgment below was for the amount of 5 per cent. of the price—\$180,000—at which the property was sold, and every witness testifying as to the value of the plaintiff's services stated that the value of the services was at least equal to the amount at which the jury fixed it. None put it at less, and some put it higher.

In *Smith v. Sharp*, 162 Ala. 433, 50 South. 381, 136 Am. St. Rep. 52, a case very similar to the case at bar, the contract of employment was written and under seal, giving the broker or agent the exclusive right to sell the land within a given time at a fixed price per acre, and fixed the pay of the agent for making the sale. The agent, as in this case, introduced to the owners of the land a prospective purchaser, and the owners, conduct-

ing the negotiations for themselves, concluded a sale of the land to the said purchaser for a less consideration than that fixed in the agreement with the agent authorized to sell the land; and the court, after determining that Smith, the agent, upon the facts of the case, was entitled to some compensation, held that the written contract of employment was competent evidence to be introduced "as a guide for the jury in arriving at what is reasonable compensation." In other words, the court held that while the agent, Smith, was not entitled to recover compensation by reason of his express employment in writing by the owners of the property, he was entitled to recover, upon a quantum meruit, the value of his services, and that the express contract was competent evidence to be considered by the jury, along with all other evidence, as a guide in arriving at what was reasonable compensation for services of the kind rendered, and as an indication of what the parties considered would be reasonable. *Smith v. Packard*, 94 Va. 733, 27 S. E. 586, and authorities cited.

[3] On September 9, 1909, Paschall wrote the plaintiff, Gilliss, that the "Lofton tract" had been sold, but he (Gilliss) would receive no commission. If, therefore, the plaintiff was entitled to a commission on said sale at all, a right of action therefor accrued to him when defendants denied that right, and we are unable to see any force whatever in the defendants' contention that it was error to allow the plaintiff interest on the amount of the jury's verdict in his favor from September 10, 1909, instead of, if at all, from a later date.

[4] We do not deem it necessary to consider, *seriatim*, the instructions to the jury given by the trial court (which will be set out with the official report of this opinion), or those refused. The six instructions asked by the plaintiff, and given, and the one asked by the defendants, amended, and given, correctly propounded the law applicable to the facts which the evidence in the case tended to prove, and submitted fully and fairly each and every phase thereof to the jury. They proceed upon the theory that as a matter of law, where an agent contracts to furnish a purchaser for lands at a stipulated price, and such agent does furnish a purchaser, whom the owner accepts, and, in the negotiation of the transaction, the owner agrees upon and accepts a different price from that at which the agent was instructed to sell, still such agent would be entitled to his commission, or to such compensation for his services as would be reasonable, fair, and just under all the facts and circumstances of the case.

The cases cited for the defendants, seemingly supporting the converse of the proposition, *Crockett v. Grayson*, 98 Va. 357, 36 S. E. 477, citing *McGarock v. Woodlief*, 20 How. 221, 15 L. Ed. 884, belong to the class of cases in which no sale was made, cases

in which the broker secured an offer of a price or on terms other than his employment stipulated, which offer his employer rejected, and in which cases the court, in denying the right of the broker to compensation, said that the broker was required to produce a purchaser who was ready, willing, and able to purchase at the price and on the terms prescribed by the principal. In the case here, the property was actually sold, conveyed, and paid for.

The distinction between the authorities supporting the propositions of law propounded by the court's instructions and those relied on by the defendants is very clearly stated in *Coleman v. Meade* (Ky.) 13 Bush, 358, as follows: "The true doctrine we take to be this: The broker undertakes to furnish a purchaser, and is bound to act in good faith in presenting a person as such, and when one is presented the employer is not bound to accept him or to pay the commission, unless he is ready and able to perform the contract on his part according to the terms proposed; but if the principal accepts him, either upon the terms previously proposed, or upon modified terms then agreed upon, and a valid contract is entered into between the principal and the person presented by the broker, the commission is earned. But if, as was the case in *McGavock v. Woodlief*, 20 How. 221, 15 L. Ed. 884, the principal rejects the purchaser, and the broker claims his commission, he must show, not only that the person furnished was willing to accept the offer precisely as made, but, in addition, that he was an eligible purchaser, and such as the principal was bound, as between himself and the broker, to accept."

In *Arents v. Casselman*, 110 Va. 509, 66 S. E. 820, Thos. F. Jeffress, agent for the defendant, George Arents, requested in writing the real estate firm of Casselman & Co., composed of J. R. Hockaday and Lawrence Casselman, to "please list for sale" the farm of the defendant, Arents, in Henrico county, Va., known as "Bloomingdale," containing 280 acres, "for \$50,000." After describing the farm, the said writing continued: "My price is fifty thousand dollars (\$50,000). \$20,000 of said amount I want in cash, and the balance on one and two years. Now, if this property is sold by you or through your instrumentality, I will pay you three (3) per cent. commission, to be taken out of the cash payment." The Bloomingdale farm was sold by Arents' agent to a purchaser procured through the instrumentality of Casselman, for \$30,000 instead of \$50,000, and the cash payment was only \$5,000, instead of \$20,000. After the firm of Casselman & Co. was authorized, as stated, to find a purchaser for Bloomingdale, and before said sale thereof was made, J. R. Hockaday withdrew from said firm, and Casselman continued business under the same firm name; so that, in the

suit of Casselman against Arents to recover his commission on said sale, one of the questions involved was whether said contract, originally made with the firm of Casselman & Co., as then constituted, continued in force after Hockaday's retirement and became a contract between the new firm and the defendant, Arents; but with that question we have no concern here, except in so far as the statement of the fact will serve to make more intelligible the instruction in the case to which we will now advert.

In dealing with instruction No. 1, given to the jury in that case for the plaintiff, over the objection of the defendant, this court said it was "free from reasonable objection." It told the jury that, if they believed from the evidence that the aforesaid contract with Hockaday, Casselman & Co. was continued in force, so as to become a contract with the new firm aforesaid, "and that thereby the plaintiffs were authorized to sell said farm under the contract with Hockaday, Casselman & Co., you must find for the plaintiffs, if you believe from the evidence they sold or were instrumental in selling to W. R. Smith, as a purchaser of said farm, and that he actually purchased the same, even though you believe from the evidence the said Jeffress closed with said purchaser at the reduced price of \$30,000."

In that case the verdict and judgment were for 3 per cent. commissions in favor of the plaintiff on \$30,000, the amount for which Bloomingdale farm was actually sold, which judgment this court affirmed.

The same principle is recognized and approved in *Ice v. Maxwell*, 61 W. Va. 9, 55 S. E. 899, cited in *Arents v. Casselman* with approval. The material facts in the case were very similar to facts in this case, and the opinion of the court discusses fully the principles of law applicable to the facts, citing a great number of authorities, and affirms the judgment of the trial court in favor of the broker or agent for the commission claimed by him on the amount of the sale of the property as actually made by the owner.

In *Hovey v. Aaron*, 183 Mo. App. 573, 113 S. W. 718, the defendant sought to maintain the principle of law contended for by the defendants in this case, and in holding that instructions sanctioning the principle were erroneous, and that the plaintiffs were entitled to a recovery, the opinion of the court said: "The principle of law declared in all these instructions is not supported either upon reason or the weight of authority. * * * On the hypothesis of fact that Braley was not willing to buy at the price plaintiffs were authorized to offer, but for \$1,000 less, it would result in the grossest injustice should we say, as was said in the instructions under consideration, that such fact would preclude a recovery by the plaintiffs. If defendant, while plaintiffs' author-

ity to sell stood unrevoked, chose to sell the property, either in person or through another agent, to a customer procured by the efforts of plaintiffs, for a less price than that which plaintiffs were authorized to offer, that was his privilege; but he will not be permitted to reap the fruits of plaintiffs' labor, and then deny them their just reward." See, also, *Glade v. Mining Co.*, 129 Mo. App. 443, 107 S. W. 1002; *Hogan v. Slade*, 98 Mo. App. 44, 71 S. W. 1104, and cases cited; *Kock v. Emmerling*, 22 How. 72, 16 L. Ed. 292; *Carnes v. Finigan*, 198 Mass. 128, 84 N. E. 324; *Dexter v. Campbell*, 137 Mass. 198; *Henry v. Stewart*, 185 Ill. 448, 57 N. E. 190; *Hafner v. Harron*, 165 Ill. 242, 46 N. E. 211, and cases cited; *Hubachek v. Hazzard*, 83 Minn. 437, 86 N. W. 426.

In *Lawson v. Black, etc., Co.*, 53 Wash. 614, 102 Pac. 759, the court said: "It is not disputed that the appellant actually agreed to pay 5 per cent. on \$1,500,000 in the event of a sale at that price. When it afterwards voluntarily reduced the selling price, the respondents were entitled to a ratable commission on such reduced price. In *Martin v. Silliman*, 53 N. Y. 615, the second syllabus reads as follows: 'Where a broker, who who is employed to sell property at a given price and for an agreed commission, has opened a negotiation with a purchaser, and the principal, without terminating the agency or the negotiations so commenced, takes it into his own hands and concludes a sale for a less sum than the price fixed, the broker is entitled, at least, to a ratable proportion of the agreed commission.'"

The following cases are also in point: *Morris v. Francis*, 75 Kan. 580, 89 Pac. 901; *Jones v. Adler*, 34 Md. 440; *Pierce v. Nichols*, 50 Tex. Civ. App. 443, 110 S. W. 206; *Hoadley v. Savings Bank*, 71 Conn. 640, 42 Atl. 667; *Stewart v. Mather*, 32 Wis. 344; *Welch v. Young (Iowa)* 79 N. W. 59; *Levy v. Wolf*, 2 Cal. App. 491, 84 Pac. 313; *Keys v. Johnson*, 68 Pa. 42.

In the last-named case, the court, after showing, by the great weight of authority, the right of the broker or agent to the compensation he claimed, upon a state of facts similar to those in the case we have under consideration, said in its opinion, *inter alia*: "If 'vendors were permitted,' said Woodruff, J., 'to employ brokers to look up purchasers, and call the attention of buyers to property which they desired to sell, limiting them as to terms of sale, and then, when such purchasers were negotiating, take the matter in their own hands, avail themselves of the labor, services, and expenses of the broker in bringing the property into market, and accomplish a sale by an abatement in the price, and yet refuse to pay the broker anything, the business of a broker would not be worth pursuing. Gross injustice would be done. Every unfair and illiberal vendor

would limit his property at a price slightly above the market, and make use of the broker to bring it into notice, and then make his own terms with the buyers, who were in reality procured by the efforts of the agent.'"

The case of *Long v. Flory & Garber*, 72 S. E. 723, recently decided by this court, was very different from the case we now have in hand. In the former case the contract between the owner and the agent fixed a minimum price at which the property was to be sold, and the agent failed to find a purchaser or to effect a sale at the stipulated price. Moreover, there was no evidence tending to prove that the principal had wrongfully prevented the agent from making a sale at such price, or had waived the strict performance of the contract.

Other questions raised in the petition for this writ of error, and argued, we have not discussed, because deemed immaterial or wholly without merit.

Upon the whole case, we are of opinion that as the trial court fully, fairly, and correctly instructed the jury as to the law upon every phase thereof presented in the pleadings and evidence, it did not err in refusing the instructions asked for by the defendants, which were rejected, and that the evidence was ample to sustain the jury's verdict. Therefore the judgment upon the verdict is affirmed.

Affirmed.

(113 Va. 580)

GRAY v. ATLANTIC TRUST & DEPOSIT CO., Inc., et al.

(Supreme Court of Appeals of Virginia. June 13, 1912.)

1. CANCELLATION OF INSTRUMENTS (§ 37*)—PLEADING—BILL.

A bill to set aside a trust deed or chattel mortgage on the ground that it was invalid and fraudulent per se need not allege facts showing a fraudulent intent on the part of the grantor or grantee, the gravamen being that the mortgage was not sufficient as a matter of law, and so intentional or actual fraud is unnecessary to its invalidity.

[Ed. Note.—For other cases, see Cancellation of Instruments, Cent. Dig. §§ 66-80; Dec. Dig. § 37.*]

2. FRAUDULENT CONVEYANCES (§ 9*)—INVALIDITY—ACTUAL FRAUD.

Actual or intentional fraud need not be imputed to the grantee, the trustee, or any one else concerned, to hold a mortgage or deed of trust of personal property fraudulent in law.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 10-14; Dec. Dig. § 9.*]

3. CHATTEL MORTGAGES (§ 188*)—INVALIDITY—FRAUD AS A MATTER OF LAW.

Where a deed of trust given on a stock of china, which was an exhibit at a fair building, to secure a note, recited that the party of the first part granted unto the trustee the stock of china, but that the grantor should remain in quiet possession and take the profits thereof to his own use until default should be made in the payment of the note, it was fraudulent in

law and void, because giving the grantor and debtor a means to defraud his other creditors, and so it could not be enforced by the beneficiary against other creditors of the grantor.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. §§ 393-404; Dec. Dig. § 188.*]

Appeal from Law and Chancery Court of City of Norfolk.

Bill by Earl S. Gray, as assignee, against the Atlantic Trust & Deposit Company, Incorporated, and another. From a decree for defendants, plaintiff appeals. Reversed and remanded.

Morris, Garnett & Cotten, for appellant. Jeffries, Wolcott, Wolcott & Lankford, for appellees.

CARDWELL, J. The controlling question to be decided in this case is whether or not the deed of trust, validity of which is attacked by appellant, is fraudulent per se.

During the year 1907 an exposition, known as the Jamestown Ter-Centennial Exposition, was held in or near the city of Norfolk, Va., and incident to the operation of the said exposition one C. M. Rosenthal, a nonresident of the state, came to Norfolk and leased a certain space in one of the buildings of the Exposition Company, for the purpose of conducting therein what was termed the "Austrian Exhibit." Pursuant to his purpose, Rosenthal purchased of several business concerns of New York City large quantities of crockery, china, glassware, and other fancy articles made of china and glass, such purchases being made by Rosenthal on credit, and among them a large bill of goods from the firm of Lazarus, Rosenfeld & Leyman, the assignors of appellant, Gray, amounting to \$1,639.32, which sum Rosenthal neglected to pay.

With the stock of china, glassware, and fancy goods, etc., acquired by Rosenthal to make up his "Austrian Exhibit," he proceeded to establish an imposing place of business in the building of the Exposition Company, occupying the space in the building set apart to him, employing a force of clerks, and proceeded to dispose of his supply of goods, etc., as is usually done in the conduct of a retail store or other mercantile business, replacing the articles sold with others bought from time to time.

About 60 days after the opening of the Exposition, and apparently before his said business could have become successful, Rosenthal borrowed \$1,000 from appellee, the Atlantic Trust & Deposit Company, executing his negotiable note therefor, payable 60 days after date, and to secure its payment, and of "any note or notes given in curtail or renewal of same," he conveyed his stock of china, glassware, etc., to Floyd Hughes, trustee; the language of the deed, so far as pertinent to the issue here, being as follows:

"The said party of the first part doth grant unto the said trustee the following property, to wit: All that certain exhibit stock of china, glassware, pottery, and similar articles, now situate, lying, and being in that section of the Liberal Arts and Manufactures Building of the Jamestown Ter-Centennial Exposition, in the county of Norfolk, in the state of Virginia, assigned by the governors of said Exposition Company to the said Charles M. Rosenthal in said building at said Exposition, including all articles as are now in said exhibit, or that may be hereafter placed there during said Exposition. * * * And upon the further trust that the said grantor shall remain in quiet possession of the above granted and described property, and take the profits thereof to his own use, until default is made in the payment of the debt aforesaid," etc.

After this trust deed was executed, Rosenthal continued to conduct his business as before, selling by himself and with the assistance of his clerks the articles going to make up his said exhibit, replacing some, at least, of the articles sold with others purchased, and in the course usually pursued in the ordinary conduct of any retail business. In November, 1907, before the close of the Exposition, Rosenthal, who had been unsuccessful in his venture, absconded from the state, and Lazarus, Rosenfeld & Leyman proceeded to bring suit and to obtain an attachment on his assets, consisting only of his said exhibit, which had been greatly reduced in quantity and value. Other creditors of Rosenthal then proceeded to file an involuntary petition in bankruptcy against him, but these proceedings were dismissed and need not be further referred to.

Lazarus, Rosenfeld & Leyman obtained final judgment on their attachment, which judgment they assigned to the appellant, Gray, who thereupon instituted this suit in equity for the collection of his said judgment, and to that end to have set aside as void in law the said deed of trust to Floyd Hughes, trustee.

Prior to the filing of the bill in this cause the assets of Rosenthal were, by consent of parties interested, disposed of, and the net proceeds of their sale, amounting to \$1,625.86 deposited in the National Bank of Commerce, in Norfolk city, to await a final adjudication of the rights of the parties interested therein. The court below denied the prayer of appellant's bill, and dismissed the same, and from the decree carrying out said ruling this appeal was taken.

[1, 2] It is the contention of appellees that as "there is no allegation of fraudulent intent made in the bill, and no facts set out to show this deed operates as a fraud upon the creditors of said Rosenthal," the bill is insufficient to support the relief prayed, and, therefore, no other decree in the cause than

that complained of could have been entered.

This contention proceeds, and erroneously, as we view the case, upon the theory that, as the bill does not allege fraudulent intent, no relief could be granted upon it, although the deed itself showed upon its face that the powers reserved to the grantor over the property conveyed were adequate to defeat its avowed purposes.

The gravamen of the averments in the bill is, not that the deed was made with fraudulent intent on the part of the grantor, with knowledge on the part of the trustee or beneficiary of such fraudulent intent, and was therefore void as to other creditors of the grantor, but that the deed, upon its face, is fraudulent and void *per se*. The issue presented is not one of fact, wherein all the facts requisite to constitute the fraud charged must be set out in the bill and proved, but a question of law, to be determined by judicial construction of the deed itself, which is exhibited with the bill as a part thereof.

To hold a mortgage or deed of trust fraudulent in law, it is not necessary to impute actual or intentional fraud to the grantor, the trustee, or, indeed, to any one concerned. *Catt, Trustee, v. Knabe & Co.*, 93 Va. 736, 26 S. E. 246.

[3] The case made by the bill in this cause must stand or fall by that line of cases to which belong *Hughes, Effinger & Co. v. Eppling*, 93 Va. 424, 25 S. E. 105 and *Catt, Trustee, v. Knabe & Co.*, *supra*, where the issue decided was whether or not the powers over the property reserved to the grantor in the conveyance were incompatible with the avowed purposes of the trust and adequate to the defeat thereof. It is true that in the first named of these cases the grantor was in the business of a retail merchant; but the principle of law upheld was that where a deed of trust, executed to secure the payment of a debt, or to indemnify the surety of the principal debtor, reserves to the grantor the right to remain in the possession and enjoyment of the property conveyed until default is made in the payment of the debt secured, where such a reservation is inconsistent with the purposes of the conveyance and adequate to defeat them, such a deed is fraudulent *per se*.

The opinion by Buchanan, J., after advertent to the fact that there was not only no provision in the deed that the grantor was to account to the trustees for the proceeds of sales made by him while in possession of the trust property, but no recognition that such sales were to be for their benefit, and the terms of the trust excluded any such idea, and necessarily implied that he had the right to dispose of the goods in his business for his own benefit, and to continue to do so as long as the negotiable notes intended to be secured could be renewed, and the party secured was content not to require a sale, says: "The law does

not authorize such agreements. A creditor, in securing himself, must be careful that the contract by which he is secured does not contain provisions which do not benefit him, but which benefit the debtor, and were so intended, and are prejudicial to other creditors. It does not allow the creditor to make use of his own debt for any other purpose than his own indemnity. When he goes beyond this, and puts into the contract provisions which have the effect of shielding his debtor, by allowing him to dispose of the trust subject for his own purposes, and by which other creditors are hindered and delayed in the collection of their debts, the contract cannot be upheld. The power retained was incompatible with the avowed purpose of the grantor to furnish indemnity to his creditor and indorser, and is fully adequate to the defeat of the provision of the deed of trust"—citing *Lang v. Lee*, 24 Va. 410, and *Addington v. Etheridge*, 53 Va. 436, where it was held that similar reservations of power and control over the trust subject to the grantor, renders his conveyance fraudulent *per se* and void as to other creditors. Speaking of the two cases cited, Judge Buchanan further said: "The doctrine laid down in those cases has been uniformly recognized and followed by this court"—citing a large number of the cases referred to.

In *Catt, Trustee, v. Knabe & Co.*, *supra*, the principle is fully recognized and followed, and because the deed in that case, conveying to a trustee real and personal property, consisting of buildings and furniture and appliances suitable for the conduct of a school, authorized the trustee to conduct a school for a period of 18 months, and to that end to employ all necessary tutors and other agents, and to pay them out of the trust fund, preferring the salaries of such tutors and agents and the running expenses of the school to the creditors secured, it was considered that such a reservation of power and control over the trust subject was incompatible with the purposes of the conveyance and adequate to defeat its purposes, and the conveyance was held to be fraudulent *per se*.

The dissent in that case by Judges Riely and Buchanan was not because they were of opinion that the principle of law considered and approved did not apply in that class of cases, but because, in their opinion, the deed did not expressly charge the corpus with the debts that might be incurred by the trustee in continuing the school, and were doubtful as to whether the law would necessarily imply the charge from the language of the deed.

Among the cases relied on by appellees here is *Norris v. Lake*, 89 Va. 516, 16 S. E. 663. In that case the court does say that fraud in such a case is never presumed, unless the terms of the instrument attacked preclude any other inference, and that fraud

is not an irresistible inference from a provision in a deed of trust postponing a sale for a reasonable length of time and reserving the use of the property to the grantor in the meantime; but in the opinion by Lewis, P., stress is laid upon the fact that the deed in question did not reserve to the grantor, as in *Lang v. Lee* and other cases, power of sale, or any other power incompatible with the avowed purposes of the trust.

In *Brockenbrough v. Brockenbrough*, 72 Va. 580, the opinion by Burks, J., quotes from *Dance v. Seaman*, 52 Va. 778, that "the presumption of law is in favor of honesty, and the court cannot presume fraud, unless the terms of the instrument preclude any other inference"; but the opinion also says: "There is no doubt that the provisions of a mortgage or deed of trust may be of such a character as of themselves to furnish evidence sufficient to justify the inference of fraudulent intent. Such is the case where the grantor reserves a power over the conveyed property incompatible with the avowed purposes of the trust, adequate to the defeat thereof." The grantor, John W. Brockenbrough, executed the three deeds under consideration in that case, covering chiefly real estate, but in one of them, the one deemed of the most importance, in addition to the large amount of real estate described therein, certain personal property was conveyed, consisting for the most part of crops and stock of horses, mules, and cattle. There was nothing in the main deed to show any power whatever in the grantor to dispose of the subject-matter, and, while he was allowed to remain in possession of the real estate, together with the farming implements, horses, mules, and cattle that constituted the complement of the farm, and to have the use thereof, the language of the conveyance reserving in the grantor possession and use of the property admitted of no construction that authorized or could have resulted in the sale of the corpus itself, and the opinion of the court very plainly points out that the only effect of the reservations that could possibly have accrued to the benefit of the grantor was a mere postponement of the sale of the property.

The wise policy of the law and the distinction it makes between that class of cases in which the mortgage or deed of trust reserves to the grantor power over the property conveyed incompatible with the avowed purposes of the trust, adequate to the defeat thereof, and those cases in which the effect of the reservations that could only accrue to the grantor was a mere postponement of the sale of the property, the use and control of it until default in the payment of the debt secured, and reservations of like import, is clearly pointed out in *Catt, Trustee, v. Knabe & Co.*, supra. In that case the effect of the court's ruling is that a deed of trust on personal property, regardless of

whether or not it is a shifting stock of merchandise, containing reservations in favor of the grantor, or in favor of the trustee charged with the duty of executing the trust, which are sufficient to defeat the purposes of the trust, renders the deed void as to the creditors of the grantor.

In the case now in judgment the reservation in the deed in favor of the grantor is that he shall remain "in quiet and peaceable possession of the above granted and described property and take the profits thereof to his own use until default is made in the payment of the debt aforesaid," etc.; while the very nature of the property conveyed—"stock of china, glassware, and similar articles now situate * * * constituting the exhibit of the said Charles M. Rosenthal in said building at said Exposition"—would exclude any idea of profits to inure to the grantor other than such as he might realize from a sale or sales of the property, which was the construction put upon the reservation and actually pursued by the grantor. It will not do for the beneficiary in the deed to say that the sales made by the grantor were without its knowledge, and were made contrary to an agreement between him and the trustee, or the beneficiary in the deed. The question is: Did the deed reserve to the grantor the power to make the sales, and thereby defeat the purposes of the deed? In other words, were the agreements or conditions contained in the deed of trust of such a character that, if carried out, they would be sufficient to defeat the purposes of the deed, independent of what the intention of the parties might have been by reason of some extrinsic agreement?

As we view the language of the deed, in the light of the authorities to which we have adverted, such powers and control of the property conveyed were reserved to the grantor therein as were adequate to defeat the avowed purpose of the trust, and, therefore, the deed is fraudulent *per se*.

There is no merit in the final contention of appellees that because the property conveyed in the trust deed was "an exhibit," and not a stock of merchandise, the decisions of this and other courts, relied on by appellant in support of his contention that the deed is null and void because fraudulent in law upon its face, do not apply. The deed calls the property conveyed both an *exhibit* and a *stock of goods*, and, whether it be called the one or the other, the grantor reserved to himself absolute control over the goods and the power to sell and dispose of them, which reservations were adequate to defeat the very purposes of the deed, and rendered it fraudulent *per se*.

It follows that we are of opinion that the deed of trust in question was fraudulent *per se*, and should have been declared null and void by the trial court, as to appellant and other creditors of the grantor who establish-

ed their debts in the cause. Therefore the decree appealed from must be reversed, and the cause remanded, to be proceeded in in accordance with this opinion.

Reversed.

KEITH, P., absent.

(118 Va. 598)

HUGHES v. BURWELL.

(Supreme Court of Appeals of Virginia. June 13, 1912.)

1. ASSIGNMENTS (§ 34*)—CONTRACT—EXECUTION.

Where a contract for the sale of an account against an insolvent firm by plaintiff to defendant was fully arranged, and the details agreed on, so that nothing remained to be done, except to have the account assigned, the fact that the assignment was not made or the contract reduced to writing, because defendant elected to withdraw before the assignment had been prepared, did not indicate that the contract was incomplete, nor preclude plaintiff from suing for breach thereof.

[Ed. Note.—For other cases, see Assignments, Cent. Dig. §§ 67-71; Dec. Dig. § 34.*]

2. ASSIGNMENTS (§ 34*)—CONTRACT—BREACH—CONSTRUCTION.

In an action for breach of a contract to take an assignment of an account against an insolvent, a request to charge that if there was an agreement by defendant to buy plaintiff's claim against the insolvent, with the further understanding that the agreement should be reduced to writing, and the parties failed to reduce it to writing, then the agreement was not perfected, and the jury must find for defendant, was erroneous, and properly refused, as charging that, although there might have been a completed contract, yet if there was an understanding that it should be expressed in writing, and the parties failed to do so, plaintiff could not recover; there being no evidence that it was agreed that the contract should not be final until reduced to writing.

[Ed. Note.—For other cases, see Assignments, Cent. Dig. §§ 67-71; Dec. Dig. § 34.*]

Error to Corporation Court of Danville.

Action by M. P. Burwell against John E. Hughes. Judgment for plaintiff, and defendant brings error. Affirmed.

Julian Meade, for plaintiff in error. William Leigh and Harris & Harris, for defendant in error.

CARDWELL, J. The defendant in error, M. P. Burwell, brought this action of assumpsit and recovered a judgment in the corporation court of the city of Danville against the plaintiff in error, John E. Hughes, for the sum of \$2,570.57, which the plaintiff alleged that the defendant agreed to pay him for an open account which the plaintiff held and owned against Swain & Wyllie, a partnership which had but recently made an assignment for the benefit of their creditors.

We are asked to review and reverse this judgment because of error of the court in failing properly to instruct the jury, and in refusing to set aside the verdict as contrary to the law and the evidence.

It appears that Swain & Wyllie were dealers in leaf tobacco at Danville, Va., while the plaintiff, Burwell, was engaged in a like business at Warrenton, N. C., and in April, 1910, Burwell sold to Swain & Wyllie a certain lot of tobacco, estimated at 41,000 pounds, at a certain price, which tobacco was shipped to the purchasers on or about June 16, 1910, and was duly received by them. There was no question as to the tobacco being received by Swain & Wyllie; but on July 29, 1910, they addressed a letter to Burwell, in which they expressed regret at being unable to pay for the tobacco, and gave excuses for not doing so, and added, "We are willing to pay you interest on your invoice for the delay," and further added, "In reweighing the tare, we notice that your hhd's. weigh from 10 to 13 lbs. heavier than you have them, which we will deduct." On August 25, 1910, Swain & Wyllie paid Burwell by check on account the sum of \$2,000, leaving a balance due of \$5,035.12, exclusive of interest. Some time in September, 1910, the firm of Swain & Wyllie failed in business and made an assignment, the date of which does not appear in the record, and the debt then due to Burwell from that firm was \$5,035.12, with interest.

On the 26th day of September, 1910, after the assignment had been made by Swain & Wyllie, Burwell came from his home in Warrenton, N. C., to Danville to see after the debt due him by this firm, arriving in Danville at an early hour the following morning. After being in Danville several hours, he came upon the defendant, Hughes, and a conversation between them in regard to his debt against Swain & Wyllie took place at the Hotel Burton. At this conversation Burwell discussed with Hughes the subject of the failure of Swain & Wyllie, and in the conversation Hughes told Burwell that he had an account against that firm. Then followed a discussion between Burwell and Hughes about the assets of Swain & Wyllie, and whether the assets were sufficient to pay their indebtedness; Hughes expressing the opinion that they would eventually pay out in full, or nearly so. Burwell, having little idea of what the insolvent firm would pay, said that he would be satisfied to accept 60 cents on the dollar of his account; whereupon Hughes asked Burwell if he would take 50 cents on the dollar for his claim, and, upon being asked by Burwell if he wanted to pay him that price, Hughes said: "Yes; I will give you that." Whereupon Burwell asked Hughes to give him until 5 o'clock to consider the matter, and to decide whether or not he would accept the offer, to which Hughes agreed. Between that time and 5 o'clock, Burwell went to see a number of people. Among the number was Mr. Leigh, at his law office, and he discussed particularly with Mr. Leigh the offer which Hughes had

made him for his claim against Swain & Wylie; but, as Mr. Leigh was not sufficiently posted to advise him, he went to see others, with like results. He went again to see Mr. Leigh, when Mr. Leigh advised him to accept Hughes' offer, and thereupon Burwell went to see Hughes, reaching his office just before 5 o'clock; Hughes having said that he would be at his office at that hour and invited Burwell to see him there. Upon reaching Hughes' office, Burwell told Hughes that he had decided to accept his offer of 50 cents on the dollar of his account against Swain & Wylie, to which Hughes replied, "All right." Burwell then showed Hughes his account against Swain & Wylie. He also showed him a contract, evidenced by a letter, showing that the tobacco he had sold Swain & Wylie was sold to be paid for in cash, and shipment was to be made f. o. b. Warrenton, N. C., and then showed Hughes another letter from Swain & Wylie, saying that they could not pay cash, but that they would allow him interest until they could pay it. Hughes then stated that that was all right, and expressed himself as finding it satisfactory, whereupon Burwell proposed to transfer the account to Hughes, and Hughes said: "Burwell, the trade is made. I have just started for a horseback ride. If you are not in a hurry, we will make the transfer of the account in the morning. I want to go out horseback riding." Burwell then told Hughes that he wanted to leave town on the early morning train, and asked, if convenient, that the transfer be made that evening, to which Hughes replied that, if Burwell would go up to Jones' drug store, on Main street, he (Hughes) would meet him there. Burwell was walking, while Hughes had his horse at his office. Upon Burwell arriving at the drug store, he had to wait some little while for Hughes; but Hughes came and said that his lawyer had told him that he did not think much of the trade, to which Burwell replied, "Mr. Hughes, the trade is already made; just a question of transferring the account;" to which Hughes replied, "All right, I am going to stand up to the trade, and we will go up and have the account transferred." They then went up into an office, and Hughes introduced Burwell to Mr. Meade, who he said was an attorney, and requested Mr. Meade to make the transfer of the account; and Hughes then turned to Burwell and said, "Burwell, if you will excuse me I will finish my horseback ride; I will meet you at supper with the bill and transfer, and I will settle up with you." Burwell told him that it would not take but a few minutes. Hughes said he could not stay longer at that time, as it would knock him out of his ride, as it was getting late, whereupon Burwell said, "All right, we will meet at supper and fix it up." Mr. Meade started to write the transfer on Burwell's

account against Swain & Wylie; but there was some little interruption, and it turned out when the transfer was written that it did not have the interest calculated on the account, as had been previously agreed upon, and Burwell called Mr. Meade's attention to that, to which Mr. Meade replied that he did not understand from Mr. Hughes that interest was to be added. Upon Burwell's insisting that that was the understanding between him and Hughes, the attorney made the calculation and entered it on the account, and read the account over to Burwell, whereupon Burwell told Mr. Meade that it was satisfactory to him, except that he did not think Mr. Hughes wanted it to show what it cost him, and the assignment did go on to show that it was 50 cents on the dollar. Some further conversation took place between the attorney and Burwell, which need not be related, and the matter of completing the transfer was delayed until the following morning.

Burwell and Hughes met according to appointment at the hotel about supper time, when Burwell told Hughes that Mr. Meade did not understand that interest was to be added to the account, and that he was to receive 50 cents on the dollar of interest, to which Hughes replied, "Certainly, I intended to include that;" and, upon being told by Burwell that the transfer showed the amount he was to pay for the account, Hughes said he did not intend it to show that amount. There was no disagreement as to the terms of the agreement between Burwell and Hughes at that time, and they then agreed to meet at Mr. Meade's office at 8 o'clock the following morning to carry out the contract they had made by having a proper assignment of the account to Hughes.

The following morning Burwell met Hughes at the Hotel Burton, when Hughes asked him to let him off with the trade they had made the night before, stating that he had found out that the assignment of Swain & Wylie was "rotten"; but Burwell declined to do so, and insisted on Hughes complying with his contract, whereupon Hughes went off and consulted an attorney, and came back and stated that he was not bound to stand up to the trade, and that he was going to be released, and then and there refused to carry out the contract.

It seems very clear from the evidence that all matters of detail were discussed between Burwell and Hughes, and that they finally agreed upon the sale by Burwell and the purchase by Hughes of Burwell's claim against Swain & Wylie. Burwell stipulated that interest was to be added; Hughes agreed to it. The account was to be transferred without recourse; Hughes agreed to it. Subsequently Hughes stipulated that Burwell should guarantee the correctness of the account, and to this Burwell agreed, and

declared himself ready to do so. The question of interest, and the question as to the correctness of the account, had all been settled and agreed to before Hughes attempted to repudiate his agreement on the morning of September 28, 1910.

[1] There is practically no controversy as to what took place between Burwell and Hughes with respect to the contract they entered into, which was in all respects complete, leaving nothing to be done except to have it properly transferred from Burwell to Hughes—that is, as Hughes stated, “transferred satisfactorily and legally.”

After the evidence had gone to the jury, the court gave, at the request of the plaintiff and without objection on the part of the defendant, the following instruction:

“The court instructs the jury that if they believe from the evidence in this cause that the late firm of Swain & Wyllie, of Danville, Va., was on the 25th day of September, 1910, indebted to the plaintiff, M. P. Burwell, in the sum of \$5,141.15, that upon the failure of the said Swain & Wyllie the said M. P. Burwell came to the city of Danville to look after his interest as one of the creditors of the said firm, that while so in Danville the plaintiff met with the said defendant, and that the matter of the failure of the said Swain & Wyllie was discussed between them, and that the defendant, Hughes, offered the said plaintiff, M. P. Burwell, 50 cents on the dollar for his said claim against the said firm of Swain & Wyllie, and that the offer of said Hughes so made was accepted by the said Burwell, and that the said Burwell was willing and offered to make proper assignment and transfer of said claim to said Hughes, that this made and constituted a binding contract and sale between them, and the plaintiff is entitled to recover of and from the said Hughes the sum of 50 per centum of his said debt and claim of \$5,141.15 against said Swain & Wyllie, to wit, the sum of \$2,570.57½, with interest thereon from the 27th day of September, 1910, and the jury should so find.”

Whereupon the defendant, by counsel, moved the court to give the jury three instructions, and the court gave the second of these, but refused to give the first and third.

Instruction No. 2, given, is as follows: “The court instructs the jury that in order for the offer of plaintiff to sell his claim against Swain & Wyllie, and the alleged acceptance of that offer by defendant, to constitute a binding contract, they must believe from the evidence that the said offer was completely accepted, in every particular, and that nothing remained for future determination or settlement between the parties to the alleged agreement; and if they do not believe from the evidence that the offer of plaintiff to sell his said claim was accepted by defendant completely and in every particular, with nothing left for future settlement or

arrangement between the parties, then they must find for the defendant.”

[2] Defendant's instruction No. 1, refused, sought to have the jury told that if they believed from the evidence that there was an agreement between the parties to this suit whereby the defendant was to buy plaintiff's claim against Swain & Wyllie, with the further understanding that the terms of the agreement were to be expressed in writing, and said parties failed to reduce the terms of their said agreement to writing, then the agreement was not perfected, and they must find for the defendant. This instruction is plainly defective, in that it stated the proposition that, although there might have been a complete contract between Hughes and Burwell, yet if there was an understanding that the terms of the agreement were to be expressed in writing, and said parties failed to reduce the terms of their agreement to writing, then an agreement was not perfected, and the jury must find for the defendant. There was no evidence tending to show that the agreement between the parties was not to be final until reduced to writing; nor was there any evidence tending to show an agreement that the contract was not to be binding until reduced to writing. On the contrary, the evidence very plainly shows that nothing was to be drawn up in Mr. Meade's office but a suitable assignment of the account from Burwell to Hughes, pursuant to the contract between them previously entered into.

Defendant's instruction No. 3 is substantially the same as defendant's instruction No. 1, in that it sought to tell the jury that if they believed from the evidence that there was an agreement between the parties to this action, whereby the defendant was to buy plaintiff's claim against Swain & Wyllie, with the further understanding that the terms of the agreement were to be expressed in writing, and when they sought to express the terms of said agreement in writing they could not agree upon the terms to be inserted in said writing, then the agreement of purchase and sale was not complete. Again we say there was not evidence to justify the giving of this instruction. The assignment and delivery of the account was not the contract. It was only the act of delivery of the subject of the contract. It was not necessary, nor was it ever intended, that the assignment should embrace the contract, for the contract was distinct from the assignment, and both parties understood that in the usual course of business an account and a right to it was passed by an assignment on the account; but neither understood that the assignment was to set out all the terms of sale, binding Hughes to take and Burwell to sell the account, as all that had been agreed upon between the parties, and when they went to Mr. Meade's office the formal and usual assignment of the account was all that was to be done, except the payment of

the money therefor by Hughes, or the giving of his note for it, which was a matter of accommodation to Hughes and which Burwell had agreed to.

The contract entered into between the parties contained all the essentials of a contract on the part of Burwell to sell his account against Swain & Wyllie to Hughes, and on the part of Hughes to buy the said account, at a price agreed upon. Benjamin on Sales (4th Am. Ed.) § 39.

The case of Lyman v. Robinson, 96 Mass. 242, cited by plaintiff in error, has no application to the facts of this case. That case was one in which there was a mistake as to what was offered and what was bought—that is, there was a mistake as to the subject-matter of the contract, which is by no means the case here. Nor does what is said in Clark on Contracts, p. 37, apply to the facts of this case.

In Sanders v. Pottlitzer, etc., Co., 144 N. Y. 209, 39 N. E. 75, 29 L. R. A. 431, 43 Am. St. Rep. 757, the principles applicable to a case like the one under consideration are discussed, and it was there held that a stipulation to reduce a valid written contract to some other form does not affect its validity, and the stipulation may not be used by either of the parties for the purpose of imposing upon the other additional burdens or obligations, or of evading the performance of any of the provisions of the contract. This rule applies where, by means of letters and telegrams exchanged between the parties, a clear and definite proposition, containing all the requirements of a completed contract, is made by one and accepted by the other, with an understanding that the agreement shall be expressed in a formal writing. "Where, therefore, in such a case, one of the parties refuses to execute the formal agreement, unless certain material conditions and provisions are inserted therein not contemplated or embraced in the correspondence, to which modification the other party declines to assent, the former is still bound by the contract as made by the correspondence." In other words, it was held in that case that, a valid and binding contract having been entered into between the parties, the obligation of the parties thereunder was not affected by the failure to execute the formal instrument, and that for the damages resulting from defendant's breach of the contract he was liable. See, also, Pratt v. Hudson River R. Co., 21 N. Y. 305.

We have adverted to enough of the evidence to show that we think that the jury were warranted in their finding of a verdict in favor of the plaintiff, and there was no error in the judgment of the trial court refusing to set aside that verdict. Therefore the judgment of the trial court is affirmed.

Affirmed.

(113 Va. 627)

LOYD'S EXECUTORIAL TRUSTEES v. CITY OF LYNCHBURG.

(Supreme Court of Appeals of Virginia. June 13, 1912.)

1. TAXATION (§ 254*)—INTANGIBLE PROPERTY—WHERE TAXABLE.

Generally intangible property has no situs of its own for taxation, and is therefore assessable only at the owner's domicile.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 419-426; Dec. Dig. § 254.*]

2. TAXATION (§ 275*)—CORPORATIONS—DOMICILE.

Generally a corporation, for the purposes of taxation, has its domicile where its principal office is located.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 450-452; Dec. Dig. § 275.*]

3. TAXATION (§ 275*)—CORPORATIONS—DOMICILE—CERTIFICATE OF INCORPORATION.

A recital in a certificate of incorporation that the corporation's principal office is at a particular place is conclusive as affecting the right to tax stocks, bonds, etc., in another city, though the principal office be fixed at a place other than where the corporation's principal business is done, for the purpose of getting a lower rate of taxation.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 450-452; Dec. Dig. § 275.*]

4. CORPORATIONS (§ 52*)—PRINCIPAL OFFICE—LOCATION.

Independent of statute, it is not essential to the existence of a corporation that its principal office be fixed, or that it have such office.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 140-150; Dec. Dig. § 52.*]

Error to Corporation Court of Lynchburg.

Application by Lloyd's Executorial Trustees against the City of Lynchburg for relief from taxes. Judgment dismissing the application, and petitioners bring error. Reversed.

Kirkpatrick & Howard and J. Irby Hurt, for plaintiffs in error. Robert D. Yancey, Wilson & Manson, and the Attorney General, for defendants in error.

BUCHANAN, J. This is an application of the plaintiffs in error, who were the plaintiffs in the trial court, to be relieved from certain state and city taxes assessed against them in the city of Lynchburg.

The ground upon which they based their right to the relief sought was that the property upon which the tax had been assessed consisted entirely of stocks, bonds, etc.—intangible personal property—which had been, prior to the beginning of the tax year, transferred and assigned to the Loyd Corporation, a corporation organized and chartered under the laws of this state, with its principal office in the town of Abingdon, in the county of Washington; that the said corporation had been assessed with all taxes properly leviable and assessable against it for that year (1910), and had paid the same to the commonwealth, the county of Washington,

and the town of Abingdon, where its principal office was located.

The corporation court of Lynchburg was of opinion that the petitioners were not entitled to the relief sought, and dismissed their petition.

Section 1105a, Code 1904, which prescribes what a certificate of incorporation shall contain, provides among other things (subsection 2, cl. "b") that it shall set forth "the name of the county, city or town wherein its principal office in this state is to be located."

Section 492 of the Code, among other things, provides that property belonging to a corporation, which property is not otherwise taxed, shall be listed for taxation "to the corporation by the principal accounting officer and at the principal place of business of such corporation; but if not so listed it shall be listed and taxed in the place where the property is."

[1] The general rule is that property of an intangible nature has no situs of its own for the purposes of taxation, and is therefore assessable only at the place of its owner's domicile. *State Bank of Virginia v. City of Richmond*, 79 Va. 113; *Cooley on Taxation*, 63.

[2] The general rule also is that a corporation, for the purposes of taxation, has its domicile at the place where its principal office is located. *Atlantic & Danville Ry. Co. v. Lyons, Treas.*, 101 Va. 1, 42 S. E. 932; *Orange & Alex. R. Co. v. City Council of Alexandria*, 58 Va. 176, 185, 186; *Cooley on Taxation*, p. —.

Mr. Black, in his article on *Taxation*, 37 *Cyc.* 959, says that, "if the law requires the certificate of incorporation to state where such principal office shall be located, it is ordinarily conclusive on this point, and fixes the place for taxing the company's property, unless its residence has been changed by some statute, although some decisions hold that if no business is transacted at the nominal principal office, except the meetings of stockholders and directors, while all the company's executive and financial business is done at another place, it is to be taxed at the latter place. * * *"

[3] Among the contentions made by the city of Lynchburg in maintaining its right to tax the property in question is the fact that the office of the Loyd Corporation at Abingdon is merely nominal, and all of its executive and financial business is done in Lynchburg, and that the principal office was fixed in the certificate of incorporation at Abingdon to obtain a lower rate of taxation than existed in Lynchburg. It becomes material, therefore, to consider and decide whether the declaration in the certificate of incorporation of that company as to the location of its principal office, as required by the statute, is conclusive on that point, and fixes the place for taxing the property in question; for, if the matter is open to parol

proof, it is clearly shown—indeed, it is conceded—that practically all the business of the corporation is transacted at its office in Lynchburg.

[4] Independent of statute, it is not essential to the existence of a corporation that its principal office shall be fixed, or, indeed, that it shall have a principal office; yet for some purposes and for obvious reasons it is important that every corporation chartered under the laws of the state should have a principal office in the state, and that its location should be definite and certain, for the location of such office, among other things, affects the jurisdiction of the courts (Code, § 3214), the service of process (Code, §§ 3227, 3225), and the place of taxation.

Unless the General Assembly intended that the statement in the certificate of incorporation should be conclusive as to the location of the company's principal office, there does not seem to be any good reason for requiring such statement to be made; for if that statement is not conclusive of the place where the company's principal office is located, but its location may be elsewhere, either by the act of the company alone, or because its business is chiefly conducted at some other office, then the requirement will be of little value, and may be hurtful. If the question of where its principal office is located is to be determined, not by its certificate of incorporation, but by parol proof, serious difficulties and embarrassments will often arise, not only in the courts, but with litigants in instituting suits, sheriffs and other officers in executing process, and commissioners of the revenue in assessing taxes.

These considerations and others which might be mentioned would seem to indicate pretty clearly that the object of the Legislature in requiring the certificate of incorporation to state where the principal office of the company was to be located was to bring about that certainty on the subject which could not otherwise be attained, and to make the statement in the certificate conclusive of the fact required to be stated.

Whether such a statement is conclusive, or is open to parol proof, has been considered in other jurisdictions.

The Court of Appeals of New York, in the case of *Western Transportation Company v. Scheu*, 19 N. Y. 408, held that the statement in the certificate of incorporation was conclusive as to the location of the principal office as therein designated. The act for the incorporation of companies to navigate the lakes and rivers, which was construed in that case, required the certificate of incorporation to designate the city or the town and county in which the principal office for the management of the company's affairs was to be located. That action was instituted for the purpose of determining where the plaintiff, a corporation having a capital stock of over \$900,000 was taxable—whether in the town

of Tonawanda, designated by the certificate of incorporation as the place where its principal office was located, but at which scarcely any business was done, or in the city of Buffalo, where it had an office, and where its president, secretary, and treasurer lived and the business of the company was largely transacted. It also appeared in that case, as in this, that the object of the corporation in locating its principal office at a place where it did little business, instead of at a place where its business was largely or principally done, was to escape a higher rate of taxation. "Under these circumstances," said the judge delivering the unanimous opinion of the court, "it is evident that unless the certificate filed pursuant to the statute is conclusive upon the question of location, if the matter is open to parol proof at all, it is established beyond controversy that the principal office 'for transacting the financial concerns of the company' is not at Tonawanda, but either at New York or Buffalo, probably the latter. The only question then is in regard to the effect as evidence of the statement in the certificate. There are some considerations which seem to me decisive of this question. Unless the Legislature intended that the certificate should be conclusive as to the location of the principal office, it is difficult to see any adequate motive for requiring the statement to be made. It is in no manner essential to the existence of a corporation that the place of its principal office, should be fixed, or even that it should have any such office. We can, however, see obvious reasons why it is expedient that corporations should be deemed to have a location for certain purposes, among which is that of taxation, and that this should be definite and certain, and not subject to fluctuation or doubt. When the question is left open to parol proof, serious difficulties and embarrassments must often arise. What makes the office of a corporation its principal office? Is it the residence of its officers? Or does it depend upon the amount of business done, or the number of clerks kept, at a particular office? These and other like questions are of difficult solution, where the question is left open and at large, and necessarily tend to produce controversies and litigation. To avoid disputes upon the subject was, I apprehend, one motive for requiring the location to be fixed by the certificate. It is not important that a corporation should be taxed where it does the greatest amount of its business; but it is important that the place where it is liable to be taxed should be known."

In reply to the argument that the motive of the company in placing its principal office at the place designated in the certificate was to escape taxation, the judge said: "But it is no more immoral or inequitable for a corporation to do this than for an individual to do precisely the same. A person may keep

his office in Buffalo, and transact business there to an unlimited amount, enjoying all the facilities and advantages which the enterprise and expenditures of the city have afforded, and yet by residing without the city bounds avoid all municipal taxation. When this shall be practiced, either by individuals or corporations, to an extent which renders it a serious evil, it will be for the Legislature to interfere."

The decision in that case was approved and followed in later cases in that state. See *Oswego Starch Factory v. Dolloway*, 21 N. Y. 449; *Union Steamboat Co. v. City of Buffalo*, 82 N. Y. 351.

In the last-named case it is said, in reference to the two preceding cases, that "in those cases the whole subject was considered and discussed. We held that for the purpose of taxation the principal office of the company was fixed conclusively by the certificate of incorporation, and that in the county thus designated, and there alone, it could be lawfully taxed. We determined that such was the legal effect of the statute, presenting the manner of taxation, and the reasons for that conclusion, drawn from the law itself, and the manifold ills and inconsistencies which would result from a contrary construction, were so plainly and forcibly stated as to make repetition or further discussion unnecessary. * * * It is urged, also, that the purpose for which the principal office of the plaintiff was located in the county of Rockland was to avoid taxation. That may be, although no such fact is embraced in the findings of the trial court. We held that to be immaterial in the case of *Western Transportation Company v. Schen*. We have nothing to do with the motive. We can only deal with the fact. If such an evil exists, another authority than ours must provide for its correction."

In *Pelton v. Transportation Company*, 87 Ohio St. 450, it was held that a certificate of incorporation, which under the statute specifies the place where the principal office is to be located, is conclusive as to the location of such office. Such office is to be regarded as the residence of the corporation, within the meaning of section 4 of the tax law of April 5, 1859 (56 Ohio Laws, p. 178), as amended April 8, 1865 (62 Ohio Laws, p. 106), which provides that certain personal property "shall be entered for taxation in the township or town in which the person to be charged with taxes thereon resides at the time of listing the same by the assessor."

There are cases which hold that the designation of the location of the principal office or place of business of the company in its certificate or articles of incorporation is not conclusive of that fact for purposes of taxation; but some of them are cases where the law under which the incorporation was had did not require that the principal office or place of business of the company

should be so stated (*Milwaukee Steamship Co. v. Milwaukee*, 83 Wis. 590, 53 N. W. 839, 18 L. R. A. 353; *Georgia Fire Ins. Co. v. Cedartown*, 134 Ga. 87, 67 S. E. 410, 19 Ann. Cas. 954), and others where the decision turned upon the special provisions of the statutes involved, as in *Michigan*. In that state it seems that the taxation statute provides that the place where the principal office of a corporation is located in its articles of incorporation shall be deemed its residence, provided its business is actually transacted at such office; but if it establishes its principal office at a place elsewhere than at the place designated, then the place where it transacts its principal business shall be deemed its residence for purposes of the act. See *Teagan Transportation Co. v. Detroit*, 139 Mich. 1, 102 N. W. 273, 69 L. R. A. 431, 111 Am. St. Rep. 391.

No case has been cited, nor have we found one in our investigation, where it has been held, in construing a statute similar to ours, that the statement in the articles of incorporation of the location of the company's principal office was not conclusive of that fact.

Counsel for the city of Lynchburg insists that this court held, in refusing an appeal in the case of *Harrison & Long, Trustees, v. West Lynchburg Furniture Co.*, on April 2, 1896, that such a statement in the articles of incorporation was not conclusive of the fact. In that case, which involved the question whether or not the claim of a mechanic's lienor had been recorded in the proper clerk's office, under sections 2485 and 2486 of the Code of 1887 (pages 1246 and 1249, Code 1904), it was found by the commissioner that at the time the contract of the lien claimant was entered into and the materials furnished the corporation had abandoned the office named in its charter as its principal office and transferred it to its factory in Campbell county, and at that time had but the one office, and never afterwards had any other, and that the memorandum of the claim asserted as a lien was filed in the clerk's office of the county court of Campbell county in which the only office the company had was located. Upon that state of facts the trial court and this court were of opinion that the memorandum required had been filed in the proper clerk's office and the lien duly perfected. Under the peculiar circumstances of that case, we do not think that the conclusion reached established a precedent which should control the decision of this case.

We are of opinion that the proper place for the taxation of the property sought to be released from taxation was in the town and county where its principal office was fixed by the corporation's charter, and not in the city of Lynchburg; that its motive in fixing its principal office in a place other than where its principal business was done,

for the purpose of getting a lower rate of taxation, is not material in construing the statutes in question. "We have," as was said by the Court of Appeals of New York in *Union Steamship Co. v. Buffalo*, supra, "nothing to do with the motive. We can deal only with the fact. If such an evil exists, another authority then ours must provide for its correction."

The order complained of must be reversed, and the cause remanded to the corporation court, with direction to enter the proper order, exonerating and discharging the appellants from the payment of said taxes assessed against them in the city of Lynchburg. Reversed.

CARDWELL and WHITTLE, JJ., absent.

(113 Va. 677)

STANDARD MFG. CO., Inc., et al. v. S. M. PRICE MACHINERY CO., Inc.

(Supreme Court of Appeals of Virginia. June 13, 1912.)

CORPORATIONS (§ 545*)—INSOLVENCY—PREFERENCES—WAIVER OR LOSS OF RIGHT.

Stockholders of a corporation, who were accommodation makers and indorsers of the company's notes, which were secured by a deed of trust, paid a number of the notes, which were destroyed, and new notes issued to the stockholders therefor. An agreement was subsequently made between the corporation and its creditors, by which the creditors agreed to postpone payment of their debts in consideration of the stockholders' agreement that the creditors should be preferred in the distribution of profits or the assets of the company in the event of a sale; and, pursuant to such agreement, the property of the corporation was conveyed to trustees, who took charge of the business for the creditors. The trustees having failed to make a success of the business, the deed of trust was foreclosed, and the property purchased by one of the stockholders, who claimed the right to offset against the purchase price the notes issued in exchange for those secured by the deed of trust and paid by the stockholders. Held, that whatever right the stockholders had to offset their indebtedness, or to be subrogated to the rights of the holders of the secured notes, was waived by the agreement that the other creditors should be preferred; and hence the entire purchase price should be distributed to the general creditors.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. §§ 2170-2175; Dec. Dig. § 545.*]

Appeal from Circuit Court of City of Norfolk.

Action by the S. M. Price Machinery Company, Incorporated, against the Standard Manufacturing Company, Incorporated, and others. From the decree, defendants appeals. Affirmed.

Frick & Williams, for appellants. Peatross & Savage and A. B. Carney, for appellee.

CARDWELL, J. This is a general creditors' suit, brought by the S. M. Price Machinery Company, Incorporated, on behalf of itself and all other creditors of the Stand-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

ard Manufacturing Company, Incorporated, against the last-named company, George A. Frick, trustee under a deed of trust executed by the Standard Manufacturing Company on August 22, 1906, the National Bank of Commerce, of Norfolk, Va., the beneficiary under said deed to Frick, trustee, G. W. Truitt and others, trustees under a deed of trust executed by the Standard Manufacturing Company on February 24, 1908, and George H. Lewis, Frederick Lewis, and W. H. Robinson, stockholders and creditors of the Standard Manufacturing Company.

It appears from the pleadings and evidence in the record that the Standard Manufacturing Company, organized for the operation of a large timber and lumber plant situated at Suffolk, Va., was admittedly a close corporation, having originally but five stockholders, viz., George H. Lewis, Frederick Lewis, W. H. Robinson, George L. Barton, and J. C. Foster, who subscribed the nominal capital stock of \$15,000 in the sum of \$3,000 each. Subsequently, and before any of the stock subscriptions were paid, all of the stock was acquired by the two Lewises and Robinson. The subscriptions to the stock were not paid in money, but by the demand notes of the several subscribers, payable to the company, which were discounted at the National Bank of Commerce, and the proceeds paid into the treasury of the company and used in the course of its business. It soon became apparent that more capital was needed in the company's business, and certain advancements were made by the Lewises and Robinson, either in the form of notes given by themselves to the company, or their indorsement of the company's notes, all of which were likewise discounted, and the proceeds thereof paid into the company's treasury; George H. Lewis claiming that, altogether, the above-named stockholders paid into the company, for the company's purposes, in the neighborhood of \$64,000.

Notwithstanding these large advancements, the company was financially unsuccessful in its business, steadily losing money, whereupon the Bank of Commerce demanded of the company and of the Lewises and Robinson, who were indorsers on the paper of the company discounted by the bank, additional security, and this was given, in part, by a deed of trust conveying all of the company's property to George A. Frick, trustee, dated August 22, 1906, the said conveyance having been authorized by formal resolutions adopted by the directors and stockholders at a meeting held on that day; but the deed of trust was not acknowledged until November 1, 1906, or recorded until November 14, 1906. This deed was to secure four notes, for the sum of \$4,500 each, due in six months from date, one of which was indorsed by each of the then stockholders, the Lewises, Robinson, and Barton; the latter two notes being given priority over the former two. The aggregate

amount of these notes, \$18,000, was fixed upon, because it was the limit to which the Bank of Commerce would extend credit.

The Lewises, who it seems were regarded as people of means, claim to have made other advancements to the company, either in cash, notes, or indorsements of notes to or for the company; but it is not deemed necessary that these advancements be set out at length.

On January 30, 1908, the company, being hopelessly involved and desiring to obtain from its creditors, other than the stockholders, an extension of credit for one year, prepared and urged upon the general creditors an agreement providing the desired extension, wherein, by way of consideration to the general creditors for the indulgence, the following clause was inserted: "The said stockholders, who are also creditors, agree that all other creditors shall be preferred in the distribution of such profits as may be made from the operation of the plant, or the assets of the company in the event of sale." The plan of the agreement was that the plant and effects of the company were to be turned over to five trustees, viz., George W. Truitt, Claude Dennis, Charles H. Hutchins, George H. Lewis, and William H. Robinson, and said trustees, acting as a committee, a majority of whom were to constitute a quorum for the transaction of business, were to manage the affairs of the company during the entire period covered by the agreement, as authorized and directed by the provisions of the agreement.

The general creditors having agreed to the plan and terms of said agreement, pursuant thereto a deed of trust was executed, conveying to said Truitt and others, trustees, the company's property, which deed, bearing date February, 1908, was executed by the said company and George H. Lewis, Frederick Lewis, and William H. Robinson, individually.

The trustees were able to pay a dividend of 15 per cent. on the indebtedness due the creditors who had accepted notes payable in one year from the date of said agreement; but they, too, were unable to make a success of the business, and on February 24, 1909, they closed their accounts and did nothing further, and the company assumed possession of its property. Whereupon, in March, 1909, George A. Frick, trustee in the deed of August 22, 1906, being required so to do by the National Bank of Commerce, the holder of the notes secured by said deed, advertised the company's property for sale thereunder; and thereupon the bill in this cause was filed, asking that a sale by Frick be enjoined, that a receiver be appointed by the court, etc., and alleging, inter alia, that the Lewises and Robinson had never paid their stock subscriptions, but that the deed of trust to the National Bank of Commerce had been executed to secure notes of the com-

pany, which were substituted for the stock subscription notes of the subscribers, and that the Lewises and Robinson should be required to pay their stock subscriptions.

The prayer for an injunction and the appointment of a receiver was denied by the court, and Frick, trustee, was directed to sell the property, which he did at public auction on April 7, 1909, at which sale the property was bid in by George H. Lewis for the sum of \$21,000, which bid was reported to the court and approved, and Frick, as trustee, conveyed the property to Lewis. It appears, however, that Lewis was not required to pay the whole of the purchase money to Frick, trustee, and paid only a sufficient sum to pay the costs of sale and of this suit; the balance being left in Lewis' hands to await a final decision as to whether he was entitled to the same, or any part thereof, or whether said balance belonged to the general creditors of the company.

An amended bill was filed in the cause, to which, as well as to the original bill, there was a demurrer by the defendants, which was overruled, and answers were thereupon filed, and the cause was referred to a master commissioner to make certain inquiries and to state certain accounts, as set out in the court's decree.

In the taking of the evidence before the commissioner, it developed that the subscriptions to the capital stock of the defendant company made by the defendants the Lewises and Robinson, as alleged in the bill, had not been paid at the time of the institution of the suit; that the notes of these individual stockholders in evidence of their stock subscriptions had been given to the defendant company, and by it discounted at the National Bank of Commerce; and that said notes were outstanding at the time of the institution of this suit, but that some time after the institution of the suit, and after the sale of said property by Frick, trustee, the said stockholders had paid at the bank their notes, and thereby paid their stock subscriptions. It was likewise developed that the National Bank of Commerce had not in reality loaned anything to the defendant company in return for the four notes aggregating \$18,000, secured by the deed of trust to Frick, trustee, but that, although the resolution of the stockholders showed the deed of trust given to secure a loan to be made, as a matter of fact these notes were deposited with the said bank as collateral security for certain notes theretofore held by it, other than the notes of the stockholders given by them for their stock subscriptions.

The commissioner reported that there were held by said bank at the time of the delivery of these collateral notes, and for which collaterals were given as security, notes made or indorsed by the defendant company, and made or indorsed by the stockholders of the company, aggregating in prin-

cipal \$21,000, and that between November 1, 1906, the date that these collateral notes were delivered to the bank, and December 3, 1906, the Lewises, as indorsers or makers, paid to the bank notes aggregating in principal \$15,400; so that on January 30, 1908, when the said agreement between the defendant company and its creditors, to which its stockholders were parties, was made, the said bank held only \$6,500 of the notes made or indorsed by the defendant company, which were secured by the collateral notes aggregating \$18,000, which in turn were secured by the deed of trust to Frick, trustee, and this \$6,500 was the only amount that had been held by the said bank secured by said collateral notes since the 3d day of December, 1906. Therefore it appears that the amount due to said bank secured by the deed of trust to Frick, trustee, on January 30, 1908, was \$6,500 in principal, with some interest thereon, which interest, as calculated by the commissioner, makes the aggregate amount due on said collateral notes, principal and interest, \$7,509.84, the result being that if, as the general creditors contend, George H. Lewis (who is authorized by Fred Lewis to use the notes taken up by them at the bank as offsets against the purchase money due to Frick, trustee, by virtue of the agreement of January 30, 1908, and the deed of assignment to Truitt and others, trustees, of February 24, 1908, executed pursuant to said agreement) agreed to allow the general creditors preference over all of his claims held against the company at that time, in the distribution of the company's assets arising from a sale of its property and plant, then he, George H. Lewis, is entitled to receive credit on his purchase of the property from Frick, trustee, for the amount only of said notes, aggregating, principal and interest, the sum of \$7,509.84, leaving a balance of \$14,310.95 due by him to Frick, trustee, for distribution among the general creditors of the defendant company. On the other hand, if Lewis is allowed to offset all the notes he claims to have paid the bank and now asserts in this suit as debts due to him from the defendant company, he will receive practically all of the company's assets, and its general creditors will get little or nothing.

The master commissioner made an elaborate and carefully prepared report in the cause, and upon the main question, stated by him to be, "*Did Lewis waive his right to priority as a secured creditor under the first deed of trust, dated August 22, 1906, in favor of the general creditors?*" he reported that "the two Lewises and Robinson did not, by the agreement of January 30, 1908, and the deed of assignment of February 24, 1908, in which they joined, waive their rights as secured creditors under the first deed of trust (to Frick, trustee), and that George Lewis has a right now to offset the notes held by him, which were covered by the col-

lateral notes secured under the first deed of trust, against the balance of the purchase money which he owes to George Frick, trustee, to the extent of the amount which may be due on said collateral notes." He then proceeds to calculate the amount due to Lewis on the original notes, to secure which the notes secured by the deed of trust to Frick, trustee, were delivered to the bank as collateral, and ascertained the amount to be, principal and interest, \$21,171, and the amount then due by Lewis to Frick, trustee, including interest, \$21,820.79, so that the balance due from Lewis to the trustee was only \$649.79; but in this calculation the commissioner disregarded whether or not the said original notes, to secure which the collateral notes were delivered to the bank, were paid by the Lewises and Robinson before or after the agreement of January 30, 1908.

The plaintiff, S. M. Price Machinery Company, Incorporated, filed six exceptions to said report; but in the view that the learned judge of the circuit court took of the case he deemed it necessary to consider only the fourth and sixth of said exceptions, relating to the controlling question as stated in the commissioner's report, and in a written opinion made a part of the record, in which the facts stated above in this opinion and other facts appearing in the record are adverted to, laying stress upon the fact that after being urged to do so by the said bank the Lewises paid off some \$14,000 or more of the deed of trust indebtedness due the bank, taking no assignment of these notes, which apparently were canceled and destroyed, and had the company issue to them its ordinary notes for the amount so advanced, payable on demand, it is said in conclusion: "So it seems to me it would be a great injustice upon the general creditors, as well as a wresting of the language contained both in the contract and deed of trust from its plain and unambiguous meaning, to allow the Lewises to hold this secret lien for some \$14,000 or more, which amount is of necessity included in the \$40,000 which they held out to the creditors they were yielding in order to induce their co-operation and consent to the plan which had been devised by these defendants themselves—a device and plan which they believed would work itself out, giving them back the property clear of all liabilities to the general creditors, and thereby save them, not only the amount they had paid the bank, but the entire indebtedness which the company owed them. It is neither unreasonable nor unnatural, therefore, that the Lewises, strong in the confidence of the successful termination of the plan which had been devised, should have postponed the payment of their debts in order to please the creditors, who were insisting upon payment and were threatening proceedings looking to the liquidation of the company. They felt reasonably satisfied that

by so doing both the general creditors and themselves would be ultimately paid in full. But, however that may be, the fact is they entered into this solemn contract with the creditors for a consideration which to them seemed sufficient in law, as well as in fact, that their claims should be postponed, and I find nothing, either in the contract or the deed of trust, which seems to me to be in conflict with this view of language too plain to need construction, and I, therefore, feel obliged to sustain the exceptions 4 and 6 to the commissioner's report, and as these views will, when carried into effect, probably result in the payment of all the general creditors, it seems unnecessary to consider the other questions raised upon the exceptions to the report." From a decree carrying into effect the views of the learned judge, as expressed in his written opinion, this appeal was allowed.

The assignments of error in the petition for the appeal, relating to the rulings of the court below in permitting an amended bill to be filed in the cause, and overruling the demurrer to the original and amended bills, were not insisted on in the oral argument before this court, and will, therefore, not be further considered here.

The main question, as considered by the court, and rightly, is: "Did not the Lewises, by the agreement of January 30, 1908, and deed of February 24, 1909, waive their rights to participate in the security of the deed of trust to Frick, trustee, even if they had such a right at the time of the execution of the said agreement and deed of trust?"

A discussion as to the law with respect to the rights of subrogation in one who stands in the relation of surety to a principal debtor, and who has paid the debt of the principal, and to enforce every remedy and every security the creditor had against the principal debtor, would serve no good purpose in the consideration of this case, upon the indisputable facts to which we have adverted. The trial court of opinion that, however it might be as to the subrogation of the Lewises to the rights of the National Bank of Commerce, they had by the two written instruments (the agreement of January 30, 1908, and the deed of assignment executed pursuant to the agreement), in "language too plain to need construction," waived whatever right they may have had to demand payment of the indebtedness due them by the defendant company until its other creditors were paid in full. If more were needed to make plain the meaning and intent of the parties than the language itself used in said agreement and deed of assignment, it is to be found in the interpretation given to it by appellant George H. Lewis when testifying in this cause:

"Q. Under what circumstances was the agreement with the creditors by which this plant was turned over to George W. Truitt and others executed? A. Under the agreement that we should surrender the amount

that the company owed us, provided the creditors accepted the terms of that agreement, and accepted the plant to be run under the management of the trustees for the benefit of the creditors."

Further testifying, the witness Lewis said: "They all agreed to take notes, with the understanding that the plant should be turned over to the said trustees, who would operate the plant for the creditors, and we believed that would be a final settlement of the whole matter, and we agreed not to expect the indebtedness to us, but surrendered that indebtedness; otherwise, we would not have gone into any such agreement."

In view of the facts and circumstances appearing from the proof in the record, the appellant George H. Lewis could not be heard to say in a court of equity that although he and his associates, in the negotiations with the general creditors of the company for an indulgence on their demands past due, and which led to the agreement providing for the indulgence asked and the deed of assignment of February 24, 1908, executed pursuant to the agreement, agreed to subordinate their rights to be paid *any indebtedness due to them* from the company, whose president and principal owner he was, until the other creditors of the company were paid in full, and then, more than two years later, and after this suit was instituted, say that "we did not surrender certain rights which we at the time of said agreement did not disclose to the general creditors, but now assert, and which entitles me to practically all of the assets of the company, and leaves little or nothing thereof for its general creditors."

We are of opinion that the decree of the circuit court is right, and it will therefore be affirmed; but the cause has to be remanded for further necessary proceedings therein, or that may be expedient, to carry out the views expressed in this opinion.

Affirmed.

(138 Ga. 336)

WORLEY v. STATE.

(Supreme Court of Georgia. June 13, 1912.)

(*Syllabus by the Court.*)

1. HOMICIDE (§ 309*) — INSTRUCTIONS — VOLUNTARY MANSLAUGHTER.

Under the evidence in the case, the court did not err in refusing to charge upon the subject of voluntary or involuntary manslaughter.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 649, 650, 652-655; Dec. Dig. § 309.*]

2. HOMICIDE (§ 340*) — INSTRUCTIONS — PROVOCATION.

The court gave to the jury the following charge: "If you should find, for instance, in this case, that these defendants, or either of them, if they were acting jointly, delivered upon the person named in the indictment a blow with a deadly weapon which produced death,

and there was no provocation, no sufficient provocation, provocation sufficient enough to reduce it to some other offense, nor justification, and the person named in the indictment died in consequence of that blow, delivered under those circumstances by that character of weapon, that, under the law of Georgia, would be murder." This does not afford the defendant ground for a new trial, although in view of the ruling above made, that neither the law of voluntary nor involuntary manslaughter was involved in the case, the instruction just quoted is somewhat inapt, because it embodies the unnecessary expression, "provocation sufficient enough to reduce it to some other offense."

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 715-717, 720; Dec. Dig. § 340.*]

3. CRIMINAL LAW (§ 1134*) — APPEAL — REVIEW.

It is unnecessary to pass upon the exception relative to the alleged disqualification of a named juror.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2587, 2653, 2986-2998, 3056, 3067-3071; Dec. Dig. § 1134.*]

4. HOMICIDE (§ 163*) — EVIDENCE — CHARACTER OF DECEDENT.

The court erred in admitting, over objection duly made, evidence of the character of the decedent for peaceableness; no evidence having been introduced by the defendant on trial putting the decedent's character in issue.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 310-317; Dec. Dig. § 163.*]

Lumpkin and Hill, JJ., dissenting.

Error from Superior Court, Chatham County; W. G. Charlton, Judge.

J. W. Worley was convicted of murder, and brings error. Reversed.

Robt. L. Colding, of Savannah, and Denny & Wright, of Rome, for plaintiff in error. W. O. Hartridge, Sol. Gen., of Savannah, and T. S. Felder, Atty. Gen., for the State.

BECK, J. John Worley and Hugh Boggs were jointly indicted for the murder of Jasper Turner. Worley was put upon trial, and convicted of the offense of murder, and a recommendation was made by the jury that he be imprisoned for life in the penitentiary. The defendant thereupon made a motion for a new trial, which was overruled.

The state introduced evidence tending to show that the homicide was willful and unprovoked murder, committed by the defendants for the probable purpose of securing possession of an automobile which belonged to the decedent and which they had hired for the evening, ostensibly for the purpose of taking a ride into the country; the decedent acting as chauffeur. The state having exercised its right to sever, and Worley being on trial, Boggs, the other defendant, was introduced as a witness by the defense. According to his testimony, he and Worley came to Savannah upon an excursion. They were in and about Savannah several days. On the day of the homicide, July 31, 1911, desiring to take a ride in an automobile, they hired the car of the decedent and engaged him to carry them for a ride, for \$2.50

an hour. After they had been riding for two hours on a country road, witness told the owner of the car they had gone far enough, and to turn back. At this point the defendants and the decedent engaged in a controversy as to the amount of fare due; the decedent insisting that they owed him \$10, while they contended that only \$5 was due. The witness emphatically stated to the decedent that he would not be robbed in that way. Thereupon the decedent drew a pistol, pointed it at the witness Boggs, and then Worley hit the decedent with a hammer. Witness jumped from the car, and the decedent turned on Worley, and both of them fell out of the car. Decedent had Worley on the ground, and Worley called loudly for help; whereupon decedent started towards Boggs, who thereupon seized the hammer and hit his assailant over the head with it. Decedent had dropped the pistol in the car when Worley hit him. When the decedent turned from Worley, who was upon the ground, to assail Boggs, the latter hit at him twice, hit him a glancing blow at first, and then, as decedent came on, hit him again. The witness then stated how they placed the body of the decedent in the car, started back to the city of Savannah with him, and then, finding him to be dead, became alarmed, and started away from the city of Savannah, and finally placed the body in a well. The witness testified at length as to many other particulars and details tending to explain the conduct of himself and his joint defendant, which it is not necessary to set forth here.

The defendant made a statement, which, in so far as it is material to the issues made in the record, is substantially as follows: They hired Turner's automobile, as stated by Boggs, and went out on the country road. When the altercation as to the fare arose, as detailed by Boggs, and Boggs said, "I will not stand to be robbed like that," the decedent, Turner, said, "You will give me \$10 or I will blow your brains out," and he drew a pistol and pointed it at Boggs. The defendant on trial thereupon, in order to protect himself and companion, picked up the hammer, which was in the bottom of the car, and hit Turner on the side of the head. The latter fell over and dropped the pistol in the car. The accused hit him, because he thought he was going to shoot Boggs and then kill him, the defendant on trial. After Turner was hit, he turned over and grabbed Worley, and they fell out of the side of the car. "He and I rolled out of the car, and we struggled there on the ground. He commenced choking me, and reached his hands in his pocket like this (indicating), trying to get something out of his pocket. I hollered to Boggs to come and help me; and as he was coming the negro turned me loose and started after Boggs in a sort of crouching position; and when he got close to Boggs,

Boggs hit him, it seems like a glancing blow, and, the negro still coming on, Boggs hit him again, and the negro rolled on the ground." Worley further declared, "The negro had the pistol pointed at my partner, and I was afraid he was going to shoot us both." The statement continues with details relating to the disposition of the body and the reason for the flight.

[1] 1. The court did not err in refusing to charge the jury on the subject of voluntary or involuntary manslaughter. If the defendant's statement and the testimony of the witness Boggs, who was jointly indicted with him, be true, the plaintiff in error was not guilty of any offense against the law. When he struck the decedent, he did it because, according to his statement and the testimony of his companion, Boggs, the decedent had a deadly weapon leveled at Boggs, and the defendant acted under the fear that the life of himself and his companion was about to be taken by the decedent, to whom they had given no other provocation for a deadly assault than by refusing to pay as hire for a car a sum which they insisted was greater than the amount which they had contracted to pay. Under these circumstances the assault by the decedent upon the defendant Worley and Boggs was of a felonious character; and if Worley acted, when he struck the deceased, in defense of himself or his companion against such an assault, the blow was justifiable, and if that blow caused the death of Turner, the homicide was justifiable. If the blow stricken by Worley did not cause the death of Turner, but left him with strength enough, after dropping the pistol, to make further assault upon Worley and to hurl him to the ground, or to throw himself upon Worley after the latter had fallen upon the ground, and he desisted from the last attack only when Worley's cries for help brought his companion, Boggs, to his aid, and Boggs, as Turner approached him in a crouching position, struck him twice, the first blow being a glancing one, Boggs would have been justifiable in striking this blow, and, if death resulted from it, neither Boggs nor Worley would have been guilty of any offense. Or if it could be held that Boggs, coming up in response to the cries for help from his companion, who was upon the ground and in the grasp of an assailant, who but a few moments before had tried to murder them, used more force than was necessary in repelling the attack of Turner, who approached him in a crouching position, and that this was done not to repel a felonious attack, inasmuch as Turner was then unarmed, and having struck a blow with more force than was necessary to repel the attack, was guilty of voluntary manslaughter, as death resulted from his last blow, still that would not render Worley guilty of voluntary manslaughter. For, according to the testimony

of Boggs and the statement of Worley himself, Worley had done nothing more in the first instance than to strike in order to save his own and his companion's life, and then, when he was on the ground, with the assailant on him, he had cried for help. If the one who came to his help under these circumstances, when attacked in turn by Worley's assailant, struck with more force than was absolutely necessary, Worley was in no way responsible for the violence of the blow, and did not share in the guilt of the man who struck it, if there was any guilt at all upon the part of the latter.

The evidence for the state, largely circumstantial, tended to show an unprovoked murder. The statement of the defendant on trial, and the testimony of his companion, Boggs, if they were to be believed, showed no acts upon this defendant's part that were not entirely justifiable; and the jury, therefore, were called upon to determine whether the defendant on trial was guilty of murder, or not guilty of any offense. And instructions upon the subject of voluntary manslaughter could find no proper place in the court's charge upon the real issues made by the evidence.

[2] 2. Error is assigned upon the following charge of the court: "If you should find, for instance, in this case, that these defendants, or either of them, if they were acting jointly, delivered upon the person named in the indictment a blow with a deadly weapon which produced death, and there was no provocation, no sufficient provocation, provocation sufficient enough to reduce it to some other offense, nor justification, and the person named in the indictment died in consequence of that blow, delivered under those circumstances by that character of weapon, that, under the law of Georgia, would be murder." Having shown that the law of manslaughter was not involved in this case, the charge just quoted affords the plaintiff in error no ground of complaint, because, after having charged as above quoted, the court "failed and refused to charge upon any theory of the case whereby provocation would be sufficient to reduce it to some other offense." For, as we have attempted to demonstrate, there was no evidence in the case tending to show that the defendant was guilty of any offense, if he was not guilty of murder.

[3] 3. It is unnecessary to determine the question raised on the ground of the motion based upon the alleged disqualification of a named juror, as this question will not arise upon the next trial; a reversal being granted upon another ground of the motion.

[4] 4. Error is assigned in the motion for a new trial upon the ruling of the court admitting, over objection duly made, evidence of the good character of the decedent. The admission of this testimony was error, and it was of such a nature as to require the grant of a new trial. In the trial of a crim-

inal case, it is the privilege, in the first instance, of the defendant to put in issue his own character, and under circumstances that of the deceased. But until the defendant takes the initiative, and puts in issue the character of the deceased, it is not competent for the state to adduce evidence to prove the good character of the deceased for peaceableness, or in other respects. We do not think that proof of the attack by the deceased upon the defendant at the time of the homicide is sufficient to warrant proof of his peaceable character. Our attention has been called to one or two decisions laying down a contrary doctrine; but we think that the rule as we have stated it is the sounder rule. In the case of *Pound v. State*, 43 Ga. 129, it was said: "If the character of the deceased for violence is put in issue by the evidence offered for the accused, then the right to rebut such evidence is invoked, as a matter of right; but only then, and not till then." And in that case it was held that it was error upon the part of the court below to admit, over objection by the prisoner, evidence of the character of the accused for violence, and also of the deceased for peaceableness; the same not being in rebuttal. In the case just cited, and from which the above excerpt is taken, there was evidence tending to show that the deceased was about to cross a fence for the purpose of making an assault upon the defendant with an ax; and in view of these facts the court laid down the rule which we have stated, and we are unable to find any case in this state changing or modifying it.

Judgment reversed. All the Justices concur, except LUMPKIN and HILL, JJ., dissenting.

LUMPKIN, J. (dissenting). Conceding that the admission of the evidence of a witness as to the peaceable character of the deceased was erroneous, I do not think a reversal should result. It would not be advisable to enter into a full discussion of the evidence, as the case is to be returned for a new trial. Suffice it to say that the evidence showed a shocking case of murder. Testimony on behalf of the defendant showed that he and his comrade rode into the country in a hired automobile at night, killed the owner, sold the automobile, concealed their identity, and fled, and that at the time the deceased was killed he had gotten out of the automobile on the ground and had no weapon then with him. As to these facts there was no real dispute, though the accused and his witness insisted that the deceased was the assailant. A single witness testified that "the general character [of the deceased] for peaceableness or violence was good; that his reputation was that of a peaceable, honest negro." To upset the verdict for this alone seems to me to be wrong.

I am authorized to state that Mr. Associate Justice HILL concurs in this dissent.

(23 Ga. 377)

BROWDER-MANGET CO. v. CALHOUN BRICK CO.

(Supreme Court of Georgia. June 13, 1912.)

*(Syllabus by the Court.)***ANIMALS (§ 85*)—INJURIES TO OTHER ANIMALS—LIABILITY.**

Where a railroad company permitted shippers and consignees to use a driveway in its yard for the purpose of loading and unloading cars, and a foreman of a person who had cars to unload, while engaged in the performance of his duties, hitched a horse to one of the cars, and left it standing and eating feed which had been given it, if the horse kicked a mule of another shipper which was driven behind it, this did not make out a prima facie case for recovery, without proof of viciousness and scienter, although the railroad company had given no permission to feed horses in that place.

[Ed. Note.—For other cases, see *Animals*, Cent. Dig. §§ 297-308; Dec. Dig. § 85.*]

Error from Superior Court, Fulton County; J. T. Pendleton, Judge.

Action by the Browder-Manget Company against the Calhoun Brick Company. Judgment for defendant, and plaintiff brings error. Affirmed.

Hewlett & Dennis, of Atlanta, for plaintiff in error. Candler, Thomson & Hirsch, of Atlanta, for defendant in error.

LUMPKIN, J. The Browder-Manget Company brought suit against the Calhoun Brick Company, alleging in substance as follows: The defendant was engaged in the manufacturing and selling of brick, owned mules and horses, operated wagons and drays, and employed drivers, and also a foreman to superintend and look after the management of its business in the county where the injury took place. It owned and furnished to its foreman a certain horse for the better performance of his duties. The horse was used "as an industrial appliance," and was vicious and unsafe, and this was known to the defendant, or should have been so known. The foreman hitched the horse to a car on the track of the railway company, at a place known as "a team track," which was used by the public for loading and unloading cars from the tracks of the railway. The defendant knew that the place was used by the public, and frequented by persons, vehicles, and animals for the purposes mentioned. A drayman of the plaintiff endeavored to pass in the rear of the horse, when the horse kicked the mule attached to the dray and broke its foreleg. It was the duty of the foreman to feed and care for the horse, and he was acting in the scope of his employment. He was negligent in tying the horse in a place so frequented by persons, vehicles, and animals. Such place was not designed or used for the purpose of feeding horses, and "the said defendant did thus wrongfully place the said horse therein to petitioner's injury and damage."

On the trial the evidence tended to show the hitching of the horse to the car by the defendant's foreman, the driving behind him by the plaintiff's driver, and the kicking and injury of the plaintiff's mule. On the subject of the place where this occurred, the testimony of the agent of the railroad company was to the effect that the driveway was for the purpose alone of loading and unloading shipments of freight, and no one was authorized to tie horses to a car and feed them; that ordinarily that particular track was assigned to the defendant for the unloading of brick, as a matter of convenience; that he did not know that people fed their stock there while unloading cars; that it might have been done, but was not authorized; and that there were no instructions posted in the yards or given to shippers that they must not feed their horses there. There was no evidence of any previous viciousness on the part of the horse, or of notice thereof to the defendant. At the close of the plaintiff's evidence, the court granted a nonsuit, and the plaintiff excepted.

If the plaintiff sought to recover only because of the act of a vicious horse, it would be sufficient to say that there was no evidence of previous viciousness or scienter. But as there were allegations in certain paragraphs of the petition to the effect that the defendant's foreman was negligent in tying the horse in a frequented place, and that the driveway was not designed or used for the purpose of feeding horses, and the defendant thus wrongfully placed the horse therein, and as counsel for the plaintiff in error, in his able brief, insists that, without proof of viciousness or of the scienter, the case should have been submitted to the jury, we will discuss the question somewhat further. The common-law rule as to the liability of an owner of domestic animals allowed to run at large, and committing damages on the premises of another, or the status of the law on that subject, prior to or under the statutes providing for local elections as to fences, need not be discussed. The horse of the defendant was not running at large or on the land of the plaintiff.

Two cases will suffice as illustrations of recoveries which have been allowed on account of negligence of the owner or person in control of a domestic animal, regardless of any vicious disposition on its part. In *Jones v. Owen*, 24 L. T. R. N. S. 587, two greyhounds coupled together with a chain or piece of rope were allowed to go upon the highway at night. They ran on each side of a passer, and he was thrown down, in consequence of the chain or rope coming in contact with his legs, and was injured. The owner was held liable because of negligence in permitting the dogs to go coupled together upon the highroad, without any proof of viciousness in them. In *Phillips v.*

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Dewald, 79 Ga. 732, 7 S. E. 151, 11 Am. St. Rep. 458, a horse was negligently left standing unhitched in a street, in front of its owner's door. It moved off, and, being frightened by persons who sought to capture it, ran away, ran upon the sidewalk, and injured a passer. It was held that the question of negligence was for the jury, and a recovery by the plaintiff was sustained, without proof of viciousness in the horse.

As to injuries done by vicious animals in the exercise of their vicious propensities, a number of courts in England and in America have held that the gist of the action is keeping the animal after notice of its vicious character. Cooley on Torts (3d Ed.) 696; 2 Am. & Eng. Enc. Law, 353, 354, and note. Of course, where this rule prevails, proof of the scienter is necessary. Other courts have held that the gist of the action is not in the fact of keeping the vicious animal after notice of its vicious propensity, but negligence in the manner of such keeping. Friedman v. Goodman, 124 Ga. 532, 52 S. E. 892. But whether the fact of keeping after knowledge of the viciousness be treated as the gist of the action, or whether it is sought to impose upon the owner a certain duty by reason of knowledge of the viciousness, in either event, as to such actions, proof of the scienter will be necessary. In some cases it has been declared that, if a domestic animal is rightfully in the place where it inflicts an injury, the owner will not be liable unless he had knowledge of the vicious propensities of such animal; but, if the animal was wrongfully in such place, proof of the scienter is unnecessary. 2 Am. & Eng. Enc. Law (2d Ed.) 364, and citations; 2 Cyc. 368; Eddy v. Union R. Co., 25 R. I. 451, 56 Atl. 677, 105 Am. St. Rep. 897, 1 Ann. Cas. 204. The statement was cited in Reed v. Southern Express Co., 95 Ga. 108, 22 S. E. 133, 51 Am. St. Rep. 62.

To the mind of the writer of this opinion, the generic words "rightfully" and "wrongfully," as applied to places and animals, may possibly be subject to misconstruction. Some of the cases mentioned deal with trespasses; but others go further, and hold that the owner may subject himself to liability on the basis of wrongfully putting his domestic animal in a certain place, although there was no trespass upon the premises of another, without proof of the scienter. Thus in New Jersey one whose servant led his horse by a halter along a sidewalk in a city was held liable to a person lawfully passing upon the sidewalk and who was kicked by the horse, without requiring proof of scienter. Healey v. Ballantine & Sons, 66 N. J. Law, 339, 49 Atl. 511. In Massachusetts, where a wagon was stuck in the mud, and one of the horses was made nervous by the effort to pull it out and by being brutally beaten, and was then left standing partially on the sidewalk while eating from a feed bag, and kicked a person passing on the

sidewalk, the owner was held liable. Referring to the necessity for knowledge of previous viciousness, Holmes, J., sententiously said: "It used to be said in England, under the rule requiring notice of the habits of an animal, that every dog was entitled to one worry; but it is not universally true that every horse is entitled to one kick." Hardiman v. Wholley, 172 Mass. 411, 52 N. E. 518, 70 Am. St. Rep. 292. See, also, Dickson v. McCoy, 39 N. Y. 400; Goodman v. Gay, 15 Pa. 188, 53 Am. Dec. 589; Ingham's Law of Animals, §§ 74, 93. For the purpose of the present case, it is unnecessary to determine how far these rulings will be followed here. In Reed v. Southern Express Co., 95 Ga. 108, 22 S. E. 133, 51 Am. St. Rep. 62, supra, an ordinary draft horse, attached to a vehicle, was momentarily left standing in a street adjacent to a sidewalk, and bit one passing by on the sidewalk. It was held that the horse was in its rightful place in the street, and that, there being no evidence that it was vicious or had a tendency to bite persons, the injury was not one which the defendant was bound to anticipate and guard against and the leaving of the horse unattended was not such negligence as would entitle the plaintiff to recover. In Corcoran v. Kelly, 61 Misc. Rep. 323, 113 N. Y. Supp. 686, the Supreme Court of New York held that, where a horse was negligently left standing in a street while eating and bit a passer-by, the vicious propensity of the horse was the proximate cause of the injury, and proof of the scienter was necessary.

Turning, now, to the facts of the case before us, the place where the injury occurred was in a railroad freightyard. Shippers and consignees were allowed by the company to use a driveway for the purpose of loading and unloading freight. An agent of the company testified that the company did not authorize horses to be tied to cars and fed in the driveway; that ordinarily the particular track on which the car was standing where the horse was hitched while eating was assigned to the defendant company for unloading brick, as a matter of convenience; that he did not know that others fed their stock there while unloading cars, but that no instructions were posted in the yards or given to shippers that they must not feed their horses there. The horse kicked a mule which was driven behind it by the driver of the plaintiff. The defendant's "riding boss" rode the horse there in the discharge of his duties in connection with the unloading of the cars. If the tying of the horse and feeding him amounted to a misuse of the license of the railroad company, such company is not complaining. Relatively to the plaintiff, which was also a licensee, it cannot be held that the horse was unlawfully at that place, regardless of any vicious characteristics. The place was a passway which shippers and consignees were permitted to use. As to the licensees, it was somewhat analogous

to a road or street which various persons may lawfully use. It was thus quite similar to the Reed Case, in which a horse was in the street, but temporarily stopped near the sidewalk. In the absence of any proof of viciousness and scienter, there was no error in granting a nonsuit.

Judgment affirmed. All the Justices concur.

(128 Ga. 247)

JOHNSON v. OLIVER.

(Supreme Court of Georgia. July 9, 1912.)

(Syllabus by the Court.)

1. JUDGMENT (§ 796*)—LIEN—SALE OF LAND—RETENTION OF POSSESSION BY GRANTOR.

Where a man who owned a two-fifths undivided interest in a tract of land, his children owning the other three-fifths undivided interest, sold and conveyed his interest, and thereupon became the tenant of the purchaser, giving rent notes and paying rent, and the purchaser, through his tenant, remained in possession for four years, the interest so conveyed was discharged from the lien of a judgment against the maker of the deed, if the purchase was bona fide and for a valuable consideration. Civil Code, § 5950; *Edwards v. Stinson*, 59 Ga. 443; *Blalock v. Denham*, 85 Ga. 646, 11 S. E. 1038.

(a) That the grantor remained in possession as tenant of the grantee as to the interest conveyed is a circumstance for the consideration of the jury in determining the bona fides of the transaction, but will not per se prevent it from falling within the rule above stated.

(b) The request that the decision in *Edwards v. Stinson*, 59 Ga. 443, be reviewed and overruled, is denied.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1395; Dec. Dig. § 796.*]

2. JUDGMENT (§ 796*)—LIEN—SALE OF LAND—TRANSACTIONS—CONSIDERATION.

If a debtor bona fide conveys land to his creditor in payment and discharge of an existing debt, this constitutes such a valuable consideration as falls within the provision of Civil Code, § 5950.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1395; Dec. Dig. § 796.*]

3. TRIAL (§ 203*)—INSTRUCTIONS—ISSUES.

In a claim case, where neither the pleading nor the evidence put in issue the adequacy or inadequacy of the consideration paid to the defendant in *fi. fa.* by a purchaser from him for a valuable consideration, there was no error in charging the jury in effect that no such issue was before them.

(a) Such a charge furnishes no ground for a reversal, whether or not it was accurate to state that upon proof of a valuable consideration it would be presumed to be sufficient.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 477-479; Dec. Dig. § 203.*]

4. NEW TRIAL (§ 102*)—GROUNDS—NEWLY DISCOVERED EVIDENCE—DILIGENCE.

There was no error in overruling the ground of the motion for a new trial based upon newly discovered evidence, which consisted merely of a letter written to the attorney of the movant after the trial, by a person who must have been known before the trial to have been connected with the transaction, and who resided only a few miles distant from the place of the hearing.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 207, 210-214; Dec. Dig. § 102.*]

Error from Superior Court, Sumter County; Z. A. Littlejohn, Judge.

Action between H. R. Johnson and George Oliver. From the judgment, Johnson brings error. Affirmed.

R. L. Maynard, of Americus, for plaintiff in error. Ellis, Webb & Ellis, of Americus, for defendant in error.

LUMPKIN, J. Judgment affirmed. All the Justices concur.

(133 Ga. 252)

NELSON v. CITY OF ATLANTA.

(Supreme Court of Georgia. June 12, 1912.)

(Syllabus by the Court.)

1. EMINENT DOMAIN (§ 141*)—PUBLIC IMPROVEMENTS—DAMAGES—MEASURE.

Where a city lawfully constructs a viaduct in the extension of one of its streets, which interferes with an abutter's right of ingress and egress, in a suit by the abutter against the city for consequential damages, the measure of damages is the diminished market value of the property. If the market value of the abutter's property has not been decreased, there can be no recovery.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 372-376; Dec. Dig. § 141.*]

2. EMINENT DOMAIN (§ 140*)—PUBLIC IMPROVEMENTS—DAMAGES—MEASURE.

In ascertaining the extent of any injury to the land and buildings of the abutter, the physical property is to be considered as a unit. Easement of access, and its value for a particular use, are not to be considered as independent items of damage to be separately compensated, but as component parts of the entire damage.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 371; Dec. Dig. § 140.*]

3. EMINENT DOMAIN (§ 146*)—PUBLIC IMPROVEMENTS—DAMAGES—MEASURE.

Consequential damages to contiguous property resulting from a change in the grade of a street may be diminished or extinguished by special benefits to the property growing out of the improvement. The fact that other property in the vicinity may also be increased in value from the same cause will not justify excluding special benefits to the particular property in determining whether or not it has been damaged.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 390-393; Dec. Dig. § 146.*]

4. EMINENT DOMAIN (§ 141*)—PUBLIC IMPROVEMENTS—DAMAGES—MEASURE.

In the process of ascertaining whether contiguous property has suffered consequential damage from the change of the grade of a street, the market value of the property before and after the change of the grade is to be compared.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 372-376; Dec. Dig. § 141.*]

5. EMINENT DOMAIN (§ 141*)—PUBLIC IMPROVEMENTS—DAMAGES—MEASURE.

In estimating the market value of the property, its adaptability to business or other advantageous uses made possible by the construction of the viaduct, as well as the capabilities of the property, and all the uses to which

it may be applied or to which it is adapted, may be considered.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 372-376; Dec. Dig. § 141.*]

6. EMINENT DOMAIN (§ 299*)—PUBLIC IMPROVEMENTS—ACTIONS FOR DAMAGES—EVIDENCE.

But evidence of the existence of structures on the viaduct, erected by third persons after its completion and before the trial, is inadmissible, because the city cannot diminish the amount of the wrong by benefits which other people may give to the property.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 808, 809; Dec. Dig. § 299.*]

7. EMINENT DOMAIN (§ 299*)—PUBLIC IMPROVEMENTS—ACTIONS FOR DAMAGES—EVIDENCE.

Nor is testimony admissible that, since the erection of the viaduct, bawdyhouses on the street along and over which ran the viaduct had been abandoned, and their abandonment was attributable by the witness to the construction of the viaduct. This result is too speculative and conjectural.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 808, 809; Dec. Dig. § 299.*]

8. EMINENT DOMAIN (§ 299*)—PUBLIC IMPROVEMENTS—ACTIONS FOR DAMAGES—EVIDENCE.

The issue was the difference in market value of the property before and after the improvement in the manner in which the work was constructed, and evidence that the city had consented to the closing of Waverly Way, upon condition that it was to be relocated on or near by land to be furnished by a railroad company, was irrelevant.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 808, 809; Dec. Dig. § 299.*]

Error from Superior Court, Fulton County; J. T. Pendleton, Judge.

Action by C. K. Nelson, trustee, against the City of Atlanta. From a judgment for defendant, plaintiff brings error. Reversed.

Jno. L. Hopkins & Sons, of Atlanta, for plaintiff in error. J. L. Mayson and W. D. Ellis, Jr., both of Atlanta, for defendant in error.

EVANS, P. J. The Protestant Episcopal Church in the Diocese of Atlanta, an ecclesiastical corporation, is the owner of a lot of land on the corner of Washington and Hunter streets, in the city of Atlanta, fronting about 235 feet on Washington street and about 183 feet on Hunter street. On the corner of the lot facing Washington street is constructed a building known as St. Philip's Cathedral, and to the north of the church, facing Washington street, are the deanery and Sunday school house, and in their rear sits the parish house. Several years ago Washington street, which runs north and south, stopped at its northern terminus at the railroad yards, and travel along that street from Hunter street was by means of a street called Waverly Way, which led into another street of the city

parallel with Washington street. In this condition of affairs the city constructed a viaduct, extending Washington street northward over the railroad yards and two or three blocks to Gilmer street. The viaduct was built of the same width as Washington street, and extended longitudinally over Collins street from the railroad yards to its northern end. The grade of the viaduct began to ascend just off of Hunter street. The approach to the Cathedral was on a level, but at the northern limits of the church lot the viaduct was elevated 12 or 15 feet above the land surface. Waverly Way was closed. The owner of the church property sued the city of Atlanta for damages claimed to have resulted from the construction of the viaduct. The city pleaded that the plaintiff should not recover damages, because the consequential benefits to the plaintiff's property exceeded any injury occasioned by the construction of the viaduct. The jury returned a verdict for the defendant, the court refused a new trial, and the plaintiff brings error.

[1] 1. It is not contended that the city was without authority in constructing this street improvement, or that any property of the plaintiff was actually taken by the city. The suit is only for consequential damages alleged to have been sustained by reason of the construction of the viaduct. The ultimate and only measure of damages to contiguous property resulting from the construction of a public improvement is the diminished market value of the property. In arriving at the effect of the improvement on the market value, the consequent injury and benefit are to be compared. If the market value of the property has not been diminished, in legal contemplation it has not been damaged, and there can be no recovery. *Streyer v. Georgia Southern, etc., Railroad Co.*, 90 Ga. 56, 15 S. E. 637; *Hurt v. Atlanta*, 100 Ga. 274, 28 S. E. 65.

[2] 2. In ascertaining the extent of the injury to the land and buildings, the physical property is to be considered as a unit. The various elements as affecting the market value of this unit in its relation to the improvement are to be treated as component parts of the entire damage, and not as independent items to be separately compensated for. The easement of access to the property from the street is not to be considered as having a separate value, independently of the property itself; but the property and the easement of access are to be treated as parts of one and the same estate. Likewise the devotion of the property to a particular use, and its value for that use, are relevant only as an element entering into the consideration of the ultimate fact of diminution of market value. *Streyer and Hurt Cases*, supra; *Selma R. Co. v. Keith*, 53 Ga. 178; *Moore v. Atlanta*, 70 Ga. 611.

[3] 3. As the measure of damages is the difference in market value before the proposed construction and afterwards, the effects flowing from the proposed public improvement are to be considered. While it has been sometimes broadly stated that the benefit to the particular property must be special, in contradistinction to general benefits shared by it in common with the generality of property, it is a misconception of the principle to eliminate a consideration of any special benefit to the particular property because other property in the vicinity may also be specially benefited. The illustration given in 1 Elliott on Roads and Streets, § 279, strongly brings out this point. There it is said that "it seems clear that if a narrow alley should be widened to a broad street, and connections thus made with much-traveled streets, the abutters on the alley would, in the increased value of their property, supposing, of course, that the widening of the alley does add to the value of the property, receive a benefit not common to the public, but peculiar to the owners of the lots abutting on the alley widened into a street." The effect of the extension of Washington street by means of this viaduct may be to enhance the value of the property on either side of it. The purpose of this inquiry is to ascertain the effect of its construction on the church property, so as to find out if its market value has been diminished. Manifestly an added value to the particular property must not be rejected in the computation of values solely because other property in the immediate vicinity may also be benefited by the public improvement. *Metropolitan West Side R. Co. v. Stickney*, 150 Ill. 362, 37 N. E. 1098, 26 L. R. A. 773.

[4] 4. Prior to the Constitution of 1877 municipal corporations were not liable to property owners for raising or lowering the grades of streets; but this rule was changed by that provision in the fundamental law that "private property shall not be taken or damaged for public purposes without just and adequate compensation being first paid." *City of Atlanta v. Green*, 67 Ga. 386. The adjustment of values may be made before the completion of the public improvement or afterwards. Irrespective of the time when judicial estimation of the damage is invoked, whether before or after the construction of the public improvement, the range of elements affecting the market value of the property is essentially the same. In all cases the enhancement of the value of the property must spring alone from the improvement made. The time for the estimation of the market value of the property, as affected by the improvement, in cases where condemnation is necessary, is the day of the award. *Gate City Terminal Co. v. Thrower*, 136 Ga. 456, 71 S. E. 906. This results from the interpretation of the constitutional provision above quoted, that, except in cases

where damage results from the improvement of streets by a municipality, the payment of consequential damages must precede the construction of the public improvement. *Athens Terminal Co. v. Athens Foundry*, 129 Ga. 393, 58 S. E. 891. But where a city, in pursuance of a plan of street improvement, alters the grade of a street to the injury of abutting property, the owner cannot demand prepayment of consequential damages as a condition to doing the work on the street, but his remedy is an action for damages. *Moore v. Atlanta*, supra. It is a general rule in tort that an action for damages arises upon the infliction of the injury which causes the damages. Hence the time for the computation of damages in this case is upon the construction of the public improvement. *City of Atlanta v. Green*, supra.

[5] 5. As we have already said, the question for decision in cases where consequential damages to abutting property is claimed by reason of the change of the grade of the street is the difference in market value of the property before and after the change of the grade of the street. The difficulty of formulating any rule for the estimate of such values is apparent. Mr. Lewis defines market value to be "the price it will bring when it is offered for sale by one who desires, but is not obliged to, sell it, and is bought by one who is under no necessity of having it." *Lewis on Eminent Domain*, § 706. This definition is but general, and does not undertake to enumerate any specific factors which fix the value, except the absence of necessity to sell or buy. In the absence of a standard of value for property, the law provides no means for ascertaining its value other than by the opinions of witnesses. 13 Enc. Ev. 485. All facts which tend to show damage or benefit to the property by reason of the improvement may be considered. The adaptability to business or other advantageous uses of that portion of the street on the viaduct, made possible by the construction of the viaduct, as bearing on the market value of the church property, may be considered. Likewise all the capabilities of the property, and all the uses to which it may be applied, or to which it is adapted, both before and after the improvement, may be considered. *Young v. Harrison*, 17 Ga. 30; 2 *Lewis on Eminent Domain*, § 706.

[6] 6. The trial occurred about four years after the completion of the viaduct. The city was allowed to prove that since the completion of the viaduct certain structures had been erected on it. In admitting the testimony the court ruled that the mere fact of the existence of the structures was irrelevant, but that if it was made to appear that the viaduct made it possible to improve the property in the neighborhood in a way that it could not have been improved without it, the evidence was admissible as illustrative of such possibilities. We think it was error

to admit this evidence, because it allowed a consideration of elements of value that came into existence after the time the law fixes for the estimation of the value of the property in the process of ascertaining whether it had been damaged by the improvement, and, further, because any damage which may result to the church property from the construction of the viaduct cannot be diminished by a benefit which might come from the erection of buildings by third persons. The city cannot diminish the amount of the wrong by benefits which other people may give to the property. *Chicago v. Le Moyne*, 119 Fed. 662, 56 C. C. A. 278.

[7] 7. A similar point is presented in the ruling of the court on the clearance of the bawdyhouses from Collins street. It will be recalled that the railroad yards separated the southern end of Collins street and the northern end of Washington street, and there was no physical connection between these two streets. It will also be recalled that the viaduct extends longitudinally over Collins street for its entire length. The court allowed proof tending to show that the removal of the bawdyhouses was attributable to the erection of the viaduct, and that its effect was to specially enhance the value of the property of petitioner, as well as others, on the viaduct. We think the testimony, even when so restricted in effect as it was by the court, inadmissible.

[8] 8. The defendant offered in evidence a petition of the Louisville & Nashville Railroad Company, which recited the passage of an ordinance relocating Waverly Way, and an ordinance expressing the city's consent to the closing of Waverly Way, and its relocation 90 feet south of the old location, on property to be deeded to the city by the railroad company. The evidence was objected to as irrelevant. The evidence was inadmissible. The issue was not whether Waverly Way was to be permanently closed or relocated, but whether the plaintiff's property had been damaged by the construction of the viaduct in the manner in which it was actually constructed.

Judgment reversed. All the Justices concur.

(138 Ga. 258)

SOUTHERN IRON & EQUIPMENT CO. v. VOYLES.

(Supreme Court of Georgia. June 12, 1912.)

(Syllabus by the Court.)

1. DEEDS (§ 47*)—SALES (§ 145*)—BILL OF SALE—ATTESTATION—DISQUALIFICATION OF NOTARY.

A notary public is disqualified from attesting a deed or bill of sale, so as to entitle it to record, if he is pecuniarily or beneficially interested in the transaction.

[Ed. Note.—For other cases, see *Deeds*, Cent. Dig. §§ 104-110; Dec. Dig. § 47;* *Sales*, Cent. Dig. § 343; Dec. Dig. § 145.*]

2. ACKNOWLEDGMENT (§ 20*)—DISQUALIFICATION OF NOTARY—STOCKHOLDER.

A stockholder of a corporation bears such financial relation to it that he is disqualified, on account of interest, from attesting as a notary a deed or bill of sale to which the corporation is a party.

[Ed. Note.—For other cases, see *Acknowledgment*, Cent. Dig. §§ 104-111; Dec. Dig. § 20.*]

3. ATTACHMENT (§ 180*)—CONDITIONAL SALES—INVALID CERTIFICATION—RECORD.

Where a corporation sells property, and takes from the vendee a conditional bill of sale, reserving title in the vendor until the purchase price is paid, and the vendee's signature is attested by a notary public who is a stockholder of the corporation, and where the conditional bill of sale is recorded, in a contest between the conditional bill of sale and a junior lien, such record will not give the conditional bill of sale priority over the younger lien, if the disqualification of the notary was known to the official of the corporation conducting the transaction, although such disqualification may not appear on the face of the paper.

[Ed. Note.—For other cases, see *Attachment*, Cent. Dig. §§ 550-575; Dec. Dig. § 180.*]

4. ATTACHMENT (§ 180*)—LIEN—JUNIOR ATTACHMENT.

A junior attachment, levied on the property embraced in the conditional sale thus illegally recorded, but founded on a debt antecedent to the conditional bill of sale, has priority of lien over the conditional bill of sale.

[Ed. Note.—For other cases, see *Attachment*, Cent. Dig. §§ 550-575; Dec. Dig. § 180.*]

Error from Superior Court, Clark County; Chas. H. Brand, Judge.

Action by George W. Voyles against W. S. Pickett. On levy of attachment, the Southern Iron & Equipment Company interposed a claim. After verdict for claimant, a new trial was granted, and claimant brings error. Affirmed.

Hamilton McWhorter and Lamar Rucker, both of Athens, for plaintiff in error. Thos. F. Green and Cobb & Erwin, all of Athens, for defendant in error.

EVANS, P. J. An attachment issued in favor of George W. Voyles against W. S. Pickett, and was levied, on November 10, 1910, upon two railroad cars. A claim was interposed by the Southern Iron & Equipment Company. On the trial it appeared that the cars were sold by the claimant to the defendant in attachment, who executed to the claimant, on October 31, 1910, an instrument wherein it was contracted that the title to the cars was to remain in the claimant until the entire purchase money was paid. The instrument was attested by two unofficial persons and a notary public. It was recorded on November 18, 1910. The president of the claimant company and the notary public testified that the notary was a stockholder of the claimant at the time of the execution of the instrument, and had been such from the organization of the company in 1903 continuously to the time of the trial. The court directed a verdict for the

claimant, and afterwards granted a new trial. The claimant excepted.

The controlling question in the case is whether a conditional bill of sale, attested by a stockholder of the claimant corporation, who is a notary public and recorded within the statutory period, shall prevail over the lien of a subsequent attachment on the property. The statute provides that when personal property is sold and delivered, with the condition affixed to the sale that the title shall remain in the vendor until the purchase price shall have been paid, such conditional sale, in order for the reservation of title to be valid as against third persons, shall be evidenced in writing. The statute further provides that conditional sales shall be recorded within 30 days from their date, and in other respects shall be governed by the laws relating to the registration of mortgages. Civil Code, §§ 3318, 3319. In order for a mortgage to be entitled to registry, it must be executed in the presence of, and attested by, or proved before, a notary public or justice of any court of this state or a clerk of the superior court (and, in case of real property, by one other witness). Civil Code, § 3258. A mortgage recorded without due attestation or probate shall not be held notice to subsequent bona fide purchasers or younger liens. Civil Code, § 3262. The contention is that the conditional bill of sale was illegally attested, in that the notary public was pecuniarily interested in the transaction, and therefore its record is not constructive notice of its existence to the holder of the younger attachment lien.

[1] The rule is universal that an officer cannot take an acknowledgment of his own deed. And "because of the probative force accorded to the certificate, as well as the usually important consequences of the instrument itself, public policy forbids that the act of taking and certifying the acknowledgment should be exercised by a person financially or beneficially interested in the transaction." 1 Cyc. 553. While there may be some diversity of opinion in the application of the rule in determining whether the officer is disqualified by interest in the particular case, the wisdom of the rule has never been doubted. The rule that interest will disqualify does not depend upon any statutory prohibition. It arises out of the fact that it is against public policy to permit a grantee or mortgagee, or other person beneficially interested in the transaction, to take an acknowledgment to an instrument in which he is named as a party or has a beneficial interest. The law contemplates that the attesting notary must not be in such pecuniary relationship to the transaction that there shall exist any temptation for him to be otherwise than impartial between the parties to the conveyance.

[2] It is maintained in a large majority of

the decided cases, on this point, that a stockholder of a corporation beneficially interested in an instrument is disqualified from taking an acknowledgment thereof. 1 Devlin on Real Estate, § 477b. See note to the case of *Ardmore National Bank v. Briggs Machinery Co.*, 16 Ann. Cas. 133, where a large number of cases are collected and examined; *Betts-Evans Trading Co. v. Bass*, 2 Ga. App. 718, 59 S. E. 8. While it is conceded, under the doctrine of corporate entity, that a stockholder has no independent ownership in the corporate property, nevertheless, if the corporate property is enhanced in value, he gets the benefit of the enhancement in the increased value of his shares; and while this benefit may be small, the amount of beneficial interest cannot be made the criterion of disqualification on the ground of interest. His shares of stock entitle him to such aliquot parts of the corporate property as his number of shares bears to the entire capital of the corporation. His holding of stock may be so large that almost any transaction of the corporation may affect the value of his shares. Indeed, a corporation may have only one stockholder (*Exchange Bank v. Macon Co.*, 97 Ga. 1, 25 S. E. 326, 33 L. R. A. 800), and in such a case there would be no difference, even in degree, between the pecuniary interest of the stockholder and the corporation. His pecuniary relation to the corporation is so intimate that it cannot be said that he has no financial interest in a transaction to which the corporation is a party. Both upon reason and authority we consider a stockholder's relation to a corporation such as to disqualify him on the ground of interest from taking the acknowledgment as a notary to a conveyance to which the corporation is a party.

[3] All the authorities agree that, if an instrument discloses on its face that it is not entitled to record, the actual record of it is ineffectual to charge the public with constructive notice. *Herndon v. Kimball*, 7 Ga. 432, 50 Am. Dec. 406; *MacKenzie v. Jackson*, 82 Ga. 80, 8 S. E. 77; 1 Cyc. 529. There is a difference of opinion in the American courts as to the effect of a record of an instrument defectively acknowledged, where the defect does not appear on the face of the record. Some courts hold that a defectively acknowledged instrument is not entitled to record, whether the defect is apparent on the face of the instrument or not, and therefore the actual record of such an instrument does not import constructive notice. *Smith v. Clark*, 100 Iowa, 605, 69 N. W. 1011; *Kothe v. Krag-Reynolds Co.*, 20 Ind. App. 293, 50 N. E. 594. Others hold that, where an instrument bearing a certificate of acknowledgment or proof which is regular on its face is presented to the recording officer, it becomes his duty to record it, and its record operates as constructive notice to third persons, notwithstanding there may be a hidden defect in the

acknowledgment. *National Bank of Fredericksburg v. Conway*, Fed. Cas. No. 10,037; *Ardmore National Bank v. Briggs, etc., Co.*, 20 Okl. 437, 94 Pac. 533, 23 L. R. A. (N. S.) 1074, 129 Am. St. Rep. 747, 16 Ann. Cas. 133; *Stevens v. Hampton*, 46 Mo. 404; *Morrow v. Cole*, 58 N. J. Eq. 203, 42 Atl. 673. This court has never considered and adjudged the effect of the record of a defectively acknowledged instrument, where the defect was hidden, and the acknowledgment was regular on the face of the instrument, as between third parties in the determination of their respective rights. Nor do the facts require such adjudication in the instant case. But this court has decided, in at least three cases, that in a contest between a party to a defectively acknowledged instrument and an innocent third party, where the defect was hidden, such innocent third party may go dehors the record, and show by extrinsic proof that the instrument was defectively acknowledged, and that as between them the record is not notice of the existence of the instrument recorded. *Nichols v. Hampton*, 46 Ga. 253; *White v. Magarahan*, 87 Ga. 217, 13 S. E. 509; *Baxley v. Baxley*, 117 Ga. 60, 43 S. E. 436.

The argument is that, when one undertakes to circumvent the rights of others by the assertion of a superior right accruing solely from compliance with a statute conferring superiority, he must show full and complete compliance with the statute. A mortgagee has no natural equity over a subsequent purchaser or lienor without notice; and before he will be given this priority by virtue of the registry laws, he must bring himself within their precise terms. In *Nichols v. Hampton*, supra, a mortgage on personalty was attested by an unofficial witness. The mortgage was recorded on the probate affidavit of the witness before the attorney of the mortgagee, who was a notary public. The fact that the notary was attorney for the mortgagee did not appear from the probate affidavit or otherwise. The mortgagor sold the property to a subsequent purchaser before actual record of the mortgage. The mortgage was recorded within three months of its execution, and under the statute its record within that time was notice of its existence from the date of its execution. In a proceeding to subject the property to the lien of the mortgage, the court held that an affidavit probating a mortgage, taken before the attorney of the mortgagee, who is a notary public, is not a legal affidavit, and a mortgage recorded on such probate is not legally recorded, and gives no priority over a subsequent purchaser without actual notice. In *White v. Magarahan*, supra, the point arose in this way: Magarahan was a member of a firm who bought goods from White. As a basis of credit Magarahan represented that he was the owner of certain

land, and goods were sold to the firm on the basis of that representation. At a period of the business transactions between Magarahan's firm and White, when the former did not owe the latter anything, Magarahan made a voluntary deed of the land to his wife and children. Subsequently Magarahan's firm bought other goods from White upon the original representation of Magarahan's ownership of the land. These goods were not paid for, and White obtained a judgment for their purchase price. Execution issued and was levied on the land, and a claim was interposed by the wife and children. The deed from Magarahan to his wife and children was in the usual form, and appeared to have been attested by three witnesses, one of whom was the clerk of the superior court. There was nothing on the face of the deed to indicate otherwise than all three witnesses were present and attested the deed when it was executed. On the trial it appeared that, when Magarahan carried the deed to the clerk's office to have it recorded, it was witnessed only by two unofficial witnesses. The clerk observed that the deed was not properly attested for record, and called Magarahan's attention to it. Whereupon Magarahan acknowledged the deed before the clerk; but the clerk, instead of making the statutory certificate, simply signed his name officially to the attestation clause. The court held that the paper was not entitled to record, because the acknowledgment by the maker was not certified as required by the statute, nor was the original attestation good, because of the failure of the clerk to sign at the time the deed was executed, and that the record was not notice of the execution of the deed at the time it bore date, though recorded within the statutory period. The case of *Baxley v. Baxley*, supra, was an ejectment case. The plaintiff and defendant claimed under a common grantor. Both deeds appeared on their face to have been properly executed for registration, and both were recorded. The plaintiff's deed was inferior in date to the defendant's, but it was made to appear on the trial by extrinsic proof that neither of the so-called attesting witnesses was present when the grantor signed the latter deed. It further appeared that the grantor handed the deed to the defendant's husband, who subsequently obtained the signatures of the witnesses, and in this condition delivered it to his wife. On these facts the court held that "a deed is not duly recorded on the affidavit of one whose name was affixed to the usual attestation clause, but who did not in fact hear the grantor acknowledge, or see him sign, the instrument."

The case in hand comes within the principle of these cases. The circumstances attending the execution of the conditional bill of sale authorize the inference that the managing officials of the corporation knew, at

the time of its execution, that the attesting witness was a stockholder of the corporation. Of course, he was bound to know the law that a stockholder, who is a notary, cannot take the acknowledgment to an instrument to which the corporation is a party. Therefore knowledge to the corporation is imputable that the conditional bill of sale was not entitled to go to record, and its procuring the record of an instrument not entitled to record, and known to be such at the time, cannot serve to defeat the lien of one acquired without notice of the existence of the conditional bill of sale.

[4] The claimant further contends that, aside from the defective attestation of its conditional bill of sale, it is entitled to prevail over the attaching creditor, because the latter's lien was based on an indebtedness incurred previously to the execution of its conditional bill of sale. We do not think so. The statute provides that a mortgage or conditional sale recorded without due attestation or probate shall not be held notice to subsequent bona fide purchasers or younger liens. Civil Code, § 3262. This statute makes it the duty of a mortgagee to see that his mortgage is duly attested for record, and, if he fails in this regard, then his mortgage is postponed to younger liens. The question is not an open one; for it has been distinctly decided that "a judgment junior in date to a mortgage illegally recorded for want of probate, but founded on a debt antecedent to the date of the mortgage, has priority of lien to the mortgage." *Andrews v. Mathews*, 59 Ga. 466; *Richards v. Myers*, 63 Ga. 762; *New England, etc., Co. v. Ober*, 84 Ga. 294, 10 S. E. 625; *Cottrell v. Merchants' & Mechanics' Bank*, 89 Ga. 517, 15 S. E. 944. As the same rules govern the priority of conditional bills of sale, as affected by registry, which govern the registry of mortgages, it follows that, if the conditional bill of sale be illegally recorded, the property therein described is subject to a younger attachment lien founded on an antecedent debt.

Judgment affirmed. All the Justices concur.

(138 Ga. 412)

McNAUGHTON v. STATE.

(Supreme Court of Georgia. July 11, 1912.)
CRIMINAL LAW (§ 945*)—NEW TRIAL—PROBABLE EFFECT OF EVIDENCE.

Where rebutting evidence is submitted by the state on motion for new trial for newly discovered evidence, and the newly discovered evidence, considering the evidence on the trial,

would probably not produce a different result, the refusal will be affirmed.

[Ed. Note.—For other cases, see Criminal Law. Cent. Dig. §§ 2324-2327, 2336; Dec. Dig. § 945.*]

Error from Superior Court, Emanuel County; B. T. Rawlings, Judge.

W. J. McNaughton was convicted of crime, and brings error. Affirmed.

This case was before the Supreme Court on a former occasion. *McNaughton v. State*, 136 Ga. 600, 71 S. E. 1038. After the judgment of the Supreme Court, affirming the judgment of the superior court in refusing to grant a new trial, was made the judgment of the latter court, the plaintiff in error, at the April term, 1912, made an extraordinary motion for new trial, under the provisions of Civil Code, § 6092, on the ground of certain evidence alleged to have been discovered after the trial, and after the original motion for new trial had been overruled, and immediately preceding the term of court to which the motion for new trial on extraordinary grounds was filed. After considering this evidence, and other evidence offered in rebuttal by the state, the court overruled the motion and refused to grant a new trial. The movant excepted.

A. L. Franklin, of Augusta, F. H. Saffold, of Swainsboro, W. W. Larsen, of Dublin, and Wilson, Bennett & Lambdin, of Waycross, for plaintiff in error. Alfred Herrington, Sol. Gen., of Swainsboro, T. S. Felder, Atty. Gen., and Hines & Jordan and R. R. Arnold, all of Atlanta, for the State.

PER CURIAM. This was an extraordinary motion for new trial upon the ground of alleged newly discovered evidence. In view of the rebutting evidence submitted by the state on the hearing of the motion, and the improbability, considering the evidence upon the trial, that the alleged newly discovered evidence would produce a different result on another trial, the judgment refusing a new trial must be affirmed. See *Malone v. Hopkins*, 49 Ga. 221, and other cases collated in 14 *Michie's Dig.* 398.

ATKINSON, J. While I am of the opinion that the evidence on the trial was not sufficient to authorize the verdict, I concur in the opinion that the alleged newly discovered evidence would not probably produce a different result.

Judgment affirmed. All the Justices concur.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

(138 Ga. 413)

KIMBRELL v. STATE.

(Supreme Court of Georgia. July 11, 1912.)

*(Syllabus by the Court.)***1. RULINGS ON EVIDENCE—REMARKS BY COURT—NO ERROR.**

There was no merit in the assignment of error upon the rulings of the court in rejecting evidence, or those relative to remarks by the court made when the testimony was excluded.

2. CHARGE OF COURT—OPINION AS TO FACTS—ARGUMENTATIVE CHARGES.

The assignments of error upon excerpts from the charge, to which there were exceptions severally on the ground that they were not authorized by the evidence, that the court expressed an opinion as to the facts, that they were argumentative, and that they did not properly state the contentions of the state and the accused, were without merit.

3. HOMICIDE (§ 300*)—TRIAL—INSTRUCTIONS.

Where the only evidence as to the violent character of the deceased was that he was turbulent and violent when drinking, and there was no evidence that he was drinking or under the influence of liquor at the time of the homicide, the failure to charge as to the character of the deceased was not error.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 614, 616-620, 622-630; Dec. Dig. § 300.*]

4. REQUESTS COVERED BY GENERAL CHARGE.

In so far as the requests to charge embodied correct legal principles applicable to the case as made by the evidence, they were fully, fairly, and specifically covered by the general charge.

5. CRIMINAL LAW (§ 824*)—TRIAL—INSTRUCTIONS—NECESSITY FOR REQUEST.

Where the prisoner in his statement claimed that the deceased had made threats to him, there was no error in failing to charge the law applicable to threats, on the basis of such statement, in the absence of a request therefor.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1996-2004; Dec. Dig. § 824.*]

6. CRIMINAL LAW (§ 824*)—TRIAL—INSTRUCTIONS.

Where, on the trial of one for murder, there was evidence on behalf of the accused of uncommunicated threats made against him by the deceased, the failure to charge, without request, in regard to the law touching such threats, was not error; the court having fully charged the law of murder, manslaughter, and justifiable homicide, including the doctrine of reasonable fears.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1996-2004; Dec. Dig. § 824.*]

7. CRIMINAL LAW (§ 761*)—HOMICIDE (§ 286*)—TRIAL—INSTRUCTIONS—ASSUMPTIONS AS TO FACTS—MALICE.

The court charged "that the purchase of a weapon beforehand for the purpose of killing

deceased, if the evidence shows that he purchased it beforehand to kill this man, you may take that, if that is shown, as evidence of malice to that extent. It is for you to determine whether or not he purchased it for that purpose. But if he simply purchased it, but not for that purpose, then it would not be evidence of malice, and you would not be authorized to so take it." This charge, when considered in connection with the entire charge, was not error on the ground that it "assumed that the defendant purchased the pistol beforehand for the purpose of killing deceased," or upon the ground "that the purchase of a pistol for self-protection does not show evidence of malice."

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1731, 1538, 1754-1764, 1771; Dec. Dig. § 761.* Homicide, Cent. Dig. §§ 586-591; Dec. Dig. § 286.*]

8. HOMICIDE (§ 295*)—TRIAL—INSTRUCTIONS—PROVOCATION.

The court charged "that provocation by words, threats, menaces, or contemptuous gestures shall in no case be sufficient to free the person killing from the guilt and crime of murder," as applicable to one phase of the case. The portion of the charge so quoted was not error, on the ground that "provocations by words, threats, menaces, or contemptuous gestures may reduce the crime from murder to manslaughter, but in all cases it is a question for jury to decide, and not for the court."

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 606-609; Dec. Dig. § 295.*]

9. SUFFICIENCY OF EVIDENCE—REFUSAL OF NEW TRIAL—NO ERROR.

The evidence was sufficient to support the verdict, and there was no error in refusing to grant a new trial.

Error from Superior Court, Newton County; L. S. Roan, Judge.

Jim Kimbrell was convicted of murder, and brings error. Affirmed.

Jim Kimbrell was indicted for the murder of Jim McCart by shooting him with a pistol. On the trial the jury convicted the accused and recommended him to the mercy of the court. A motion for new trial was made, and afterwards amended. On the hearing the motion was overruled, and a new trial refused. The defendant excepted.

Rogers & Knox and A. D. Meador, all of Covington, and John R. Cooper, of Macon, for plaintiff in error. C. S. Reid, Sol. Gen., of Palmetto, R. W. Milner, of Covington, and T. S. Felder, Atty. Gen., for the State.

ATKINSON, J. Judgment affirmed. All the Justices concur.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

(133 Ga. 370)

WASHINGTON v. STATE.

(Supreme Court of Georgia. July 10, 1912.)

(Syllabus by the Court.)

1. CRIMINAL LAW (§ 828*)—TRIAL—INSTRUCTIONS—NECESSITY FOR REQUEST.

In the absence of a timely written request, it is not erroneous for the court to omit to charge the law upon the subject of the impeachment of witnesses. *Brown v. McBride*, 129 Ga. 92 (7), 58 S. E. 702; *Baker v. State*, 121 Ga. 189, 48 S. E. 967; *Phillips v. State*, 121 Ga. 358, 49 S. E. 290.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2007; Dec. Dig. § 828.*]

2. CRIMINAL LAW (§ 814*)—TRIAL—INSTRUCTIONS.

There was no evidence as to difference in race and social standing of the accused and the woman alleged to have been raped; hence under no view was it error for the judge to fail to charge the doctrine of *Dorsey v. State*, 108 Ga. 477 (2), 34 S. E. 135, to the effect that such matters may be considered in determining the intent with which the accused acted, etc.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1821, 1833, 1839, 1860, 1865, 1883, 1890, 1924, 1979-1985, 1987; Dec. Dig. § 814.*]

3. CRIMINAL LAW (§ 824*)—TRIAL—INSTRUCTIONS—NECESSITY FOR REQUEST.

The woman alleged to have been raped testified to the fact, and her testimony was corroborated by that of other witnesses. Error was assigned upon the failure of the judge to charge, without request, "that the accused should not be convicted upon the woman's testimony alone, however positive it may be, unless her testimony was corroborated by other evidence." *Held* that, under the facts stated, there was no error in such omission.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1996-2004; Dec. Dig. § 824.*]

4. CRIMINAL LAW (§ 918*)—TRIAL—CUSTODY AND DELIBERATIONS OF JURY.

"Where the sheriff deputized a person to take charge of the jury pending the trial of a criminal case, and the appointee acted as bailiff and had charge of the jury, without being sworn, a new trial will be granted." *Roberts v. State*, 72 Ga. 673.

(a) Accordingly, where, after a jury had retired to consider of their verdict in a felony case, the sheriff deputized a person who was not an officer to take charge of the jury, and the person so deputized, not having been sworn, accompanied them to a boarding house to get supper, and afterwards accompanied them to the courthouse, where they were put in charge of the sheriff, a new trial must be granted, although it appears from the affidavit of such appointee upon the hearing of the motion for new trial that the jury were in his custody "for not more than 40 minutes," and "that affiant guarded said jury, kept them segregated from other persons, and that affiant said nothing in the presence of said jury in reference to said case, and no member of said jury said anything in the presence of affiant in reference to said case, and that no member of said jury had any communication with any other person in said case during said time."

(b) The facts above recited are similar to the facts involved in the case of *Roberts v. State*, supra, and the ruling there made requires that a new trial should be granted.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2163-2196, 2219; Dec. Dig. § 918.*]

Error from Superior Court, Laurens County; K. J. Hawkins, Judge.

General Washington was convicted of rape, and brings error. Reversed.

General Washington was indicted in Laurens County for the crime of rape, alleged to have been committed on the person of Ada Wright. Both were persons of color, and there was no evidence as to difference in their social standing. The jury convicted the accused, and recommended him to the mercy of the court. A motion for new trial was made, which was afterwards amended. On the hearing the judge overruled the motion and refused a new trial. The defendant excepted.

Burch & Burch, of Dublin, for plaintiff in error. E. D. Graham, Sol. Gen., of McRae, and T. S. Felder, Atty. Gen., for the State.

ATKINSON, J. Judgment reversed. All the Justices concur.

(133 Ga. 347)

WALL v. CENTRAL OF GEORGIA RY. CO.

(Supreme Court of Georgia. July 9, 1912.)

(Syllabus by the Court.)

EJECTMENT (§ 95*)—EVIDENCE—TITLE OF PLAINTIFF.

The rule is that, where the plaintiff in an action for land claims under an administrator's deed, proof that the intestate died seised and possessed of the property, and that it was sold by the administrator of his estate under an order granted by the ordinary, is sufficient evidence of title, without proof of title in the intestate. This rule, however, is not applicable in the case at bar. The action was in the statutory form for the recovery of land. The land sought to be recovered was a narrow strip on each side of the track of the defendant railway company, which ran through what was known as the "Jordan place." The real issue was as to the width of the right of way of the railway company; the plaintiff's contention being that it was only 20 feet wide, that is, 10 feet on each side from the center of the track; the defendant railway company's contention being that the right of way was 100 feet wide, that is, 50 feet on each side from the center of the track. So that the strips in controversy were 40 feet wide, running parallel with the track on each side thereof, and 10 feet therefrom. There was evidence in behalf of the plaintiff to the effect that the intestate, under whom the plaintiff claimed, died "seised and possessed of the 'Jordan place.'" There was uncontradicted evidence to the effect that the railway company had a track in use at the same place through the "Jordan place" during the lifetime of Jordan, and many years prior to the time that the intestate went into the possession of the "Jordan place"; but there was nothing tending to show the width of the right of way of the railway company over the land at that time. It is clear, therefore, that the evidence wholly failed to show that the intestate died seised and possessed of the strips of land sued for. It necessarily follows, as the plaintiff failed to

show title from any other source or in any other way, that the verdict in favor of the defendant, the railway company, was demanded under the evidence. It is unnecessary, in view of this fact, to pass upon the assignments of error as to rulings made during the trial.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. §§ 280-295; Dec. Dig. § 95.*]

Error from Superior Court, Baldwin County; J. B. Park, Judge.

Action by Ophelia Wall against the Central of Georgia Railway Company. Judgment for defendant, and plaintiff brings error. Affirmed.

Hines & Vinson, of Milledgeville, for plaintiff in error. Allen & Pottle, of Milledgeville, and Lawton & Cunningham, of Savannah, for defendant in error.

FISH, C. J. Judgment affirmed. All the Justices concur.

(138 Ga. 346)

BREWER v. RAGAN.

RAGAN v. BREWER.

(Supreme Court of Georgia. June 13, 1912.)

(Syllabus by the Court.)

1. APPEAL AND ERROR (§ 1170*)—INSTRUCTIONS—REVIEW—INACCURACIES—REVERSAL.

While there are some inaccuracies in the charges complained of, when considered separately, yet, taken as a whole in the light of the evidence in the case, there should not be a reversal of the judgment of the court below refusing a new trial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4540-4545; Dec. Dig. § 1170.*]

2. NEW TRIAL (§ 108*)—NEWLY DISCOVERED EVIDENCE.

The newly discovered evidence was largely, though not entirely, cumulative, and, taken in connection with the affidavits in rebuttal thereto submitted by the defendant in error, was not of such a character as to make it an abuse of discretion on the part of the trial judge to refuse a new trial on that ground.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 226, 227; Dec. Dig. § 108.*]

3. CROSS-BILL OF EXCEPTIONS.

The judgment on the main bill of exceptions being affirmed, the cross-bill is dismissed.

Error from Superior Court, Polk County; Price Edwards, Judge.

Action between Joel Brewer and R. J. Ragan. From the judgment, Brewer brings error, and Ragan assigns cross-error. Judgment on main bill of exceptions affirmed, and cross-bill dismissed.

C. G. Janes and Bunn & Bunn, all of Cedartown, for plaintiff in error. W. W. Mundy, of Cedartown, for defendant in error.

HILL, J. Affirmed on main bill of exceptions, and cross-bill dismissed. All the Justices concur.

(138 Ga. 139)

WHITAKER v. STATE.

(Supreme Court of Georgia. May 14, 1912.)

(Syllabus by the Court.)

1. CRIMINAL LAW (§ 1124*)—WRIT OF ERROR—RECORD—BRIEF OF EVIDENCE.

"When no bona fide attempt is made to file a brief of evidence in accordance with the provisions of Civ. Code 1910, § 6093, but a document is filed, and approved by the trial judge, which includes the oral and documentary evidence without abridgment, in violation of the provisions of such section," the motion for new trial does not stand in the appellate court upon the same footing as if no brief of the evidence at all were filed.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2939, 2946-2948; Dec. Dig. § 1124.*]

2. CRIMINAL LAW (§ 1124*)—WRIT OF ERROR—RECORD—BRIEF OF EVIDENCE.

While a brief of evidence is a statutory requisite of a valid motion for new trial, there may, however, be a valid motion for new trial so far as to enable the reviewing court to consider and pass on assignments of error not dependent for determination upon the evidence, although the paper filed as a brief of evidence in connection with the motion shows that in its preparation no bona fide effort was made to comply with the provisions of Civ. Code 1910, § 6093.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2939, 2946-2948; Dec. Dig. § 1124.*]

3. CRIMINAL LAW (§ 1124*)—WRIT OF ERROR—RECORD—BRIEF OF EVIDENCE.

(a) Where a paper purporting to be a brief of evidence, but not made up according to the requirements of the Civil Code, § 6093, "is approved by the trial judge, and the motion for a new trial is thereupon overruled and the case is brought to the Court of Appeals upon writ of error complaining of such judgment," the Court of Appeals should not "deal with the case as though no valid motion for new trial had been filed by the movant."

(b) If, in such a case, the Court of Appeals "discovers charges of the court which appear abstractly erroneous, or, in a criminal case, not applicable to the charge made in the indictment, or that there have been errors prima facie committed in the admission or rejection of testimony, and these errors are complained of in the motion for new trial," the judgment overruling the motion for new trial should be reversed, provided that any of the assignments of error on the points above stated can be determined without reference to the evidence, and, furthermore, that the error appears to be such that the plaintiff in error was manifestly thereby injured. Otherwise the judgment should be affirmed.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2939, 2946-2948; Dec. Dig. § 1124.*]

4. CRIMINAL LAW (§§ 1124, 1122*)—WRIT OF ERROR—RECORD—BRIEF OF EVIDENCE.

(a) "When there is no legal brief of evidence filed with the motion for new trial, but only a document which fails to comply with the provisions of Civ. Code 1910, § 6093," the Court of Appeals should not look to such a document for the purpose of determining the questions raised in the motion for new trial.

(b) There may be cases wherein it can "be said, * * * without an examination of the evidence, that an instruction of the trial judge,

abstractly erroneous, [was] so hurtful to the plaintiff in error as to require a reversal of the judgment" overruling a motion for a new trial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2939, 2946–2948, 2940–2945; Dec. Dig. §§ 1124, 1122.*]

Certified Questions from Court of Appeals.

W. P. Whitaker was convicted of crime, and brings error. Heard on questions certified by the Court of Appeals. Questions answered.

For opinion of Court of Appeals, see 75 S. E. 258.

Gober & Griffin, of Marietta, for plaintiff. J. P. Brooke, Sol. Gen., of Alpharetta, for the State.

FISH, C. J. The Court of Appeals has certified to this court certain questions, which we will state and deal with seriatim.

[1] 1. The first question is: "When no bona fide attempt is made to file a brief of evidence in accordance with the provisions of Civil Code (1910), § 6093, but a document is filed, and approved by the trial judge, which includes the oral and documentary evidence without abridgment, in violation of the provisions of such section, should the motion for new trial stand upon the same footing as though no effort had been made to comply with the provisions of such section of the Code?" We will say in the outset that in one of the briefs filed in this court in behalf of the plaintiff in error, in the case to which the questions relate, the contention is vigorously urged that the evidence introduced upon the trial of such case was briefed in accordance with the requirements of the statute, approved by the trial judge, and duly filed as a part of the motion for new trial. It will appear from an examination of the questions certified that no inquiry is made of this court as to whether or not a legal brief of the evidence was filed in the case. Nor is this court asked in any of the certified questions whether or not any specific assignment of error made in the motion for new trial can be considered and decided by the Court of Appeals without reference to the evidence. Obviously, therefore, it is not in order for this court to deal with such matters. There are many decisions of this court to the effect that a brief of the evidence is an indispensable statutory requisite to a valid motion for new trial. In other words, if there is no brief of evidence, no motion for new trial exists. This is clearly deducible from the Civil Code, § 6080, and from Rule 20 of the superior court embodied in the Civil Code, § 6306. See, also, Civ. Code, § 6090. It is unnecessary to cite the great number of cases wherein the above cited rule has been applied; but we call attention to *Baker v. Johnson*, 99 Ga. 374, 27 S. E. 706, wherein it was held that the trial

judge properly dismissed the motion for new trial because no brief of evidence had been prepared and presented in accordance with the order of the judge, although the sole ground of the motion relied on was the disqualification of one of the jurors who tried the case. A similar ruling was made in *Mize v. Americus, etc., Co.*, 106 Ga. 140, 32 S. E. 22. The rule is recognized in *Holloman v. Small*, 111 Ga. 812 (1), 35 S. E. 665; *Brooks v. Proctor*, 111 Ga. 835 (1), 36 S. E. 99; *Hyatt v. Cowan*, 115 Ga. 608, 41 S. E. 985; *Blackburn v. Alabama Midland Ry. Co.*, 116 Ga. 936, 43 S. E. 366; *Blakeman v. State*, 121 Ga. 334, 49 S. E. 261; *Moxley v. Georgia Ry. & Elec. Co.*, 122 Ga. 493, 50 S. E. 339. Other cases in point will be found collated in 13 Enc. Dig. Ga. R. 223; 15 Enc. Dig. Ga. R. 299. Where, however, a paper purporting to be a brief of evidence has been filed and approved by the trial judge, but from which it appears no bona fide effort has been made to comply with the provisions of Civil Code, § 6093, requiring that briefs of evidence shall be a condensed and succinct brief of the material portions of the oral testimony as well as the documentary evidence, the writ of error should not be dismissed, but, as has been held in numerous cases by this court, if there be in such a case assignments of error which do not involve a consideration of the evidence for their determination, they will be decided. *Crumbley v. Brook*, 135 Ga. 723, 70 S. E. 655. To the same effect, see the cases cited in 2 Enc. Dig. Ga. R. 612 (D); 13 Enc. Dig. Ga. R. 233 (C2); 15 Enc. Dig. Ga. R. 310 (1V-A-1-a). It follows that the first question must be answered in the negative; that is, that a motion for a new trial, accompanied by a paper purporting to be a brief of the evidence filed and approved by the trial judge, but in the preparation of which it appears that there has been no bona fide effort to comply with the provisions of the Civil Code, § 6093, does not stand upon the same footing as a paper presented as a motion for a new trial unaccompanied by anything purporting to be a brief of the evidence introduced on the trial.

[2] 2. The second question is: "Can there be a valid motion for a new trial in a case where no attempt has been made to file a brief of evidence, and the document filed as a brief of evidence is not in compliance with the provisions of Civil Code (1910), § 6093?" From what we have said in reply to the first question, it follows that the second question must be answered in the affirmative; that is, there may be a valid motion for new trial in a case where a paper purporting to be a brief of the evidence filed as such in connection with the motion for new trial, but not made up in accordance with the Civil Code, § 6093, so far as to authorize the appellate court to consider and decide any

point raised in the motion not dependent for determination upon the evidence.

[3] 3. The first inquiry in the third question is as follows: "Where no legal brief of evidence is filed, but a document such as is described in the preceding questions is tendered as a brief of evidence, and is approved by the trial judge, and the motion for a new trial is thereupon overruled and the case is brought to the Court of Appeals upon writ of error complaining of such judgment, should this court deal with the case as though no valid motion for new trial had been filed by the movant?"

(a) In view of what we have already said in answer to the foregoing questions, it is apparent that this inquiry must be answered in the negative; that is, such a case as that stated should not be dealt with by the appellate court as though no valid motion for new trial had been filed by the movant, because unaccompanied by any paper purporting to be a brief of the evidence.

(b) The second inquiry embodied in the third question is as follows: Should the Court of Appeals in such case, as just above stated, "reverse the judgment overruling the motion for new trial if it discovers charges of the court which appear to be abstractly erroneous, or, in a criminal case, not applicable to the charge made in the indictment, or that there have been errors *prima facie* committed in the admission or rejection of testimony, and these errors are complained of in the motion for new trial?" Our answer is, if it should be apparent from a consideration of the record, other than the so-called brief of evidence, that the plaintiff in error has been manifestly injured by one or more of such errors, without regard to what the evidence on the trial may have been, then there should be a reversal of the judgment overruling the motion for a new trial; otherwise the judgment should be affirmed, as it is incumbent upon the plaintiff in error to show, not only error, but that he has thereby been injured. In *McPherson v. Chandler*, 137 Ga. 129, 72 S. E. 948, where the action was for illegal arrest and malicious prosecution, this court found the brief of evidence so imperfect in omitting essential parts of the evidence that it declined to treat it as made up in compliance with the requirements of Civil Code, § 6093, and held that none of the assignments of error requiring a consideration of the evidence could be passed on, but reversed the judgment of the trial court in overruling a motion for new trial on several assignments of error in the motion, on charges of the court and the exclusion of evidence, which could be considered and determined without reference to the so-called brief of evidence, and which were manifestly prejudicial to the plaintiff in error. In another recent case—*Monroe v. Martin*, 137 Ga. 262, 73 S. E. 341—the

suit was on a promissory note brought by the executor of the payee against the maker, who pleaded a contemporaneous written agreement between himself and the payee, containing a covenant never to sue on the note. The case had formerly been before this court (*Martin v. Monroe*, 107 Ga. 330, 33 S. E. 62), when it was held that such covenant in effect relieved the maker from liability on the note as to the payee thereof and his legal representative. On the last trial the plaintiff amended his petition by alleging that the defendant on stated occasions "recognized the validity of such note and promised your petitioner to pay the same to him." The court on that trial instructed the jury as to such amendment to the following effect: That if plaintiff's testator, at the time the note was executed, covenanted with the defendant in writing never to sue on the same, yet, if after the testator's death, the defendant expressly agreed to pay the note to plaintiff as executor, the moral obligation resting on the defendant to pay the debt would be sufficient to sustain the new contract and promise to pay the note, and the defendant would be liable to pay the same, notwithstanding such previous covenant with the plaintiff's testator. There was a verdict for the plaintiff. The defendant moved for a new trial, which motion was overruled, and he excepted. Upon the hearing before this court, counsel for the defendant in error contended that the brief of evidence which had been duly approved and certified to this court should be disregarded, for the reason that it was not made up in compliance with the provisions of the Civil Code, § 6093. Presiding Justice Evans, who delivered the opinion, said: "This court has frequently pointed out the necessity of a compliance with the act of the General Assembly in the preparation of briefs of evidence. Only relevant and material evidence should be included, and repetitions should be avoided. We do not find it necessary to examine the brief of evidence in ruling upon the controlling points in this case. Where points of law are made in the record, and they can be passed on without reference to the evidence, this court will decide them. The instruction, which we hold to be erroneous, does not require a consideration of the evidence to demonstrate the necessity of another trial." In that case it was apparent from the pleadings in the case without reference to the evidence that the erroneous instruction was palpably injurious to the defendant. Another case where this court passed on legal questions not dependent for determination on the evidence, which were raised in a motion for a new trial, and where the evidence was not briefed in compliance with the statute, is *Equitable Mortgage Co. v. Bell*, 115 Ga. 651 (2), 42 S. E. 82. Other cases where the same rule was followed, but

in which there was no motion for new trial, are *St. Amand v. Lehman*, 120 Ga. 253 (3, 4), 47 S. E. 949; *De Loach v. Planters, etc.*, of Georgia, 122 Ga. 335 (2), 50 S. E. 141; *Crumbley v. Brook*, 135 Ga. 723, 70 S. E. 655. It is impracticable for this court to make up a catalogue of instances wherein the case stated by the Court of Appeals in the second division of the third question, the judgment of the trial court in refusing a new trial should be reversed or affirmed on account of one or more of the errors committed by the trial court as stated in the second division of the question under consideration. The appellate court must, when such cases come before it, determine in each case whether the assignment of error can be passed on and determined from the record without reference to the evidence, and, if the assignment of error be meritorious, whether or not the plaintiff in error has been thereby manifestly injured. The same rule is applicable to both civil and criminal cases.

An instruction to the jury upon the trial of a criminal case not applicable to the charge made in the indictment might for the very reason of its patent inapplicability be not cause for reversing a judgment overruling a motion for new trial. Suppose upon the trial of one charged with larceny an instruction should be given defining express or implied malice. It would be manifest that such an instruction could not possibly have injured the accused. On the contrary, if on the trial of one charged with rape the law as to the offense of seduction should be given in charge and the accused should be found guilty of seduction, a judgment overruling the motion of the accused for a new

trial wherein such instruction was excepted to should be reversed, even though the evidence could not be considered, for obviously the accused would have been injured by such an erroneous instruction. Of course, such illustrative cases might be stated practically without number. So suppositive cases might be stated where error in the admission or rejection of testimony was so slight or immaterial as to be harmless, without reference to the evidence submitted in the case. On the other hand, cases may be easily supposed where the testimony admitted or rejected was of such a character, when considered in connection with the record aside from the evidence, as to make it manifest that the party complaining was injured by its admission or rejection.

[4] 4. The fourth question certified is as follows: "Assuming that a plaintiff in error must show both error and injury, when there is no legal brief of evidence filed with the motion for new trial, but only a document which fails to comply with the provisions of Civil Code (1910), § 6093, should this court look to such a document for any purpose, and can it be said in any case without an examination of the evidence that an instruction of the trial judge, abstractly erroneous, is so hurtful to the plaintiff in error as to require a reversal of the judgment?" It is apparent from what we have said in reply to the other questions that the first inquiry propounded in this question must be answered in the negative, and that an affirmative answer must be given to the second inquiry made in this fourth question. All the Justices concur.

(11 Ga. App. 208)

WHITAKER v. STATE. (No. 3,714.)
(Court of Appeals of Georgia. June 5, 1912.)

(Syllabus by the Court.)

1. FALSE PRETENSES (§ 26*)—INDICTMENT AND INFORMATION—SUFFICIENCY.

The indictment sufficiently charged the offense of cheating and swindling to withstand general demurrer.

[Ed. Note.—For other cases, see False Pretenses, Cent. Dig. § 31; Dec. Dig. § 26.*]

2. FALSE PRETENSES (§ 29*)—INDICTMENT AND INFORMATION—SUFFICIENCY.

The special demurrers, to the effect that the deceitful means and artful practices by which the fraud was consummated are not sufficiently set forth, are not well taken.

[Ed. Note.—For other cases, see False Pretenses, Cent. Dig. §§ 34-36; Dec. Dig. § 29.*]

3. FALSE PRETENSES (§ 7*)—INDICTMENT AND INFORMATION—ELEMENTS OF OFFENSE.

An indictment for cheating and swindling may be predicated of a false representation relating partly to matters of fact and partly to matters of opinion, where it is alleged that the loss to the prosecutor ensued through his acting upon the false representation as to the fact.

[Ed. Note.—For other cases, see False Pretenses, Cent. Dig. §§ 5-12, 25; Dec. Dig. § 7.*]

4. FALSE PRETENSES (§ 9*)—DEFENSES—NEG-LIGENCE OF PERSON INJURED.

To an indictment for cheating and swindling by false representations, it is no objection that the false matters alleged were of such a nature that the person defrauded could, by making an independent investigation, have ascertained that they were false, before he acted upon them.

[Ed. Note.—For other cases, see False Pretenses, Cent. Dig. § 14; Dec. Dig. § 9.*]

5. INDICTMENT AND INFORMATION (§ 72*)—SUFFICIENCY OF ACCUSATION—DESCRIPTIVE TERMS—"OR."

An indictment is subject to demurrer if the descriptive terms relating to any material allegation are set forth in an alternate form. The word "or" is generally used as a disjunctive, and to express the notion that the two clauses which it connects are alternative; but this is not always so. It may properly be used to introduce a statement which is an amplification or explanation of a preceding statement. The use of the word in the present indictment was of the latter nature.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 195-199; Dec. Dig. § 72.*]

For other definitions, see Words and Phrases, vol. 6, pp. 5002-5015; vol. 8, p. 7739.]

6. FALSE PRETENSES (§ 36*)—INDICTMENT AND INFORMATION—ELEMENTS OF OFFENSE.

Where an indictment alleges a false statement, and the statement relates to a number of different facts, it is not necessary that the indictment should allege that loss resulted from each and all of these statements which proved untrue, but, if it be alleged that any one of the material false statements resulted in loss, the indictment will be sufficient, so far as this point is concerned.

[Ed. Note.—For other cases, see False Pretenses, Cent. Dig. § 48; Dec. Dig. § 36.*]

7. CRIMINAL LAW (§ 1124*)—WRIT OF ERROR—RECORD—BRIEF OF EVIDENCE.

Where no bona fide attempt is made to file a brief of evidence in accordance with the

provisions of section 6093 of the Civil Code 1910, but a document is filed and approved by the trial judge which includes the documentary and oral evidence without abridgment, in violation of the provisions of that section, the reviewing court will determine only such assignments of error in the motion for a new trial as can be considered without reference to the evidence in the case.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2939, 2946-2948; Dec. Dig. § 1124.*]

8. CRIMINAL LAW (§ 804*)—INSTRUCTIONS—FORM—SUFFICIENCY OF WRITING.

The trial judge was duly requested to put his charge in writing. As written out, the charge contained the following statement: At one place there was a note in parenthesis as follows: "(Here the court reads section 710 of volume 2 of the Code of 1910, leaving off the words at the top, 'other offenses of like character.')" In another place in the charge the following appears: "Here the court reads the indictment in full, leaving off the names of the grand jurors who returned it, and leaving off the entries on the back of the indictment." In another place in the charge the following notation was made: "Here the court charged paragraph one of the defendant's request, No. 1." In another place: "Here the court charged paragraphs second and fourth of defendant's request, No. 2." Held, that such a charge was not a compliance with the mandatory requirement of section 1056 of the Penal Code of 1910, and the failure of the trial judge to write out his charge as prescribed by that section demands a new trial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1948-1957; Dec. Dig. § 804.*]

9. FALSE PRETENSES (§ 45*)—EVIDENCE—ADMISSIBILITY.

On the trial of an indictment for cheating and swindling in fraudulently misrepresenting the value upon a specified date of shares of stock in an alleged corporation, evidence as to the value of such stock both before and after the date of the misrepresentation may be material as illustrating the probable value of the stock on that date.

[Ed. Note.—For other cases, see False Pretenses, Dec. Dig. § 45.*]

10. FALSE PRETENSES (§ 52*)—INSTRUCTIONS—ELEMENTS OF OFFENSE.

Upon the trial of such an indictment, a request to charge that if the jury believed the defendant in good faith thought the purchase of the stock was a safe investment, and honestly made a mistake as to its value, he could not be convicted, was pertinent, and should have been given.

[Ed. Note.—For other cases, see False Pretenses, Cent. Dig. § 64; Dec. Dig. § 52.*]

11. FALSE PRETENSES (§ 45*)—EVIDENCE—ADMISSIBILITY.

In the trial of such a case, evidence of purchases of shares of stock in the alleged corporation by persons other than the prosecutor, and the price which such persons paid for the stock, was admissible as a circumstance tending to illustrate the probable value of the stock, unless it appeared that such other purchases were also made as a result of misrepresentations made by the defendant.

[Ed. Note.—For other cases, see False Pretenses, Dec. Dig. § 45.*]

12. CRIMINAL LAW (§ 403*)—EVIDENCE—BEST AND SECONDARY EVIDENCE—EXISTENCE OF CORPORATE CHARTER.

When it becomes material to prove that no charter has ever been granted to an alleged banking corporation, this fact must be proved by the testimony of some person who has examined the records in the office of the Secretary of State, where, by law, the records of such incorporation are required to be kept.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 889; Dec. Dig. § 403.*]

13. CRIMINAL LAW (§ 442*)—EVIDENCE—DOCUMENTARY EVIDENCE—AUTHENTICATION.

The document purporting to be a certificate of stock in the alleged banking corporation was prima facie not admissible, without proof as to the genuineness of the signatures of the alleged president and secretary of the corporation. If it should in fact appear from the evidence that this document was the one delivered by the defendant to the prosecutor as a certificate of stock in the alleged corporation, it would be immaterial whether the signatures of the alleged officers were genuine or not.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1027; Dec. Dig. § 442.*]

14. CRIMINAL LAW (§ 406*)—EVIDENCE—ADMISSIONS.

The answer of the defendant filed in the receivership proceedings involving the solvency of the alleged banking corporation was not inadmissible for any of the reasons assigned in the motion for a new trial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 785, 894-927; Dec. Dig. § 406.*]

15. CRIMINAL LAW (§ 400*)—EVIDENCE—BEST AND SECONDARY EVIDENCE—CERTIFIED COPIES.

The original record of a petition in bankruptcy in the United States court, and the original schedules thereto attached, are not admissible in evidence in the trial of an action brought in one of the courts of this state. A duly certified copy of such original records is the highest and best evidence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 879-886; Dec. Dig. § 400.*]

16. OTHER ASSIGNMENTS NOT CONSIDERED.

The foregoing headnotes deal with all the assignments of error which can be considered without reference to the evidence.

Error from Superior Court, Cobb County; N. A. Morris, Judge.

W. P. Whitaker was convicted of cheating and swindling, and brings error. Reversed.

Certified questions answered by Supreme Court (75 S. E. 254).

Gober & Griffin, of Marietta, for plaintiff in error. J. P. Brooke, Sol. Gen., of Alpharetta, for the State.

POTTLE, J. [1] 1. The indictment charged the defendant, W. P. Whitaker, with the offense of cheating and swindling, for that he "did unlawfully then and there falsely and fraudulently represent to one T. L. Underwood that the Bank of Kennesaw was incorporated, and was perfectly solvent, and that the stock in said bank was well worth the sum of hundred and seven (\$107.00) dol-

lars per share of one hundred dollars, and, by thus making said false and fraudulent representations and statements, did then and there induce the said T. L. Underwood, who relied upon said false and fraudulent representations and statements as true, to buy from him, the said W. P. Whitaker, two shares of said stock, or what purported to be two shares of stock in said Bank of Kennesaw, for which the said T. L. Underwood paid him, the said W. P. Whitaker, the sum of two hundred dollars, when in truth and in fact the stock in said Bank of Kennesaw was not worth anything of value, and was of no value, whereby the said T. L. Underwood was cheated and defrauded out of two hundred dollars, and was deceived, imposed upon, and damaged in said sum by relying upon and believing said false and fraudulent representations and statements, as made by the said W. P. Whitaker as aforesaid, and which said false and fraudulent representations and statements the said W. P. Whitaker knew then and there to be false and untrue." The defendant demurred to the indictment generally and on a number of special grounds. As against general demurrer, it was certainly sufficient under Penal Code 1910, § 719.

[2] 2. Special demurrer to the effect that the indictment does not set forth the deceitful means or artful practices that were used is not well taken.

[3] 3. The point made by special demurrer that the alleged false representations were representations not of facts, but merely of opinions, is not meritorious. The statement that the bank was incorporated is a statement of fact. The statement that it was perfectly solvent is likewise a statement of fact, and the further statement that the stock in the bank was well worth the sum of \$107 per share, though perhaps a statement of an opinion, was properly included in the indictment; for cheating and swindling may be predicated of a representation which in part alleges a fact and in part an opinion.

[4] 4. The demurrer on the ground that the indictment showed that the prosecutor could by the exercise of reasonable diligence have investigated and discovered that the alleged false statements were not true, if in point of fact they were not true, is not well taken, (1) because the demurrer is speaking; (2) because it does not rob a false statement of its culpability, so far as a prosecution for cheating and swindling is concerned, for it to appear that the prosecutor acted upon it instead of making an investigation elsewhere for the purpose of discovering the truth. *Crawford v. State*, 117 Ga. 247, 43 S. E. 762; *Id.*, 4 Ga. App. 789, 62 S. E. 501.

[5] 5. The allegations in the indictment

that the accused induced Underwood to buy from him "two shares of said stock, or what purported to be two shares of stock, in said Bank of Kennesaw," is demurred to on the ground that it does not definitely allege whether it was two shares or what purported to be two shares in the Bank of Kennesaw that Underwood was induced to buy. The rule is well settled in this state that an indictment must not state essential of the offense in the alternative, and, since the word "or" is usually a disjunctive conjunction indicating an alternative between two different things, it is generally an improper word to be used to connect the affirmative allegations of an indictment. For instance, it is bad to charge that the defendant shot "with a gun or a pistol." But this is not the only use of the word "or." It is sometimes used to introduce a reiteration of the same idea, and to express it in a somewhat different way. Thus for an indictment to charge that liquor was sold "to a minor or to a person under twenty-one years" is not to charge the crime in the alternative, for the manifest meaning of the language in that case is simply to make the last clause explanatory of the first. So in this case the allegation that the accused sold Underwood two shares of stock, or what purported to be two shares of stock, in the bank in question, means that he sold him that which, if the bank had been incorporated, would have been shares of stock, but which, since the bank was not incorporated, is to be more properly called "what purported to be" two shares of stock. In other words, the expression "shares of stock," as applied to an unincorporated bank, would not, if left to stand alone, be an accurate expression, though it is a common expression used by the people to express a notion, even as applied to an unincorporated bank; and the pleader in this case, by the use of the additional expression "or what purported to be two shares of stock," merely amplified his previous allegation, and made it more certain. Hence, the indictment is not subject to the demurrer aimed against it on this ground.

[6] 6. The demurrer makes the further point that it is not shown that any loss resulted to the prosecutor because it turned out that the bank was not incorporated. It may be, and probably is, true that, if the sole false statement alleged was that the bank was incorporated, the allegation as to how the prosecutor's loss came about would not be sufficient to support the indictment, but it must be kept in mind that this is not the sole false statement alleged. The whole of the false statement as charged against the accused is that he represented that the Bank of Kennesaw was incorporated, that it was perfectly solvent, and that its stock was worth more than par. Each of these statements was false. The loss occurred because

the stock was of no value. This being a natural and proximate result of the bank's insolvency (that is, from the falsity of the statement that the bank was solvent), there is a sufficient proximity of connection between the falsity of the statement and the loss that came to the prosecutor through the stock's being worthless. We are not now discussing the question as to the admissibility of evidence under this indictment, or as to the sufficiency of the evidence to support the indictment. What we are here attempting to show is that there is a direct connection between one material portion of the false statement and the loss to the prosecutor, according to the allegations of the indictment. It is not necessary, in an indictment for cheating and swindling, that the loss be shown to have come about as the direct and natural result of the falsity of each or all of the statements made in the representations on which the indictment is based. It is proper to set out in the indictment the entire statement, and to show that by reason of any portion of this statement's proving false loss resulted in the manner set out in the indictment. To illustrate, suppose in this case the indictment had alleged the same false statement and had charged that the loss came about by reason of the fact that the prosecutor had been exposed to liability and consequent loss as a partner in the unincorporated bank, when he could not have been so exposed if the bank had been chartered. In the case just supposed the indictment would have been good on the theory that the loss alleged was a natural result flowing from the falsity of the statement that the bank was incorporated, and certainly the indictment would sustain a conviction if these two allegations were proved, notwithstanding it turned out that at the time the representation was made stock in it was of the market value asserted by the accused. We conclude that the demurrer to the indictment was properly overruled.

[7] 7. A judgment of affirmance was entered by the Court of Appeals in this case, and subsequently a motion for rehearing, filed by the plaintiff in error, was granted. The court had previously reached the conclusion that the document appearing in the record as a brief of the evidence was not a compliance with section 6093 of the Civil Code 1910, and that for this reason the court was without power or authority to pass upon any ground of the motion for new trial. An order was entered requiring the case to be reargued, in order that this court might re-examine the question whether or not it had authority to consider any of the assignments of error contained in the motion for new trial, in view of the fact that no legal brief of evidence was incorporated in the record and tendered to the judge in connection with the motion for new trial. In other

words, the court decided to hear reargument upon the question as to whether or not the motion for new trial stood upon the same footing as if no brief of evidence at all had been filed. The court in its order declined expressly to reopen the question as to whether the brief of evidence was legally prepared. After reargument, the Court of Appeals certified to the Supreme Court for instruction the following questions: "When no bona fide attempt is made to file a brief of evidence in accordance with the provisions of Civil Code 1910, § 6093, but a document is filed, and approved by the trial judge, which includes the oral and documentary evidence without abridgment, in violation of the provisions of such section, should the motion for new trial stand upon the same footing as though no effort had been made to comply with the provisions of such section of the Code? Can there be a valid motion for a new trial in a case where no attempt has been made to file a brief of evidence, and the document filed as a brief of evidence is not in compliance with the provisions of Civil Code 1910, § 6093? Where no legal brief of evidence is filed, but a document such as is described in the preceding questions is tendered as a brief of evidence, and is approved by the trial judge, and the motion for a new trial is thereupon overruled and the case is brought to the Court of Appeals upon writ of error complaining of such judgment, should this court deal with the case as though no valid motion for new trial had been filed by the movant; and should the Court of Appeals in such a case reverse the judgment overruling the motion for new trial, if it discovers charges of the court which appear to be abstractly erroneous, or, in a criminal case, not applicable to the charge made in the indictment, or that there have been errors *prima facie* committed in the admission or rejection of testimony, and these errors are complained of in the motion for new trial? Assuming that a plaintiff in error must show both error and injury, when there is no legal brief of evidence filed with the motion for new trial, but only a document which fails to comply with the provisions of Civil Code 1910, § 6093, should this court look to such a document for any purpose, and can it be said in any case, without an examination of the evidence, that an instruction of the trial judge, abstractly erroneous, is so hurtful to the plaintiff in error as to require a reversal of the judgment?" The Supreme Court has delivered its instructions, and has answered the questions propounded by this court as follows: The first question was answered in the negative, the court holding that a motion for a new trial, accompanied by a paper purporting to be a brief of the evidence filed and approved by the trial judge, but in the preparation of which it appears that there has been no bona fide effort to comply with the

provisions of the Civil Code, § 6093, does not stand upon the same footing as a paper presented as a motion for a new trial unaccompanied by anything purporting to be a brief of the evidence introduced on the trial. The second question was answered in the affirmative, the court holding that there may be a valid motion for new trial in a case where a paper purporting to be a brief of the evidence is filed as such in connection with the motion for new trial, but not made up in accordance with the Civil Code, § 6093, so far as to authorize the appellate court to consider and decide any point raised in the motion not dependent for determination upon the evidence. The first inquiry embodied in the third question was answered in the negative, and the second inquiry embodied in the third question was answered in the affirmative, the court holding that it is the duty of the reviewing court to reverse the judgment overruling the motion for new trial, if it discovers charges of the court which appear to be abstractly erroneous, or, in a criminal case, if there have been errors *prima facie* committed in the admission or rejection of testimony, and these errors are complained of in the motion for new trial. The first inquiry propounded in the fourth question was answered in the negative, and an affirmative answer given to the second inquiry made in the fourth question. Under these instructions from the Supreme Court, it becomes the duty of the Court of Appeals to examine the motion for new trial in the present case, for the purpose of determining whether there are any assignments of error made in the motion which can be considered without reference to the evidence in the case. The foregoing headnotes from 1 to 6 inclusive, and the corresponding divisions of the opinion, were prepared by Judge Powell and adopted by this court as its opinion. We now reaffirm the rulings thus made and the opinion of the court as thus delivered. We proceed, therefore, to a consideration of the motion for new trial.

[8] 8. The trial judge was duly requested to put his charge in writing. As written out, the charge contained the following statement: At one place there was a note in parenthesis as follows: "(Here the court reads section 719 of volume 2 of the Code of 1910, leaving off the words at the top, 'other offenses of like character.')" In another place appeared the following: "Here the court reads the indictment in full, leaving off the names of the grand jurors who returned it, and leaving off the entries on the back of the indictment." In another place, the following: "Here the court charged paragraph one of defendant's request, No. 1." In another place, the following appeared: "Here the court charged paragraph second and fourth of defendant's request, No. 2." The Code requires that, when counsel for

either party request it before argument begins, the trial judge shall "write out their charges and read them to the jury, and it shall be error to give any other or additional charge than that so written and read." Penal Code 1910, § 1056. It has been held by the Supreme Court that "it is no failure to comply with a request to charge the jury in writing for the judge, instead of copying into his charge sections of the Code which he submits to the jury, to read these sections verbatim from the Code itself, noting accurately in his written charge the sections so read." *Burns v. State*, 89 Ga. 527, 15 S. E. 748. This itself, as was said by this court in *Hays v. State*, 10 Ga. App. 823, 74 S. E. 314, was a departure from the letter of the Code, and both this court and the Supreme Court have several times held that it was the duty of the trial judge to obey both the letter and the spirit of the statute which declares that he must, when a timely request is made, write out in full the charge to the jury. See *Walker v. State*, 8 Ga. App. 214, 68 S. E. 873. But, under the ruling of the Supreme Court in the *Burns* Case, *supra*, it was not error for the judge to read section 719 of the Code without copying the section into his charge, he having noted, in the charge as filed, the number of the section, and the fact that it was read. It may be that upon the principle of that decision it was also not error to fail to copy the indictment in the charge, since the indictment is a part of the record in the case, and there can be no dispute as to its contents. The purpose of this section of the Code is to prevent controversies between judge and counsel in reference to what instructions were given the jury, and certainly it is true, and this court holds broadly, that as to every matter about which there can be a controversy between court and counsel the judge must write out his instructions to the jury, when duly requested so to do by counsel for either party. We think, therefore, that it was error for the judge to fail to write out in full in his charge the portions of the requests of the defendant which he gave to the jury. Requests are not part of the record in the case. They are not filed as such. They are frequently lost or destroyed after the charge is delivered. Generally, they are returned to counsel with a notation, either of "given" or "refused," as the case may be. It is therefore not a compliance with the mandatory provisions of the section of the Code to simply state in the charge, as was done in the present instance, that the court read, at a certain point in the charge, indicated by the notation, certain paragraphs of the requests presented by the defendant and identified by numbers. It can readily be seen how a controversy might arise between court and counsel as to what the request contained if they

should be lost or destroyed, and we are unwilling to approve the practice of simply noting on the charge that a certain request was given, and we are clear that the failure to copy the request in the charge was a violation of both the letter and the spirit of the statute. The error thus committed demands a new trial.

[9] 9. Several assignments of error in the motion for new trial involve the question as to whether it was proper to permit proof of the value of the shares of stock which the defendant was alleged to have sold to the prosecutor and of other stock in the alleged corporation at a time subsequent to the date upon which the sale was alleged to have taken place. As a separate and independent fact, the evidence of the value of the stock at other dates was not material, but it was material as illustrating the probable value of the stock on the date on which the sale was alleged to have been made. For instance, if it could have been shown that a week or ten days after the sale the stock was absolutely worthless, that no changes took place in the meantime in the condition of the alleged corporation, and that nothing occurred to depress the price of the stock within that period, the value of the stock at that time would be a very strong circumstance, and almost conclusive, upon the question as to what its value was at the date of the sale. The court should, however, in admitting the evidence and in instructing the jury, have confined proof of the value of the stock upon other dates solely to the purpose of illustrating the value of the stock at the date the sale was alleged to have taken place.

[10] 10. In another ground of the motion for new trial, complaint is made of the refusal of the court to give in charge a written request substantially that if the jury should believe that the defendant in good faith thought the purchase of the stock was a safe investment, and the jury believed that he entertained that opinion and honestly made a mistake as to its value, he could not be convicted. The defendant was indicted and convicted for cheating and swindling, in that he sold to the prosecutor a certain number of shares of stock in an alleged corporation which had not in fact been incorporated at the time of the sale of the stock; that the stock was worthless; that the defendant represented that the company had been incorporated, and represented that the stock was well worth par or above; that both of these representations were false and fraudulent, and the defendant knew they were false at the time he made them. To support the allegations of the indictment, it was necessary for the state to show that the company had not been incorporated; that the stock was worthless, or worth greatly less than par; that the defendant, in order to induce the prosecutor to purchase, false-

ly represented to him that the company had been incorporated and that the stock was worth par; that these representations were false at the time he made them and they were made for the purpose of inducing the sale. Value is largely a question of opinion. It may be illustrated in various ways, but, at last, what a given commodity is worth depends upon the opinion which people who profess to be acquainted with its value entertain on the subject. Men are frequently honestly mistaken as to the value of property, and particularly would this be true as to the value of shares of stock in a corporation and similar property. Value of such stock depends upon a variety of things. If the defendant honestly believed that the stock was worth par when he sold it to the prosecutor, then the representations made by him as to its value could not be said to have been fraudulently made, and this necessary ingredient in the offense charged would not have been made out. Therefore the principle incorporated in the request to charge should have been given.

[11] 11. Complaint is made in other grounds of the motion that the court refused to permit the defendant to show, for the purpose of illustrating the value of the stock, that a number of other people had bought stock in the company at or about the same time the sale was made to the prosecutor, and paid the same or a larger price than that paid by the prosecutor. Of course, if all of these other sales were made by the defendant and upon representations similar to those made to the prosecutor and the representations were acted on by the purchasers, the evidence would not be admissible for the purpose of illustrating the value of the stock. But if other purchases were made by a number of people and upon their own independent judgment, after an investigation as to its value, the fact that they paid a sum equal to or greater than that paid by the prosecutor would be a very strong circumstance to show that the purchasers were of the opinion that the stock was worth what they paid for it, and could be properly proved by the defendant for the purpose of rebutting the inference that in making the representations which he is alleged to have made to the prosecutor as to the value of the stock he was guilty of a fraudulent intent. The fact that a man may have paid a given sum for an article would, of course, not necessarily show what the article is worth, but it would tend to illustrate his opinion as to its value, and, where a number of purchases of the same kind of property were made for the same price and at or about the same time, while this would not necessarily prove that the property was worth the sum paid for it, it would show that in the opinion of the purchasers the property was of that value. We think, therefore, that such evidence ought to have been

admitted and considered by the jury as a circumstance which might indicate that the defendant made the representations without fraudulent intent.

[12] 12. Another ground complains that the court allowed one of the bank's officers to testify that there was no evidence in any of the bank records of any charter having been granted to the bank. The proper place to look to ascertain if a bank has been chartered is the office of the Secretary of State. The fact that there is no record in the bank of the incorporation would not necessarily show that no charter had in fact been granted. Upon another trial the proper way to prove this fact is to produce the testimony of some one who has examined the records in the office of the Secretary of State that no such charter has been granted.

[13] 13. The court allowed in evidence a paper which purported to be a certificate of stock in the Bank of Kennesaw, executed by John W. Bennett as president, and the defendant as cashier, under the seal of the bank. Counsel for the accused objected to the admission of this document on the ground that its execution had not been proved, in that neither of the signatures was shown to be genuine. This objection, from the recitals in the motion for new trial, appears to have been well taken, and we cannot look to the evidence for the purpose of ascertaining whether error was committed in overruling the objection. If it in fact appeared from the evidence that this was the document sold to the prosecutor by the defendant as a share of the stock in the bank, then the paper would have been admissible, without reference to whether the signatures of the persons signing as president and cashier were genuine or not. But, so far as appears from the motion for new trial, the paper was offered generally, without any evidence explaining that it was the paper which had been delivered to the prosecutor by the defendant; and, this being so, the general rule that the execution of such a document must be proved before it becomes admissible in evidence applies.

[14] 14. Record of a receivership proceeding was admitted in evidence for the purpose of showing that in an answer claimed to have been filed by the defendant he had admitted that the bank was not incorporated, and that it was insolvent when the petition was filed. The answer purported to have been signed in behalf of the defendant by attorneys of record, and there is also attached to the answer an affidavit verifying the truth of the contents of the answer, purporting to be signed by the defendant in the presence of a notary public. There was objection to the admission of this answer, on the ground that it had not been shown that it had been in fact made as an answer of the defendant and by his authority. The

objection made to the admission of the document was not well founded, and the ruling of the court was proper in admitting that portion of the answer which admitted that the bank had not been incorporated but was a partnership, and also admitted that the bank was insolvent.

[15] 15. Over objection of the defendant, the court admitted in evidence an original record from the United States court of a petition in bankruptcy which had been filed by the defendant. The evidence was objected to, both upon the ground that a certified copy, and not the original, was the proper evidence of the bankruptcy proceedings, and that the evidence was irrelevant and immaterial. Without an examination of the evidence we cannot tell whether the bankruptcy proceeding was material or not, but it is clear that the original record was not admissible. The original record was a paper belonging to the office of the United States court, and counsel for the state had no right to withdraw it from that office for the purpose of offering it in evidence in the case. The original was not admissible; and, if the evidence was material, a certified copy should have been offered. *McLanahan v. Blackwell*, 119 Ga. 64, 45 S. E. 785.

[16] 16. The foregoing deals with all the assignments of error in the motion for new trial which can be considered without reference to the evidence. As to such other assignments we express no opinion. On account, however, of the errors above pointed out, a new trial is demanded.

Judgment reversed.

(11 Ga. App. 323)

WATSON v. ASHBURN.

(Court of Appeals of Georgia. July 10, 1912.)

(*Syllabus by the Court.*)

APPEAL AND ERROR (§ 1099*)—REVIEW—SUCCESSIVE PROCEEDINGS FOR REVIEW.

There being no substantial variance between the evidence in the present record and

that in the record of this case when before this court at the October term, 1910 (8 Ga. App. 566, 70 S. E. 19), the decision then made is controlling, and the trial judge did not err in directing a verdict in favor of the plaintiff.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4370-4379; Dec. Dig. § 1099.*]

Error from City Court of Thomasville; W. H. Hammond, Judge.

Action by A. P. Ashburn, executrix of W. W. Ashburn, against A. M. Watson. Judgment for plaintiff, and defendant brings error. Affirmed.

Louis Moore and Roscoe Luke, both of Thomasville, for plaintiff in error. Shipp & Kline, of Moultrie, for defendant in error.

POTTLE, J. The facts are fully reported in the former decision. *Ashburn v. Watson*, 8 Ga. App. 566, 70 S. E. 19. The main defense was that Ashburn, the grantee, had abandoned the possession which he acquired after the execution of the deed by the defendant and his coveasant, in consequence of which abandonment Morrison had been enabled to acquire possession and maintain it against the paper title which Ashburn held. As to this defense this court held: "The evidence introduced by the defendant along this line was too indefinite and too lacking in particularity to overcome the prima facie case made by the plaintiff upon the introduction of proof of the warranty and of the notice to the warrantor, and of the adverse judgment in the complaint for land." A careful examination of the evidence in the present record discloses no substantial variance from that in the former record. The testimony of the witness Murphy was relied upon in both trials to prove the abandonment of possession by Ashburn. The testimony of this witness is no more definite now than it was before, and the former decision is res judicata. There was no error in directing a verdict for the plaintiff.

Judgment affirmed.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

(11 Ga. App. 323)

TOBIN v. PURSLEY. (No. 4,123.)

(Court of Appeals of Georgia. July 23, 1912.)

*(Syllabus by the Court.)***BILLS AND NOTES (§ 452*)—ACTION ON NOTE—DEFENSES.**

It is no defense to an action on a promissory note that the note was given for the purchase price of a mule, secured by a mortgage thereon; that the defendant had delivered the mule to the plaintiff (the mortgagee) upon his agreement to foreclose the mortgage in a justice's court, sell the mule at constable's sale (the note and mortgage being for more than \$100), and notify defendant of the time and place of sale; that the plaintiff foreclosed the mortgage in the superior court, had the mule sold by the sheriff, and failed to notify the defendant of the time and place of sale; and that, in consequence of this failure, the defendant did not appear at the sale, and the mule was sold for a sum greatly less than its value. If the defendant has any remedy, it is by an independent action against the plaintiff.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1303, 1352-1364, 1387-1376; Dec. Dig. § 452.*]

Error from Superior Court, Fulton County; W. D. Ellis, Judge.

Action by G. T. Pursley against Fannie Tobin. Judgment for plaintiff, and defendant brings error. Affirmed.

Wm. J. Laney and Jos. W. & J. D. Humphries, all of Atlanta, for plaintiff in error. A. C. Broom, of Atlanta, for defendant in error.

POTTLE, J. Judgment affirmed.

(11 Ga. App. 345)

COWART v. HAMILTON et al. (No. 4,059.)

(Court of Appeals of Georgia. July 23, 1912.)

*(Syllabus by the Court.)***1. JUSTICES OF THE PEACE (§ 107*)—CONTINUANCE—ABSENCE OF WITNESS.**

There was no abuse of discretion in the refusal of the justice of the peace, in the trial of a civil case, to stop the trial, at the request of the plaintiff, to enable him to secure the attendance of a witness, especially where the witness was a woman not under subpoena, and where the justice, in his answer to the writ of certiorari, stated that the court was not informed as to what was expected to be proved by the absent person desired as a witness.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 351-361; Dec. Dig. § 107.*]

2. REVIEW ON APPEAL.

No error of law is complained of, except as indicated above, and there was evidence to support the verdict.

3. OVERRULING CERTIORARI.

The judge of the superior court did not err in overruling the certiorari.

Error from Superior Court, Tattnall County; W. W. Sheppard, Judge.

Action by Bolivar Cowart against E. Hamilton and others. Judgment for defendants. From an order overruling a certiorari to the justice court, plaintiff brings error. Affirmed.

H. H. Elders, of Reidsville, for plaintiff in error.

HILL, C. J. Judgment affirmed.

(11 Ga. App. 345)

GATES v. FREEMAN & REEVES. (No. 4,050.)

(Court of Appeals of Georgia. July 23, 1912.)

*(Syllabus by the Court.)***1. UNILATERAL CONTRACT.**

The contract sued upon was not unilateral, but was mutually binding, unconditional, explicit, and complete as to its terms. The demurrer on the ground that the contract was unilateral was therefore properly overruled.

2. SALES (§ 406*)—EXECUTORY CONTRACT—DEMAND FOR PERFORMANCE.

Where an executory contract for the sale and delivery of property specifies the property to be delivered, the price to be paid, and the place and time for delivery, no demand by the purchaser for performance by the seller is necessary before suit is brought to recover damages for breach of the contract by the seller. *McNamara v. Georgia Cotton Co.*, 10 Ga. App. 669, 73 S. E. 1092.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1156-1158; Dec. Dig. § 406.*]

3. EVIDENCE (§ 397*)—PAROL EVIDENCE—AMENDMENT OF PLEA.

There was no error in striking the amendment to the plea, as it was an attempt to vary the unconditional terms of the contract by parol.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1756-1765; Dec. Dig. § 397.*]

4. REVIEW ON APPEAL.

The evidence demanded the verdict, and any error of law was immaterial.

Error from City Court of Greenville; H. H. Revill, Judge.

Action by Freeman & Reeves against Henry Gates. Judgment for plaintiffs, and defendant brings error. Affirmed.

N. F. Culpepper, of Greenville, for plaintiff in error. McLaughlin, Jones & Jones, of Greenville, for defendants in error.

HILL, C. J. Judgment affirmed.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

(11 Ga. App. 383)

MILLS v. STATE. (No. 4,242.)

(Court of Appeals of Georgia. July 23, 1912.)

*(Syllabus by the Court.)***1. INTOXICATING LIQUORS (§ 233*)—ILLEGAL SALE—EVIDENCE.**

A witness for the state having testified that he bought intoxicating liquor from the accused a large number of times during the two years immediately preceding the finding of the bill of indictment, it was not erroneous to admit, in corroboration of this evidence, the testimony of another witness that during this period he had seen the accused several times with "his pockets loaded with whisky."

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. §§ 293-297, 298½; Dec. Dig. § 233.*]

2. INTOXICATING LIQUORS (§ 236*)—CRIMINAL LAW (§ 1172*)—ILLEGAL SALE—AGENCY—HARMLESS ERROR—INSTRUCTIONS.

The following instruction was a correct statement of the law: "It would not be necessary to show, in order to warrant a conviction, that the person who sold the liquor was the real owner of the liquor. If one person receives from the real owner liquor or whisky, and goes and sells it for the owner, delivers it for the owner, receives payment or purchase price for the liquor for the owner, that would make the party who delivers it and sold it guilty, whether he was the real owner or not." Even if there was no evidence that the accused, in making the sales, was acting as agent for another, the charge was not prejudicial, since, if he was not the agent, he was necessarily the principal, and equally guilty in either event.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. §§ 300-322; Dec. Dig. § 236.* *Criminal Law*, Cent. Dig. §§ 3128, 3154-3157, 3159, 3163, 3169; Dec. Dig. § 1172.*]

Error from Superior Court, Early County; W. C. Worrill, Judge.

John Mills was convicted of an illegal sale of liquor, and brings error. Affirmed.

Rambo & Wright, of Blakely, for plaintiff in error. J. A. Laing, Sol. Gen., of Dawson, and R. R. Arnold, of Atlanta, for defendant in error.

POTTLE, J. Judgment affirmed.

(11 Ga. App. 387)

DIXON v. STATE. (No. 4,226.)

(Court of Appeals of Georgia. July 23, 1912.)

*(Syllabus by the Court.)***1. ARSON (§ 37*)—EVIDENCE—CORPUS DELICTI.**

Where, in the trial of one charged with arson, it appears that the barn described in the indictment was destroyed by fire about 3 o'clock in the morning, that no fire had been left in or near the building on the night before it was burned, that while the fire was in progress an odor of kerosene oil emanated from the building, and an empty can which had contained such oil was found near by, and that tracks of a human being, leading to and from the barn, were found, and the circumstances were such as to indicate that they were made after the barn was closed on the night before the burning, the corpus delicti is sufficiently proved.

[Ed. Note.—For other cases, see *Arson*, Cent. Dig. §§ 71-73; Dec. Dig. § 37.*]

2. ARSON (§ 37*)—EVIDENCE—CIRCUMSTANTIAL EVIDENCE.

The evidence relied on to show the guilty connection of the accused with the burning was circumstantial. His tracks were positively identified by the prosecutor. He made false statements as to his whereabouts on the night of the burning. He was angry with the prosecutor and had made threats against him. When he saw the prosecutor and others on the morning after the fire, measuring the tracks leading to the barn, the accused went to his home, changed his shoes, and returned to the place where the fire occurred. These and other circumstances authorized the conviction. The jury did not credit the testimony offered to prove an alibi, and this court cannot say there were not some facts and circumstances sufficient to support the verdict. The charges complained of were not erroneous, and the requests to charge, so far as pertinent and legal, were fully covered by the general charge.

[Ed. Note.—For other cases, see *Arson*, Cent. Dig. §§ 71-73; Dec. Dig. § 37.*]

Error from Superior Court, Wilkinson County; K. J. Hawkins, Judge.

Richard Dixon was convicted of arson, and brings error. Affirmed.

Sibley & Sibley and Livingston Kenan, all of Milledgeville, for plaintiff in error. Jos. E. Pottle, Sol. Gen., of Milledgeville, for the State.

POTTLE, J. Judgment affirmed.

(10 Ga. App. 147)

KIDD v. STATE. (No. 3,611.)

(Court of Appeals of Georgia. Nov. 20, 1911.)

*(Syllabus by the Court.)***1. HOMICIDE (§ 340*)—WRIT OF ERROR—HARMLESS ERROR—INSTRUCTIONS.**

The defendant was indicted for assault with intent to murder, and was convicted of unlawfully shooting at another. The defendant cannot complain that the judge erred in charging the jury as to the law of voluntary manslaughter. It conclusively appears that he could not have been injured by such charge.

[Ed. Note.—For other cases, see *Homicide*, Cent. Dig. §§ 715-720; Dec. Dig. § 340.*]

2. CRIMINAL LAW (§ 918*)—NEW TRIAL—PRESENTATION OF QUESTIONS IN TRIAL COURT—NECESSITY.

Where, prior to an announcement of ready by both sides, the judge makes a complimentary remark as to credibility of one of the state's witnesses, subsequently sworn as a witness in the case, the remark being made in the hearing of the jury, and thereafter the defendant, without objection, goes to trial before the jury and is convicted, it is too late to complain for the first time by motion for a new trial that the judge erred in making the remark referred to. *White v. State*, 7 Ga. App. 20, 65 S. E. 1073; *Smith v. State*, 7 Ga. App. 252, 66 S. E. 556.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 2136; Dec. Dig. § 918.*]

3. SUFFICIENCY OF EVIDENCE—NO ERROR.

The evidence amply authorizes the verdict, and no error of law appears.

Error from Superior Court, Madison County; D. W. Meadow, Judge.

C. C. Kidd was convicted of unlawfully shooting at another, and brings error. Affirmed.

J. F. L. Bond and J. H. Skelton, for plaintiff in error. Thos. J. Brown, Sol. Gen., and Jno. E. Gordon, for the State.

RUSSELL, J. [1] 1. From the fourth ground of the motion for a new trial it appears that, after the case had been called for trial and both sides had announced ready, counsel for the prosecution announced that the state was ready for trial, provided Stephen O'Kelley, a witness for the state, was present; that he had been called, but had not responded. The presiding judge inquired if the witness had been subpoenaed. Counsel replied that he had been, and had promised to be on hand that morning. The judge then said: "If Mr. O'Kelley, the witness, told you that he would be here, you can count on his being here. I know him, and have known him from his childhood. I know his father. Whatever Stephen O'Kelley tells you, you can rely on it. The court will announce ready for the state." All this occurred in the presence of the jury. It is alleged that the court erred in thus commending the witness, because the jury were thereby influenced to believe his testimony in preference to the defendant's statement, which was in conflict with it.

If the probable effect of the judge's language in regard to this witness was as stated in this ground of the motion for a new trial, the accused and his counsel knew it before accepting the jurors and entering upon the trial. So far as appears, there was no objection to it until after the verdict had been rendered. "A defendant cannot sit idly by and accept jurors without objection, take the chance of obtaining an acquittal, and then complain that they were influenced by a fact of which he was aware and to which he did not object before they were sworn." *White v. State*, 7 Ga. App. 22, 66 S. E. 1074. As to the proper mode of objection, see *Smith v. State*, 7 Ga. App. 252, 66 S. E. 556, and *Perdue v. State*, 135 Ga. 277, 69 S. E. 184. The decisions cited in support of this ground of the motion for a new trial relate to language used to or in the presence of the jury during the trial, and not to language used before entering upon the trial.

[2] 2, 3. The indictment was for assault with intent to murder. It alleged that the offense was committed by shooting a named person with a pistol. The verdict was that the defendant was "guilty of shooting another unlawfully." It is contended in behalf of the accused that there is no such offense as this, and that the verdict is void for uncertainty. There is no merit in this contention. Under an indictment containing a single count for assault with intent to murder, there may be a conviction of the statutory offense of shooting at another; that being a lesser offense of the same general character. *Rhinehart v. State*, 7 Ga. App. 425, 66 S. E. 982; *Wostenholms v. State*, 70 Ga. 720; *Watson v. State*, 116 Ga. 607, 43 S. E. 32, 21 L. R. A. (N. S.) 1. "Verdicts are to have a reasonable intendment, and are to receive a reasonable construction, and are not to be avoided unless from necessity." Penal Code 1910, § 1059. It was clearly the intention of the jury in this case to find the accused guilty of the offense of shooting at another (Penal Code of 1910, § 115), as to which the court had fully instructed them. It was not necessary for the verdict to negative the statutory exception by stating that the shooting was "not in his own defense or under circumstances of justification." *Arnold v. State*, 51 Ga. 144; *Isom v. State*, 83 Ga. 378, 9 S. E. 1051.

Complaint is made as to the "qualified manner" in which the court gave in charge to the jury the provisions of the Penal Code as to voluntary manslaughter. This did not hurt the accused, for the principles of the law of voluntary manslaughter were applied in his behalf, when the jury found him guilty of shooting at another, instead of assault with intent to murder. By this verdict for the lesser offense he got all the benefit he could have derived from a correct charge on the law of voluntary manslaughter.

Some of the grounds of the motion for a new trial complain that the court erred in not giving to the jury certain lengthy and detailed instructions set out in the motion; but it does not appear that these instructions were requested on the part of the accused.

[3] The evidence amply authorizes the verdict, and no error of law appears.

Judgment affirmed.

(11 Ga. App. 334)

ATLANTIC COAST LINE R. CO. v. COX.
(No. 4,246.)

(Court of Appeals of Georgia. July 23, 1912.)

*(Syllabus by the Court.)***RAILROADS (§ 441*)—KILLING STOCK—NEGLIGENCE.**

The plaintiff's right to recover resting solely upon the statutory presumption of negligence, and the undisputed testimony of the engineer and fireman showing that they were in the exercise of all ordinary care and diligence, and that the killing of the plaintiff's cow was not due to any negligence on the part of the defendant or its employes, the presumption of negligence was fully rebutted, and the recovery in favor of the plaintiff was unauthorized. *Macon, Dublin & Savannah R. Co. v. Hamilton*, 9 Ga. App. 254, 70 S. E. 1123; *Atlantic Coast Line R. Co. v. Whitaker*, 10 Ga. App. 207, 73 S. E. 34.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1575-1596; Dec. Dig. § 441.*]

Error from Superior Court, Decatur County; Frank Park, Judge.

Action by B. W. Cox against the Atlantic Coast Line Railroad Company. Judgment for plaintiff, and defendant brings error. Reversed.

Pope & Bennet, of Albany, and R. G. Hartsfield, of Bainbridge, for plaintiff in error. M. E. O'Neal, of Bainbridge, for defendant in error.

POTTLE, J. Judgment reversed.

(11 Ga. App. 353)

HENDERSON et al v. HOLCOMB.
(No. 4,188.)

(Court of Appeals of Georgia. July 23, 1912.)

*(Syllabus by the Court.)***BILLS AND NOTES (§ 459*)—JOINT AND SEVERAL MAKERS—ACTIONS.**

Suit upon a promissory note executed by two as joint and several makers was brought by the payee against one of the makers alone, and the court dismissed the suit, because the other maker was not also made a party defendant. Held error. The maker sued was not deprived of any right of defense against the

plaintiff, or of eventual contribution from his co-maker, by the fact of the separate suit. The holder of the note could sue one or both of the makers.

[Ed. Note.—For other cases, see *Bills and Notes*, Cent. Dig. §§ 1424-1433; Dec. Dig. § 459.*]

Error from City Court of Dublin; Henry R. Daniel, Judge.

Action between W. J. Henderson and others and J. H. Holcomb. From the judgment Henderson and others bring error. Reversed.

Davis & Barrett, of Dublin, for plaintiffs in error. J. S. Adams, of Dublin, for defendant in error.

HILL, C. J. Judgment reversed.

(11 Ga. App. 352)

TICE v. CRAWFORD. (No. 4,121.)

(Court of Appeals of Georgia. July 23, 1912.)

*(Syllabus by the Court.)***APPEAL AND ERROR (§ 977*)—GRANT OF NEW TRIAL—REVIEW.**

The Supreme Court and this court have uniformly held that the discretion of the judge of the superior court in granting a first new trial on certiorari will not be interfered with, unless the judgment under review was demanded by the law and the evidence. *Loftin v. Great Southern Home Benevolent Association*, 9 Ga. App. 121, 70 S. E. 353, and citations; 14 Encyc. Digest Georgia Reports, 864.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3860-3865; Dec. Dig. § 977.*]

Error from Superior Court, Richmond County; H. C. Hammond, Judge.

Action between Ola Tice against A. R. Crawford. From a judgment of the superior court granting a new trial on certiorari, Tice brings error. Affirmed.

Jos. S. Watkins, of Augusta, for plaintiff in error. Isaac S. Peebles, Jr., of Augusta, for defendant in error.

HILL, C. J. Judgment affirmed.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

(11 Ga. App. 350)

GUY & MONTGOMERY et al. v. KAULMAN. (No. 4,076.)

(Court of Appeals of Georgia. July 23, 1912.)

*(Syllabus by the Court.)***1. PARTNERSHIP (§ 204*)—ACTION AGAINST FIRM—SERVICE OF PROCESS.**

Service of process on one partner, with a return of "non est inventus" as to the others, shall authorize a judgment against the firm, binding all the firm assets and the individual property of the one served. Civil Code 1910, § 3167.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 376-381; Dec. Dig. § 204.*]

2. PARTNERSHIP (§ 204*)—ACTION AGAINST FIRM—DISMISSAL.

In a suit brought against a partnership, where service of process was made on a partner, who appeared and defended the suit for the firm, the trial court did not err in refusing to dismiss the petition, as against the firm and the partner who was served and who appeared, on the ground that one alleged to be a partner of the firm sued was in fact not such partner. Taylor v. Felder, 3 Ga. App. 106, 59 S. E. 323.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 376-381; Dec. Dig. § 204.*]

3. VERDICT.

The evidence demanded the verdict as directed for the plaintiff.

Error from City Court of Oglethorpe; R. L. Greer, Judge.

Action by O. S. Kaulman against Guy & Montgomery and others. Judgment for plaintiff, and defendants bring error. Affirmed.

J. J. Bull & Son, of Oglethorpe, for plaintiffs in error. R. W. Barnes, of Macon, for defendant in error.

HILL, C. J. Judgment affirmed.

(11 Ga. App. 359)

FORD & PRUETT v. THOMASON. (No. 4,212.)

(Court of Appeals of Georgia. July 23, 1912.)

*(Syllabus by the Court.)***1. BROKERS (§ 42*)—REAL ESTATE BROKERS—RIGHT TO COMMISSIONS—PAYMENT OF TAX.**

One who opens up or carries on the business of selling real estate on commissions, without having registered with the ordinary and paid the tax to the tax collector, as required by Civil Code 1910, § 978, cannot recover commissions accruing from the sale of such property.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. § 43; Dec. Dig. § 42.*]

2. BROKERS (§ 3*)—REAL ESTATE BROKERS—WHO ARE "ENGAGED IN SELLING REAL ESTATE."

A person whose principal business is that of insurance agent is also engaged in carrying on the business of selling real estate, if he enters into a contract for the sale of such property on commission, and renders such serv-

ice under the contract as would entitle him to his commission if he had complied with the law in reference to registering and paying the tax.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. §§ 2, 2½; Dec. Dig. § 3.*]

For other definitions, see Words and Phrases, vol. 3, pp. 2392-2394; vol. 8, pp. 7649-7651.]

Error from Superior Court, Gwinnett County; Robt. T. Daniel, Judge.

Action by Ford & Pruett against T. S. Thomason. Judgment for defendant, and plaintiffs bring error. Affirmed.

O. A. Nix, of Lawrenceville, for plaintiffs in error. I. L. Oakes, of Lawrenceville, for defendant in error.

POTTLE, J. 1. The action was brought to recover commissions alleged to be due the plaintiffs by the defendant upon a sale of real estate. The contract providing for the commissions is in writing, and is of doubtful construction. It appears that the plaintiffs were authorized by the defendant to sell the real estate during a period named in the contract, and that during this period the defendant himself disposed of the property. Under the provisions of Civil Code 1910, § 3587, he had a right to do this, unless the contract otherwise provided. It is contended in behalf of the plaintiffs that under the terms of the contract they are entitled to commissions, even though the defendant himself sold the property, while counsel for the defendant contend that this is not a proper construction of the contract; but under the view we take of the case it is unnecessary to decide this question.

[1] It is admitted by the plaintiffs that they had not registered and paid the tax required of real estate agents by Civil Code 1910, §§ 971, 978. Section 971 imposes a tax of \$10 upon every person or firm "engaged in the business of buying or selling real estate on commission." Section 978 provides that, "before any person shall be authorized to open up or carry on said business," he shall register with the ordinary and pay the tax to the tax collector. The section further provides that any person who carries on the business before registering with the ordinary and before paying the special tax shall be guilty of a misdemeanor. Counsel for the defendant raises the point that the plaintiffs are not entitled to recover their commissions, because they were acting in violation of the law in having engaged in the business of selling real estate on commission, without having registered and paid the tax as required by law. This point, we think, is well taken. The statute makes it a misdemeanor for one to engage in this business without having complied with the terms of the statute and paid the tax; but the law imposes an additional penalty, to wit, forfeiture of

the fruits of his labor. One cannot defraud the state of its rightful due and then recover by law the profit accruing from a transaction in which he had no right to engage. The question is settled by the decisions of the Supreme Court in the case of *Murray v. Williams*, 121 Ga. 63, 48 S. E. 686, and of this court in *Jalonick v. Greene County Oil Co.*, 7 Ga. App. 309, 66 S. E. 815.

[2] 2. It appears, from the evidence, that the principal business of the plaintiffs was that of insurance agents, and that during the year in which this transaction took place they made only one contract for the sale of real estate on commission; and it is insisted in their behalf that this was not carrying on the business of real estate agents within the meaning of the statute. We cannot agree with this conclusion. If the contention be sound, it would be a very difficult matter to determine when a person was engaged in the business of selling real estate on commission, and it would be left to a jury in each instance to say whether that business or some other was his principal business. The statute cannot be given any such intendment. It plainly means that before any person shall begin to transact the business referred to in the statute, and before he makes any contract for the selling or buying of real estate on commission, and, in the language of the statute, "before he opens up such business," he shall register with the ordinary and pay the tax to the tax collector. The plaintiffs were clearly engaged in the business of selling real estate on commission, within the purview of the statute, and, not having registered or paid the tax, are not entitled to recover their commission. The court properly directed a verdict in favor of the defendant.

Judgment affirmed.

(11 Ga. App. 290)

FLORIDA CENT. R. CO. v. LUKE.
(No. 4,171.)

(Court of Appeals of Georgia. July 2, 1912.)

(Syllabus by the Court.)

1. COURTS (§ 189*)—CITY COURTS—JUDGMENT.

Under the act creating the city court of Thomasville (Acts 1905, p. 383), as amended by the act approved August 22, 1907 (Acts 1907, p. 238), it is the duty of the trial judge to call the appearance docket, and, if no defense is filed on or before the call of the docket, the judge must, upon sufficient proof submitted by the plaintiff, render a judgment in his favor. There is nothing, however, in the provisions of the act creating the city court of Thomasville, or in its amendments, which abrogates the general rule that during the term the court has plenary power over all of its judgments and orders, and may modify or vacate them for good cause shown.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 409, 412; Dec. Dig. § 189.*]

2. COURTS (§ 189*)—CITY COURTS—JUDGMENT.

Where, under the provisions of the act creating the city court of Thomasville, no defense is filed within the time required by the act, and judgment is rendered in favor of the plaintiff, such a judgment will not be vacated, even during the same term, at the instance of a defendant who shows no reason good in law for his failure to appear and file his defense within the time required by the act. The discretion vested by law in the trial judge is a legal discretion, and will be exercised only in cases where the defendant shows a legal reason for its exercise. No such reason having been shown in this case, the judge properly held that he was without power or authority to vacate the judgment.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 409, 412; Dec. Dig. § 189.*]

Error from City Court of Thomasville; W. H. Hammond, Judge.

Action by Roscoe Luke against the Florida Central Railroad Company. Judgment for plaintiff, and defendant brings error. Affirmed.

J. H. Merrill, of Thomasville, for plaintiff in error. Roscoe Luke and Louis S. Moore, both of Thomasville, for defendant in error.

POTTLE, J. Luke brought an action in the city court of Thomasville upon an open account against the Florida Central Railroad Company and the Tallahassee Sawmill Company. The petition was returned to the March term, 1912. At the appearance term, and upon the day fixed for the call of the appearance docket, pursuant to the notice which had been published in the newspaper of the city of Thomasville, the case was sounded. No defense having been filed by either of the defendants, the plaintiff was permitted to make proof of his claim, and judgment was entered in his favor against both of the defendants jointly. On March 23, 1912, during the same term of the court at which the judgment was rendered, and before the adjournment, the Florida Central Railroad Company, having paid all the costs which had accrued in the case, filed a motion to set aside the judgment, annexing to the motion a demurrer and a plea, and announcing its readiness to go to trial. The motion to vacate set forth, as a reason why it should be sustained, that the movant had regularly retained a member of the Thomasville bar to look after all of its business in the courts, and depended upon and expected this counsel to file its defense to the suit, "but by some misunderstanding or otherwise (movant is unable to state why) this was not done, and in consequence thereof the case was in default when the appearance docket was called. Movant's president, * * * who had exclusive charge of such matters for it, did not see the publication as to when the appearance docket would be called, and understood counsel for the company to say, when he ask-

ed him about this case, that it would not be called until the last of the week of court, and but for this he would have been at the court, and personally attended to this case, and seen to the filing of its defense." Upon this motion a rule nisi was granted, and upon the hearing the judge sustained a demurrer setting up, in substance, that no sufficient reason was set forth in the motion why the judgment should be vacated, and that upon the facts presented the judge was without discretion or power to vacate the judgment; the order reciting that it was based both upon the ground that under the act creating the city court of Thomasville the court had no discretion to vacate the judgment, and upon the ground that the facts set forth in the motion were not sufficient to authorize the court to set aside the judgment. To this order the defendant excepted.

[1] 1. In the original act creating the city court of Thomasville it was provided that "the defendant shall file his defense on or before the first day of the first term of said court, and said case shall then be tried unless continued, postponed, or passed by the court, for such causes and under such rules as cases are now continued, postponed or passed, unless not reached by the court." Acts 1905, p. 385, § 7. This act was later amended by striking the whole of section 7 and inserting in lieu thereof the following: "That all civil cases shall be returnable for trial to the first regular quarterly term of said court convening twenty days, or more, after the filing and docketing of the case, and fifteen days or more after the service of process on the defendant. All defenses must be filed at the first term, and in any case where no defense is filed before or at the time the judge calls the appearance docket, then the judge shall, upon sufficient proof submitted by the plaintiff, render judgment without the intervention of a jury for the plaintiff; if a demurrer is filed and overruled and no other defense is filed, then the judge shall render judgment as though no defense had been filed. If a defense is filed, other than as last above mentioned, then the case shall go to the next regular quarterly term as the trial term." Acts 1907, p. 239, § 2. The statutes in relation to opening defaults in the superior court have no application to the city court of Thomasville, since in that court, when no defense is filed, judgment may be taken at the first term. *Dodson Printers' Supply Co. v. Harris*, 114 Ga. 966, 41 S. E. 54; *Thurmond v. Groves*, 126 Ga. 779, 55 S. E. 915. The question arises whether, under the provisions of the act creating the city court of Thomasville, as amended by the act of 1907, the judge of the city court had power to vacate the judgment granted in favor of the plaintiff in the present case and permit defenses to be filed.

It has been several times held that, where

the act creating a city court provided that all defenses shall be filed before or by the first day of the term, the judge has no authority to permit a defense to be filed at a later date. *Dodson Printers' Supply Co. v. Harris*, supra; *Pitts v. Wheeler*, 6 Ga. App. 720, 65 S. E. 689; *Hunter v. Hinman*, 7 Ga. App. 387, 66 S. E. 1039. In *Bass v. Doughty*, 5 Ga. App. 458, 63 S. E. 516, it was held that, under the peculiar language creating the city court of Bainbridge, a defense might, in the discretion of the trial judge, be filed after the first day of the term. The decision rendered in that case really has no applicability to the case now under consideration. In principle the other decisions cited above would seem to be controlling in the present case. The act of 1907 provides, first, that all defenses in the city court of Thomasville must be filed at the first term. Under this provision, if the appearance docket is not called a defense may be filed at any time during the term, even upon the last day. But the act further provides that, if no defense is filed before or at the time the appearance docket is called, "the judge shall upon sufficient proof submitted by the plaintiff render judgment, without the intervention of a jury, for the plaintiff." This language is as mandatory as is the language of the act referred to in the case above cited. It leaves the trial judge without any discretion. If he calls the appearance docket and no defense is filed, then he shall render a judgment in favor of the plaintiff if sufficient proof to authorize it be offered. It follows that, when the case was called in the city court of Thomasville on the day fixed by the presiding judge for the call of the appearance docket, no defense having been filed up to that time, there was no other course open to the judge than to permit the plaintiff to make out his case and take judgment for such amount as was authorized by his pleading and his proof.

[2] 2. It does not follow, however, that the judge of the city court of Thomasville is, under the above-cited provision of the act creating the court, wholly without power or authority in any case to vacate a judgment at the term at which the same was granted. The general rule is that during the term all judgments and orders are in the breast of the court, and subject to be modified or vacated for good cause shown. *Patterson Co. v. Wilkes*, 1 Ga. App. 430, 57 S. E. 1047; *Cole v. Illinois Sewing Machine Co.*, 7 Ga. App. 338, 66 S. E. 979. While the provisions of the act creating the city court of Thomasville imperatively require the trial judge to permit a plaintiff to make proof and take judgment where no defense has been filed up to the time the appearance docket is called, there is nothing in the act which abrogates the general rule, above stated, that during the term the court has plenary power over its judgments. But while this is true,

whenever a motion is made to vacate a judgment, even during the term at which the same was rendered, the movant must allege and prove some reason good in law why he had failed to make his defense at the time required by the act. The law rewards diligence, but is slow to harken to the prayer of the slothful. The vigilant man does not need to make excuses; but where one has sat idly by, and overslept his rights, and permitted a judgment to be taken against him, which he might have prevented by the exercise of the slightest diligence, the law is not disposed to grant him relief. *Heitmann v. Commercial Bank*, 6 Ga. App. 584, 65 S. E. 590. When, therefore, a motion to vacate a judgment, even though granted during the same term, is presented, the motion must show upon its face some reason which the law will accept for the failure of the movant to appear in court at the proper time and make his defense. The discretion vested in the trial judge is a legal discretion, to be exercised upon legal principles. It is not an arbitrary discretion, in the exercise of which the court may at its will set aside a judgment or order granted in favor of the litigant at the same term.

The excuse offered by the plaintiff in error in the present case for its failure to appear and plead at the proper time is wholly insufficient. The neglect of movant's counsel was in law the movant's neglect. There is no pretense that the counsel had any excuse for failing to file the defenses. On the contrary, the movant does not undertake to

explain the negligence of his counsel, but says expressly that he is unable to state why the defense was not filed before the call of the appearance docket, as required by the act. It is also inferable, from the facts alleged in the motion, that the attention of the counsel was called to the case by the president of the plaintiff in error, and that counsel stated that the case would not be called until the latter part of the week. The plaintiff in error knew that the case was in court, and knew that it was returnable to the March term, 1912. It was charged with knowledge that the defense must be filed before the appearance docket was called. It would be trifling with the courts and with orderly judicial procedure to permit a litigant to sit idly by until after judgment against him has been rendered, and then vacate the judgment upon such an excuse as is offered by the movant in the present case.

It is argued on behalf of the plaintiff in error that inasmuch as the order refusing to vacate the judgment recites that the trial judge was without discretion, the case should be sent back, in order that upon the coming in of the evidence the judge might, in the exercise of his discretion, determine whether or not he will vacate the judgment. The presumption is that the movant has no reason for vacating the judgment, other than that set forth in his motion. And, upon the facts set forth in the motion, the judge did not abuse his discretion in refusing to set aside the judgment.

Judgment affirmed.

(92 S. C. 114)

LEE v. HILL et al.

(Supreme Court of South Carolina. July 25, 1912.)

1. CHATTEL MORTGAGES (§ 237*)—DISCHARGE—TENDER—ACTS CONSTITUTING.

A mortgagor, by requesting the mortgagee to furnish a correct statement of the account, stating his willingness to pay it, and informing the mortgagee that he has some one to pay the amount due on the mortgage transferring the mortgage, does not thereby make a legal tender of the amount due, so as to discharge the lien of the mortgage.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. §§ 501, 502; Dec. Dig. § 237.*]

2. CHATTEL MORTGAGES (§ 237*)—DISCHARGE—TENDER—ACTS CONSTITUTING.

Where a mortgagee rendered an account of the amount due, honestly believing it to be correct, and his belief, though erroneous, was based on reasonable grounds, the refusal of a legal tender by the mortgagor of the amount actually due did not discharge the lien; and the question of the mortgagee's good faith was for the jury.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. §§ 501, 502; Dec. Dig. § 237.*]

3. LANDLORD AND TENANT (§ 331*)—RENTING ON SHARES—FAILURE TO DELIVER CROP—MEASURE OF DAMAGES.

The measure of damages for breach of contract to deliver specific personal property is, as a rule, the value of the property when it should have been delivered, with interest until delivery, or until the value at the date it was due is paid, so that where a tenant failed to deliver rent cotton when due and the cotton decreased in value, the landlord's measure of damages was the difference in the value of the cotton at the time fixed for delivery and the time of actual delivery, with interest on its value, at the date fixed for delivery, until delivery.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 1360-1362, 1379-1387; Dec. Dig. § 331.*]

4. INTEREST (§ 6*)—OPEN ACCOUNTS—AGREEMENTS OF PARTIES.

Though, generally, the law does not allow interest on an open account, a debtor agreeing to pay interest is bound to pay interest on the amount actually due, when ascertained, though he disputes items in the account.

[Ed. Note.—For other cases, see Interest, Cent. Dig. §§ 13-16; Dec. Dig. § 6.*]

Appeal from Common Pleas Circuit Court of York County; Robt. Aldrich, Judge.

"To be officially reported."

Action by David Lee against W. L. Hill, trading as the Hill Banking & Mercantile Company, and another. From a judgment for plaintiff, defendants appeal. Reversed.

W. W. Lewis, of Yorkville, for appellants.
John R. Hart, of Yorkville, for respondent.

HYDRICK, J. The plaintiff recovered judgment for the possession, or the value, of certain personal property which defendant had seized under mortgages given by plaintiff, who was tenant under defendant in 1907 and 1908. The mortgages were given to secure plaintiff's account with defendant for

supplies. A dispute arose between them as to the correctness of the account. Plaintiff claimed that there were certain errors in the account, which defendant refused to correct, after his attention had been called to them. His position is: (1) That there was nothing due on the mortgages when the defendant seized his property. (2) That the lien of the mortgages had been discharged by his offering to pay defendant what was due, if anything, on a correct accounting.

As a new trial will be granted on other grounds, we will not discuss the ground that the verdict is wholly unsupported by evidence, as a discussion of the evidence might result in prejudice to one side or the other on the new trial.

The plaintiff testified that he told defendant, if he would give him a correct statement of his account, he was willing to pay it, if he owed him anything; that he had some one to pay it for him; and that defendant said, if he did not pay all that he claimed, he would not accept any. He also testified, on cross-examination, that he told defendant he had some one who would take up his papers (meaning the mortgages), if he would give him a correct account, and that he wanted defendant to transfer his papers to that person.

On the subject of tender and the discharge of the lien of the mortgages thereby, the court instructed the jury as follows: "Where the mortgagor (that is, the one that makes the mortgage) goes to the mortgagee and says: 'I wish to pay my debt. I am prepared to pay it, and I wish to pay the debt now and settle my mortgage'—if the mortgagee refuses to receive the payment, why, the lien of the mortgage is discharged, and he can no longer claim anything of the mortgagor on account of that mortgage. He can recover his debt; that don't discharge the debt. The debt remains due until it is paid; but the lien of the mortgage is gone when the mortgagor offers to pay it, and the mortgagee refuses to receive it. Now, there is such a thing as a legal tender, where a man seeks to avail himself of that law which discharges the lien of the mortgage, where the creditor refuses to accept payment. There is an obligation upon the debtor to tender the right amount of the debt to make what is known as a legal tender—that is, to offer to pay the creditor the debt, and the whole of it, then and there—and if he does not make that legal tender, the creditor is not bound by that offer. It is not necessary that the debtor should take the money out of his pocket and have it out; but he must be in a position to pay. He must be able to comply, if the creditor signifies his willingness to receive the right money. But the creditor has no right to insist upon a legal tender, where he is in the wrong; if he is demanding more than he is entitled to, if he

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

has rendered a statement of account which is wrong, and insists upon payment of that amount, why, then he cannot say, "The lien of the mortgage is not discharged, because you didn't tender me the right amount," because he had already taken a position which precludes him from saying so, by demanding more than was due. And if the debtor comes to him and says: "I am ready, I am prepared to settle my debt, and I demand of you an account, showing the right amount that I am due you"—and the creditor refuses him, why, that lien is gone. If the creditor refuses to acquaint the debtor with the true amount that he owes him, then the debtor who makes a bona fide offer to pay the true amount, and is prepared to do it, whether he is prepared to take the money out of his own pocket, or has got somebody else who is willing to pay it for him, and the creditor refuses to give him a statement of the true amount and accept payment, the lien of the mortgage is gone. What the law strives at is justice; and where a debtor comes there with the money in his pocket, or with a friend who is willing to take up the debt for him, and offers to pay, and demands a statement of the amount due, and the creditor refuses to give the statement and to accept the payment, the lien of the mortgage is gone. But, unless the debtor does do that, unless he makes a bona fide offer to pay the debt, and is able to do it at the time, then he cannot be said to have made an offer to pay it, which was refused by the creditor, and in that case the lien of the mortgage would not be gone; and, as long as there is one dollar due on that debt, the creditor is entitled to foreclose the mortgage to collect it. * * * If the plaintiff went to the defendant with an honest purpose and a present ability to pay the debt, and sought to do it, and the defendant prevented him from doing it by refusing to give him a correct statement of the account, or by refusing to accept the correct amount, then the lien of the mortgage is gone, and the plaintiff is entitled to recover."

[1] It is clear from the evidence of plaintiff himself that no legal tender was made to the defendant. *Eastland v. Longshorn*, 1 Nott & McC. 194; *Siter v. Price*, 2 Bailey, 274; *Reynolds v. Price*, 88 S. C. 525, 71 S. E. 51; 38 Cyc. 141-143.

[2] It may be that defendant waived a legal tender of the amount due him, if any, by rendering an incorrect account, and by insisting on payment of the account as rendered, coupled with the statement that, unless it was paid, he would accept nothing. But whether he did so waive a tender or not depends upon the circumstances and his purposes. If he honestly believed the account he rendered was correct, and insisted on payment of it in that belief, and if that belief, though erroneous, was based upon reasonable grounds, the refusal of even a

legal tender of the amount actually due would not have discharged the lien of his mortgages. *Reynolds v. Price*. But his good faith or his alleged wrongful purposes, and the reasonableness of his contentions, were questions which were not submitted to the jury; nor was the question of waiver. It appears, therefore, that the charge was at variance with the principles decided in *Reynolds v. Price*.

But, as it appears from the undisputed evidence that no legal tender was made, and that plaintiff never was, at any time, ready to pay what was due to defendant, if anything, but that he was depending upon another person to pay for him, on transfer of his papers by defendant to that person, and as he had no right to demand such transfer, it follows that he can gain no advantage from the law of tender. Therefore his right to recover depends solely upon whether he owed the defendant anything when the property was seized.

[3] Defendant charged plaintiff in the account \$20 as the difference in the value of the rent cotton between the day he agreed to deliver and the day he did deliver it. Plaintiff disputed this item on two grounds. He contends, first, that the cotton was delivered in due time, which is a question of fact for the jury; and, second, that, even if it was not delivered at the time agreed on, defendant had no right to charge him more than interest on the value of the cotton on the day it should have been delivered, from that day until it was delivered. The court sustained his second contention in the following instruction: "If the plaintiff owed him cotton at a certain time, and didn't pay it until a subsequent time, all that the defendant could recover on that account was the interest on the debt for the intervening time; and he had no right to charge him the difference between the price of cotton at the time he ought to have paid the rent and at the time when he did pay it." This instruction was erroneous. The general rule is that the measure of damages for the breach of a contract to deliver specific personal property is the value of the property at the time it should have been delivered, with interest thereon from that time until it is delivered, or until the value at the date it was due is paid. *Davis v. Richardson*, 1 Bay, 102; *Justrobe v. Price*, Harp. 112; 13 Cyc. 168. If the cotton was worth \$100 on the day it should have been delivered, and only \$80 on the day it was delivered, the defendant lost \$20, besides the use of \$100 between those dates. Therefore the measure of his damages is the difference in the value of the cotton, with interest on its value at the date it should have been delivered, and from that date until it was delivered.

[4] At the end of the year 1907, the plaintiff failed to pay his account with defendant for that year. There is now a dispute as to

what the correct balance was; but, on April 13, 1908, he gave defendant his note for \$225, wherein he stated that it was "for advances made during the present year, and back indebtedness, with interest on the latter from January 1, 1908, at the rate of eight per cent. per annum, until paid." A similar provision appears in another note given to defendant in 1907. His honor instructed the jury that an open account does not bear interest until it becomes an account stated, or unless it is received by the debtor, and it is not disputed. In this instruction, his honor erred. While, as a general rule, the law does not allow interest on an open account, it is perfectly competent for the debtor to agree to pay interest on it; and if he does so agree he is bound to pay interest on the amount that is actually due, when it is ascertained, even though he disputes certain items in the account. There is no law prohibiting such a contract. In this case, the plaintiff agreed to pay interest on his back indebtedness, and, when that is ascertained, interest must be added, according to his agreement.

Judgment reversed.

GARY, C. J., and WOODS, WATTS, and FRASER, JJ., concur.

(92 S. C. 113)

TAYLOR et al. v. JACKSON et al.

(Supreme Court of South Carolina. July 22, 1912.)

APPEAL AND ERROR (§ 901*)—REVIEW—BURDEN TO SHOW ERROR.

The burden is on appellant to show that the evidence preponderates in his favor against the findings by the trial judge.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1771, 3670; Dec. Dig. § 901.*]

Appeal from Common Pleas Circuit Court of Dillon County; Robt. Aldrich, Judge.

Action by E. V. Taylor and another against Thomas Jackson and another. Judgment for defendants, and plaintiffs appeal. Affirmed.

Gibson & Muller, for appellants. James R. Coggsall, for respondents.

FRASER, J. The plaintiffs-appellants brought action in this case against the defendants-respondents for a tract of 40 acres of land, and alleged that the defendants are in the unlawful possession of said land, and wrongfully withhold the possession of the same from the plaintiffs. The defendants claim that the defendant Nedie Jackson is in the lawful possession and is the equitable owner and is entitled to specific performance of an agreement to convey made by one W. W. Hamilton, Sr., the immediate grantor of the plaintiffs, and that the plaintiff took their title with full knowledge of the equity of the defendant Nedie Jackson. The case

was withdrawn from the jury by consent of counsel, and tried upon the equitable issues by Judge Robert Aldrich, the then presiding judge. After reading carefully all the evidence and arguments of counsel, we do not see that the evidence preponderates against the findings of fact by the circuit judge. There are nine exceptions, but they all raise questions of fact.

In the case of Boatwright v. Crosby, 83 S. C. at page 191, 65 S. E. at page 174: "The burden rested upon the appellant to show error, on the part of his honor, the circuit judge, in his finding that the deed was intended as a mortgage. The testimony is conflicting upon every material fact; and the appellant has failed to satisfy this court that the preponderance of the evidence is in his favor. It would subserve no useful purpose to narrate the details of testimony."

The judgment of the circuit court is affirmed.

GARY, C. J., and HYDRICK and WATTS, JJ., concur.

WOODS, J., absent.

(92 S. C. 77)

EVANS v. BLUE RIDGE RY. CO. et al.

(Supreme Court of South Carolina. July 18, 1912.)

1. APPEAL AND ERROR (§ 241*)—PRESENTATION BELOW—SUFFICIENCY OF EVIDENCE.

Under circuit court rule 77 (73 S. E. vii), providing that the point that there is no evidence to support a cause of action shall be first made either by a motion for nonsuit or a motion to direct a verdict, exceptions relating to the sufficiency of the evidence cannot be reviewed where defendant's only objection was by motion for nonsuit on the ground of plaintiff's contributory negligence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1413-1416; Dec. Dig. § 241.*]

2. STREET RAILROADS (§ 91*)—NEGLIGENCE—SPEED.

A failure to comply with the requirements of an ordinance that a train shall not exceed four miles an hour is negligence per se.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 190-192; Dec. Dig. § 91.*]

3. STREET RAILROADS (§ 117*)—COLLISION—NEGLIGENCE—QUESTION FOR JURY.

Where, in an action for damages sustained from a motor car's colliding with plaintiff's automobile at a street crossing, there was evidence tending to show that both parties were negligent, the question of whose negligence was the proximate cause of the injury was for the jury.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 239-257; Dec. Dig. § 117.*]

Appeal from Common Pleas Circuit Court of Anderson County; Geo. B. Prince, Judge.

"To be officially reported."

Action by George W. Evans against the Blue Ridge Railway Company and another. From judgment for plaintiff, defendants appeal. Affirmed.

Bonham, Watkins & Allen, of Anderson, for appellants. Leon L. Rice, of Anderson, and Paget & Watkins, for respondent.

GARY, C. J. This is an action for damages alleged to have been sustained by the wrongful acts of the defendants in causing the motor car operated by them to collide with plaintiff's automobile at a street crossing in the city of Anderson, S. C.

The allegations of the complaint material to the questions involved are as follows: "That on the 14th day of May, 1911, the plaintiff was driving his automobile along Fant street, in the city of Anderson, at the point where defendant's line of railway intersects said street. As soon as plaintiff came into view of the track of defendant's line of railway, he was surprised by the approach of said motor car, running at a greater rate of speed than allowed by law. The sudden surprise and lack of warning on the part of the approaching car, coupled with the short distance plaintiff had in which to avoid the impending collision, made it impossible for plaintiff to do otherwise than to try to keep out of the way of the onrushing car. He turned his automobile quickly to the left, and was almost clear of the track of defendant's line of railway, when defendant's motor car, running by said crossing at a great rate of speed, struck the automobile of plaintiff, doing it great damage and endangering the lives of its passengers; that said collision was not due to the negligence of plaintiff, neither did any negligence on his part contribute to the injury, but the same was due to the defendant's negligence in running by said street crossing at a greater rate of speed than allowed by law; that section 226 of the ordinances of the city of Anderson, S. C., 1910, is as follows: 'No railroad engine, car or train shall be run through or within the city, at a greater speed than at a rate of fifteen miles an hour, nor over any street or crossing, at a greater speed than four miles an hour, and any engineer, conductor or other person causing or permitting the same, to run at a greater rate of speed, shall be deemed guilty of a misdemeanor, and on conviction thereof, shall be punished as hereinafter prescribed.' The defendant's motor car was running at a greater rate of speed than four miles an hour at the time hereinabove referred to, against the provisions of said ordinance." There was also a second cause of action in the complaint, alleging recklessness instead of negligence. The defendants denied the allegations of negligence, and set up the defense of contributory negligence on the part of the plaintiff.

[1] At the close of the plaintiff's testimony, the defendants made a motion for a nonsuit on the ground that the collision was caused by the plaintiff's contributory negligence, which motion was refused. The jury rendered a verdict in favor of the plaintiff for \$500 actual damages, and the defendants appealed.

All the exceptions relate to the sufficiency of the evidence, or assign error on the part of his honor, the presiding judge, in refusing the motion for nonsuit, on the ground that plaintiff's damages were the result of his contributory negligence. Rule 77 (73 S. E. vii) of the circuit court is as follows: "The point that there is no evidence to support an alleged cause of action, shall be first made, either by a motion for nonsuit, or a motion to direct the verdict. * * * Therefore the only question properly arising under the exceptions is whether there was error in refusing the motion for nonsuit on the ground of plaintiff's contributory negligence.

[2,3] "Failure to comply with a city ordinance providing that trains should not be run faster than four miles an hour within the city limits, and that a man should precede an engine while crossing a street or lane with certain signals, is negligence per se, and even if a man at a street crossing, trying to get his horse off the track, is guilty of negligence and is injured, whether the negligence of the railroad company or of the deceased was the proximate cause of the injury, should have been sent to the jury." (Syllabus) *Butler v. Railway*, 90 S. C. 273, 73 S. E. 185. In that case the court uses this language: "A failure to comply with the requirements of the ordinance that a train should not exceed four miles an hour * * * was negligence per se. * * * It was held in *Craig v. Railway*, 89 S. C. 161, 71 S. E. 983, that it is the duty of a railroad company to keep a lookout for persons and pedestrians on its track at a highway crossing. It will thus be seen that there was testimony tending to show negligence on the part of the defendant, and, even conceding that there was negligence also on the part of plaintiff's intestate, the question whether the negligence of the defendant or that of plaintiff's intestate was the proximate cause of the injury should have been submitted to the jury. We see no difference in principle between the case now under consideration and that just mentioned.

Judgment affirmed.

WOODS, HYDRICK, WATTS, and FRASER, JJ., concur.

(92 S. C. 72)

BENNETT v. COLUMBIA ELECTRIC ST. RY., LIGHT & POWER CO.

(Supreme Court of South Carolina. July 18, 1912.)

1. TRIAL (§ 256*)—INSTRUCTIONS—REQUESTS—NECESSITY.

Failure to make instructions on the subject of vindictive or punitive damages more specific in an action for damages is not erroneous, in the absence of a request to that effect.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 628-641; Dec. Dig. § 256.*]

2. STREET RAILROADS (§ 114*)—INJURIES TO PERSONS ON TRACK—PUNITIVE DAMAGES—EVIDENCE.

In an action for injuries to a child while on the defendant's track, evidence of wantonness held sufficient to sustain a verdict awarding vindictive damages.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 239-250; Dec. Dig. § 114.*]

3. STREET RAILROADS (§ 93*)—INJURIES TO PERSONS ON TRACK—INTENT—WILLFUL AND WANTON INJURY.

Though an invasion of another's rights be unconscious, where it is committed in such a manner that a person of ordinary prudence would say that it was a reckless disregard of another's rights, it is an actionable wrong, so that, though employees of a railroad company in charge of a train do not see persons on the track in time to avoid injuring them, the company may still be liable for their failure to keep a reasonable lookout, and thus discover the peril.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 195-200; Dec. Dig. § 93.*]

Appeal from Common Pleas Circuit Court of Richland County; John S. Wilson, Judge. "To be officially reported."

Action by Thomas Bennett, by H. P. Bennett, his guardian ad litem, against the Columbia Electric Street Railway, Light & Power Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Elliott & Herbert, of Columbia, for appellant. W. H. Cobb, of Columbia, for respondent.

GARY, O. J. This is an action for damages alleged to have been sustained by the plaintiff when he was about a year and a half old through the negligence and recklessness of the defendant.

The allegations of the complaint, material to the questions involved, are as follows: "That on or about August 7, 1910, the defendant, while running one of its cars on its track through the Olympia Mill village, on Olympia avenue, at or near its intersection with Ninth street, which is also one of the public highways of said Olympia Mill village, on a level grade, at a rapid and dangerous rate of speed, and in violation of the rules of said defendant, requiring all cars to be stopped when they cross the Bluff road, a public highway about 400 feet east of where Ninth street crosses said Olympia avenue, without warning or signal, and with-

out having air or other brakes than hand brakes on said car, ran against said Thomas Bennett, who was on and crossing said Olympia avenue at its said intersection with Ninth street. That the aforesaid injuries to the plaintiff were caused by the carelessness, negligence, willfulness, recklessness, and wantonness of defendant, its agents, and servants in allowing the car to be run at a rapid and dangerous rate of speed; in that, well knowing said crossing to be dangerous and collisions likely to occur thereat, it failed to stop at the Bluff road crossing, as the rules required, thereby enabling the conductor and motorman to get a clear view of and down said Olympia avenue, to and past the Ninth street crossing, and see if it were obstructed, in failing to give any signal to warn plaintiff of its approach, in allowing said car to be run with worn and defective brakes and appliances for stopping same, in that it failed to bring said car to a stop, and avoid running against and injuring said plaintiff, in failing to keep a proper lookout down said track, and to have seen the plaintiff in time to have stopped its car and avoided the injury."

The defendant denied the allegations of negligence and recklessness, and set up as a defense "that on the date alleged the plaintiff herein walked or crawled out on defendant's track near its father's residence, and, being a child of only two or three years of age, it assumed a position where it could not be seen until defendant's car was almost upon it, whereby it received some injuries, but defendant does not know the nature or extent of said injuries." The defendant also set up as a defense the contributory negligence of the plaintiff and his parents, but subsequently withdrew said defense. The defendant's attorneys presented the following request, which was refused: "I charge you there is no evidence which will justify you in finding any verdict whatever for punitive damages, and, as to this, I direct you to find for defendant." The jury rendered a verdict in favor of the plaintiff, whereupon the defendant made a motion for a new trial, which was refused, and it afterwards appealed.

The first question presented by the exceptions, which will be considered, is whether there was error on the part of his honor, the presiding judge, in failing to define punitive damages, or to instruct the jury as to the grounds upon which they could be given. His honor, the presiding judge, after defining actual or compensatory damages, charged the jury as follows: "Then there is another kind of damages, what is known as 'vindictive' or 'punitive' or 'exemplary' damages; that is, an amount in addition to actual damages, given by way of punishment against the wrongdoer, as a lesson to him and others doing likewise. These kind

of damages are called 'vindictive,' 'punitive,' or 'exemplary' damages. You have heard it sometimes alluded to as 'smart money.' Now, in this case, the plaintiff not only sues for actual damages, but sues for vindictive damages, or exemplary damages, or punitive damages, as it is called." At the close of the charge the defendant's attorney said: "Your honor has declined my request to direct a verdict, there being no evidence at all as to willfulness." The request to which he had reference was as follows: "I charge you that there is no evidence which will justify you in finding any verdict whatever for punitive damages. * * *"

[1] The following cases show that, if the appellant desired that the instructions should be more specific, they should have been presented, as requests to charge. *State v. Adams*, 68 S. C. 421, 47 S. E. 676; *Jennings v. Mfg. Co.*, 72 S. C. 411, 52 S. E. 113; *Williams v. Ry.*, 76 S. C. 1, 56 S. E. 652; *State v. Thompson*, 76 S. C. 116, 56 S. E. 789; *Snipes v. Ry.*, 76 S. C. 208, 56 S. E. 959; *Morrison v. Ass'n*, 78 S. C. 398, 59 S. E. 27; *State v. Boyleston*, 84 S. C. 574, 66 S. E. 1047; *State v. Chastain*, 85 S. C. 64, 67 S. E. 6; *State v. Hendrix*, 86 S. C. 64, 68 S. E. 129; *State v. Du Rant*, 87 S. C. 532, 70 S. E. 306.

[2] The next question for consideration is whether there was any testimony tending to show that the plaintiff was entitled to punitive damages. There was testimony to the effect that the usual speed down Olympia avenue was about 15 or 20 miles an hour, but that on this occasion the car was running about 25 or 30 miles an hour; that it is required by the rules of the company that the car should stop at the Bluff road crossing, but that there was a failure to comply with this requirement; that there was a failure to give any signals when approaching the crossing at Ninth street; that the car did not have an emergency brake, and that an emergency brake would have enabled the motorman to stop the car more quickly; that the motorman saw the child on the crossing, when the car was 100 feet therefrom, and that it ran about 50 feet beyond the crossing before it stopped; that, when running 10 miles an hour, a car can be stopped in little over a car length, which in this instance was 45 feet long; that, when the car is running 20 miles an hour, it can be stopped in about a car length and a half, or two car lengths; that the track from Bluff road crossing, to Ninth street crossing, is level and straight, and that the motorman on that occasion saw persons whom he recognized at Eighth street crossing, which was one block from Ninth street crossing, or two blocks from Bluff road crossing. Of course, there was contradictory testimony, but this raised a question to be

determined by the jury, and not by the presiding judge.

[3] The rule stated in *Tolleson v. Railway*, 88 S. C. 7, 70 S. E. 311, and quoted with approval in *Bennett v. C. U. Station Co.*, 90 S. C. 308, 73 S. E. 340, is that: "Not only is the conscious invasion of the rights of another in a wanton, willful, and reckless manner an act of wrong, but that the same result follows, when the wrongdoer does not actually realize that he is invading the rights of another, provided the act is committed in such a manner that a person of ordinary prudence would say that it was a reckless disregard of another's rights." "The question whether a railroad company owes any duty to an infant trespassing upon its track until it discovers the infant has given rise to much discussion, and the authorities upon the subject are in irreconcilable conflict. Even conceding that a railroad company is not bound as a general proposition to look out for trespassers upon its track, it nevertheless is bound to exercise ordinary care in running its trains. The law imposes upon it the duty of keeping a reasonable lookout for obstructions on its track. The safety of its passengers and the rights of the public generally demand the enforcement of this rule. It is a general rule of law that a railroad company is liable in damages for an injury inflicted by it, when its negligence was the direct and proximate cause of the injury. If the direct and proximate cause of the infant's death was the negligence of the defendant in failing to keep a reasonable lookout, and to discover the child in time to have prevented the injury, it is as much liable in damages as if the proximate cause of the injury had been its negligence, after discovering the child upon its track." *Mason v. Railway*, 58 S. C. 70, 36 S. E. 440, 53 L. R. A. 913, 79 Am. St. Rep. 826.

The exceptions raising this question are therefore overruled.

Judgment affirmed.

WOODS, HYDRICK, WATTS, and FRASER, JJ., concur.

(93 S. C. 83)

LOWRY v. ATLANTIC COAST LINE R. CO.
(Supreme Court of South Carolina. July 13, 1912.)

1. PLEADING (§ 238*)—AMENDMENT—MOTION—NOTICE.

A notice served June 28th fixing the hearing of a motion for leave to amend the answer on July 3d or "as soon thereafter as counsel can be heard" was sufficient to authorize the court to entertain the motion on November 6th of the same year during another term, following a further notice on November 2d that the motion would be brought on for hearing.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 602, 620-625; Dec. Dig. § 238.*]

2. MOTIONS (§ 40*)—DUTY OF JUDGE.

When a motion is made before a circuit judge which he thinks himself without power to entertain, he should intimate what he would do if clothed with such power, so that on appeal the court may decide whether such disposition would be a proper exercise of discretion.

[Ed. Note.—For other cases, see *Motions*, Cent. Dig. §§ 49-52; Dec. Dig. § 40.*]

3. PLEADING (§ 238*)—AMENDMENT—NOTICE.

Under Code Civ. Proc. 1902, § 195, allowing the court in its discretion and on terms, to permit an answer or reply to be made, or other act to be done after the time limited, or extend the time, or relieve a party from a proceeding taken against him by his mistake, etc., or permit an amendment of a proceeding taken by him to make it conform to the Code requirements, the court, upon proper showing and on such terms as it deems just, may allow the defendant to amend his answer without notice.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. §§ 602, 620-625; Dec. Dig. § 238.*]

4. APPEAL AND ERROR (§ 1041*)—REVIEW—HARMLESS ERROR—LEAVE TO AMEND.

The court's error in ruling that he had no power to entertain a motion for leave to amend the answer was harmless where it appeared that such motion should have been overruled.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4106-4109; Dec. Dig. § 1041.*]

5. PLEADING (§ 238*)—AMENDMENT—SHOWING.

A motion for leave to amend the answer should have been overruled where the supporting affidavit did not show mistake or inadvertence or that due diligence had been exercised to procure the information upon which the proposed new defenses were based, but alleged merely that it was not convenient to sooner get such information.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. §§ 602, 620-625; Dec. Dig. § 238.*]

6. APPEAL AND ERROR (§ 1052*)—REVIEW—HARMLESS ERROR—ADMISSION OF EVIDENCE.

Error in permitting a witness to give improper testimony for one party was cured where the same testimony was given by the witness on cross-examination by the adverse party.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4171-4177; Dec. Dig. § 1052.*]

7. TRIAL (§ 139*)—PROVINCE OF JURY—DIRECTION OF VERDICT.

Where there was sufficient testimony to take the case to the jury, the court properly refused to direct the verdict; it being for the jury to settle disputed matters of fact.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 332, 333, 338-341, 365; Dec. Dig. § 139.*]

8. TRIAL (§ 194*)—INSTRUCTIONS—EVIDENCE.

In an action for damage to freight, defendant's requested instruction that the presumption of loss and damage by the last carrier cannot arise where there is credible evidence tending to show that, prior to the delivery to the last carrier, the goods were not in good order, was properly refused; it being for the jury whether a presumption raised by law has been rebutted by evidence.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 413, 436, 439-441, 446-454, 456-466; Dec. Dig. § 194.*]

9. PRINCIPAL AND AGENT (§ 194*)—AUTHORITY—INSTRUCTIONS.

In an action for damage to freight, there was no error in modifying an instruction "that

the agent had authority to incur the expense of making repairs" by inserting the words "express or apparent" after the word "authority."

[Ed. Note.—For other cases, see *Principal and Agent*, Cent. Dig. §§ 727-731; Dec. Dig. § 194.*]

10. PRINCIPAL AND AGENT (§ 119*)—AUTHORITY—BURDEN OF PROOF.

A principal who asserts that his agent, while acting within the apparent scope of his authority, acted outside of his instructions must sustain his assertion by a preponderance of the evidence.

[Ed. Note.—For other cases, see *Principal and Agent*, Cent. Dig. §§ 891-401; Dec. Dig. § 119.*]

Appeal from Common Pleas Circuit Court of Sumter County; Ernest Gary, Judge.

Action by Mrs. E. A. Lowry against the Atlantic Coast Line Railroad Company. Judgment for plaintiff, and defendant appeals. Affirmed.

See, also, 91 S. C. 350, 74 S. E. 753.

L. D. Jennings, of Sumter, for appellant. Willcox & Willcox, of Florence, and Mark Reynolds, of Sumter, for respondent.

WATTS, J. This is an action against the defendant company for loss and damage to shipment of household furniture which the plaintiff had shipped from Henrietta, Tex., to Sumter, S. C. Upon the first trial of the cause, the presiding judge directed a verdict in favor of the defendant, which upon appeal was reversed. See 88 S. C. 310, 70 S. E. 806. Some time thereafter and before the summer term of court for Sumter county in 1911, the defendant gave notice that a motion would be made on July 3d for an order allowing an amendment to the original answer. This motion was not brought to a hearing by the defendant during that term of court. On November 2, 1911, the defendant served upon plaintiff's counsel another notice that a motion would be made on November 6th before the presiding judge, Hon. Robert E. Copes, for an order to amend the answer. With this notice an affidavit of one of defendant's counsel was served stating that he had only recently been able to secure complete information upon the facts upon which he was seeking to amend the answer. Judge Copes refused to allow the amendment, holding that the notice of November 2d of the motion to be heard November 6th was not sufficient as to time. This cause was then tried before a jury and a verdict rendered for the plaintiff. A motion was made for a new trial which was overruled, and defendant appeals on 15 grounds.

[1] At the hearing of the cause in this court, exceptions 4, 5, 7, and 10 were withdrawn by the appellant. The first, second, and third exceptions allege error on the part of his honor, Judge Copes, in refusing to pass upon the merits of the motion for leave to amend the answer. The original notice

of motion was served June 28, 1911, fixing the hearing of the motion on July 3, 1911, or "as soon thereafter as counsel could be heard." The motion was not heard at the July term of court, and afterwards on November 2, 1911, an additional notice was served notifying plaintiff's counsel that defendant would renew the notice of motion and the motion papers "heretofore served on June 28, 1911, on November 6, 1911," or "as soon thereafter as counsel could be heard." Judge Copes held that the notice served in June had lost all legal vitality, and that the notice served in November was ineffectual because it did not allow sufficient time. We think his honor was in error in so holding. The failure to dispose of the motion at the July term of court did not destroy the vitality of the notice. It provided for it to be heard at that term or "as soon thereafter as counsel could be heard." The object of the notice was to prepare the opposing counsel. It would be an extremely technical rule which would, as a matter of law, deprive a litigant of the right to have a motion of this nature heard under the circumstances as developed here. His honor was in error in holding that he could not hear the motion and that he had no discretion in the matter. He should have heard the motion and granted or refused it as he saw fit in his discretion.

[2] It is the better and safer practice for a circuit judge, when a motion is made before him when he thinks he has no power to entertain it, to intimate what he would do if he were clothed with the power, whether he would grant or refuse it, and then upon the appeal this court could determine whether he had erroneously exercised his discretion or not. In the case at bar, Judge Copes held he had no power to hear the motion. It would have been the better practice for him to have decided if he had the power would he have allowed the defendant to file the amended answer or not.

[3] Under section 195 of the Code of Civil Procedure, the court, upon a proper showing and upon such terms as the court thought just, could have allowed the defendant to amend its answer without notice whatsoever.

[4, 5] While Judge Copes was in error in not entertaining the motion, we do not think the defendant was prejudiced, as the proposed answer upon the showing made should not have been allowed. This case had been tried in the circuit court, verdict rendered for the plaintiff, appeal taken and a new trial granted, and case remanded on April 4, 1911, for another trial. During all this time no effort was made by the defendant to amend its answer or to secure complete information. The action was originally brought on July 22, 1908, and defendant's counsel's affidavit, upon which defendant relies to procure the order to amend answer, is dated November 2, 1911. A careful reading of that affidavit will not show such diligence on the part of

defendant's counsel in procuring the information upon which amended answer is based as to allow them now to file the amended answer. It does not show excusable mistake or inadvertence on their part, and for this reason alone it would work injustice and hardship to the plaintiff at this stage of the proceedings to allow it to be filed. If there is any defense in the proposed amended answer at all, the inexcusable neglect of the defendant in not pleading it sooner deprives it of the right to have it heard in this case. If there is any merit in it, the plaintiff can be sued by defendant in a separate action. The substance of defendant's affidavit is not that it was mistaken when it first answered, but it was not convenient for it sooner to get the information upon which it bases its proposed new defenses. We are clearly of the opinion that, had Judge Copes considered the motion on the merits, he would not have been warranted in granting the order asked for on the affidavit submitted, together with the proposed amendment.

[6] The eighth and ninth exceptions allege error on the part of the circuit judge in admitting, over objection, evidence showing that the defendant, its agents and servants, had attempted to have repaired some of the damaged furniture. Even if it were conceded that there was error in the first instance in admitting this evidence and allowing plaintiff to testify to a conversation she had on the subject with Cooper, the agent of defendant, it was cured when defendant's attorney had Cooper, in response to his questions, testify in full as to what he did and as to the conversation between himself and the plaintiff. These exceptions are overruled.

[7] Exception 11 alleges error in not directing a verdict in favor of defendant for insufficiency or total want of evidence on the part of plaintiff showing any loss or damage occurred while in defendant's possession, and, if goods were damaged at all or lost, it occurred before delivery of property to the defendant.

Exception 15 alleges error on the same grounds in not granting a new trial, and the additional ground that the verdict is palpably excessive. There was sufficient testimony to carry the case to the jury, and it is their province to settle all disputed matters of fact, and there is sufficient testimony in the case to support their verdict. These exceptions are overruled.

[8] The twelfth exception alleges error in refusing to charge defendant's first request which is: "I charge you that the presumption of loss and damage by the last carrier cannot arise in any case where there is credible evidence tending to show that, prior to the delivery of the goods to the last carrier, they were not in fact in good order." There is no error here. It has been held, where a presumption of law arises and there is some testimony to rebut this presumption, it is for the jury and not for the court to determine

upon which side rests the weight. *Baker v. Telegraph Co.*, 87 S. C. 174, 69 S. E. 151. This exception is overruled.

[9] Exception 13 alleges error in modifying defendant's second request to charge and not charging it as submitted. His honor modified the request by inserting the words, after the word "authority," "express or apparent," so that the request as modified read, "That the agent had authority, express or apparent, to incur the expenses of making repairs," etc., instead of charging the request, "That the agent had the authority to incur the expenses of making repairs," etc. This exception is overruled.

[10] It is "hornbook law" that the agent must act within the scope of his authority or within the apparent scope of his authority. Whenever there is evidence that there is an agent acting in the apparent scope of his authority to do certain things, and it is shown that he has done these things apparently acting in the scope of his authority, then the burden would be shifted to the other side, and it would be necessary for them to show by the greater weight of evidence that these acts on the part of the agent were outside of his authority. A principal who asserts that his agent has acted outside of his instructions must show it by the preponderance of the evidence. *Whaley v. Duncan*, 47 S. C. 139, 25 S. E. 54.

Exception 14 alleges error in charging plaintiff's second request. We see no error in this. His honor qualified the request by adding the words, "And I charge you further that the presumption may be rebutted by evidence." He also in this connection charged defendant's fifth request to charge.

A reading of the judge's charge will show that the jury were instructed that the defendant was not liable unless it was shown that the goods were lost or damaged by the defendant.

Judgment affirmed.

WOODS, J., did not sit in this case. GARY, O. J., and HYDRICK, J., concur. FRASER, J., concurs in the result.

(93 S. C. 136)

STATE v. BETHUNE†

(Supreme Court of South Carolina. July 12, 1912.)

1. CRIMINAL LAW (§ 1176*)—APPEAL—REVIEW—PREJUDICE.

Renewal of a motion for a new trial because accused was denied the right to move for change of venue was not prejudicial where the facts did not establish a prima facie case calling for a change, so that, if the motion had been made in due time, the circuit court would have refused it on the showing made.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3180, 3191; Dec. Dig. § 1176.*]

2. JURY (§ 131*)—EXAMINATION—VOIR DIRE.

Where a juror had sworn that he was not conscious of any prejudice or bias for or against

accused, it was not an improper exercise of the court's discretion to sustain an objection to the further question whether the juror would be influenced by the fact that accused was a negro, though he had exhausted his peremptory challenges.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 561-582; Dec. Dig. § 131.*]

3. CRIMINAL LAW (§ 1152*)—APPEAL—EXAMINATION OF JUROR.

After the statutory questions have been asked of a juror and answered, any further examination on the juror's voir dire is within the discretion of the trial judge, the exercise of which will be reviewed only for abuse thereof.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3053-3067; Dec. Dig. § 1152.*]

4. CRIMINAL LAW (§ 920*)—NEW TRIAL—GROUNDS—INCAPACITY OF ATTORNEY.

That the attorney for accused was mentally unbalanced during the trial, and soon thereafter was carried to a sanitarium for treatment, was not ground for a new trial where it did not appear that he did or left undone anything which would have affected the result.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2202-2205; Dec. Dig. § 920.*]

5. CRIMINAL LAW (§ 913*)—PUBLIC PREJUDICE—VERDICT—VACATION.

Since mere existence of a strong public prejudice against accused is not necessarily ground for change of venue, the existence of such prejudice does not warrant the setting aside of a conviction unless it appears that the verdict was influenced thereby.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2137-2145; Dec. Dig. § 913.*]

6. CRIMINAL LAW (§ 1163*)—CONVICTION—VERDICT—PREJUDICE—BURDEN OF PROOF.

The burden of proving that a conviction was influenced by public prejudice is on accused; the presumption being that such was not the case, but that the trial judge performed his duty to see that accused had a fair and impartial trial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3090-3099; Dec. Dig. § 1163.*]

7. CRIMINAL LAW (§ 1156*)—NEW TRIAL—NEWLY DISCOVERED EVIDENCE.

A motion for a new trial for newly discovered evidence is addressed to the trial court's discretion, the exercise of which will not be reviewed unless it appears to have been abused or controlled by some error of law.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3067-3071; Dec. Dig. § 1156.*]

Appeal from General Sessions Circuit Court of Clarendon County.

"To be officially reported."

Willie Bethune was convicted of murder, and from an order denying his motion for new trial for newly discovered evidence, he appeals. Affirmed.

J. H. Clifton, for appellant. P. H. Stoll, Sol., for the State.

HYDRICK, J. At the June term, 1909, of the court of general sessions for Clarendon county, defendant was convicted of murder and sentenced to death. On appeal, his conviction was sustained. 86 S. C. 143, 67 S. E.

466. A petition for rehearing was presented, one of the grounds being that, since his conviction, defendant had become insane. The petition was dismissed without prejudice to defendant to plead his insanity, when called upon to say why a new day for execution of the sentence should not be assigned. 86 S. C. 154, 67 S. E. 466. At the June term, 1910, when so called upon, he pleaded that he was insane. Upon that issue, a trial by jury was had, and the verdict was that he was sane. On appeal, that judgment was affirmed, and the case was remanded for the purpose of having another day assigned for execution of the sentence. 88 S. C. 401, 71 S. E. 29. This was done at the June term, 1911. Thereafter, on motion of defendant, execution of the sentence was stayed in order that he might make a motion for a new trial on the ground of after-discovered evidence, and on the ground that he had not had such fair and impartial trial as is guaranteed by the Constitution. That motion was heard at the September term, 1911, and refused, and, from the order refusing it, this appeal was taken.

The murder of which defendant stands convicted was committed February 21, 1909. Soon after the defendant was arrested, the sheriff received information that a mob was being organized to lynch him, and, by order of the Governor, he was carried to the state penitentiary for safe-keeping, and was kept there until he was carried back for trial at the next succeeding term of court in June. He was arraigned on Wednesday, June 9th, and his trial was set for and had on Saturday, the 12th, which was the last day of the court.

Unusual interest on the part of the public was taken in the trial, and there was considerable feeling of resentment and indignation against the defendant, which was manifested by threats on the part of the friends and relatives of the deceased that, if he were convicted of anything less than murder, he would be lynched. These threats were brought to the attention of the presiding judge, who caused 10 or 12 extra deputies to be sworn in to preserve order and protect the prisoner. During the trial, the courthouse was crowded to standing room. The space within the bar was filled, and some of the audience were allowed to sit on the steps leading to the judge's bench.

At one time—just when it does not appear—the prisoner's attorney had been mentally unbalanced and had been in a sanitarium for treatment; but, for some time immediately before the trial, he had been attending to his business, and was employed by the prisoner's stepfather to defend him. The solicitor admits in the "case" that he was unbalanced during the trial, and that he remained so until after the trial on circuit of the issue as to the prisoner's sanity. Soon after that trial, he was carried to a sanitari-

um for treatment, and has not since participated in the defense.

Notwithstanding some of the points raised on this appeal were considered and decided on the first appeal, we have, in *favorem vite*, at the earnest request of appellant's attorney, whose services in behalf of appellant are entirely gratuitous, carefully reconsidered them; but we find no reason to change or modify the previous decision.

[1] The first of these contentions is that, under the circumstances, the appellant was denied the right to move for a change of venue. In addition to the ground upon which this point was decided on the first appeal, we may say that the facts made to appear on that appeal and also on this do not make a *prima facie* case calling for a change of venue. Therefore, if the question were an open one, and if the motion had been made in due time, the circuit court would have refused it on the showing made. Hence appellant was not prejudiced by the failure to make the motion. And certainly where the failure to make such motion was due to no error on the part of the court, at least a *prima facie* case, entitling appellant to a change of venue, should be made before this court would be warranted in reversing the judgment.

[2] We notice next the ground that appellant's attorney was not allowed to ask a juror, on his *voir dire*, whether he would be influenced, in passing on the evidence, by the fact that defendant is a negro. Mr. Justice Woods, in concurring in the opinion of Mr. Chief Justice Jones on the first appeal stated that, if it had appeared that defendant had exhausted his peremptory challenges, he would have been inclined to sustain the exception to the ruling of the circuit court on that point. It now appears that the prisoner had exhausted his peremptory challenges. Notwithstanding that fact and the great weight to which the intimation of the learned justice (who did not sit at the hearing of this appeal) is entitled, after careful consideration, we are constrained to adhere to the previous decision. The juror had already sworn that he was not conscious of any prejudice or bias for or against the prisoner. Therefore his answer to the proposed question if he had been allowed to answer must have been in the negative.

[3] After the statutory questions have been asked and answered, any further examination of a juror on *voir dire* must be left to the discretion of the trial judge, which is subject to review only for abuse thereof.

[4] The mental condition of the appellant's former attorney is not ground for a new trial, because it has not been made to appear that it caused prejudice to his case. It does not appear that he did or left undone anything which would probably have affected the result. If there had been any apparent prejudicial mismanagement of the case, we

feel sure that it would not have escaped the vigilance of the presiding judge, who would have taken the necessary steps to safeguard the defendant's rights. The case was managed in this court with a zeal and skill equal to, if not above, the average, and there is nothing in the record in either of the former appeals, or in the evidence on this motion, which leads to the conclusion that the appellant's rights were not duly protected, or that he suffered any detriment by reason of the unfortunate condition of his attorney.

[5] The mere existence of a strong public prejudice against the accused is not necessarily ground for a change of venue. It must be made to appear that it is such that he cannot get a fair trial. A fortiori the mere existence of strong prejudice against the accused does not warrant setting aside a verdict of guilt, unless it is made to appear that the verdict was influenced by it. When the existence of such prejudice as would call for a change of venue is known, or by the exercise of due diligence would be known, to the defendant or his attorney, a motion to change the venue should be made. The defendant will not be allowed to speculate on chances, and, if the verdict goes against him, obtain a new trial because of such prejudice, unless a very clear case, calling for the exercise of the discretion vested in the court, is made out. Now, in this case, it has not been made to appear that the prejudice in the community against the defendant was so great that it influenced the verdict, or that any of the things relied upon by defendant to show such prejudice had any effect upon the result.

[6] The burden was upon defendant to prove that fact by clear and convincing evidence. The presumption is the other way. We are bound to presume that the conscientious and learned judge who presided at the trial saw to it, as was his duty, that defendant had a fair and impartial trial, according to law, and also that it was had with the dignity and decorum which becomes the administration of justice, and which the gravity and solemnity of the issue demanded. We must presume, until the contrary is made to appear, that good men and true, who are under the sanction of a solemn oath to render a true verdict, will be governed by their honest judgment of the evidence, and that neither passion nor prejudice nor the influence of the mob nor any other improper influence will be allowed to swerve them from the path of duty.

It is greatly to be regretted that it should be necessary to hold a trial in any other than a calm and judicial atmosphere. But it is natural that foul murder or other brutal crime should arouse excitement and indignation among the people, and, in such circumstances, we cannot expect normal conditions. As was said by Mr. Justice Woods in *State v. Weldon*, 91 S. C. 36, 74 S. E. 44:

"Ideal conditions, it is true, are not to be expected, and verdicts should not be set aside by an appellate court for misconduct in a trial, unless the evidence is clear and convincing that extraneous influences so interfered with the conduct of the trial, or so pressed upon the jury, as to become factors in the result. A vast number of cases might be cited to show that this court will refuse to heed unsubstantial charges that trials have not been fair."

While that case, which is relied on by appellant, had some points of similarity to this, in its most essential features there were marked differences. There a special court was ordered to try the defendants soon after the crime was committed, and they were tried in the midst of intense and bitter public excitement against them. They had no counsel. The presiding judge appointed counsel for them who, on account of the mob spirit, which was so prevalent that it invaded the courthouse itself, and the threats of lynching which he heard as he went into the courthouse in response to the call of the presiding judge, felt constrained to forego his right to demand the three days allowed by law, after arraignment, for preparation for trial, and went into the trial at once, without the least time for preparation, or to get defendants' witnesses, under compulsion of the fear that, if he did not, his clients would be lynched. During that trial, the spectators were allowed to so crowd the space within the bar, and press upon the court and jury, that defendants' counsel could not see the witnesses while he was cross-examining them, and had frequently to call on the court to order the crowd back so that he could see the witness he was cross-examining; and he did not see the jury, because of the intervening crowd, until he stood before them to make his argument. On the other hand, this defendant had from February 21st till June 12th to prepare for trial. To be sure he was in the state penitentiary nearly all of that time, but he was at liberty to communicate with his attorney and his friends, who were looking after his interests. His stepfather employed counsel for him—just how long before the trial does not appear—but no point was made that he was not employed or could not have been employed long enough before to have had ample time to get ready for trial. The three days after arraignment allowed by law for preparation for trial were demanded and allowed. Besides these, there are a number of other distinguishing features.

[7] As to the ground of after-discovered evidence: "The rule is well settled that a motion for a new trial on after-discovered evidence is addressed to the discretion of the circuit court, and the refusal of such motion will not be reviewed unless it appears that there was abuse of discretion, or that the exercise of discretion was controlled

by some error of law. *State v. David*, 14 S. C. 432; *State v. Workman*, 15 S. C. 547; *Sams v. Hoover*, 83 S. C. 404, 12 S. E. 8; *Seegers v. McCreery*, 41 S. C. 549, 19 S. E. 696; *Peeples v. Werner & Co.*, 51 S. C. 405, 29 S. E. 2. Such a motion must generally depend on matters of fact, over which this court has no jurisdiction in actions at law." *State v. Bradford*, 87 S. C. 546, 549, 70 S. E. 308. Applying the principles above stated to this case, it has not been made to appear that there was abuse of discretion in refusing the motion, or that the exercise of the discretion was controlled by error of law. The refusal of the motion necessarily implied a finding of all the material facts involved against appellant, and such findings are not reviewable. It is inconceivable that the circuit judge would have refused the motion if he had been satisfied by the evidence that, for any of the reasons assigned, defendant had not had a fair and impartial trial.

Under the peculiar circumstances of this case, and in view of the fact that a human life is at stake, we have waived all formalities and have carefully examined this record, as well as those of the former trials, but we have not been satisfied that the defendant has not had a fair and impartial trial, and been justly condemned.

Therefore it is the judgment of this court that the order appealed from be affirmed, and that the case be remanded to the circuit court for the purpose of having another day assigned for the execution of the sentence heretofore imposed upon the defendant.

Affirmed.

GARY, C. J., and WATTS, J., concur.
WOODS and FRASER, JJ., disqualified.

(91 S. C. 477)

GEDDINGS v. ATLANTIC COAST LINE R.
CO. et al.

(Supreme Court of South Carolina. June 4, 1912.)

1. DAMAGES (§ 151*)—NEGLIGENCE (§ 111*)—PLEADING—SUFFICIENCY.

In an action for actual and punitive damages from being struck by a telegraph cross-arm negligently thrown from a passing freight train, the plaintiff was required to specify in his complaint the negligence relied upon, and also the grounds upon which he based his claim for punitive damages.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. §§ 420, 421; Dec. Dig. § 151; **Negligence*, Cent. Dig. §§ 182-184; Dec. Dig. § 111.*]

2. RAILROADS (§ 364*)—PERSONAL INJURIES—PERSON ON RIGHT OF WAY.

The fact that telegraph cross-arms were thrown from a train moving at a rapid rate of speed at a point traveled by the public tended to show such reckless disregard of the rights of the public and of plaintiff, a section hand, who was struck by a cross-arm, as would render the defendant railroad company liable.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1252, 1253; Dec. Dig. § 364.*]

3. APPEAL AND ERROR (§ 1032*)—PRESENTATION OF ERROR.

A case will not be reversed for error in refusing to strike out part of the complaint, where it is not made to appear that such error was prejudicial.

[Ed. Note.—For other case, see *Appeal and Error*, Cent. Dig. §§ 4047-4051; Dec. Dig. § 1032.*]

4. NEGLIGENCE (§ 11*)—"WILLFULNESS."

Willfulness is the intentional doing of some act or the failure to do some act, according to one's own will, regardless of the right of others, when the party knows, "or is under legal obligation to know," that the doing or the failing to do such act might cause injury to other persons.

[Ed. Note.—For other cases, see *Negligence*, Cent. Dig. § 13; Dec. Dig. § 11.*]

For other definitions, see *Words and Phrases*, vol. 8, pp. 7485-7486.]

5. MASTER AND SERVANT (§ 133*)—INJURIES TO SERVANT—PERSON ON RIGHT OF WAY.

A railroad company was liable for injury to a section man struck by a telegraph cross-arm thrown from a passing freight train by an employe of the telegraph company; the duty of the railroad company to load and unload its freight being one which it could not so delegate to the telegraph company as to escape liability.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 213, 224-227; Dec. Dig. § 133.*]

Appeal from Common Pleas Circuit Court of Sumter County; R. E. Copes, Judge.

"To be officially reported."

Action by Henry R. Geddings against the Atlantic Coast Line Railroad Company and others. From a judgment for plaintiff, defendant named appeals. Affirmed.

See, also, 91 S. C. 350, 74 S. E. 753.

Instruction objected to in the eighth exception on account of the italicized words: "Willfulness, gentlemen of the jury, is the intentional doing of some act, or the failure to do some act, according to one's own will, regardless of the right of others, when the party knows, *or is under legal obligation to know*, that the doing or the failing to do such act might cause injury to other persons."

The material parts of the complaint are as follows:

"(2) That at the times hereinafter mentioned the plaintiff was working for the defendant Atlantic Coast Line Railroad Company as one of its section force.

"(3) That on or about the 23d day of August, 1910, the plaintiff was working with said section force on the railroad right of way of the said Atlantic Coast Line Railroad Company between Alcolu and Manning, near what is known as the 'Sixteen Mile Post.' That the plaintiff and the other section force were engaged in clearing off the right of way. That while so engaged a freight train came along, coming from toward Sumter and going toward Manning. That said train was running at the speed of about 30 miles an hour. That, as said train approached, the

plaintiff turned his back toward the way from which the train was coming, in order to prevent cinders and smoke from getting into his eyes. That the plaintiff got out of the way of the train and stood some eight or ten feet from the railroad track, with his back turned as aforesaid, and that, while standing there and without any notice to the plaintiff whatsoever, the agent of the defendant Atlantic Coast Line Railroad Company threw from said train, under the said defendant's instructions, what is known as a 'cross-arm' for telegraph poles, and struck the plaintiff below the knee on the left leg, knocked him down, and broke his left leg, and knocked the plaintiff into the ditch along said right of way. The plaintiff alleges that under the instructions of the defendant Atlantic Coast Line Railroad Company that said cross-arm and other cross-arms were thrown off of the train wherever needed, while going at its ordinary speed, for the purpose of saving time, and not stopping where it was necessary to put off cross-arms for the telegraph poles. The plaintiff alleges that all of this was done in a willful, wanton, negligent, and reckless manner by the defendant Atlantic Coast Line Railroad Company.

"(4) The plaintiff alleges that the defendants knew that the right of way of the Atlantic Coast Line Railroad Company at the point herein alleged, and other points, were constantly and with the knowledge and consent of the said Atlantic Coast Line Railroad Company *traveled by the public, as well as* being worked upon by the section hands of the defendant, Atlantic Coast Line Railroad Company, and knew that the throwing off of said cross-arms while the train was running was dangerous and liable to injure *the traveling public, and especially* the section hands of the Atlantic Coast Line Railroad Company, by the throwing off of the cross-arms in the manner herein alleged. The plaintiff further alleges that the defendants knew that he was standing on the right of way where he was required to be in the performance of his duties to the defendant Atlantic Coast Line Railroad Company at the time he was hurt aforesaid. That the defendant Alger Hawkins saw the plaintiff standing on the right of way as aforesaid, or by the slightest exercise of care could have seen the plaintiff and avoided the injury aforesaid, but without regard to the plaintiff's rights, and in a willful, wanton, reckless, and negligent manner intentionally threw said cross-arm and struck and injured the plaintiff as aforesaid. The plaintiff further alleges that it was negligence on the part of the defendants in running said train at such a rapid rate of speed, and while so running, requiring and allowing the throwing off of said cross-arms on the right of way, upon which they knew that the plaintiff and other section hands were engaged in work, *and upon which they knew the traveling public con-*

stantly traveled, and that injury would likely occur to some of them; that, notwithstanding this knowledge on the part of the defendants, the defendants required or allowed the cross-arm to be thrown as aforesaid, and injured the plaintiff as aforesaid, which injury caused this plaintiff great suffering, physical pain, mental anguish, loss of time, and expense, and maimed and permanently injured him for life all through the carelessness, recklessness, wanton, and willful conduct and negligent acts of the defendants, to the damage of the plaintiff in the sum of \$25,000."

Mark Reynolds, of Sumter, and Lucian W. McLemore, of Florence, for appellant. L. D. Jennings, of Sumter, for respondent.

GARY, C. J. This is an action for damages alleged to have been sustained by the plaintiff through the wrongful acts of the defendants. The allegations contained in the second, third, and fourth paragraphs of the complaint are material to the questions involved, and will be reported. The defendants denied each and every allegation of the complaint. The jury rendered a verdict in favor of the plaintiff for \$3,000 actual damages and \$2,000 punitive damages against the Atlantic Coast Line Railroad Company, and the said defendant appealed upon exceptions, which will be reported.

The defendants made a motion to strike out the words in the complaint which we have italicized, but the motion was refused, and this constitutes the first assignment of error.

[1] The plaintiff is required to specify in his complaint the grounds upon which he bases his cause of action for negligence; also, the grounds upon which he bases his cause of action for punitive damages. The italicized words were intended to allege a reckless disregard of the rights of the traveling public at the said place in throwing the cross-arms from the train, from which the law imputes malice, towards the plaintiff, or any other person thereby injured.

[2] The fact that the right of way where the injury was sustained was constantly, and with the knowledge and consent of the appellant, traveled by the public, tends to show that it was recklessness to throw the cross-arms from the train at that point.

[3] But, even if such words were erroneously allowed to remain in the complaint, the exceptions raising this question cannot be sustained, as it has not been made to appear that such error was prejudicial. It is conceded by the appellant's attorneys that the exceptions assigning error on the part of his honor, the presiding judge, in permitting the introduction of testimony, to prove the italicized allegations, cannot be sustained, in case this court sustains the circuit court in refusing to strike out the italicized words.

The next question for consideration is

whether there was any testimony tending to show that the plaintiff was entitled to punitive damages. There was testimony tending to sustain the allegations of the complaint in this respect.

[4] The next question which will be considered is presented by the eighth exception. It is only necessary to refer to the case of *Tolleson v. Railway*, 88 S. C. 7, 70 S. E. 311, to show that this exception cannot be sustained. In that case the court uses this language: "Not only is the conscious invasion of the rights of another, in a wanton, willful, and reckless manner, an act of wrong, but that the same result follows, when the wrongdoer does not actually realize that he is invading the rights of another, provided the act is committed in such a manner that a person of ordinary reason and prudence would say that it was a reckless disregard of another's rights."

The tenth exception raises the next question that will be considered.

[5] It is the duty of a railroad company to load and unload its freight, and in the present case the appellant could not escape liability by delegating such duty to the telegraph company. We have so recently discussed a similar question that we deem it only necessary to cite the case of *Reed v. Railway*, 75 S. C. 162, 55 S. E. 218, to show that this exception cannot be sustained.

The last question to be determined is raised by the eleventh exception. There was other testimony besides the failure of the conductor to keep a proper lookout. Unloading the cross-arms at a point traveled by the public, while the train was running at a rapid rate of speed, tended to show a reckless disregard of the rights of the public and of the plaintiff.

Judgment affirmed.

HYDRICK, WATTS, and FRASER, JJ., concur.

WOODS, J., did not sit.

(92 S. C. 105)

JAMES et al. v. FERGUSON et al.
(Supreme Court of South Carolina. July 22, 1912.)

1. APPEAL AND ERROR (§ 706*)—REVIEW—GRANT OF NEW TRIAL.

Exceptions complaining that the trial judge granted a new trial on the three grounds stated in the motion are not reviewable, where it does not appear that the motion was granted on all or either of such grounds.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2944-2947; Dec. Dig. § 706.*]

2. EVIDENCE (§ 183*)—SECONDARY EVIDENCE—LOST DEEDS.

All parties who offer a copy of a deed in evidence, in lieu of the original, must make proof of the loss of the original.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 605-637; Dec. Dig. § 183.*]

3. EVIDENCE (§ 183*)—SECONDARY EVIDENCE—LOST DEEDS—PROOF OF LOSS—SUFFICIENCY.

A plaintiff made sufficient proof of loss of an original deed, so as to permit him to offer a record copy, where he testified that it was "out of his power to produce" the original; that he had never seen it; that, so far as he knew, the paper was in the possession of the former attorney; and by proof that a member of a law firm, to whom the clerk of the court sent the original after it had been recorded, had searched through the firm papers and through the papers of the first-mentioned attorney, and that it was not found, though the other member of the firm did not search for the lost instrument.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 605-637; Dec. Dig. § 183.*]

Appeal from Common Pleas Circuit Court of Lee County: Robt. E. Copes, Judge.

Action by Sebastian W. James and others against Martha A. Ferguson and others. From an order revoking a nonsuit and granting a new trial, defendants appeal. Affirmed.

L. D. Jennings, of Sumter, for appellants.
A. B. Stuckey, of Sumter, for respondents.

FRASER, J. The following statement appears in the case: "This was a suit commenced by S. W. James, Marion Moise, and A. B. Stuckey, plaintiffs, against William J. James, Andrew Reynolds et al., defendants, for partition of several tracts of land, including a 90-acre tract, in the possession of the defendant Andrew Reynolds. Andrew Reynolds answered, denying that the plaintiffs had the title, or any other of the defendants, to the 90 acres in his possession. The case was placed on calendar 1 to try the issue of title to the 90-acre tract. The case was called for trial, and trial began at Bishopville, Lee county, S. C., on the 26th of October, 1911, before his honor, Robert E. Copes, presiding judge. Mr. A. B. Stuckey, attorney for plaintiff, offered in evidence the record copy of deed of W. H. Ingram, master, to W. F. B. Haynsworth, which he claimed to be a link in the chain of title to the 90-acre tract. When this was offered, L. D. Jennings, attorney for Andrew Reynolds, objected, upon the ground that the plaintiffs had not shown the loss of the original deed, or that it was out of their power to produce the same, or that they had not destroyed or mislaid the same, or in any way previously put it out of their power to produce the same, in order to introduce a copy in evidence. It further appears that the only plaintiff who has any interest in this branch of the case is Sebastian W. James. The presiding judge granted a nonsuit; but, being satisfied that he had made a mistake in granting it, revoked the order and granted a new trial.

[1] The motion for a new trial was made on three grounds. There are four exceptions, three of which complain that his honor erred in granting the motion on the three several grounds taken in the motion. These three

exceptions cannot be considered, inasmuch as it does not appear that his honor granted the motion on all or either of the grounds of the motion. The order simply states that, "after full argument and upon the record, I have concluded that I was in error in excluding the copy of the said deed in evidence which brought about the order of nonsuit; therefore said order is set aside and a new trial ordered."

[2, 3] The appellant's fourth exception complains of error in the order of revocation, on the ground that the original order was correct; and appellant claims that the loss of the original deed of Ingram, master, to W. F. B. Haynsworth was not sufficiently proven. Was there sufficient proof? It is true that there were three plaintiffs of record, and only two testified. It is also true that all the parties who offer the copy must make proof. *Linning v. Crawford*, 2 Bailey, 297.

At this stage of the case, the Moise and Stuckey interests were not involved, and they offered nothing. It was Sebastian W. James who offered the paper, and he was examined and showed that it was "out of his power to produce it." The proof showed that he had never seen the paper; that, so far as he knew, the paper was in the possession of his former attorney, Mr. W. F. B. Haynsworth. The clerk of the court, however, said that, while he did not make the actual transcript on the record, he had possession of the original, and had sent it, together with the bill for recording, to Haynsworth & Haynsworth. It was then proven that a member of the firm of Haynsworth & Haynsworth had searched through their papers and those of his father, Mr. W. F. B. Haynsworth, and it was not found. It is claimed, however, that Mr. Hugh C. Haynsworth, the other member of the firm, should also have looked, in order that all who may have had possession may purge themselves of responsibility. That is not the rule. The Haynsworths did not offer the copy. The rule that all must make proof applies only to those offering the copy, in order that one party to a cause may not suppress testimony.

In *Turner v. Moore*, 1 Brev. 236, it is said sometimes "very slight evidence of the loss, in cases like the present, where the land has been conveyed by the original grantee, and has passed to different purchasers, and no proof that the plaintiff ever had possession of the original grant, ought to be deemed sufficient for the purpose of admitting an authentic office copy in evidence."

Why the record itself should have been treated as a copy of the record does not appear; but the parties have so treated it, and we have accepted the statute as we find it.

His honor was fully justified in granting the order appealed from; and it is affirmed.

GARY, C. J., and HYDRICK and WATTS, JJ., concur. WOODS, J., absent.

(92 S. C. 108)

LAWRENCE v. ATLANTIC COAST LINE R. CO. et al.

(Supreme Court of South Carolina. July 22, 1912.)

1. APPEAL AND ERROR (§ 573*)—STATEMENT OF FACTS—"EX PARTE" STATEMENT.

While, ordinarily, a short statement of the testimony, rather than a complete transcript thereof, is sufficient for appeal, where the parties stipulated to make an agreed statement, and the appellant, being pressed for time, did not submit the statement to the respondent, it was "ex parte," and could not be considered.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 2560-2566; Dec. Dig. § 573.*]

2. MASTER AND SERVANT (§ 291*)—INJURIES TO SERVANT—ACTIONS—INSTRUCTIONS.

In an action for injuries to a railroad employé the court first instructed that a failure to employ competent servants, by which a servant was injured, would render the master liable. At the request of the defendant, the jury were then charged that the master must furnish reasonably safe and suitable appliances for its employés, and that it could not be charged as an insurer of the safety of its employés, being liable only for negligence. A charge, requested by plaintiff, was given that the master must furnish reasonably safe and suitable appliances, and if its failure to do so is the proximate cause of an injury to an employé, without negligence on his part, the master would be liable therefor. The court, of its own motion, then charged that if the jury should find the defendant guilty of the negligence charged in the complaint, and that that negligence was a proximate cause of plaintiff's injury, it should find for the plaintiff; but if the plaintiff himself was negligent, or if both the negligence of plaintiff and defendant concurring produced the injury, they should find for defendant. Held, that the propositions of law stated are not conflicting and irreconcilable, and the charge was proper.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 1133, 1134, 1136-1147; Dec. Dig. § 291.*]

Appeal from Common Pleas Circuit Court of Sumter County; Robert E. Copes, Judge.

Action by Shelley Lawrence against the Atlantic Coast Line Railroad Company and others. From a judgment for plaintiff, the Atlantic Coast Line Railroad Company appeals. Affirmed.

L. W. McLemore, of Florence, and Mark Reynolds, of Sumter, for appellant. L. D. Jennings and J. H. Clifton, both of Sumter, for respondent.

FRASER, J. Appellant's argument thus states the case: "Plaintiff respondent, employed by defendant appellant as brakeman, while attempting to uncouple certain cars in the freight train upon which he was working, was, at Orangeburg, S. C., on June 7, 1910, injured under circumstances concerning which there is conflict in the evidence. Thereafter, on October 6, 1910, this action was commenced to recover damages in the sum of \$25,000 upon allegations of negligence and willfulness in the several particulars described in the complaint. Appellant answered, denying generally the allegations of the complaint,

and alleging respondent's contributory negligence and his acceptance of relief department benefits as affirmative defenses. The case was tried before his honor, Judge Robert E. Copes, and a jury at Sumter, on November 10, 1911, resulting in verdict for plaintiff of \$2,500. The case is before this court on the exceptions appearing in the record."

[1] The appellant was required, by order of court, to withdraw the statement in "the case" upon which exceptions 1, 2, 6, 7, and 8 were based; and therefore these exceptions were abandoned. It seems that appellant and respondent agreed to make an agreed statement, and appellant, being pressed for time, did not submit the statement to respondent. It is not to be inferred from this action of the court that it requires the printing of the testimony (sometimes hundreds of pages of entirely useless testimony), instead of a short statement of it. The statement here was stricken out because it was "ex parte." The appellant said that the statement was true in every word. This court does not doubt it. A statement may be true in every word and still unfair. We do not intend to intimate that this statement was unfair. It was ex parte, and therefore excluded.

[2] The appellant consolidated the third, fourth, and fifth exceptions, as follows: "The remaining exceptions, Nos. 3, 4, and 5, complain of error in the charge, in that, first, his honor charged plaintiff's seventh request with a slight and unimportant modification, containing, as we hope to show, an utterly unsound principle of law; second, that his honor, of his own motion, charged the jury practically to the same effect; third, that, although his honor charged defendant's third request, yet he nevertheless destroyed its effect by charging plaintiff's seventh request, and by the portion of the charge already mentioned as being in consonance with this seventh request. Not only was appellant deprived of its right to have the jury properly instructed upon the questions covered by its third request, but the case was submitted to the jury under the charge, embracing conflicting and irreconcilable propositions of law."

His honor first charged the jury as follows: "Now, it is the duty of the master, as he employs servants, to employ competent servants, reasonably safe and competent servants; and if a person is injured on account of the master's failure to employ competent servants, if by reason of incompetency a servant is injured, and that failure causes the injury, the master would be liable."

The jury were next charged defendant's third request: "It is the duty of a railroad company to furnish reasonably safe and suitable appliances for the use of its employes, and a reasonably safe and suitable place to perform the same; and it is liable only for

negligence in failing to perform this duty. It is not an insurer of the safety of its employes, but it is liable only for negligence. The law does not require it to furnish the most improved and newest appliances, but only requires that it shall furnish those which a reasonably careful person would provide under the same or similar circumstances."

His honor, however, subsequently reiterated the instruction first given, and, as we contend, accentuated the error therein, by granting plaintiff's seventh request and giving it to the jury with the slight modification already referred to: "It is the duty of the master to furnish reasonably safe and suitable appliances to enable the servant to perform his work; and if injury result to the servant, without negligence on his part, on account of the failure of the master to perform this duty to the servant, then the master is liable for such injury, if such failure is the proximate cause of the servant's injury."

The charge must be considered as a whole, and, when so considered, the exceptions cannot be sustained. His honor commenced his charge proper with a definition of negligence. He then, at the defendant's request, charged the jury that the defendant was only liable for negligence. Then, in defendant's third request, he again told the jury "it is liable only for negligence to perform its duty." Then his honor, on his own account, charged as follows: "So, gentlemen of the jury, if the evidence satisfies you by its preponderance that the defendants, or any one or more of them, were guilty of negligence in any respect, in one or more of the respects alleged in the complaint, and that that negligence was the direct and proximate cause of plaintiff's injury, then it would be your duty to find for the plaintiff; but, gentlemen of the jury, if, on the other hand, the evidence satisfies you that the plaintiff himself was negligent, and that his own negligence was the direct and proximate cause of his injury, then it would be your duty to find for the defendant. Or, if you find that the plaintiff was guilty of contributory negligence, in the sense in which I have defined it to you—that is, if you find that the plaintiff was negligent, and that the defendant was also negligent—and those two acts of negligence combining and concurring and moving together brought about the disaster as the proximate cause thereof, then, gentlemen of the jury, in that event it will be your duty to find for the defendant."

These are not "conflicting and irreconcilable propositions of law."

In *Anderson v. Railway*, 70 S. C. 492, 493, 50 S. E. 202, 203, this court says: "The sixth exception is as follows: 'Because his honor erred in instructing the jury that the master must furnish the servant with safe and suitable tools and appliances, and also furnish him with an adequate force of hands to do

the work in a safe manner; and, if he fails in that duty, then he has not come up to the measure of duty imposed upon him by the law. The error being, as it is respectfully submitted, that this instruction overlooked the rule of law which requires the master to furnish his servants with reasonably safe and suitable tools and appliances, and with such a force as would enable him to do the work in a reasonably safe manner, thereby fixing a higher standard of care than the law fixes, and making this standard imperative upon the master.' The charge stated a correct principle of law. *Hicks v. Railway*, 63 S. C. 559, 41 S. E. 753. If the defendant desired further explanation of this principle, requests to that effect should have been presented." In this case the defendant desired a fuller statement, requested it, and the request was granted. These exceptions are overruled.

The judgment of this court is that the judgment of the circuit court be affirmed.

GARY, C. J., and HYDRICK and WATTS, JJ., concur. WOODS, J., absent.

(113 Va. 775)

FLANARY v. COMMONWEALTH.

(Supreme Court of Appeals of Virginia. June 18, 1912.)

1. WITNESSES (§ 304*)—PRIVILEGE—STATUTORY PROTECTION.

A witness in a criminal proceeding cannot avail himself of the privilege against giving incriminating testimony afforded by Const. art. 1, § 8 (Code 1904, p. ccix), where a statute gives him full immunity against liability to prosecution for any unlawful act which he may disclose in such testimony.

[Ed. Note.—For other cases, see *Witnesses*, Dec. Dig. § 304.*]

2. WITNESSES (§ 304*)—PRIVILEGE—STATUTORY PROTECTION.

On a criminal trial a witness was asked whether, after an election, he testified before the grand jury touching the violation of any clause or part of Code 1904, § 145a, and also touching the violation of any other election laws, to which he replied that he went before the grand jury and testified concerning breaches of the election laws. *Held*, that the answer, considered in connection with the question, showed that he had testified relative to violations of section 145a, and hence was entitled to whatever immunity was afforded by subsection 9, § 145a, Code Supp. 1910, providing that no witness, giving evidence in any prosecution or other proceeding under that act, shall be proceeded against for any offense against that act, or against any other election law, committed by him at or in connection with the same election.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. §§ 1061, 1062; Dec. Dig. § 304.*]

3. CRIMINAL LAW (§ 42*)—PRIVILEGE—"PROCEEDING."

A witness testifying before the grand jury relative to violations of section 145a, Code Supp. 1910, is entitled to the immunity afforded by subsection 9, whether the grand jury's investigation results in an indictment, presentment,

or information, or not; such inquiry by the grand jury constituting a "proceeding."

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 45-48; Dec. Dig. § 42.*]

For other definitions, see *Words and Phrases*, vol. 6, pp. 5631-5638.]

4. WITNESSES (§ 304*)—PRIVILEGE—STATUTORY PROTECTION.

Under such subsection 9, a person who testified before the grand jury relative to violations of section 145a, Code Supp. 1910, at a particular election, can be compelled to testify on the trial of a person charged with accepting a bribe to vote at the same election for a particular candidate, under section 3853, although his testimony incriminates himself; that section affording immunity from prosecution under Code 1904, § 145a, or any other election law, coextensive with the constitutional privilege of silence.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. §§ 1051, 1052; Dec. Dig. § 304.*]

Error to Circuit Court, Lee County.

C. R. Flanary, a witness on the trial of Dock Burchett for crime, was adjudged guilty of contempt of court, and he brings error. Affirmed.

J. C. Noel, J. W. Orr, and M. G. Ely, for plaintiff in error. Samuel W. Williams, Atty. Gen., E. E. Skaggs, and E. W. Pennington, for the Commonwealth.

KEITH, P. Dock Burchett was indicted in the circuit court of Lee county at its December term, 1911, for unlawfully and corruptly receiving from C. R. Flanary \$40, under an agreement with him that he, the said Dock Burchett, would vote for J. D. Edds, candidate for clerk, and other candidates in said election, against the peace and dignity of the commonwealth. To this indictment Burchett pleaded not guilty, whereupon a jury was sworn to try the issue, and the commonwealth placed upon the stand C. R. Flanary, and asked him certain questions connected with and relating to the offense charged in the indictment, which the witness refused to answer, because, as he stated, to answer any of the said questions would either incriminate or tend to incriminate himself, and thereupon the court adjudged the witness to be in contempt of court, and assessed against him a fine of \$25 for said alleged contempt, to which judgment Flanary obtained a writ of error.

The petitioner contends that the judgment of the circuit court violates section 8 of the Bill of Rights, article 1 of the Constitution (Code 1904, p. ccix), which declares, that no man shall be "compelled in any criminal proceeding to give evidence against himself"; that the privilege guaranteed by this constitutional provision relates to the personal liberty of the citizen, and it is now a generally accepted principle that such constitutional provisions should be liberally construed and given full force, or the intent thereof will be unavailing; that, being compelled to answer said questions, the petition-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

er would have been deprived of this constitutional right, guaranteed to him by both the Constitution of the United States and the Constitution of Virginia, as construed by this court in the cases of *Cullen v. Commonwealth*, 65 Va. 624, *Temple v. Commonwealth*, 75 Va. 892, and *Kendrick v. Commonwealth*, 78 Va. 490.

In *Cullen's Case*, *supra*, the court said: "By the eighth section of the bill of rights of Virginia a person is not only secured against giving evidence against himself on his own trial, but he cannot be required, on the trial of another, to testify, if his evidence will tend to criminate himself," and that, "even if a person might be required to give evidence on the trial of another which might tend to criminate himself, if the statute afforded him a complete indemnity, by discharging him from all prosecution for the offense (of which *quære*), the act of October 31, 1870 (Acts 1869-70, c. 355), amending section 1, c. 12, of the Code of 1860, does not afford that indemnity, and therefore, in requiring any person engaged in a duel to testify against another prosecuted for having fought such duel, is unconstitutional." It appears from that case that the point decided by the court was that the statute, which it was claimed afforded indemnity to the accused and by virtue of which he was adjudged guilty in the hustings court of the city of Richmond for refusing to testify, was held not to afford a sufficient indemnity against prosecution, and the question was left undecided as to whether or not it was in the power of the Legislature to afford him a complete indemnity by discharging him from all prosecution for the offense.

In *Temple's Case*, *supra*, one Berry was indicted for setting up and promoting a lottery, and Temple was called by the commonwealth as a witness. He refused to testify, upon the ground that his answers might tend to incriminate him; but, the commonwealth relying upon chapter 195, § 20, of the Code of 1873, as affording the witness indemnity from prosecution, a fine was imposed upon the witness, who brought the case to this court, where it was held that the section of the Code relied upon, "which provides that a witness giving evidence in a prosecution for unlawful gaming shall never be proceeded against for any offense of unlawful gaming committed by him at the time and place indicated in such prosecution, does not apply to a prosecution for managing and conducting a lottery, and a witness cannot be required to testify in such a case if he will thereby criminate himself." In that case the opinion was delivered by Judge Christian, and Judge Staples delivered an opinion, concurring in that of Judge Christian, that the "indemnity afforded the witness in prosecutions for gaming by the twentieth section of chapter 195, Code of 1873, is not extended to witnesses in prosecutions for violation of the

laws against lottery dealing. Upon that ground I think the witness in this case would not be compelled to answer the question asked him by the attorney for the commonwealth."

Continuing, the judge said: "If this were a prosecution for unlawful gaming, as defined by our statutes, I think the witness would be bound to testify; for he is fully protected by the very provisions of the twentieth section already adverted to. It is very true I concurred with the majority of the court in *Cullen's Case*, 65 Va. 624; but the question whether the Legislature may not compel the witness to answer by affording him ample indemnity was left undecided in that case. I wish further to say that subsequent reflection has led me to entertain considerable doubt of the correctness of a good deal that was said in *Cullen's Case*, and, if the occasion occurs, I feel myself at liberty to reconsider the whole subject."

In *Kendrick v. Commonwealth*, 78 Va. 490, *Kendrick* was sworn and sent to the grand jury to testify as to a charge against Lyon of unlawful gaming, and refused to answer questions propounded by the grand jury, because the answer would tend to criminate and disgrace him. A majority of the court held, Judge Fauntleroy delivering the opinion, that sections 20 and 22, pp. 314, 315, subc. 10, c. 311, Acts 1877-78, New Criminal Procedure, "secures full protection to witnesses testifying in prosecutions for unlawful gaming, and *Kendrick* is not justified in refusing to testify on the ground that his answer will tend to criminate and disgrace him."

The statute under which indemnity in that case was asserted enacts that "no person, prosecuted for unlawful gaming, shall be competent to testify against a witness for the commonwealth in such prosecution touching any unlawful gaming committed by him prior to the commencement of such prosecution; nor shall any witness, giving evidence either before the grand jury or the court in such prosecution, be ever proceeded against for any offense of unlawful gaming committed by him at the time and place indicated in such prosecution; but such witness shall be compelled to testify, and for refusing to answer questions, may, by the court, be fined a sum not exceeding five hundred dollars, and be imprisoned for a term not exceeding six months"; and by the twenty-second section of the same act it is provided that "in a criminal prosecution, other than for perjury or an action on a penal statute, evidence shall not be given against the accused of any statement made by him as a witness upon a legal examination."

The court was of opinion that these provisions of the law "give to the witness full indemnity and assurance against any liability to prosecution for a disclosure which he could be called upon to make as to his own

implication or complicity in the unlawful gaming as to which he was sworn and sent to the grand jury to testify. It was the duty of the witness to testify, and, therefore, we do not think the hustings court erred in its judgment complained of."

In *State of Kansas v. Jack*, 69 Kan. 387, 76 Pac. 911, 2 Ann. Cas. 171, annotated in 1 L. R. A. (N. S.) 167, it was held that the exemption provided by the Bill of Rights, that "no person shall be a witness against himself," cannot be claimed by a witness when, by the terms of a statute, the immunity afforded is coextensive with the constitutional privilege of silence.

In *Hale v. Henkel*, 201 U. S. 43, 26 Sup. Ct. 370, 50 L. Ed. 652, which construes article 5 of the amendments to the Constitution of the United States, which is in effect identical with the provision in the Virginia Bill of Rights, it was held that "the right of a witness to claim his privilege against self-incrimination, afforded by Const. U. S. Amend. 5, when examined concerning an alleged violation of the anti-trust act of July 2, 1890 [26 Stat. 209, c. 647 (U. S. Comp. St. 1901, p. 3200)], is taken away by the proviso to the act of February 25, 1908 [32 Stat. 904, c. 755 (U. S. Comp. St. Supp. 1911, p. 1313)], that no person shall be prosecuted or be subjected to any penalty or forfeiture for, or on account of, any transaction, matter, or thing concerning which he may testify or produce evidence in any proceeding, suit, or prosecution under certain named statutes, of which the anti-trust act is one, which furnishes a sufficient immunity from prosecution to satisfy the constitutional guaranty."

In a note to *State v. Jack*, *supra*, very many authorities are collated, as a result of which it seems to be established that, "before the constitutional privilege of silence could be taken away by the Legislature, there must be absolute indemnity provided; that nothing short of a complete amnesty to the witness—an absolute wiping out of the offense so that he could no longer be prosecuted for it—would furnish that indemnity; and that a provision merely that the testimony of a witness should not be used in evidence against him did not secure such absolute immunity."

The law was so declared in *Counselman v. Hitchcock*, 142 U. S. 547, 12 Sup. Ct. 195, 35 L. Ed. 1110, where it was decided that nothing short of absolute immunity from prosecution could satisfy the constitutional guaranty, and that a statute declaring that no evidence obtained from a witness should be given in evidence, or in any manner used against him or his property or estate, in any court of the United States, in any criminal proceeding, or for the enforcement of any penalty or forfeiture, did not supply a complete protection from all the perils which the constitutional guaranty was designed to guard, since it would not prevent the use of

his testimony to search out other testimony to be used against him or his property.

In *Brown v. Walker*, 161 U. S. 591, 16 Sup. Ct. 644, 40 L. Ed. 819, it was held that exempting a witness from any prosecution, or any penalty or forfeiture, on account of any transaction to which he may testify, sufficiently satisfies the guaranty against self-incrimination. The court further said that the fact that a witness cannot be shielded from the personal disgrace attaching to the exposure of his crime does not render a statute exempting him from prosecution therefor unconstitutional.

[1] We consider it, therefore, as established that the case of *Kendrick v. Commonwealth*, *supra*, was correctly decided, and that, where the law gives to the witness full indemnity and assurance against any liability to prosecution for a disclosure which he could be called upon to make as to his own implication or complicity in the unlawful act as to which he was sworn and sent to the grand jury to testify, he is bound to answer, and cannot shield himself under the provision of our Bill of Rights. It remains to consider whether or not the provisions of our statute do give to the witness that immunity from prosecution which he is entitled to demand before being called upon to answer a question which may tend to incriminate himself.

Section 145a of the Code, commonly known as the "Barksdale Pure Election Law," provides that no candidate "shall expend, pay, promise, loan, or become pecuniarily liable in any way for any money or other valuable thing to influence voters in his behalf, or permit the same to be so used, with his knowledge and consent, by his friends or adherents in any election, primary or nominating convention: Provided, however, that no expenditure made by any candidate or his adherents and friends for the purpose of printing or advertising in some newspapers, or in securing suitable halls for public speaking at a reasonable price, shall be deemed illegal."

It will be observed that section 145a is directed against the giver of the bribe, and the indemnity afforded the person who testifies as to a matter which may incriminate him is found in subsection 9 of section 145a, as amended (Code Supp. 1910), which now reads as follows: "No witness giving evidence in any prosecution, or other proceeding under this act, shall ever be proceeded against for any offense against this act, or against the other election laws, committed by him at or in connection with the same election."

The prosecution of Burchett was under section 3853 of the Code, which by its own terms affords no immunity, and reads as follows: "If any person, directly or indirectly, give to a voter in any election any money, goods, or chattels under an agreement, express or implied, that such voter shall give

his vote for a particular candidate, or for or against any question voted on at any such election, such person shall be fined not less than one hundred dollars nor more than one thousand dollars, or confined in jail not less than one nor more than twelve months. And the voter receiving such money, goods, or chattels, in pursuance of such agreement, shall be punished in like manner with the person giving the same."

It was, therefore, properly conceded in argument by counsel for the commonwealth that the conviction of Flanary could not be maintained unless he had been called upon to testify under section 145a, and was thereby brought therefore under the protection of the immunity afforded by subsection 9 of that section.

[2] When Flanary was put upon the stand, he was asked, as has already been stated, a number of questions, which are copied into the record, among them question 6, which is as follows: "After said election in said county, were you sent as a witness before the grand jury of Lee county at the December term, 1911, of the circuit court of said county to give evidence before said grand jury touching the violation of any clause or part of section 145a of the Code of Virginia for 1904, as amended by the Acts of the General Assembly of Virginia of 1908, and in force June 26, 1908, and also touching the violation of any other election laws?" to which question the witness answered: "Yes; I was before the grand jury at the December term, 1911, of said court, and then and there testified concerning breaches of the election law. I was compelled to testify before said grand jury by the court, because, as I understood it, if I refused to testify the court would have fined or imprisoned me for contempt."

The question in terms embraces an inquiry into the violation of any clause or part of section 145a of the Code of Virginia for 1904. That is the specific point of inquiry, and it was then added, "and also touching the violation of any other election laws." The answer of the witness was, "Yes; I was before the grand jury at the December term, 1911, of said court, and then and there testified concerning breaches of the election law." Of what election law? The specific inquiry of the question was as to section 145a of the Code for 1904, as amended by the Acts of the General Assembly of Virginia of 1908; and the categorical answer of the witness is, "Yes; I was before the grand jury at the December term, 1911, of said court, and then and there testified concerning breaches of the election law." If there could be any doubt as to what election law was referred to by the witness' answer, it would arise rather with respect to the inquiry as to other election laws than section 145a, which is specifically mentioned; but we think it is manifest, from the question

asked and from the answer given, that the witness did not intend any such discrimination, but plainly intended by his answer to state that he was examined as to section 145a, and also touching the violation of other election laws—as, for instance, section 3853 of the Code.

[3] It is true that it does not appear that the investigation as to violation of section 145a resulted in any indictment, presentment, or information. The grand jury was exercising its functions as an inquisitorial body, and searching, as it was its duty to do, into any and all violations of the criminal laws of the commonwealth, and especially those pertaining to the election laws. In the course of that inquiry, and within the strict limits of its duty, if Flanary was put upon the witness stand and interrogated as to the giving of bribes within the purview of section 145a, it matters not that the facts elicited by the grand jury did not culminate in any prosecution under that statute. It is the scope and extent of the inquiry, and not the use which was subsequently made of the information thus elicited, with which we are concerned, and which is to determine whether or not the witness was brought within the terms of the immunity embraced in subsection 9 of section 145a.

In *Hale v. Henkel*, supra, it is said that the examination of the witness before the grand jury need not be preceded by a presentment, indictment, or other formal charge; that in the summoning of witnesses before a grand jury it is sufficient to apprise them of the names of the parties with respect to whom they will be called upon to testify, without indicating the nature of the charge against such persons." Mr. Justice Brown, in delivering the opinion, uses the following language: "We are pointed to no case holding that a grand jury cannot proceed without the formality of a written charge. Indeed, the oath administered to the foreman, which has come down to us from the most ancient times, and is found in *Shaftesbury's Trial*, 8 How. St. Tr. 769, indicates that the grand jury was competent to act solely on its own volition. This oath was that 'you shall diligently inquire and true presentments make of all such matters, articles, and things as shall be given you in charge, as of all other matters and things as shall come to your own knowledge touching this present service,' etc. This oath has remained substantially unchanged to the present day. * * * While no case has arisen in this court in which the question has been distinctly presented, the authorities in the state courts largely preponderate in favor of the theory that the grand jury may act upon information received by them from the examination of witnesses without a formal indictment, or other charge, previously laid before them."

In *Hale v. Henkel* it was suggested that

a person who has testified compulsorily before a grand jury may not be able, if subsequently indicted for some matter concerning which he testified, to procure the evidence necessary to maintain his plea, but that suggestion the court deemed to be more fanciful than real. "He would have, not only his own oath in support of his immunity, but the notes often, though not always, taken of the testimony before the grand jury, as well as the testimony of the prosecuting officer, and of every member of the jury present. It is scarcely possible that all of them would have forgotten the general nature of his incriminating testimony, or that any serious conflict would arise therefrom. In any event, it is a question relating to the weight of the testimony, which could scarcely be considered in determining the effect of the immunity statute. The difficulty of maintaining a case upon the available evidence is a danger which the law does not recognize. In prosecuting a case, or in setting up a defense, the law takes no account of the practical difficulty which either party may have in procuring his testimony. It judges of the law by the facts which each party claims, and not by what he may ultimately establish."

In the case before us the difficulty suggested does not arise, for the witness himself proves that he was examined touching the matter from which his immunity from prosecution is held to flow.

As to the inquisitorial power of a grand jury, we refer to what was said by this court in the recent case of *In re Cutchin*, 74 S. E. 403.

We have thus far concluded that it is within the power of the Legislature to compel a witness to answer incriminating questions, if he is by law completely protected against any prosecution touching the matter with respect to which he is interrogated; secondly, that Flanary was, in this case, questioned with respect to the violation of section 145a, and thereby became entitled to whatever immunity is afforded by the ninth section of that act; and it only remains for us to consider whether that be sufficient to afford him that complete immunity from prosecution to which we are of opinion that he is entitled.

[4] The language of the immunity clause is: "No witness giving evidence in any prosecution, or other proceeding under this act, shall ever be proceeded against for any offense against this act, or against the other election laws, committed by him at or in connection with the same election."

Turning again to *Hale v. Henkel*, supra, we find that the United States statute there under consideration provides that "no person shall be prosecuted or be subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing, concerning which he may testify or produce evidence, documentary or otherwise, in any pro-

ceeding, suit, or prosecution under said acts," of which the anti-trust statute is one. It will be observed that this act uses the term "proceeding," just as the act under consideration does, and Mr. Justice Brown, with reference to it, speaks as follows:

"While there may be some doubt whether the examination of witnesses before a grand jury is a suit or prosecution, we have no doubt that it is a 'proceeding,' within the meaning of this proviso. The word should receive as wide a construction as is necessary to protect the witness in his disclosures, whenever such disclosures are made in pursuance of a judicial inquiry, whether such inquiry be instituted by a grand jury, or upon the trial of an indictment found by them. The word 'proceeding' is not a technical one, and is aptly used by the courts to designate an inquiry before a grand jury. It has received this interpretation in a number of cases.

"The object of the amendment is to establish in express language and upon a firm basis the general principle of English and American jurisprudence that no one shall be compelled to give testimony which may expose him to prosecution for crime. It is not declared that he may not be compelled to testify to facts which may impair his reputation for probity, or even tend to disgrace him; but the line is drawn at testimony that may expose him to prosecution. If the testimony relate to criminal acts long since past, and against the prosecution of which the statute of limitations has run, or for which he has already received a pardon or is guaranteed an immunity, the amendment does not apply."

We have the very high authority, therefore, of the Supreme Court of the United States, that if a witness has been called upon to testify before a grand jury in any proceeding before that body, although there may be no indictment, presentment, or information, but merely an inquiry instituted by the grand jury itself, the witness is entitled to invoke the benefits of the laws which shield him from prosecution.

In this case the witness, having testified under section 145a, by the terms of subsection 9 can never be proceeded against for offenses against that act, "or against the other election laws, committed by him at or in connection with the same election." The immunity is as complete with respect to offenses against other election laws as it is with respect to an offense against the particular act within the terms of which the immunity is found.

We conclude, therefore, to use the language of the court in *Kansas v. Jack*, supra, that by the terms of our statute the immunity afforded is coextensive with the constitutional privilege of silence, from which it follows that the judgment of the circuit court must be affirmed.

Affirmed.

(123 Va. 547)

CLEMENT v. ADAMS BROS.-PAYNES CO., Inc.

(Supreme Court of Appeals of Virginia. June 13, 1912.)

1. CORPORATIONS (§ 398*)—POWERS—OFFICERS.

The powers of a corporation, so far as it deals with third persons, are primarily lodged in its board of directors, from which source the officers, expressly or by implication, derive the authority bestowed on them.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1592-1594; Dec. Dig. § 398.*]

2. CORPORATIONS (§ 398*)—OFFICERS—PRESIDENT—POWERS.

The office of president of a corporation confers of itself no power to bind the corporation or control its property, and the power of the president as agent must be conferred by the board of directors.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1592-1594; Dec. Dig. § 398.*]

3. MECHANICS' LIENS (§ 5*)—STATUTES—CONSTRUCTION.

The remedial portion of the mechanic's lien statute, providing for enforcing a lien after it is perfected, must be liberally construed, while the portion dealing with the right to the existence of a lien must be strictly construed.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. §§ 3, 5; Dec. Dig. § 5.*]

4. MECHANICS' LIENS (§§ 154, 157*)—VERIFIED ACCOUNT—SUFFICIENCY OF VERIFICATION.

Under Code 1904, §§ 2476, 2477, declaring that to perfect a lien an account must be filed, verified by the oath of the "claimant or his agent," the verification of the account by the claimant or his agent is an essential requirement to the perfection of a lien, and where a corporation is a claimant, a verification by its president is insufficient to perfect a lien, unless the affidavit avers that he is the agent of the corporation for that purpose, and a defect in the affidavit arising from a failure to aver the fact of agency is not within section 2478, providing that no inaccuracy in the account filed or in the description of the property to be covered by a lien shall invalidate the lien.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. §§ 261-267, 268-274; Dec. Dig. §§ 154, 157.*]

5. MECHANICS' LIENS (§ 258*)—WANT OF JURISDICTION.

Where a court of equity, in a suit to enforce a mechanic's lien, may not enforce a lien for the failure of the claimant to properly verify the account, it has no jurisdiction to afford relief, and the bill must be dismissed.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. §§ 452-454; Dec. Dig. § 258.*]

Buchanan, J., dissenting.

Appeal from Circuit Court, Appomattox County.

Suit by the Adams Bros.-Paynes Company, Incorporated, against one Clement. From a decree overruling a demurrer to the bill, and from a final decree for plaintiff, defendant appeals. Reversed, and bill dismissed.

Caskie & Caskie, for appellant. F. C. Moon, Sackett & Sackett, and R. C. Blackford, for appellee.

HARRISON, J. The bill in this case was filed by the appellee corporation for the purpose of asserting and enforcing an alleged mechanic's lien against certain real estate of the appellant. A demurrer to the bill by the appellant was overruled, and upon the final hearing a decree was entered in favor of a receiver appointed by the court for \$367.39, the balance due from the appellant, and provision made for the sale of her property to satisfy the same. From the decree overruling the demurrer, and the final decree, this appeal was allowed.

The first assignment of error is to the action of the circuit court in overruling the demurrer to the bill. The ground of demurrer was that the alleged mechanic's lien was not supported by proper affidavit, and was, therefore, void and of no effect; that in support of an account constituting the basis for a mechanic's lien the statute requires the same to be verified by the affidavit of the "claimant or his agent," whereas, in this case, the affidavit was made by C. S. Adams, the president of the plaintiff corporation, and contains no averment of any agency on the part of the affiant, and that it cannot be implied that the president of the appellee corporation was, by virtue of his office, its agent to make the required affidavit.

Section 2475 of the Code provides that all lumber dealers and other persons furnishing materials for the construction of any building shall have a lien, "if perfected as hereinafter provided," upon such building or structure.

Sections 2476 and 2477 provide that, among other steps necessary to perfect such lien, an account shall be filed by the general or subcontractor, as the case may be, showing the amount and character of the materials furnished, the prices charged therefor, the payments made, if any, and the balance due, verified by the oath of the "claimant or his agent."

Adams Bros.-Paynes Company is a corporation, and the language of the affidavit attached to the account which constitutes the basis of the proceeding is that "C. S. Adams, the president of Adams Bros.-Paynes Company, a corporation, this day personally appeared before me in my said city, and, being by me first duly sworn, made oath to the correctness of the foregoing account."

[1] The contention of the appellee, that the president of a corporation is necessarily its agent for the purpose of making the affidavit required in this case, cannot be sustained. The general doctrine is well settled that the powers of a private corporation, so far as its dealings with third persons are concerned, are primarily lodged in its board of directors, from which source the officers, either expressly or by implication, derive such measure of authority as may be bestowed upon them.

[2] With respect to the powers of the president of a corporation it is said: "The office itself, however, confers no power to bind the corporation or control its property. The president's power as an agent must be sought in the organic law of the corporation, in a delegation of authority from it, directly or through its board of directors formally expressed or implied from a habit or custom of doing business." 10 Cyc. 903; 2 Cook on Corp. (5th Ed.) § 716; Morawetz on Private Corp. § 537. See, also, *Crump v. U. S. Mining Co.*, 48 Va. 352, 56 Am. Dec. 116; *Hodge v. Bank*, 63 Va. 60.

"The implied powers of the president of a corporation depend upon the nature of the company's business and the measure of authority delegated to him by the board of directors. It seems that a president has no greater power, by virtue of his office merely, than any other director of the company, except that he is the presiding officer at the meeting of the board. The Supreme Court of New Jersey said: 'In the absence of anything in the acts of incorporation bestowing special power upon the president, he has from his mere official station no more control over the corporate property and funds than any other director. The affairs of corporate bodies are within the exclusive control of their board of directors, from whom authority to dispose of their estates must be derived.'" 1 Morawetz on Private Corp. § 537.

In the case of *Lancaster v. Barton*, 92 Va. 615, 24 S. E. 251, where the question was as to the sufficiency of an affidavit to a bill which had to be verified by the oath of the plaintiff, and it appeared of record that the party objecting had shown by his own witness that the bill was signed and sworn to by each of the plaintiffs in his proper person, it was held to be sufficient; the court saying, however, that "the better practice was for the certificate to show on its face that the bill was sworn to by the plaintiff, and not leave that fact to be supplied by evidence aliunde." Since that decision this court has repeatedly held that, if the affiant bore the relation of agent to the plaintiff, the fact must be averred in the affidavit.

In the case of *Merriman v. Thomas*, 103 Va. 24, 48 S. E. 490, in construing section 3286 of the Code, which provides that, if in an action of assumpsit the account sued on is verified by an affidavit made by "the plaintiff or his agent," no plea in bar shall be received unless accompanied by a like counter affidavit, this court held that the word "bookkeeper" did not import agency, and that the affidavit of the plaintiff's bookkeeper, without more, was not a compliance with the statute. The court says: "The statute makes an innovation upon the established mode of procedure in such cases, and the plaintiff, in order to take advantage of it,

must proceed in accordance with its provisions. The affidavit can only be made by the plaintiff or his agent."

The court also in that case quoted with approval 2 *Cyclopedia of Law & Procedure*, page 5, where it is said, concerning affidavits and who may make them: "In determining this question, reference must always be had to the statutes and the rules of court governing the particular affidavit. Thus, where a statute specifically points out who may make a certain affidavit, it can be made by no other than those specified." The court adds: "If the statute had prescribed that the affidavit should be made by the plaintiff in person, then it could have been made by no one else, and, when it is declared that it must be made by the plaintiff or his agent, the courts must be content to construe the language employed. * * * While a bookkeeper may be, and often is, the agent of his employer, the word does not, *ex vi termini*, import that relation, and, in the absence of averment in the affidavit that it exists, the courts cannot by intendment enlarge the ordinary signification of the word, so as to bring it within a class to which it may or may not belong."

In the case of *Taylor v. Sutherland-Meade Co.*, 107 Va. 787, 60 S. E. 132, this court held that it could not say, as a matter of law and in the absence of averment, that the term "secretary and treasurer" necessarily imported the relation of agency between such officer and his corporation, within the intendment of the attachment laws of this state, which require the affidavit to be made by the "plaintiff, his agent or attorney"; that if he was in fact such agent it should have been averred in the affidavit. Upon petition for rehearing in that case, we were asked to remand the case to the lower court for the purpose of enabling the appellants to prove the agency of the "secretary and treasurer." This was denied, upon the ground that jurisdiction of attachments in equity was acquired alone by force of the affidavit, and that on appeal, in a case founded on an insufficient affidavit, this court could only abate the attachment and dismiss the proceeding, in the absence of application to amend the affidavit in the trial court.

In the more recent case of *Damron & Kelly v. Bank*, 112 Va. 544, 72 S. E. 153, the same conclusion was reached with respect to affidavits made in support of attachment proceedings, in the one case by the vice president of a corporation, and in the other by a director of the same corporation; the court holding that neither the vice president nor the director of a bank was such an agent of the corporation, in contemplation of the attachment laws, as to authorize either of them, by virtue of his office, without other authority, to make the required affidavit, and further holding that correct practice required the affidavit to aver that the affiant was the "plaintiff, his agent or attorney," if such was

the fact, and that compliance with the rule imposed no undue hardship, as a corporation could appoint as many agents as it pleased with specific authority to make such affidavits.

[3] The appellee contends that affidavits in attachment proceedings might be held defective, whereas a different rule would obtain as to mechanics' liens, when a more liberal construction is to be applied. There is no difference in the rule of construction in the two cases, when that portion of the mechanic's lien statute which prescribes the method of perfecting the lien is being construed. The remedial portion of the statute, which provides for enforcing the lien after it is perfected, is to be liberally construed; but that portion dealing with the right to the existence of the lien is to be strictly construed.

This distinction as to construction is laid down in 20 A. & E. Ency. of Law (2d Ed.) p. 278, where, after reviewing the authorities on the question of the method of construction of mechanic's lien statutes, the conclusion is reached, under the heading of "The Safe Rule," that "the nearest approach to a general rule which can be safely laid down would seem to be that the remedial portion of mechanic's lien statutes should be liberally construed, but that the other parts, those upon which the right to the existence of a lien depends, being in derogation of the common law, should be strictly construed."

This rule of construction has been clearly recognized by this court in the case of Bristol Iron, etc., Co. v. Thomas, 83 Va. 396, 400, 401, 25 S. E. 110, 112, where it is said: "The statute upon this subject is remedial in its nature, and while courts require a strict compliance with all the statute prescribes for the completion or perfection of the lien, and cannot by construction supply any failure or omission on the part of the claimant, and to this extent may be said to place a strict construction upon the statute, as being an innovation upon the common law, yet when the mechanic has done all that it is necessary for him to do, has performed the work or supplied the material, and perfected his lien therefor in the prescribed mode, the duty of the court is to see that those whom the law intended to protect shall enjoy the advantages which it confers."

In Trustees v. Davis, 85 Va. 193, 7 S. E. 245, in speaking of the provisions for perfecting mechanics' liens, it is said: "These provisions of the statute are indispensable to the creation of the lien, and hence, if one of them be not complied with, no lien is acquired."

And in Shackelford v. Beck, 80 Va. 573, 577, referring to those portions of the mechanic's lien statutes, the court says, the statute has "prescribed in express, plain, and unmistakable language *the way*, and the *only way*, in which the purpose it had in

view can be effected. * * * It is purely a creation of the statute, and it must be availed of, if at all, upon the terms and conditions which the statute prescribes." And on page 579 it is said: "As the law calls for nothing unreasonable at the hand of him who would fasten an incumbrance upon the property of his neighbor, no just ground of complaint is afforded by insisting upon a rigid adherence to its provisions."

The appellee relies upon section 2478 of the Code as showing that the Legislature intended a very liberal construction, and, therefore, that the affidavit, though not in strict compliance with the statute, would be good. That section provides that "no inaccuracy in the account filed, or in the description of the property to be covered by the lien, shall invalidate the lien," etc.

The Legislature having designated but two defects that could be disregarded, it would seem that under the doctrine of "*inclusio unius, exclusio alterius*," it intended that defects not mentioned were to be regarded.

[4, 5] In conclusion, and in the light of the authorities cited, we are of opinion that the verification of the account by the affidavit of the "claimant or his agent" is one of the essential requirements of the statute in perfecting a mechanic's lien; that the president is not, by virtue of his office, the agent of his corporation to make such an affidavit; and that unless the affidavit, when made by the president, avers that he is in fact the agent of the corporation for that purpose, the lien is not perfected, and, therefore, does not exist. There being no lien, a court of equity is without jurisdiction to afford relief, and the bill must be dismissed.

For these reasons, the decrees complained of must be reversed, the demurrer sustained, and the bill dismissed, with costs.

Reversed.

KEITH, P., absent.

BUCHANAN, J. (dissenting). The action of the court in overruling the demurrer to the bill is assigned as error. The ground of the demurrer to the bill, which was filed to enforce a mechanic's lien, is that the lien is void because not supported by the proper affidavit.

The Code provides that in order to perfect such lien the contractor or subcontractor (sections 2476, 2477) shall, among other things, file in the clerk's office of the proper court "an account showing the amount and character of the work done or materials furnished, the prices charged therefor, the payments made, if any, and the balance due, verified by the oath of the claimant or his agent, with a statement attached declaring his intention to claim the benefit of said lien. * * *

The affidavit, the sufficiency of which is denied, is as follows: "I, Josephine G. Yeatman, a notary public in and for the city of Lynchburg, in the state of Virginia, do hereby certify that C. S. Adams, the president of Adams Bros.-Paynes Company, a corporation, this day personally appeared before me in my said city, and, being by me first duly sworn, made oath to the correctness of the foregoing account."

The objection made to the affidavit is that it was "made by C. S. Adams, president of the plaintiff corporation, and contains no averment of any agency on the part of said Adams. The mere use of the term 'president' does not imply such agency."

Assuming, but not deciding, that, where an affidavit is made by a person as agent of a corporation, the fact that he is such agent must be stated or averred in the affidavit, where it is made by the president of the corporation, as well as where it is made by its bookkeeper, as in *Merriman v. Thomas*, 108 Va. 24, 48 S. E. 490, or by its secretary and treasurer, as in *Taylor, Receiver, etc., v. Sutherland-Meade Tobacco Co.*, 107 Va. 787, 60 S. E. 132, or by its vice president, or its director, as in *Damron & Kelly v. Citizens' Nat. Bank*, 112 Va. 544, 72 S. E. 153, it does not follow, as it seems to me, that the affidavit in question is not sufficient. The statute expressly provides that the affidavit required can be made in either of two ways—by the claimant himself, or by his agent. It is not denied, and if it were the contrary has been expressly decided (*Haskin Co. v. Cleveland Co.*, 94 Va. 439, 447, 26 S. E. 878), that a corporation is within the meaning and entitled to the benefits of our mechanic's lien law. Since a corporation may be a mechanic's lien claimant, why cannot the affidavit required be made by it through its president, as well as by an agent expressly authorized to make it? To hold otherwise would be, as was said by the Court of Errors and Appeals of the state of New Jersey in passing upon the sufficiency of an affidavit made under a chattel mortgage statute, which provided that the affidavit required might be made by the holder of the mortgage or his agent or attorney, to rest the decision upon "the denial of the right of a corporation to be a holder within the meaning and entitled to the benefits of the statute, or else upon the assumed right of the court to nullify one of the three modes by which the Legislature has allowed the affidavit to be made." *Am. Soda Fountain Co. v. Stolzenbach*, 75 N. J. Law, 721, 725, 68 Atl. 1078, 1080 (16 L. R. A. [N. S.] 708, 127 Am. St. Rep. 822).

The decision cannot be rested on the former alternative; for, as we have seen, a corporation is within the meaning of and entitled to the benefits of the statute. It cannot be rested on the latter alternative, unless it be that a corporation cannot make

such affidavit per se, but only per alium—by an agent. It is true that a corporation cannot perform the acts required of a mechanic's lien claimant, except through some agency or some agent. It cannot make out and file the account required by section 2476, or give the notice required by section 2477, any more than it can make the affidavit required by both sections, except by some agency or agent; but it does not follow that, because it must use some agency in performing those acts, it is not doing them per se, but is acting per alium. The corporation may make out and file the account and give the notice required through its own administrative officers—"its inherent agencies," as they are sometimes called—or it may cause those things to be done by a person specially authorized to do them. In the one case, it is doing the acts itself; in the other, its authorized agent is doing the acts for it.

The distinction between these two modes of acting is clearly stated by Judge Dill in delivering the opinion of the Court of Errors and Appeals of the state of New Jersey in the case of *American Soda Fountain Co. v. Stolzenbach*, supra. He says: "The fallacy of the argument of the defendant in error is that it fails to note the distinction between a corporate act, performed through the intermediation of a person specially empowered to act as its agent or its attorney, and a like act done immediately by the corporation, through its administrative officers—its inherent agencies. The right of an artificial person to empower and employ agents or attorneys is identical with that of a natural person—each is governed alike by the law of principal and agent. The fundamental difference between the natural and the artificial person is that the latter, even when not acting as principal through the intermediation of an agent, acts through some agency inherent in its corporate form. Normally, such agency inheres in the natural persons who hold and administer the offices of the corporation. The analogy of a natural body having a head and members holds good in the case of the artificial body; the common and declared law recognizing that the officers are the means, the hands, the head, by which corporations normally act. *Bank of Toronto v. McDougall*, 15 U. C. C. P. 475, 482. The very word 'officer' has this precise meaning. Webster gives the etymology of the word as 'ops,' help, and 'facere,' to do or make. Hence, when a corporation does not go outside of its corporate machinery and capacity in doing a corporate act, it is a confusion of terms and of ideas to say that it is acting through an agent, when the fact is that it is acting through an agency, and in chief. This distinction is not merely verbal, and hence trivial, but, on the contrary, marks the wide difference that exists between acting for

oneself by an inherent faculty and the employment of another person to act for and in one's stead. In this as in all cases, loose terminology implies and conduces to loose reasoning. The maxim 'qui facit per alium facit per se' requires and should be applied only when the agent—the alius—is not the principal acting for himself."

That a corporation does and may so act has been recognized in numerous cases. The English cases seem to recognize the distinction between the act of the corporation by an agent or attorney and the act of an administrative officer in behalf of the corporation. *Deffell v. White*, 36 L. J. N. S. Common Pleas, 25; *Shears v. Jacobs* (1866) 35 L. J. (N. S.) pt. 2, Common Pleas, 241; *Penwarden v. Roberts* (1882) 51 L. J. (N. S.) pt. 2, Common Law, 312.

In *Bank of Toronto v. McDougall*, 15 U. C. C. P. 475, the question was as to the validity of an affidavit as to the bona fides of a mortgage made by one of the officers of the corporation, in which there was no recital of specific authority, nor a statement that the officer was the agent of the corporation, nor evidence, by statute or otherwise, that the officer, by virtue of his office, had the power to bind the corporation. When that case was decided the statutes of Canada provided that, where such affidavit was made by the agent or attorney, there must accompany it proof of authority. It was held that when the officer made the affidavit he did not act as an agent, but directly and in chief, and not by delegation, and that the affidavit might be properly considered as the affidavit of the mortgagee corporation, "made in the only way the mortgagee could make the affidavit, namely through its administrative officer."

In *New Brunswick Steamboat Co. v. Baldwin*, 14 N. J. Law, 440, it was held that "an affidavit made by the president, secretary, or other proper officer or agent of a corporation, where the corporation is a party to the suit, is in legal contemplation an affidavit made by the party."

In *Hopper v. Lovejoy*, 47 N. J. Eq. 573, 21 Atl. 298, 12 L. R. A. 588, it was decided that "in the eye of the law" the acknowledgment annexed to a chattel mortgage made by an officer of the grantor (corporation) was the acknowledgment of the grantor itself, as distinguished from the act of an agent or attorney.

In New York it is held that the verification of a pleading by an officer of a corporation is the verification of the corporation; that because an officer of the corporation acts in chief, and not by delegation, in making such verification, he is neither an agent nor an attorney, nor is he within the rule that an agent or attorney must state his authority and the sources of his information and the grounds of his belief. "Such verification," it was said by the court, "is the ver-

ification of the corporation and a verification by the party." *American Insulator Co. v. Bankers', etc.*, Tel. Co., 13 Daly (N. Y.) 200, 205; *Henry v. Brooklyn Heights R. Co.*, 43 Misc. Rep. 539, 89 N. Y. Supp. 525; *Shaft v. Phoenix Mutual Life Ins. Co.*, 67 N. Y. 544, 23 Am. Rep. 138.

In *Bank v. Hutchinson*, 87 N. C. 22, the conclusion was reached, based upon similar reasoning, that the verification of pleadings by an officer of a corporation is the verification of the corporation itself.

In *Lewiston Co-op. Soc., etc., v. Thorpe*, 91 Me. 64, 39 Atl. 283, the Supreme Judicial Court of Maine held that the oath of the president of a corporation was to be regarded as the oath of the corporation. In that state a debtor about to leave the same may in certain cases be arrested, but to justify such arrest the statute requires "the creditor, his agent or attorney," to make oath to a belief in the facts enumerated in the statute. The court said, among other things, in discussing the question, that "for the purpose of the creditor's oath to authorize arrest we regard the president, in taking the oath, as representing the corporation; and the oath so taken is to be regarded as the oath of the creditor corporation within the meaning of the statute." There was nothing in the affidavit to show the authority of the affiant to make it, other than that he was the president of the creditor corporation.

In *Scott Stamp Co. v. Leake*, Adm'r, 9 Cal. App. 512, 518, 99 Pac. 731, it was held that the only way that a corporation can act in verifying a claim against the estate of a decedent is by the affidavit of one of its officers, that the statement of his office in the affidavit is sufficient, and that the section of the Code requiring an affidavit to such a claim made by a person other than the claimant to set forth the reasons therefor did not apply, since the affidavit must be regarded as made by the corporation itself.

Unless the affidavit of the president of a corporation can be treated as the affidavit of the corporation itself—an act per se, and not per alium—there are many cases in which corporations would be deprived of the benefit of statutes, where they are as much within the reason and spirit of the law, if not the letter, as private individuals; for, where the word "person" is used in a statute, corporations as well as individuals are included for civil purposes. This was the rule at common law, and is also the rule under subsection 13 of section 5 of the Code, unless they are exempt by its terms or by the nature of the subject to which the statute relates. *B. & O. R. R. Co. v. Gallahue's Adm'rs*, 53 Va. 655, 65 Am. Dec. 254; *Miller v. Commonwealth*, 68 Va. 110; Const. § 153 (Code 1904, p. ccxlix); Code, § 1313a, cl. 1.

In the chapter on Mechanics' Liens, as to a certain class of liens, it is provided by sec-

tion 2487 of the Code that "any assignee of such claim may file the memorandum and make the oath required by the preceding section, and shall have the same rights as the assignor."

Under the interpleader statute (section 2908 of the Code), the affidavit required is the affidavit of the defendant who wishes to take advantage of its provisions. The question of the genuineness of a party's signature to a writing, under certain circumstances, cannot be raised under section 3250 of the Code unless the party denying its genuineness shall himself make the affidavit required. Under section 3371 of the Code, one who desires the production of books and papers, as therein provided for, must make the affidavit required. Where a tenant is unable to give a forthcoming bond, and desires to obtain the benefit of the provisions of section 3618 of the Code, he must make the affidavit provided for. By the tax bill, page 2260 of the Code, it is provided that every licensed person who manufactures brandy must furnish the commissioner of the revenue a copy of the returns made by him to the internal revenue assessor of the United States, and the commissioner of the revenue shall require said-licensed distiller to make affidavit to the correctness of such returns. Under those statutes, and others which might be referred to, where there is no authority for the affidavit to be made by an agent or per alium, it would be impossible for the person authorized or required to make the affidavits provided for, if a corporation, unless they could be made by the corporation's president or other officer and be treated as the affidavit of such corporation, or unless it be held, as some courts have done, that, since the oath required cannot be made by the corporation itself, it may appoint an agent to make it. But under our cases, where the affidavit is required to be made by the party himself, it cannot, it is said, be made by an agent. See *Merriman v. Thomas*, supra, 103 Va. 28, 48 S. E. 490; *Taylor v. Sutherlin-Meade Tobacco Co.*, supra, 107 Va. 790, 791, 60 S. E. 132.

In this case it is to be kept in mind that in making the affidavit the president of the corporation was not attempting to bind it as by a contract. There is no question on the demurrer that the contract was not properly entered into by the corporation, and the services rendered and the material furnished by it, to secure the payment of which it was attempting to secure a mechanic's lien. The act of the president in making the affidavit was merely ancillary to the contract, and was inherently and necessarily for the benefit of the corporation. The affidavit was but one of the steps made a condition precedent to recording the writings named in the

statute to perfect the lien. After the affidavit was made, the corporation availed itself of it, and recorded it, along with the account and the writing, declaring its intention to claim the benefit of the mechanic's lien law, as required by the statute. Neither the corporation, nor any one authorized to speak for it, has objected to the action of its president in making the affidavit; but, on the contrary, the corporation is in court seeking to enforce the lien, thereby declaring that the act of its president in making the affidavit was its act, or at least done by its authority. See *American Soda Fountain Co. v. Stolzenbach*, supra, 75 N. J. Law, 721, 68 Atl. 1082, 16 L. R. A. (N. S.) 703, 127 Am. St. Rep. 822.

But this is not all. The writing by which the corporation declared its intention of claiming the benefit of the mechanic's lien law (which the statute requires, and which is filed as an exhibit with the bill, and made a part thereof), and which went to record as its act, declares that the said "Adams Bros.-Paynes Company herewith files an account showing the nature and character of the materials furnished, the prices charged, the payments made, and the balance due, *verified by affidavit.*" If it were true that the affidavit, when made by its president, was not the affidavit of the corporation *per se*, or that he was not the agent of the corporation when he made it, the said statement, adopting and treating the affidavit as its own, or as made by its authority, when it filed the papers required by the statute with the clerk for recordation in perfecting its lien, was a ratification of the act of the president in making the affidavit, and gave it all the force and effect it would have had if the authority to make it had existed when made. Under these circumstances, I cannot understand upon what legal principle it can be said that the affidavit in question was made without authority.

I am of opinion that the affidavit of the president of the appellee corporation was in legal contemplation the affidavit of the corporation; but, if it were not, and the president by virtue of his office had no authority to make it when made, that the action of the corporation, when it filed its statement declaring its intention to claim the benefit of the mechanic's lien law, was a ratification of the act of the president in making the affidavit, and was as effective for the purposes for which it was made as if the authority to make it had existed when the affidavit was made.

For these reasons, I am of opinion that the trial court properly overruled the demurrer to the bill, and I cannot concur in the opinion of this court sustaining the demurrer and dismissing the bill.

(113 Va. 519)

CARPENTER v. GRAY.

(Supreme Court of Appeals of Virginia. June 13, 1912.)

1. ACCOUNT, ACTION ON (§ 11*)—VERIFICATION—SUFFICIENCY.

Where a notary public's certificate attached to plaintiff's declaration stated that J. E. G. made oath that the foregoing account against W. R. C. was just, true, and correct, and due in a stated amount, with interest thereon from a stated date, it was sufficient to entitle plaintiff to the benefit of Code 1904, § 3286, providing that when the plaintiff shall file an affidavit, by himself or his agent, verifying the account, the defendant shall not be permitted to file a plea in bar, but plaintiff shall be entitled to judgment, unless the defendant shall file a verified denial, and it was immaterial that it did not specifically state that J. E. G. was the plaintiff, or that the account and the affidavit claimed interest from different dates; substantial compliance with the statute being sufficient.

[Ed. Note.—For other cases, see Account, Action on, Cent. Dig. §§ 82-36; Dec. Dig. § 11.*]

2. ACCOUNT, ACTION ON (§ 12*)—VERIFICATION—JUDGMENT—WAIVER AND ESTOPPEL.

A plaintiff in assumpsit may waive or be estopped from asserting his right to judgment in his favor for the amount claimed by him in his affidavit filed with his declaration as provided by this statute, although the defendant has failed to comply with those provisions which entitle him to make a defense to the claim asserted.

[Ed. Note.—For other cases, see Account, Action on, Cent. Dig. § 37; Dec. Dig. § 12.*]

3. ACCOUNT, ACTION ON (§ 12*)—VERIFICATION—JUDGMENT—WAIVER.

The facts that there was no indorsement on the back of a declaration showing that an account and affidavit had been filed therewith, that the rule docket did not show that they had been filed and contained a statement that it was a writ of inquiry, that the case was placed upon the issue docket, and that plaintiff in opposing a motion for a continuance made no claim that an affidavit had been filed, or that the case should be placed upon the office judgment docket, did not indicate that the plaintiff intended to waive his right to a judgment under the provision of Code 1904, § 3286, entitling a plaintiff to judgment on a verified account not denied under oath by the defendant.

[Ed. Note.—For other cases, see Account, Action on, Cent. Dig. § 37; Dec. Dig. § 12.*]

4. ACCOUNT, ACTION ON (§ 12*)—VERIFIED ACCOUNT—WAIVER.

Nor did such facts estop plaintiff from claiming the benefit offered by Code 1904, § 3286, since they were within the knowledge of the defendant, or he had a convenient and available means of acquiring such knowledge, and facts known to both parties, or which both have the same means of knowing, cannot be the basis of an estoppel.

[Ed. Note.—For other cases, see Account, Action on, Cent. Dig. § 37; Dec. Dig. § 12.*]

5. ACCOUNT, ACTION ON (§ 12*)—VERIFIED ACCOUNT—RIGHT TO JUDGMENT—WAIVER.

By consenting to and obtaining a continuance of the case after the circuit court had set aside the office judgment and permitted the defendant to plead, the plaintiff in assumpsit did not waive his right to have judgment under Code 1904, § 3286.

[Ed. Note.—For other cases, see Account, Action on, Cent. Dig. § 37; Dec. Dig. § 12.*]

Error to Circuit Court, Brunswick County. Action by J. E. Gray against W. R. Carpenter. To judgment for plaintiff, writ of error was awarded. Judgment affirmed.

Marvin Smithey, R. B. Davis, and R. E. Byrd, for plaintiff in error. Turnbull & Turnbull, for defendant in error.

BUCHANAN, J. J. E. Gray instituted his action of assumpsit against W. R. Carpenter, and such proceedings were had in the cause as resulted in a judgment in favor of the plaintiff for the amount claimed by him in his affidavit filed with his declaration in the cause. To that judgment this writ of error was awarded.

The grounds of error assigned may be considered under two heads: First, the sufficiency of the affidavit filed under the provisions of section 3286 of the Code to entitle the plaintiff to the judgment rendered in his favor; and, second, whether, if the affidavit were sufficient, the plaintiff had by his conduct waived, or was estopped from relying upon, the provisions of that section.

The facts material to the decision of these questions are briefly stated as follows: The plaintiff, in May, 1910, instituted his action. Process was issued and executed upon the defendant, returnable to the first June rules following, when the plaintiff filed his declaration, account, and affidavit. The rules taken in the case at that time were: "Process Ret. Ex'd, Declaration Filed & C. O." At the next rule day the rules were: "C. O. C. & W. E." At the June term of the court the case was placed upon the writ of inquiry docket, and upon motion of the defendant, without filing any plea, the cause was continued over the objections of the plaintiff. On the hearing of the motion to continue, no reference was made to the affidavit, or that the cause should be put upon the office judgment docket. After the adjournment of that term, at the instance of the plaintiff's counsel, the clerk entered an office judgment for the sum sued for, but with interest from January 1, 1910, instead of March 1, 1910, as claimed in the affidavit. At the next term the plaintiff moved the court, under the provisions of section 3451 of the Code to correct the judgment as to the time from which it should bear interest. Thereupon the defendant moved the court, under section 3293 of the Code, to set aside the said office judgment, upon the ground that the affidavit was not sufficient under the provisions of section 3286 of the Code to authorize the entry of an office judgment.

Upon the hearing of these motions, which were considered together, the court being of opinion that the affidavit was not such as was required by section 3286, so as to avoid the necessity of a writ of inquiry, overruled the plaintiff's motion to amend, and set

aside the judgment, and upon the motion of the defendant gave him leave to file three pleas in bar of the plaintiff's action, accompanied by an affidavit as required by section 3286 of the Code. To all of which the plaintiff objected and excepted.

Nothing seems to have been done in the cause after the September term until the April term, except to continue the cause. At the last-named term, upon motion of the plaintiff, the action of the court at its September term was reheard, the clerk of the court was allowed to amend the rules in the cause, so as to show that said affidavit was filed with the plaintiff's declaration, and a nunc pro tunc judgment was entered in favor of the plaintiff for the amount claimed in the said affidavit.

[1] The affidavit filed with the plaintiff's declaration was in the following words: "I, Edwin C. Smith, a notary public in and for the county aforesaid, in the state of Virginia, do hereby certify that J. E. Gray this day personally appeared before me, and, after being duly sworn, made oath before me, in my county aforesaid, that the foregoing account against W. R. Carpenter is just, true, and correct, and due to the best of the affiant's belief, and that to the best of affiant's belief the amount of his claim against the said W. R. Carpenter is \$2,800, and that the said amount is justly due, with interest thereon from the 1st day of March, 1910."

This affidavit, it is claimed by the defendant, is not sufficient to entitle the plaintiff to the benefit of the provisions of section 3286 of the Code. That section, so far as material to the question under consideration, is as follows:

"In an action of assumpsit on a contract, express or implied, for the payment of money (except where the process to answer the action has been served by publication), if the plaintiff file with his declaration an affidavit made by himself or his agent, stating therein, to the best of the affiant's belief, the amount of the plaintiff's claim, that such amount is justly due, and the time from which the plaintiff claims interest, no plea in bar shall be received in the case, either at rules or in court, unless the defendant file with his plea the affidavit of himself or his agent that the plaintiff is not entitled, as the affiant verily believes, to recover anything from the defendant on such claim, or stating a sum certain less than that set forth in the affidavit filed by the plaintiff, which, as the affiant verily believes, is all that the plaintiff is entitled to recover from the defendant on such claim. If such plea and affidavit be not filed by the defendant, there shall be no inquiry of damages, but judgment shall be for the plaintiff for the amount claimed in the affidavit filed with his declaration."

The objections made to the affidavit are:

(1) That it does not aver that the affiant was the plaintiff in the action or his agent;

(2) that it is not clear and unambiguous, and does not conform to the plain terms of the statute; and (3) that it fails to state the time from which the plaintiff claims interest.

It is insisted that the same strict rule of construction should govern in construing the statute in question as has been applied in construing affidavits in attachment cases in equity, where the courts acquire jurisdiction alone by force of the affidavit. *Taylor v. Sutherland-Meade Co.*, 107 Va. 787, 797, 60 S. E. 132; *Damron & Kelly v. Citizens' Nat. Bank*, 112 Va. 544, 72 S. E. 153, 154.

A substantial compliance with the provisions of section 3286 is all that is required. It was passed to remedy the well-known evil of filing sham pleas for purposes of delay (*Grigg, etc., v. Dalsheimer, etc.*, 88 Va. 508, 510, 18 S. E. 993; *Spencer v. Field*, 97 Va. 38, 41, 38 S. E. 880), and imposes no hardship upon the defendant. A substantial compliance with its provisions is all that is or should be required. See *Jackson v. Dodson*, 110 Va. 46, 65 S. E. 484, and cases cited.

But, tested even by the strict rule of construction which has been applied in attachment cases, the affidavit is clearly sufficient. It does not, it is true, in express terms state that the affiant is the plaintiff in the action; but it uses language which plainly shows that he is the plaintiff, and that is sufficient. See *Glinch River Min. Co. v. Harrison*, 91 Va. 122, 21 S. E. 660. The plaintiff was J. E. Gray, the affiant was J. E. Gray, and the affidavit states that J. E. Gray made oath "that the foregoing account against W. R. Carpenter is just, true, and correct, and due to the best of affiant's belief, and that to the best of affiant's belief the amount of his claim against the said W. R. Carpenter is \$2,800, and that the said amount is justly due, with interest from the 1st day of March, 1910." The language quoted leaves no room for doubt that the affiant was the plaintiff, that the amount claimed was \$2,800, that it was justly due, and that it bore interest from March 1, 1910. The fact that the account filed with the declaration claimed interest from January 1, 1910, does not affect the validity of the affidavit, since the date fixed by the latter was in favor of the defendant; and will control in entering up judgment if no defense be made.

The other error assigned in substance is that, even if the affidavit be held sufficient, the plaintiff by his conduct has waived or is estopped from relying upon the benefit of the provisions of section 3286.

[2] It is well settled that a plaintiff in an action of assumpsit may waive, or be estopped from asserting, his right to have judgment entered in his favor for the amount claimed by him in the affidavit filed with his declaration; as provided by section 3286, although the defendant has failed to comply with the provisions of that section which

entitle him to make defense to the claim asserted. See *Lewis v. Hicks*, 96 Va. 91, 30 S. E. 466; *Spencer v. Field*, etc., 97 Va. 38, 33 S. E. 390; *Price v. Marks*, 103 Va. 18, 48 S. E. 499; *Jackson v. Dodson*, supra; *Pollard & Haw v. Am. Stone Co.*, 111 Va. 147, 68 S. E. 266; *Gring v. Lake Drummond*, etc., Co., 110 Va. 754, 67 S. E. 360. Such waiver may be made, as was said in *Lewis v. Hicks*, supra, either expressly or by implication by the plaintiff, or he may be estopped to take advantage of the defendant's failure to comply with the statute. In that case, the action of the plaintiff in taking issue upon a plea not accompanied by the affidavit required, instead of objecting to the plea, was held to work a waiver or an estoppel.

In *Jackson v. Dodson*, supra, the plaintiff was held to have waived his rights to a judgment as provided by that section, when he not only made no objection to the defendant's plea when tendered without a sufficient affidavit, but assented to, or accepted without objection, a continuance of the case until the next term, with leave to the defendant to file within 15 days the grounds of his defense.

Pollard & Haw v. American Stone Co., supra, is to the same effect, where counsel for the plaintiffs in an action on the office judgment docket, knowing that the case would be contested, requested that a later day in the term be set for its trial, and the court, with the consent of counsel for the defendant, set the case for trial on a day subsequent to the fifteenth day of the term, on which last-mentioned day the office judgment would ordinarily become final. In each of these cases the plaintiff expressly or impliedly assented or consented to proceedings in his case which showed that he was not insisting upon the defendant's complying with the terms of the statute in making his defense.

[3, 4] In the case under consideration the proceedings in the cause relied on to establish the waiver or estoppel claimed are that there is no indorsement on the back of the declaration showing that the account and affidavit had been filed; that the rule docket does not show that they had been filed, and contained a statement when the common order was confirmed that was to be a writ of inquiry; that the case was placed upon the issue docket of the court; that the plaintiff, in opposing the defendant's motion to continue the case, made no claim that an affidavit had been filed with the declaration, or that the case should be placed upon the office judgment docket. It is further claimed by the defendant that the account and affidavit filed with the declaration were so attached to it that the defendant's counsel, in examining the declaration, would not be likely to see them, and that during the June term of the court one of the plaintiff's coun-

sel had a conversation with the deputy clerk, which showed that the plaintiff's counsel were concealing the fact that the account and affidavit had been filed with the declaration.

Without discussing in detail the evidence that the plaintiff's counsel were attempting to conceal the fact that the account and affidavit were filed with the declaration, it is sufficient to say that they were so attached to it (the declaration ending on one page and the account and affidavit being on the succeeding sheet) that both the clerk and the deputy clerk saw them when the declaration was filed and the rules taken upon it; and as to the conversation between the deputy clerk and the plaintiff's counsel, it appears from the deputy's testimony that it was a mere casual conversation to which he paid no particular attention, and the attorney testified that not a word was said about this case in the conversation referred to by the deputy clerk. Under these circumstances, neither the manner in which the account and affidavit were attached to the declaration when filed nor the conversation of the plaintiff's counsel with the deputy clerk can have any weight in determining the question of waiver or estoppel.

Do the proceedings at rules and in court establish the waiver or estoppel relied on? As we have seen, the declaration, with the account and affidavit, were properly filed at rules by the plaintiff. He did nothing more in the case until the defendant made his motion to continue the cause at the June term. This motion he opposed, but the court overruled his objection and continued the cause. Up to that time it is clear that he had done no act upon which could be predicated a waiver or estoppel, unless it be, as the defendant insists, that in opposing the motion and insisting upon a trial of the cause he did not inform the defendant that an account and affidavit had been filed, and ask that the case should be placed upon the office judgment docket. It manifestly was not incumbent upon the plaintiff to inform the defendant that there was an account and affidavit filed—a fact which a casual, much less a careful, examination of the plaintiff's pleading (the original of which is before the court) would have shown, and which the plaintiff had the right to assume the defendant knew, and which in the exercise of ordinary care he ought to and would have known. Neither was it the duty of the plaintiff, in opposing the motion to continue, to ask the court to correct the errors of the clerk, either in taking the rules in the case, or in placing it upon the wrong docket. These were errors of the clerk for which the plaintiff was in no wise responsible, and which could not deprive him of his rights under section 3286. *Price v. Marks*, 103 Va. 18, 21, 48 S. E. 499.

In the case cited it was held that, if through error the case is placed on the writ

of inquiry docket, and unsworn pleas be filed, and the case continued to another term, and the plaintiff then moves to strike out the pleas because not sworn to; and the trial court overrules the motion and compels a trial on the pleas, which results in a verdict and judgment for the defendant, the verdict and judgment should be set aside, the pleas stricken out, and judgment entered for the plaintiff.

Under the facts disclosed by the record it cannot be said that the plaintiff intended to waive his right to a judgment under the provisions of section 3286 of the Code. Neither do the facts make out a case of equitable estoppel. Without discussing generally the requisites necessary to constitute such an estoppel, it is sufficient to say that there is one essential element lacking in this case, viz., that the party claiming to have been influenced by the conduct of the other to his injury was himself not only destitute of knowledge of the facts, but was destitute of any convenient and available means of acquiring such knowledge, and that where the facts are known to both parties, or both have the same means of ascertaining the truth, there can be no estoppel. See Am. & Eng. Ency. L. (2d Ed.) 434, cited with approval in *C. & O. Ry. Co. v. Walker*, 100 Va. 69, 92, 93, 40 S. E. 633, 914.

[5] After the circuit court had, at its September term, 1910, set aside the judgment entered in the cause by the clerk the preceding vacation, and permitted the defendant to plead, the plaintiff agreed to a continuance at one term of the court, and asked for a continuance at another. These acts of the plaintiff it is also insisted were waivers of his right to have judgment under section 3286.

Consenting to or obtaining a continuance of the case after the circuit court had set aside his office judgment and permitted the defendant to plead cannot be regarded as a waiver of his right to ask that court to rehear and set aside the orders made by it at the September term, or to insist upon his rights as they existed when the cause was continued over his objection at the June term. *Gring v. Lake Drummond, etc., Co.*, supra.

Upon the whole case we are of opinion that there is no error in the judgment complained of to the prejudice of the defendant, and that it must be affirmed.

Affirmed.

(112 Va. 532)

CERRIGLIO v. PETTIT.

(Supreme Court of Appeals of Virginia. June 13, 1912.)

1. FRAUD (§ 65*)—ACTION—INSTRUCTIONS—REPRESENTATIONS AS TO VALUE.

While plaintiff's requested instruction, in an action for deceit in the exchange of properties, that if representations were made by de-

fendant as to the value of his property, what it was renting for and would rent for, and that loans could be secured on it, and these were relied on by plaintiff, and were material, and without them plaintiff could not conclude the transaction, and they were untrue to the knowledge of defendant, plaintiff was entitled to recover, was too broad, and so properly modified by a proviso that, before they could find for plaintiff, the jury must find said statements were made as facts, not opinions of defendant, the proviso would have been clearer and less calculated to deceive, had it warned the jury against reckless statements of fact, made in disregard of whether they were true or false.

[Ed. Note.—For other cases, see *Fraud*, Cent. Dig. §§ 72-74; Dec. Dig. § 65.*]

2. FRAUD (§ 65*)—ACTION—INSTRUCTIONS—RELIANCE ON MISREPRESENTATIONS.

Plaintiff, in an action for deceit in exchange of properties, is entitled to an instruction that, if the jury believe plaintiff had not equal means of information with defendant in relation to his property, and, knowing this, defendant made representations as to its value, what it rented for, and what amount of loan could be procured on it, then, if defendant asserts that plaintiff did not rely on such representations, the evidence that he did not must be of the clearest and most satisfactory character, and not of mere inferences or implication.

[Ed. Note.—For other cases, see *Fraud*, Cent. Dig. §§ 72-74; Dec. Dig. § 65.*]

3. PRINCIPAL AND AGENT (§ 158*)—REPRESENTATIONS—EFFECT AS TO PRINCIPAL.

The agent of plaintiff, in an exchange of properties with defendant, having also, without plaintiff's knowledge, been defendant's agent, representations made by the agent to plaintiff, during the negotiations, with regard to defendant's property, were binding on defendant as if made by him, though the agent made them honestly, having been deceived by defendant.

[Ed. Note.—For other cases, see *Principal and Agent*, Cent. Dig. §§ 589-598; Dec. Dig. § 158.*]

4. FRAUD (§ 65*)—ACTION—INSTRUCTIONS.

The instruction, in an action for deceit in exchange of properties, that mere assertions by vendors as to value of their property, or the price that has been offered for it, are assumed to be so commonly made that purchasers cannot rely on them, and are not fraudulent, but are considered as "trade talk," is objectionable, as not drawing the distinction between a mere opinion as to value of property and a vendor's statement of fact as to what he has been offered for it.

[Ed. Note.—For other cases, see *Fraud*, Cent. Dig. §§ 72-74; Dec. Dig. § 65.*]

5. TRIAL (§ 244*)—INSTRUCTIONS—SINGLING OUT FACTS.

Defendant's instruction, in an action for deceit in exchange of properties, was erroneous in laying stress on the fact that persons, applied to by plaintiff, during the negotiations, for a second loan of \$3,000 on defendant's property, refused it on the ground of inadequate security, and leaving out of view defendant's subsequent reiteration of the value of his property, and his arranging such a loan, ostensibly from another, but in fact with his own money, as a further assurance that the estimate by the persons applied to by plaintiff of the value of the property was unreliable.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 577-581; Dec. Dig. § 244.*]

6. APPEAL AND ERROR (§ 1050*)—PREJUDICIAL ERROR—ADMISSION OF EVIDENCE.

Admitting evidence, in an action for defendant's fraudulent representations, in an ex-

change of properties, as to the value of his property, of a third person having been tricked into making an excessive loan on plaintiff's property, prior to plaintiff's acquisition of it, could have served no other purpose than to mislead the jury to a consideration of an irrelevant matter.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1068, 1069, 4153–4157, 4166; Dec. Dig. § 1050.*]

7. FRAUD (§ 38*)—ACTION—TIME.

Plaintiff's bringing of his action for deceit in exchange of properties was not too long delayed, with the result of estoppel or waiver; he not having had occasion to visit the property he got from defendant till several months after the exchange, when he desired to make a new loan on it, and re-rent it, and then, after a few months for finding out what redress he had, having brought the action.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. § 34; Dec. Dig. § 38.*]

Error to Circuit Court, Fairfax County.

Action by Antonio Cerriglio against R. M. Pettit. Judgment for defendant. Plaintiff brings error. Reversed, and remanded for new trial.

Chas. Poe, C. V. Ford, and Moore, Barbour & Keith, for plaintiff in error. O. E. Nicol, for defendant in error.

CARDWELL, J. This action was brought by Antonio Cerriglio to recover damages resulting from fraud and deceit, alleged to have been practiced upon him by the defendant, R. M. Pettit, in an exchange of properties made between them on the 7th day of January, 1909.

At a trial of the cause there was a verdict and judgment for the defendant, which judgment we are asked to review and reverse: (1) Because of misdirection of the jury by instructions given, and for error in refusing other instructions asked for by the plaintiff; (2) for error in allowing certain improper and irrelevant evidence to be submitted to the jury; and (3) because the verdict is contrary to the law and the evidence.

The material facts which the evidence proved, or tended to prove, and which have to be considered in connection with the assignments of error with respect to the court's rulings in giving and refusing instructions, are as follows: Cerriglio owned a farm in Fairfax county, Va., containing 804 acres, with extensive and costly buildings thereon, known as "Hayfield," situated about 6 miles from Alexandria city and 14 miles from Washington, D. C., which points are accessible by good roads, and also about 2 miles distant from Franconia station on the Richmond, Fredericksburg & Potomac Railroad. Upon the Hayfield farm there was a large quantity of valuable personal property, the larger part of which belonged to the foreman on the place, named Thompson; but the personalty owned by Thompson was purchased by Cerriglio and was included in the exchange. Pettit was the owner of a lot

in the city of Pittsburgh, Pa., with a dwelling and other improvements thereon, known as "1238 Fayette Street."

Cerriglio and Pettit were brought together through real estate agents in the city of Washington, D. C., and the exchange of their respective properties was there consummated. Pettit was represented by the real estate firm of Ballard & Lanham Company, and Cerriglio by Frank A. Harrison; but, as we shall later see, there is proof in the record going to show that Harrison, at the time of the negotiations and the closing of the deal between said contracting parties, was also in the employ and pay of Pettit, without the knowledge of Cerriglio.

Hayfield, at the time of the exchange, was incumbered by a deed of trust securing a balance of \$28,500, due to one Thomas Cover, of Winchester, Va., on a loan of \$32,000 to Cerriglio's predecessor in ownership, which Cerriglio assumed as part payment of his purchase of the property, but which he had reduced by payments to said sum of \$28,500; and the real estate of Pettit, at the time of the exchange, was subject to a mortgage amounting to \$8,000. The personal property on Hayfield was transferred by Cerriglio to Pettit free of incumbrance, and consisted in part of property owned by the foreman on the Hayfield farm, which Cerriglio had purchased in order to carry out the agreement of exchange; the agreement providing that the farm should be delivered to Pettit, together with all personal property thereon, with certain minor exceptions. There was evidence tending strongly to prove that in the negotiations leading up to said exchange Pettit and his agents represented to Cerriglio that the Pittsburgh property was worth \$35,000; that it had a loan value of \$16,000—i. e., that the latter amount could be borrowed upon it—and that it had a rental value of \$125 per month; in fact, the initial contract of exchange provided that Cerriglio should have a tenant paying a rental for the Pittsburgh property of \$125 per month until April 1, 1909, while the truth was that Pettit was agreeing to pay that rent for the property himself for the time named, as an inducement to Cerriglio to agree to the exchange being consummated, and that, too, in face of the uncontroverted facts that the Pittsburgh property had not at that time, nor down to the institution of this suit, a rental value of over \$55 per month.

At the date of the initial agreement between these parties, December 19, 1908, Cerriglio had never been to Pittsburgh, and knew nothing of values there. After this agreement had been signed, however, and before deeds were exchanged, Cerriglio went to Pittsburgh, spending a few hours there, but was with Pettit the entire time, and made no inquiry of others as to the value of

the Pittsburgh property. While these parties were together on that occasion, Pettit reiterated his assurances as to the sale value, loan value, and rental value of the property, and these representations were given additional force and credit in the estimation of Cerriglio, doubtless, by the handsome and attractive appearance of the buildings, but not a word was spoken to him to put him on notice that values in Pittsburgh in that locality had entirely changed in late years; the result being a very great deterioration in both the salable and rental values of properties there, a fact well known to Pettit. The property here in question, which had perhaps been worth, many years prior, the values placed upon it by Pettit, had declined until at the time of Cerriglio's visit to Pittsburgh it was worth no more than, if as much as, \$11,000. Instead of telling Cerriglio the truth as to the value of his property, Pettit made a number of artful suggestions as to the desirable location of his property, among them that the neighborhood was the abode of millionaires.

At the beginning of these negotiations there was only a mortgage on the Pittsburgh property for \$8,000, and it is true that before the exchange of said properties was closed Cerriglio applied to Thos. Cover (who held the \$28,500 deed of trust on Hayfield) for a loan of \$2,000 on the Pittsburgh property, to obtain the money with which to pay Foreman Thompson for the personalty he had on Hayfield, and that Cover, after he and his son-in-law, Kern, an attorney at law, had visited Pittsburgh and inspected the property, declined to make the desired loan, reporting to Cerriglio the information obtained; but it is also true that Cerriglio immediately sought out Pettit and his then undisclosed agent, Harrison, and reported what had been told him by Cover and Kern, but here again Cerriglio was thrown off his guard and his apprehensions removed by Pettit telling him that Cover and Kern were entirely mistaken, and that he, who had lived in Pittsburgh all his life, knew much better as to values than they, and that the values stated to Cerriglio by him were true. The initial contract provided, as we have seen, that Cerriglio should be paid a rental for the Pittsburgh property of \$125 per month until April 1, 1909, and when told what Cover and Kern had reported with respect to the property, Pettit not only said that they did not know what they were talking about, but with the view, obviously, of inducing Cerriglio to believe that Cover and Kern were entirely mistaken, and that the values of the Pittsburgh property, as stated by him, were true, and should be relied on by Cerriglio, arranged himself the desired second mortgage of \$3,000 on the property, which Cerriglio at the time thought, as he had every reason to think, was a bona fide loan, obtained through business channels, but which proved to be in

fact a loan made by Pettit himself; the real truth of the transaction never coming to the knowledge of Cerriglio until months after his deal with Pettit had been closed.

The defense of Pettit does not rest to any extent upon a denial of the falsity of the representations charged to have been made by him to Cerriglio, but his endeavor is to justify his method of dealing by the defense that all he said was "trade talk," and by charging that the Hayfield property was not worth more than the deed of trust lien upon it. He does not seriously question that the Pittsburgh property was really worth no more than the mortgages upon it, and introduces no evidence to contradict statements made by leading real estate agents of Pittsburgh and a large property owner there, to the effect that the real value of the Pittsburgh property in question at the time of its exchange for Hayfield farm did not exceed \$11,000, and that probably \$10,000 would be the best price that could be gotten for it, and that its rental value, instead of being \$125 per month, would not exceed \$55 per month.

Cerriglio had been offered for Hayfield \$35,000 but a short time before the exchange with Pettit, which offer did not include the personal property thereon, valued at \$3,000, and it appears from documentary evidence in the record that in the fall following his taking possession of Hayfield, in January, 1909, Pettit was pricing the farm and what was on it at \$150,000, and gave extravagant estimates of the productive character of the land, saying that under proper management it would, at the price he put on it, net the owner \$15,000 or \$20,000 per year; and in one or more letters written by him, when he had owned the farm but 10 months, he declared it worth the price he had put on it, and declared it to be the best farm in Virginia, and that a part of it the year before had yielded "98 bushels per acre." It is true that Hayfield had run down in value while owned by Cerriglio, and that Pettit made considerable expenditures upon it shortly after he became its owner; but there is quite a difference in opinion among his witnesses as to the amount so expended by him. He says that the amount was \$30,000, while the witnesses testifying vary widely as to these expenditures, one of them putting his estimate of the amount as low as \$5,000. Be that, however, as it may, it is hardly possible that an expenditure of even \$30,000 on the Hayfield farm would have brought its salable value from \$28,500 up to \$150,000 within 10 or 12 months, and the productive character of the land up sufficiently to have crops upon it worth \$25,000 and yield to the owner a net revenue of \$15,000 or \$20,000 per year.

The transaction which culminated in the exchange of properties under consideration began with a business visit of Frank A. Harri-

son (upon whom Cerriglio was relying to obtain a purchaser for Hayfield) to Pittsburgh for Ballard & Lanham Company, with which business Cerriglio was in no way connected. At this time Harrison met Pettit, and was requested by him to effect an exchange of the Fayette street property for other property—a Virginia farm desired. Thereupon Harrison listed this Pittsburgh property, and shortly after his return to Washington wrote Pettit submitting a list of properties which he had for various parties, including in the list the Hayfield farm. This letter so much interested Pettit that he came to Washington, and within a week from the date of Harrison's letter the contract with Cerriglio here in question had been procured. During the negotiations leading up to this contract, Pettit referred to Harrison, who vouched for Pettit's statements as to the Pittsburgh property. Months after the deal was closed, Cerriglio learned that Harrison had represented Pettit as well as him (Cerriglio) in the transaction, and had received one-half of the commissions of \$1,000 paid by Pettit for effecting the deal. While it is fair to Harrison to say that it seems to be conceded that at the time he honestly believed the Pittsburgh property was valuable, and worth much more than the liens against it, yet he, like Cerriglio, was deceived by the attractive appearance of the property, and also, like Cerriglio, had heard the extravagant and reckless estimates of its value repeated by Pettit. When Harrison learned the results of the deal to Cerriglio, he returned to him the note for \$750, received for his services in the transaction. It nevertheless appears that Harrison was the agent of Pettit, without the knowledge of Cerriglio, and vouched for the statements made by Pettit.

"Cerriglio," as Cover, a witness for Pettit, testifies, "is a man easily imposed upon and believes everything that is told him," and Harrison testifies that he represented both parties in this transaction, and, after stating how he brought them together, he corroborates Cerriglio in his statements as to how he was deceived as to the sale and rental value of the Pittsburgh property; that Cerriglio knew nothing of his (Harrison's) agency for Pettit, and declares that he was the party who influenced Cerriglio in making the deal; and, in effect, that he was led into doing so by the statements made by Pettit with respect to the Pittsburgh property, all of which he had repeated to Cerriglio, but found out afterwards to be unwarranted, as they were not in accordance with the truth.

The gravamen of Cerriglio's complaint is not so much what the property was worth which Pettit got from him in the exchange, but the fraud and deceit practiced upon him by Pettit with respect to the property which he deeded to him (Cerriglio), and which he was led to believe had a sale value of \$35,000, a loan value of \$18,000, and a rental val-

ue of \$125 per month, when in truth the property did not exceed in value \$11,000, had no loan value at that time beyond \$8,000 then secured upon it, and could not, as the real estate and business men testified, be rented for over \$55 per month, the amount of rent obtained for it after strenuous efforts to obtain a tenant for it when it became vacant by reason of the expiration of the time for which Pettit was paying \$125 per month.

After all the evidence in the case had been introduced, Cerriglio requested the court to give to the jury eight instructions, four of which were given, but Nos. A—6, A—7, and A—8 were refused, and A—2 given with an amendment, to which ruling amending A—2 and refusing A—6 and A—7 Cerriglio excepted.

[1] It was sought by instruction A—2 to have the jury told that if they believed from the evidence that representations were made by Pettit as to the value of the Pittsburgh property, what it was renting for and would rent for, and as to the amount of loan that could be secured upon it, and that these representations were relied upon by Cerriglio, that same were material, and without which Cerriglio could not conclude the transaction, and that the same were untrue, and known by Pettit to be untrue, then Cerriglio was entitled to a verdict in this action for such an amount, not exceeding the amount sued for, as in the judgment of the jury was right and proper under all the circumstances. The court gave this instruction, but with the proviso added to the effect that before a verdict could be found for Cerriglio the jury must further believe from the evidence that said statements were made as facts, not opinions of Pettit.

While it was not error to modify the instruction as asked, because too broad in its statement of the proposition of law it was intended to expound, the proviso added to the instruction would have been clearer, and less calculated to mislead the jury, had it gone further and to the extent of warning them against reckless statements of fact made in disregard of whether they were true or false.

[2] Instruction A—6, which was refused, was to the effect that if the jury believed from the evidence that Cerriglio had not equal means of information with Pettit in relation to the Pittsburgh property, and that, knowing this, Pettit made representations as to its value, what it was rented for, and what amount of loan could be procured upon the same, then if Pettit asserted that Cerriglio did not rely upon such representations, the evidence to show that he did not must be of the clearest and most satisfactory character, and not of mere inference or implication.

We are of opinion that the refusal of this instruction was error. The evidence as to

the statements made by Pettit, referred to in the instruction, and Cerriglio's reliance upon them, is clear and positive—in fact, the record does not show that Pettit seriously denied that Cerriglio did rely upon said statements. Harrison in his testimony went to the extent of saying that he and Pettit seemed to be Cerriglio's masters in the transaction. While Pettit is shown to be comparatively a young man, it also appears that he has been a successful business man, had lived all his life in Pittsburgh, where he had acquired considerable wealth, and was skilled in the arts of trade. On the other hand, as we have seen, Cerriglio was a man pronounced by witness Cover as "easily imposed upon, and who would believe anything that was told him."

It is said by Staples, J., in *Grim v. Byrd*, 73 Va. 293: "Even a matter of opinion may amount to an affirmation, and be an inducement to a contract, especially where the parties are not dealing upon equal terms, and one of them has, or is presumed to have, means of information not equally open to the other." *Rorer Iron Co. v. Trout*, 83 Va. 397, 2 S. E. 713, 5 Am. St. Rep. 285; *Buena Vista Co. v. Billmyer*, 48 W. Va. 382, 37 S. E. 583.

In *Fitzgerald v. Frankel*, 109 Va. 603, 64 S. E. 941, the opinion by Harrison, J., says: "If the purchaser has not equal means of information with the seller, if it be a case in which he had the right to rely upon the representation, the evidence to show that he did not rely upon it must be of the clearest and most satisfactory character. In such cases, there ought to be no room for inference or mere implication"—citing *Grim v. Byrd*, *supra*.

The fraud and deceit complained of in *Fitzgerald v. Frankel*, *supra*, was of the same character in all essential features as the fraud and deceit alleged in the case at bar, and here it is made to appear that Pettit, who is charged with fraud and deceit, designedly led Cerriglio to rely upon the representations he (Pettit) made to him; for, when confronted with the opinion expressed by Cover and Kern as to the value of the Pittsburgh property, Pettit denounced the source of their information, and, to dispel any lingering doubt in Cerriglio's mind as to the truth of his representations, immediately procured for him a second loan of \$3,000 on the Pittsburgh property, ostensibly arranging the same without difficulty by means of a telephone conversation carried on in Cerriglio's hearing, when in truth he was the only person willing to make the loan.

Instruction A—5, given for Cerriglio, was not broad enough to cure the error in refusing A—6.

[3] Instruction A—7, also refused, was as follows: "The court instructs the jury that if they believe from the evidence that, before and at the time of closing the said transaction, Frank A. Harrison was in the

employ of the defendant, to be paid, and that he was thereafter paid, a consideration by the defendant for his services in relation to the said transaction, and that such relationship existing between the said Harrison and the said defendant was unknown to the plaintiff, and not ascertained by him until long after consummating the said deal, that then, any representations made by the said Harrison to the said plaintiff, prior to and at the time of the closing of the said transaction, in relation to the said Pittsburgh property, were made as the agent and in behalf of the said defendant, and that the defendant is bound by the same, to the same extent as if made by himself."

We have already referred to the evidence sufficiently to show that this instruction was intended to direct the attention of the jury to the question whether under all the facts and circumstances of the case they should find that Harrison was the agent of Pettit in the exchange of properties between Pettit and Cerriglio, without the knowledge of the latter, and that, if the jury should so find, then, upon the principle of law that a principal is bound by representations of his agent, made either in the scope of his employment or in furtherance of the object for which he is employed, Pettit was as much bound by any false representations made by his agent, Harrison, to Cerriglio with respect to the Pittsburgh property as if such representations had been made by Pettit himself.

The refusal of instruction A—7 was also error. *Ferguson v. Gooch*, 94 Va. 1, 26 S. E. 397, 40 L. R. A. 234; *Beury v. Davis*, 111 Va. 531, 69 S. E. 1050; 1 *Ency. Dig. Va. & W. Va.* 274, and cases cited. The fact that Harrison may have been honestly deceived by Pettit does not alter the case. If deceived, Harrison, as the evidence tended to show, in turn and in the interest of Pettit, deceived Cerriglio, who looked upon Harrison as his trusted agent, and lent the ready ear of confidence to all he said and did in relation to the exchange of properties in negotiation.

The giving of instructions 1, 2, 3, and 4 for Pettit is assigned as error.

[4] Instruction 1 told the jury that mere assertions by vendors of property as to its value or the price that has been offered for it are assumed to be so commonly made that purchasers cannot rely upon them, and they are understood as affording him no ground for neglecting to make examination for himself; that one relying upon such statements does so at his peril and must take the consequences; that the mere expression of opinion in strong and positive language is no fraud, though it be false; and that such statements are not fraudulent in law, because they do not ordinarily deceive, but are considered as "trade talk."

The objection to this instruction is to that part of it which told the jury that assertions by a vendor as to the price he has been

offered for property are assumed to be so commonly made that purchasers cannot rely upon them, etc. We are of opinion that this objection to the instruction is well grounded, for the reason that the instruction does not draw the distinction in law between a mere opinion as to what a certain piece of property is worth, and the affirmation or statement by the vendor of the property, as an existing fact, that he has been offered a certain sum for the property, etc., which affirmation or statement proves to be false. The latter case is not in any way controlled by the rule respecting "trade talk" or "opinion utterances," but by the rule that, when the vendor of property states that he has been offered a given sum for it, the statement is one of fact, as the chief element of the value of property is the readiness with which it may be sold. *Strickland v. Grayhill*, 97 Va. 602, 34 S. E. 475; *Hull v. Fields & Thomas*, 78 Va. 606; *Lake v. Tyree*, 90 Va. 719, 19 S. E. 787.

The weight of authority does not sanction the doctrine that one who has fraudulently deceived another, and thereby induced him to enter into a contract to his disadvantage, can successfully defend an appropriate action against him for the fraud and deceit by saying: "It is true that I, by fraud and deceit, induced you to enter into the contract; but you were negligent in not finding out that I was deceiving you, and therefore guilty of negligence in believing me."

"If one represents as true what he knows is false, in such a way as to induce a reasonable man to believe it, and the representation is meant to be acted on, and he, to whom the representation is made, believing it true, acts on it, and thereby sustains damage, there is fraud to support an action of deceit at law, and to found a rescission of the transaction in equity. Whether the misrepresentation is made innocently or knowingly, if acted on, the effect is the same. In the one case, the fraud is actual; in the other, it is constructive. * * *

"One to whom a representation has been made is entitled to rely on it quoad the maker, and need make no further inquiry." *Lowe v. Trundle*, 78 Va. 66, and authorities cited. See, also, 2 Va. L. Reg. 694, and authorities cited.

[5] The same objection is urged to instructions 2 and 4, given for Pettit, that is made to instruction 1, just considered, with the additional objection that instructions 2 and 4 segregate some of the facts, calling particular attention thereto; and then tell the jury that, if they find those facts from the evidence, their verdict should be for the defendant.

These instructions lay stress upon the fact that Cover and Kern, after viewing the Pittsburgh property and reporting to Cerriglio that Cover would not make a loan of \$3,000 secured by a second mortgage on it, but leave out of view the transaction, testi-

fied to and practically uncontradicted, which took place after Cover and Kern had left Cerriglio, and in which Pettit and Harrison reiterated their assurances as to the value of the property, and Pettit's act in arranging the desired second mortgage loan as a further assurance to Cerriglio that Cover's and Kern's estimate of the value of the property was unreliable. There was no evidence tending to show that Cerriglio after that transaction made inquiry or received information from any one other than Pettit and Harrison. Under these circumstances the instructions should not have laid stress upon the statements made by Cover and Kern, and left out of view the evidence tending to prove the artifice of Pettit as to a second mortgage loan on the property, procured for the purpose of showing that the property had then a present actual loan value in excess of what Cover and Kern had said, and equal to the value put upon it by Pettit.

The grounds for assignments of error 5 and 6, which are founded upon bills of exceptions 5 and 6, will not be elaborated. Suffice it to say that the evidence to which the exceptions referred was irrelevant, and, if offered at another trial of the cause, should be excluded.

[6] The trial court permitted, over the objection of Cerriglio, the witness Cover to state the circumstances under which he had placed a loan of \$32,000 on the Hayfield farm in 1906, and how he was "tricked" into making the loan, which ruling is assigned as error.

We are of opinion that this assignment of error is well taken. The consideration which had induced Cover to make a loan upon Hayfield several years prior to the exchange agreement made between Cerriglio and Pettit which is involved in this cause, and prior to Cerriglio's acquisition of any interest in Hayfield, was wholly irrelevant to the issue, and could have served no other purpose than to mislead the jury to a consideration of another transaction concerning Hayfield farm, alleged to have been brought about by fraud, but with which Cerriglio had no connection whatsoever.

[7] There is no merit in the contention that Cerriglio too long delayed bringing this action, and therefore the doctrine of estoppel or waiver has no application to the case. Cerriglio did not find out, until he went to Pittsburgh in the fall of 1909 for the purpose of borrowing the money to pay the \$3,000 loan, which Pettit made him, the extent to which he had been deceived and defrauded with respect to the Pittsburgh property. His efforts to rent the place for something like \$125 per month, which Pettit said it would yield, were unsuccessful, and as long-distance telephonic communications had failed to get the money to pay the loan made by Pettit, he went to Pittsburgh to negotiate

a loan on the property, when and where he learned, as he states, that he had been swindled. True, he did not go at once into court, but took time, as he had the right to do, to inform himself as to whether or not he had any redress, and, when advised that he had a remedy at law, he brought this suit within a few months, to wit, in May, 1910.

As the case has to go back for a new trial, we will not discuss the evidence, further than has been necessary in considering the instructions to the jury given and refused at the last trial.

For the foregoing reasons, the judgment of the circuit court has to be reversed, the verdict of the jury set aside, and the cause remanded for a new trial, to be had not in conflict with this opinion.

Reversed.

(113 Va. 717)

WINFREE v. RIVERSIDE COTTON MILLS CO. et al.

(Supreme Court of Appeals of Virginia. June 13, 1912.)

1. CONSTITUTIONAL LAW (§ 123*)—OBLIGATION OF CONTRACTS—CONSOLIDATION OF CORPORATIONS.

Under Code 1904, § 1105e, subsecs. 40, 41, providing that domestic corporations engaged in the same or similar business may consolidate, when authorized to do so by majority vote at a properly called meeting of the stockholders of each corporation, a corporation had a right, by a majority vote of its stockholders, to consolidate with another corporation engaged in the same business, though one stockholder objected, and though the corporation was organized in 1882, and prior to the enactment of this statute; Code 1873, c. 57, §§ 59, 60, which was the statute then controlling, expressly reserving to the state the right to change the powers granted to corporations, and the power exercised and conferred by the consolidation statute not, therefore, operating to impair the obligation of contracts.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 325, 336-369; Dec. Dig. § 123*.]

2. CORPORATIONS (§ 38*)—LAWS GOVERNING—AMENDMENT TO CHARTER.

Under Const. § 158 (Code 1904, p. cclviii), and Code 1904, § 1105a, subsec. 8, providing that every corporation which shall amend its charter shall be deemed thereby to have accepted and become subject to the Constitution and any laws passed in pursuance thereof, the act of a corporation in passing a resolution amending its charter brought such corporation under the general laws of the state, including the statute authorizing the consolidation of corporations (Code 1904, § 1105e, subsecs. 40, 41), though the resolution declared that the amendment was not to affect the charter in any other respect or particular than that mentioned in the amendment; such declaration being in derogation of such constitutional and statutory provision, and wholly ineffectual.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 119, 120, 125-127; Dec. Dig. § 38*.]

3. CORPORATIONS (§ 38*)—LAWS GOVERNING. The provision of Const. § 158 (Code 1904, p. cclviii), and Code 1904, § 1105a, subsec. 8,

that after the amendment of the charter of a corporation the corporation shall be subject to the Constitution and general laws of the state passed in pursuance thereof, so far as applicable, is not limited to the relations between the state and the corporation, but applies also to the relations between the state and the stockholders, between the corporation and the stockholders, and between the stockholders themselves.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 119, 120, 125-127; Dec. Dig. § 38*.]

4. CORPORATIONS (§ 584*)—CONSOLIDATION—REMEDY OF STOCKHOLDER.

A stockholder, dissenting to a consolidation, is not limited to the summary remedy given him under Code 1904, § 1105e, subsec. 41, to secure payment for his stock.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2343-2347; Dec. Dig. § 584*.]

5. CORPORATIONS (§ 584*)—CONSOLIDATION—RIGHT OF STOCKHOLDER.

Code 1904, § 1105e, subsec. 40, authorizing the consolidation of corporations, does not deprive a dissenting stockholder of his right to refuse to surrender his stock for stock in the new corporation, or to refuse to take anything for it less than its actual value at the date of the consolidation.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2343-2347; Dec. Dig. § 584*.]

6. CORPORATIONS (§ 584*)—CONSOLIDATION—PRIVATE STOCKHOLDERS—EQUITY.

Where the ascertainment of such value requires investigations into the condition of the corporation and accounts to be taken, the stockholder may resort to a court of equity.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2343-2347; Dec. Dig. § 584*.]

7. CORPORATIONS (§ 394*)—SETTING ASIDE CONSOLIDATION—JURISDICTION OF COURT.

Const. § 156, subsec. "a" (Code 1904, p. cclii), provides that the State Corporation Commission shall have the power to put into effect the provisions of the Constitution and statutes relative to domestic corporations; and Code, § 1105e, subsec. 41, provides that the Commission shall determine when corporations desiring to consolidate have complied with the requirements of law, and shall issue a certificate upon finding that there has been a proper compliance, and that the filing of such certificate shall complete the consolidation. Held that, under Const. § 156, subd. "d" (Code 1904, p. ccliv), providing that no court shall have jurisdiction to correct or annul any action of the Commission within the scope of its authority, the court had no jurisdiction to set aside a consolidation which had been effected between two corporations according to law, and for which the Commission's approval and certificate had been given.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1576; Dec. Dig. § 394*.]

8. COMMERCE (§ 48*)—MONOPOLIES (§ 20*)—CONSOLIDATION OF CORPORATIONS.

The consolidation of two corporations in accordance with Code, § 1105e, subsecs. 40, 41, authorizing the consolidation of corporations engaged in the same or similar business, is not in violation of the commerce clause of the federal Constitution (article 1, § 8), or of the Sherman Anti-Trust Act (Act July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200]).

[Ed. Note.—For other cases, see Commerce, Cent. Dig. §§ 36-44, 46; Dec. Dig. § 48*; Monopolies, Dec. Dig. § 20*.]

Appeal from Corporation Court of Danville.

Bill by one Winfree against the Riverside Cotton Mills Company and others. From a decree overruling a demurrer to the bill, plaintiff appeals. Affirmed in part, and remanded.

Coleman, Easley & Coleman, Harrison & Long, and A. B. Percy, for appellant. R. W. Peatross, Harris & Harris, and A. A. Phlegar, for appellees.

BUCHANAN, J. [1] The first question to be determined in this case is whether or not the Riverside Cotton Mills, in which the appellant, who was complainant in the court below, was a stockholder, had the right by a majority vote of all of its stockholders to consolidate with the Dan River Power & Manufacturing Company, under the provisions of an act entitled "An act concerning corporations," approved May 21, 1903 (Acts of Assembly 1902-04, pp. 437, 476-480), and found in the Code of 1904 as chapter 46A.

By subsection 40 of section 1105e of that Code it is provided, with certain exceptions which do not affect this case, that any corporation organized or to be organized under any law or laws of this state may merge or consolidate into a single corporation with any other corporation organized for carrying on the same or a similar business under the laws of this or any other state of the United States.

By the following subsection (41) it is provided how such merger or consolidation may be effected. One of the provisions of that subsection is that such merger may be authorized by a majority vote at a meeting of the stockholders of each of the corporations proposing to consolidate, called and held in the manner prescribed by that subsection.

Separate meetings of the stockholders of the two companies were called to consider the proposed consolidation agreement entered into between the directors of the two companies. The appellant, who, as before stated, was a stockholder in the Riverside Cotton Mills, protested and voted against the consolidation at the meeting of his company; but the vote of the stockholders at the meeting of each company was, by a large majority, in favor of the consolidation, and the consolidation was subsequently completed or perfected in the manner prescribed by the statute.

The contention of the appellant is that, since the Riverside Cotton Mills was incorporated prior to the enactment of the statute in question authorizing the consolidation of corporations doing the same or a similar business by a majority of its stockholders, the consolidation could only be effected by the unanimous vote of the stockholders, notwithstanding the provision of the act that

such consolidation might be effected by a majority vote.

The appellees, on the other hand, insist that in the year 1882, when the Riverside Cotton Mills was incorporated under the provisions of chapter 57 of the Code of 1873 (sections 59 and 60), the power to alter or amend the charter was expressly reserved by the state, and under that reserved power and section 158 of the Constitution (Code 1904, p. cclviii) and subsection 8 of section 1105a of Pollard's Code, passed pursuant thereto, the state had the right to authorize the consolidation in question, even against a stockholder who does not consent to it.

Section 59 provided that, after a charter was certified to the secretary of the commonwealth, the court granting it, "or the judge thereof, in vacation, may, upon the motion of said company * * * or on reasonable notice to said company, alter or amend said charter, or change the corporate name of said company; and such alteration, amendment or change shall be recorded by said clerk and in the office of the secretary of the commonwealth * * * and shall be as effectual and legal from that time as if originally a part of the charter."

Section 60 provided that, as soon as the charter of the corporation was lodged in the office of the secretary of the commonwealth, the persons signing and acknowledging the certificate, their successors, and other persons associated with them, should be a body corporate, "and shall have all the general powers, and be subject to all the general restrictions provided by this edition of the Code of Virginia, or that may have been heretofore, or may hereafter be enacted by the General Assembly, in regard to such bodies politic and corporate."

It seems that such a reservation of power to the state prescribed by the laws in force when the charter is granted, whether written in the Constitution, in general laws, or in the charter itself, qualifies the grant, and that the subsequent exercise of that power cannot be regarded as an act impairing the obligation of contracts.

"The effect of such a provision," as was said by the Supreme Court of the United States in *Looker v. Maynard*, 179 U. S. 46, 52, 21 Sup. Ct. 21, 23 (45 L. Ed. 79), "whether contained in an original act of incorporation, or in a Constitution or general law subject to which a charter is accepted, is, at the least, to reserve to the Legislature the power to make any alteration or amendment of a charter subject to it, which will not defeat or substantially impair the object of the grant, or any right vested under the grant, and which the Legislature may deem necessary to carry into effect the purpose of the grant, or to protect the rights of the public or of the corporation, its stockholders,

or creditors, or to promote the due administration of its affairs."

This language is reiterated and approved in the case of *Polk v. Mutual Reserve Fund*, etc., 207 U. S. 310, 325, 328, 28 Sup. Ct. 65, 52 L. Ed. 222. See, also, generally, *Pennsylvania College Cases*, 13 Wall. 190, 212-214, 20 L. Ed. 550; *Miller v. People of State of New York*, 15 Wall. 478, 21 L. Ed. 98; *Wright v. Minn. Mutual Life Ins. Co.*, 193 U. S. 657, 663-664, 24 Sup. Ct. 549, 48 L. Ed. 832; *Anderson v. Commonwealth*, 59 Va. 295.

[2, 3] In January, 1904, upon the recommendation of the directors of the *Riverside Cotton Mills Company*, the stockholders at a meeting regularly held, in which 18,002 shares of the entire stock of 20,000 shares of the company were present and voting, voted unanimously in favor of having the charter of the company amended so as to authorize it to acquire and own stock in other companies not exceeding 80 per cent. of the capital stock of that company. The charter was so amended in accordance with the act of assembly entitled "An act concerning corporations." The object of the amendment, as alleged in the bill, was to enable the *Riverside Cotton Mills* to acquire \$350,000 of the stock of the *Dan River Power & Manufacturing Company* in addition to what the former then held in the latter company. The additional stock authorized to be acquired was acquired, and the charter as thus amended acted on without objection. At the time that amendment was sought by the *Riverside Cotton Mills* and granted by the *State Corporation Commission*, the present Constitution of the state was in force. Section 158 of that instrument (Code 1904, p. cclvii), which had been carried into a statute (subsection 8, § 1105a, *Pollard's Code*), provided that "every corporation heretofore chartered in this State, which shall hereafter accept, or effect, any amendment or extension of its charter, shall be conclusively presumed to have thereby surrendered every exemption from taxation, and every nonrepealable feature of its charter and of the amendments thereof, and also all exclusive rights or privileges theretofore granted to it by the General Assembly and not enjoyed by other corporations of a similar general character, and to have thereby agreed to thereafter hold its charter and franchises, and all amendments thereof, under the provisions and subject to all the requirements, terms and conditions of this Constitution and of any laws passed in pursuance thereof," so far as the same might be applicable to such corporation.

One of the objects of the convention which framed that Constitution was to get rid of special legislation in the creation and government of corporations, and to provide for the incorporation both of municipal and other corporations, and their government by general laws, as far as practicable. This is

apparent from sections 117, 154, and 64 (Code 1904, pp. ccxxxviii, ccl, ccxiv). In the light of that purpose of the constitutional convention, it seems to us that one of the objects of section 158 was to bring corporations theretofore created under the operation of the same general laws which were enacted to govern corporations created after the Constitution went into effect, as far as practicable. The language is sufficiently comprehensive to so provide. It declares that the corporation, after accepting or effecting an amendment to its charter, holds its charter and franchises and all amendments thereof under the provisions and subject to all the requirements, terms, and conditions of the Constitution and any laws passed in pursuance thereof, so far as the same might be applicable to such corporation. The charter which is to be so held is not only a contract between the state and the corporation, but is also a contract between the state and the stockholders, the corporation and the stockholders, and between the stockholders themselves. The provision that the charter shall be held after such amendment under the provisions and subject to all the requirements, terms, and conditions of the Constitution and of any laws passed in pursuance thereof, so far as applicable, is not limited to the relations between the state and the corporation, but applies as well to the relations between the state and the stockholders, the corporation and the stockholders, and between the stockholders themselves.

That this is the construction which should be placed upon the language used is shown by the construction which has generally, if not universally, been placed upon the language reserving the power to the state to amend, alter, or repeal a charter. Although the power reserved is to alter, amend, or repeal the charter, it is not limited to changes or alterations solely between the state and the corporation, but authorizes amendments and alterations within certain limitations directly affecting the stockholders in their relations to the state, to the corporation, and to each other.

In *Looker v. Maynard*, supra, the power to alter or amend, etc., reserved to the state, it was held authorized the Legislature to give the right of cumulative voting to each stockholder.

Under a like power it was held in *Anderson v. Commonwealth*, 59 Va. 295, that although the charter of an express company did not make the stockholders personally liable for debts of the company, the Legislature had the power to so modify the charter as to make them personally liable. See, also, *Lord v. Equitable Life Assurance Soc.*, 194 N. Y. 212, 87 N. E. 443, 22 L. R. A. (N. S.) 420; *Gregg v. Granby, etc., Co.*, 164 Mo. 616, 65 S. W. 312.

These and other cases which might be

cited show that, in order for the state to make amendments to or alterations in the charter of a corporation which affect stockholders in their relation to the corporation, to the state, or between themselves, it is not necessary that the stockholders shall be mentioned in terms in the instrument reserving the power to the state to alter or amend, but that the power reserved to alter or amend the charter is sufficient for that purpose.

But it is argued that the amendment made to the charter of the Riverside Cotton Mills Company in 1904, upon the application of that company, cannot have the effect of amending its charter and bringing it under the general laws of the state, so as to authorize it to consolidate with another company by a majority vote of its stockholders, because in its application it was declared that the amendment sought by that application was not to "affect or amend said charter in any other respect or particular, but that the same in all other respects shall continue as now."

If the effect of the amendment asked for and made was, as we have seen, to bring the corporation under the provisions of section 158 of the Constitution, the wish or declaration in the application for the amendment that the charter was not to be amended in any other respect would avail nothing. The amendment asked for could not be obtained, whatever might be the agreement of the stockholders or the desire of the corporation, upon terms inconsistent with the Constitution and laws under which it was asked and accepted. *Yazoo & Miss. etc., R. Co. v. Adams*, 180 U. S. 1, 23, 24, 21 Sup. Ct. 258, 45 L. Ed. 415.

[4] While under the provisions of section 1105e of the Code the Riverside Cotton Mills Company had the right to consolidate with the Dan River Power & Manufacturing Company by a majority vote, any stockholder of either corporation who did not give his assent to such consolidation and was dissatisfied therewith had the right to refuse to become a stockholder in the consolidated corporation, and was entitled to receive from such consolidated corporation the fair cash value of his stock as of the day before the vote for consolidation was cast, and a summary remedy was provided for ascertaining the value of such stock and to secure its payment to the dissenting stockholder. Subsection 41.

[5] While this summary remedy is given by the statute, and the appellant might have pursued it, he was not bound to do so. Although the consolidating statute took away from him the right to defeat the consolidation by refusing to assent to it, it did not take away from him the right to refuse to surrender his stock for stock in the new corporation, or to refuse to take anything for it less than its actual value at the date

of the consolidation. *Barnett v. Philadelphia Market Co.*, 218 Pa. 649, 87 Atl. 912; *Colgate v. U. S. Leather Co.*, 73 N. J. Eq. 72, 87 Atl. 657; 5 *Thomp. on Corp.*, § 6060.

[6] To ascertain that value, under the allegations of the bill, investigations into the condition of the Riverside Cotton Mills may have to be made and accounts taken, which could be much better done in a court of equity than in a court of law. The demurrer to the bill, on the ground that the appellant had a complete and adequate remedy at law, was therefore properly overruled. *Hickman v. Stout*, 29 Va. 6; *Tyler v. Nelson*, 55 Va. 214; *Coffman v. Sangston*, 62 Va. 263; *Nat. Life Assurance, etc., v. Hopkins, Adm'r*, 97 Va. 167, 33 S. E. 539.

[7] It is insisted by the appellant that, even if the Riverside Cotton Mills had the authority and right by a majority vote to consolidate with another company engaged in the same or a similar business, the consolidation in question was invalid, and should be set aside and annulled, because the provisions of section 1105e of the Code have not been complied with, and for the further reason that, even if they had been, the agreement of consolidation was so inequitable and unjust in its provisions to the appellant and other stockholders similarly situated that a court of equity should set aside the agreement on that ground.

By section 158 of the Constitution of the state, subsection "a" (Code 1904, p. ccll), it is provided: "Subject to the provisions of this Constitution and to such requirements, rules and regulations as may be prescribed by law, the State Corporation Commission shall be the department of government through which shall be issued all charters and amendments or extensions thereof, for domestic corporations, and all licenses to do business in this State to foreign corporations, and through which shall be carried out all the provisions of this Constitution, and of the laws made in pursuance thereof, for the creation, visitation, supervision, regulation and control of corporations chartered by, or doing business in, this State."

The agreement of the two corporations to consolidate, and the vote in favor thereof, were certified by the proper officers and in the manner prescribed by subsection 41 of section 1105e of the Code to the State Corporation Commission. Upon those papers being presented to the State Corporation Commission, the same subsection declares that it "shall ascertain and declare whether the applicants have, by complying with the requirements of the law, entitled themselves to the merger or consolidation applied for, and shall issue or refuse a certificate thereof accordingly; if it be issued, the said agreement and certificate, with the action thereon of the Commission, shall be certified by the Commission to the secretary of the commonwealth, and shall be recorded and lodged

in the manner in this act before provided as to the recordation and lodging of the original certificate of incorporation or articles of association of the corporation so consolidating, and when such certificate shall be filed for recordation in the office required as to original certificates of incorporation or articles of association, as the case may be, the said merger or consolidation shall be complete and the merged or consolidated corporation may proceed to carry out the details of said merger and consolidation according to the terms of the agreement and to transact and carry on business for which it was formed." All this was done in this case.

By subsection "d" of section 156 of the Constitution (Code 1904, p. ccliv), it is provided that "no court of this commonwealth (except the Supreme Court of Appeals, by way of appeals as herein authorized), shall have jurisdiction to review, reverse, correct or annul any action of the Commission, within the scope of its authority, or to suspend or delay the execution or operation thereof, or to enjoin, restrain or interfere with the Commission in the performance of its official duties: Provided, however, that the writs of mandamus and prohibition shall lie from the Supreme Court of Appeals to the Commission in all cases where such writs, respectively, would lie to any inferior tribunal or officer."

The State Corporation Commission having approved the consolidation of the two corporations and issued the certificate prescribed, which action was clearly "within the scope" of its authority, the trial court very properly held, under the plain language of subsection "d" of section 156 of the Constitution, that it had no jurisdiction to set aside or annul the consolidation thus effected.

[8] It is also insisted that the consolidation of the two corporations was in violation of the commerce clause of the Constitution of the United States (article 1, § 8) and of the act of Congress known as the "Sherman Anti-Trust Act" (Act July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200]).

Whether these were not questions to be considered and passed upon by the State Corporation Commission when it approved the consolidation and issued its certificate to the consolidated company need not be determined; for, whether they were or not, it is plain, under the allegations of the bill, that the consolidation was not in violation of either the commerce clause of the federal Constitution or the Sherman Anti-Trust Act. See *Standard Oil Co. v. United States*, 221 U. S. 1, 31 Sup. Ct. 502, 55 L. Ed. 619, 34 L. R. A. (N. S.) 834; *United States v. American Tobacco Co.*, 221 U. S. 106, 31 Sup. Ct. 632, 55 L. Ed. 663.

The court is of opinion that the corporation court properly overruled the demurrer

to the bill, and to that extent its decree must be affirmed, and the cause is remanded for further proceedings not in conflict with the views expressed in this opinion.

Affirmed.

(71 W. Va. 42)

HEROLD et al. v. McQUEEN, Sheriff, et al.
(Supreme Court of Appeals of West Virginia.
April 26, 1912.)

(Syllabus by the Court.)

1. STATUTES (§ 96*)—SCHOOLS AND SCHOOL DISTRICTS (§ 10*)—GENERAL OR LOCAL AND SPECIAL LAWS—ESTABLISHMENT OF COUNTY HIGH SCHOOL.

Chapter 26, Acts 1911, creating the Nicholas county high school in or near to the town of Summersville, and providing for the purchase of the ground, the erection of a building and the maintenance of the school by a tax to be levied by the board of directors of said school upon all the taxable property in the county, and constituting the county superintendent of free schools and the members of the county court ex officio as four members of the board of directors, and providing for the election of a fifth member at the next succeeding general election, and providing for the submission of the act to a vote of the people of the whole county, and not by districts, for their ratification or rejection, at a special election to be ordered by the county court, and providing that the act shall not become effective unless ratified by a majority of the votes taken at said special election, held to be a valid act, and not in contravention of any of the following sections of the Constitution, viz.: Section 38, art. 6 (Code 1906, p. lxii), sections 1, 5, 6, 10, and 12, art. 12 (Code 1906, pp. lxxxii, lxxxiii, lxxxiv), section 24, art. 8 (Code 1906, p. lxxiv), and section 8, art. 7 (Code 1906, p. lxxv).

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 107; Dec. Dig. § 96.* Schools and School Districts, Cent. Dig. § 13; Dec. Dig. § 10.*]

(Additional Syllabus by Editorial Staff.)

2. CONSTITUTIONAL LAW (§ 48*)—CONSTRUCTION AND OPERATION—VALIDITY OF STATUTES—PRESUMPTION IN FAVOR OF VALIDITY.

Every presumption is in favor of the validity of a legislative enactment, and, unless the court can clearly see that it is contrary to fundamental law, it will not declare the act unconstitutional.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 46; Dec. Dig. § 48.*]

3. SCHOOLS AND SCHOOL DISTRICTS (§ 10*)—COMPENSATION—CONSTITUTIONAL PROVISION.

Acts 1911, c. 26, creating the Nicholas county high school, and making the members of the county court ex officio members of the board of directors, and providing a per diem stipend for their services, is not unconstitutional as increasing the salary of the members of the county court.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. § 13; Dec. Dig. § 10.*]

Appeal from Circuit Court, Nicholas County.

Bill in equity by H. W. Herold and others against David McQueen, Sheriff, and others. From a decree for defendants, plaintiffs appeal. Affirmed.

Geo. E. Price and Squire Halstead, for appellants. Brown, Jackson & Knight, A. B. Koontz, A. L. Craig, S. R. King, Brown & Eddy, and Alderson & Breckinridge, for appellees.

WILLIAMS, J. H. W. Herold and 89 other taxpayers of Nicholas county, suing on behalf of themselves and all other taxpayers of said county, filed a bill against the sheriff, the board of directors of the Nicholas county high school, and the county court of said county, to enjoin the collection of a certain tax which had been levied for the purpose of raising funds with which to purchase ground in the town of Summersville, or near thereto, for the erection of a county high school building thereon, pursuant to a special act of the Legislature, passed at the regular session of 1911. A temporary injunction was awarded, but was later dissolved on motion of defendants, after due notice. From that order of dissolution, made on the 27th of November, 1911, plaintiffs have appealed.

In view of the nature of the case, it being one affecting the interest of all the citizens of a county, we thought we ought to determine it as soon as possible; and therefore we have taken it up for decision out of its regular order on the calendar of submitted cases. The bill assails the act creating the Nicholas county high school on the alleged ground that it contravenes certain provisions in the Constitution; and counsel for appellants, in their brief, assign a number of reasons why they think the act should be held to be unconstitutional.

[2] For a few years after the adoption of the United States Constitution it was a much mooted question whether or not the court had the power and the right to declare an act of Congress to be void on the ground that it contravened some provision of the Constitution. Many able lawyers thought it was not in the power of the court to do so. Among those who held to that view was the eminent statesman, Thomas Jefferson. But the question was early set at rest by the Supreme Court, which, in opinions handed down by the court in 1803 and in 1810, prepared by the distinguished Chief Justice, John Marshall, in *Marbury v. Madison*, 1 Cranch, 137, 2 L. Ed. 60, and in *Fletcher v. Peck*, 6 Cranch, 87, 3 L. Ed. 162, held that the court had such constitutional power. These are the leading cases on the subject, and they have been since followed, not only by the United States courts, but by the state courts as well. "But," says the Chief Justice in *Fletcher v. Peck*, "it is not on slight implication and vague conjecture that the Legislature is to be pronounced to have transcended its powers, and its acts to be considered as void. The opposition between the Constitution and the law should be such that the judge feels a clear and strong conviction of their incompatibility with each other." Every presumption, there-

fore, is in favor of the validity of the legislative enactment; and, unless the court can clearly see that the act is contrary to the fundamental law, it ought not to declare it unconstitutional. If the court entertains a doubt, that is enough to determine the question in favor of the legislative act; for the rule is that the court must be clearly and strongly convinced of its unconstitutionality before it will be justified in declaring an act void. It is a grave responsibility for the court to sit in judgment upon the acts of a co-ordinate branch of the government, and it should approach such a task with the greatest of caution, and should always be sure of its footing before pronouncing them void.

[1] Counsel claim that the act in question violates section 39, art. 6 (Code 1906, p. lxii), of the Constitution, which reads as follows, viz.: "The Legislature shall not pass local or special laws in any of the following enumerated cases; that is to say, for * * * regulating or changing county or district affairs; * * * the opening or conducting of any election, or designating the place of voting. * * * The Legislature shall provide, by general laws, for the foregoing and all other cases for which provision can be so made; and in no case shall a special act be passed, where a general law would be proper, and can be made applicable to the case, nor in any other case in which the courts have jurisdiction, and are competent to give the relief asked for." The act provides for the establishment, in the town of Summersville, or near thereto, of the Nicholas county high school, and creates a board of directors, which is to consist of five members. It constitutes the president and commissioners of the county court and the county superintendent of free schools ex officio members of said board, and gives them full power to act until the fifth member is elected, whose election is to take place at the next general election after the passage of the act. The board of directors is given the power to manage and control the school, employ teachers and fix their salaries, prescribe courses of study, and grant diplomas of graduation. It is also empowered to levy taxes for the purpose of raising revenue to purchase the necessary grounds, erect a school building thereon, and maintain the school. The funds provided for are to be collected and disbursed by the sheriff. The act also provides that, before it shall become effective, it shall be submitted to the voters of Nicholas county for their ratification or rejection at a special election to be ordered by the county court, notice of which is to be published for a given time before the election is had. Such special election was ordered and taken, and a majority of the votes cast in the whole county was for the high school, although a majority of the votes in some of the magisterial districts was against it.

The act does not attempt to regulate or change the county and district affairs of Nicholas county. Such county and district affairs as the Legislature is inhibited from regulating or changing by a local or special act are still carried on in that county under the general laws applicable alike to all the counties and districts of the state. The act only creates a county high school, and provides for its support by a tax to be levied on the taxpayers of the whole county. It does not work a change in, or operate as a regulation of, the general county and district affairs which already existed, but it is a creation of something in addition thereto. It makes no change in the plan provided by general law for the creation of district high schools; and, under the general law, any two or more districts of Nicholas county may still combine and establish district high schools.

It is insisted that the act violates the constitutional inhibition upon the Legislature to pass a special act "where a general law would be proper and can be made applicable to the case." But must not the Legislature determine for itself, before passing the law, whether or not a general law can be made applicable to the case? We think clearly that the question is chiefly one of expediency, a matter for legislative, and not judicial, judgment. Whether or not a special act is proper, for the reason that a general law cannot be made applicable to the case, often depends upon facts, circumstances, and local conditions which do not appear on the face of the act; and to ascertain whether such facts and conditions exist, as will justify a special act, is a preliminary question for the Legislature, and the passage of the special act must be taken as an expression of the legislative opinion that they do exist. The determination of such preliminary matters by the Legislature is not reviewable by the courts. They are not judicial questions. *Indianapolis v. Navin*, 151 Ind. 139, 47 N. E. 525, 51 N. E. 80, 41 L. R. A. 337; 36 Cyc. 991. Article 6 of the Constitution deals especially with matters concerning the rights, powers, and duties of the legislative branch of the government, and section 39, qualifying in a manner the legislative powers, must generally leave the matter of the propriety of a special act to the discretion of that body, and particularly must this be so with reference to such special acts as the one in question. We must therefore assume that the Legislature ascertained such facts and conditions to exist in Nicholas county, as justified the passage of the act. We have no power to review that finding. *Lusher v. Scites*, 4 W. Va. 11; *Roby v. Shepperd*, 42 W. Va. 286, 26 S. E. 278. The wisdom or propriety of passing a general law, providing for county high schools in all the counties of the state, in order that a county high school might be established, in pursuance

thereof, to meet the needs of Nicholas county, thereby avoiding the necessity of passing the special act in question, was a matter wholly within the legislative discretion. 36 Cyc. 991. The general law now in existence has no provision for the establishment of county high schools, and the expediency of passing such a general law, when perhaps only a few counties of the state stand in need of such schools, is a question determinable alone by the Legislature. "The expediency or in expediency of an act is a question for the Legislature and not for the courts." *Slack v. Jacob*, 8 W. Va. 612.

Numerous special acts have been passed at various times since the adoption of the present state Constitution, creating independent school districts, establishing branch schools of the state normal school at Huntington, and also special acts establishing preparatory schools for the state university. These acts are similar in nature to the one in question, and can claim no higher constitutional sanction. The validity of those acts has not been questioned in any of the courts, so far as we know; and to decide the present act unconstitutional would be, in effect, to hold all those schools to be unlawfully established, and might occasion great disturbance and confusion.

The fact that the Legislature submitted the act to a vote of the people of the county was not a violation of the Constitution prohibiting the passage of a special act "opening or continuing any election or designating the places of voting." The act does not provide the manner of conducting the election, or name the places of voting. Presumably the election was to be conducted under the general law regulating the holding of elections, and the voting to be had at the places theretofore determined pursuant to general law. That the general law, in force at the time this act was passed, provided for the establishment of district high schools by two or more districts in any county, the majority of the voters of each district voting in favor thereof, does not prove the act unconstitutional by showing that no necessity therefor existed. The Legislature must have determined that such general law did not meet the needs of Nicholas county. "The fact that the preceding Legislature may have considered that a general law on the subject could be made applicable is not binding upon a succeeding Legislature." 36 Cyc. 991, editorial note 87. *Wilburn v. Raines*, 111 Va. 334, 68 S. E. 993; *Indianapolis v. Navin*, *supra*.

It is urged that the act violates section 1, art. 12, of the Constitution (Code 1906, p. lxxxii), which says: "The Legislature shall provide, by general law, for a thorough and efficient system of free schools." The Legislature has, by general law, provided a system of free schools throughout the state. But it will be noted that it is not prohibited from augmenting, and making more efficient,

the general system of free schools, by the establishment of special high schools and graded schools in any locality where it may think it wise to do so. The Constitution does not provide for the establishment of the state university, or the state normal school at Huntington, or their respective branch schools. These are established and maintained by special legislation; and, while the people of their respective locations are in a position to receive a greater benefit from them than people in other parts of the state, yet the right and power of the Legislature to create them, and to provide for their maintenance by taxing the people of the whole state, has not been questioned. We think the Legislature can, with equal right, tax the county as a unit to support a county high school. True, sections 6 and 10, art. 12, of the Constitution (Code 1906, pp. lxxxiii, lxxxiv), recognize the districts existing at the time the Constitution was adopted, as the unit for free school purposes, but those sections also recognize the inherent power vested in the Legislature to change the unit, and they do not divest it of that power. There is nothing in article 12, which is the article dealing especially with the subject of public education, prohibiting the Legislature from making the county, instead of the district, the unit, if it should see fit to do so; and nothing to prevent it from retaining the district as the unit for the general or common free schools, and establishing the county as the unit for graded or high schools. The Legislature could have established the high school without submitting the question to a vote of the people at all, and may have submitted it to a vote only for the reason that it thought it unwise to establish the school unless a majority of the voters of the whole county were in favor of it. Our attention is called to section 10, art. 12, which reads: "No independent free school district or organization shall hereafter be created, except with the consent of the school district or districts out of which the same is to be created, expressed by a majority of the voters on the question." But the act in question does not create a school district out of any part of any school district or districts of the county. The integrity of the different districts remains intact, and the several boards of education thereof have the same territorial jurisdiction, and the same amount of property on which to lay their levy to raise revenue to run the schools of their several districts that they had before the act was passed. Hence we do not think the act is repugnant to the sections referred to in article 12 of the Constitution.

It is claimed that the act, in authorizing the board of directors to levy a county tax, violates section 24, art. 8 (Code 1906, p. lxxiv), of the Constitution; and also that, in constituting the county superintendent of free schools and the members of the county

court members of the board of directors for the high school, it violates section 8, art. 7, which prohibits the Legislature from appointing or electing officers. The authority to levy taxes to support the school is a necessary incident to the management and control given to the board of directors, and while the tax may be regarded as a county tax, being leviable upon all the property in the county, it is, nevertheless, no interference with the right and power conferred upon the county court by section 24, art. 8, giving to that tribunal control of the police and fiscal affairs of the county, and the power to lay and disburse the county levy. The county levies there mentioned relate to the revenues to be raised for the administration of those matters and affairs over which the county courts are given supervision and control. The public education is not under the management of the county courts. But even those powers which are given by that section to the county courts are subject to "such regulations as may be prescribed by law." That section does not say, nor does it mean, that the county court is the only tribunal that can be given the power to make county levies for any purpose.

By constituting the president and commissioners of the county court and the county superintendent of free schools ex officio members of the board of directors for the high school, the Legislature did not violate the Constitution, in that it thereby elected men to office. Those men had already been elected to their respective offices; and the act only places upon them additional duties that are not inconsistent with those which they were elected to perform. This question, we think, has been determined by the case of *Bridges v. Shallcross*, 6 W. Va. 562; and we do not think it is necessary to enter upon a discussion of it in this opinion. We approve the decision made in that case, and think the reasons assigned in the opinion therein rendered are applicable here. We do not think their duties as members of the board of directors are at all incompatible with their duties as members of the county court. We cannot see wherein their respective duties will conflict. Only a small portion of their time will necessarily be occupied in the discharge of duty in either respect. And, by increasing their duties, and providing additional compensation for the extra services to be performed, the selection of persons properly fitted to discharge the duties of the office is facilitated.

[3] It is insisted that the act violates the Constitution by increasing the salary of the members of the county court. The per diem stipend of \$2 now allowed them by law can scarcely be called a salary. But, if it be a salary, the act does not increase it, for, when they meet as a board of directors, they are not then sitting as members of the county court; and the \$2 per day allowed by

the special act to each member of the board of directors for time actually employed in transacting the business of the high school is not an increase of the per diem compensation to the members of the county court. It is not to be supposed that they would meet as a county court, and also as a board of directors, on one and the same day, and render an account for two days' services performed in one.

The decree appealed from is affirmed; and as that decree does not and could not make final disposition of the case, it being a vacation order, we are not authorized to enter a decree here dismissing plaintiffs' bill. Therefore the cause is remanded for final disposition by the lower court.

(128 Ga. 351)

COMMISSIONERS OF ROADS AND REVENUES OF SUMTER COUNTY v.
McMATH et al.

(Supreme Court of Georgia. July 9, 1912.)

(Syllabus by the Court.)

1. MANDAMUS (§ 168*)—PROCEEDINGS—ADMISSIBILITY OF EVIDENCE.

McMath and others, citizens of Sumter county, applied to the judge of the superior courts of the Southwestern circuit, under the provisions of Civil Code 1910, § 5441, for a mandamus against the commissioners of roads and revenues of that county, to compel them to have a designated public road of the county worked and repaired, so as to bring it up to that standard now required by existing laws of this state, as embodied in Civil Code 1910, §§ 632, 633, 654, and so that ordinary loads, with ordinary ease and facility, could be continuously hauled over such road. The answer of the defendants raised material issues of fact which were submitted to a jury during term. *Held*, evidence offered by the defendants was immaterial and inadmissible which tended to show (a) that the road complained of was "up to the average roads, other than graded roads, in Sumter county"; (b) that in another designated road in the county, before it was graded, "there were places where people in traveling the road turned out of the main right of way, as was done on the road in question"; (c) that the road in question was "comparatively as good as the other roads of the county," or as good as the average roads of the same class in the county; (d) and that holes had been seen in "the graded roads in the county."

[Ed. Note.—For other cases, see *Mandamus*, Cent. Dig. §§ 372-374; Dec. Dig. § 168.*]

2. NEW TRIAL (§ 128*)—PROCEEDINGS TO PROCURE—ASSIGNMENTS OF ERROR.

One ground of the defendants' motion for a new trial is: "Because, as movants contend, the court erred in refusing to allow the defendants, over the objection of the plaintiffs, to prove by R. G. Christian, superintendent of the roads of the county, whether, with the force you have, you have been able to maintain all the roads in the county so that they are free from stumps, trees, bushes, at least on first-class roads 80 feet wide, on second-class roads 20 feet wide, and third-class roads 16 feet wide, and driveways for carriages 5 feet 6 inches wide, and absolutely free from obstruction." Counsel for defendants stated that he

expected to prove by this witness that such is a fact, and that such fact was material to the issues in the case. Said ruling is error, for the reason that was stated to the court at that time, indicated herein, and for the further reason that it was not the intention of the law to give one citizen the right to require the defendants to work and maintain any particular road to the standard as required by law." No sufficient assignment of error is made in this ground, for the reason that it does not appear therefrom which fact was sought to be proved by the witness, whether he had been able, or whether he had not been able, to maintain all the roads in the county so that they were free from stumps, etc.

[Ed. Note.—For other cases, see *New Trial*, Cent. Dig. §§ 257-262; Dec. Dig. § 128.*]

3. NEW TRIAL (§ 128*)—PROCEEDINGS TO PROCURE—ASSIGNMENTS OF ERROR.

Nor is there a sufficient assignment of error in the following ground of the motion for new trial: "Because the movants contend the court erred in refusing to allow [one of the defendants], as a witness for the defendants, to answer the following question: 'How long would it take to go over all the roads in Sumter county and to keep them free from stumps, holes, ruts, and roots'"—it not appearing what answer the witness would have made to the question.

[Ed. Note.—For other cases, see *New Trial*, Cent. Dig. §§ 257-262; Dec. Dig. § 128.*]

4. MANDAMUS (§ 173*)—PROCEEDINGS—INSTRUCTIONS.

The court instructed the jury as follows: "I charge you that, if you should determine that this road was either a second-class or third-class road, it was kept and maintained in accordance with the law and with the standard as required by the law for that class of roads—whether second-class road or third-class road—whichever you may determine it was, then if the road got in a bad condition from heavy rains, or matters of that character, if while in that condition it had been destroyed or injured or put out of that condition by excessive or heavy rains, the county commissioners would be entitled to a reasonable time (and it is a question for the jury to determine as to what would be a reasonable time) to put said road back in the condition in which the law requires such roads to be maintained." This charge related to one of the defenses set up, to the effect that the road in question, if not in the condition required by law, was out of repair by reason of recent heavy rains, and that the defendants had not had sufficient time, with the force at their command, to repair it and the other public roads of the county which had also been damaged by excessive rains. The instruction was therefore not erroneous, and especially in view of the whole charge, (a) as in effect telling the jury that "unless the road in question was up to the standard as required by law before the injury occasioned by heavy rains, then the fact that rains had washed and ruined the road in question would be no reason why a mandamus absolute should not be granted"; or (b) "because said charge is inconsistent with and contrary to the following portion of the charge of the court to the jury in said cause: 'If the facts disclose that the road is not below that standard, that is, that reasonable loads with reasonable ease and facility can be transported continuously over said road, then the plaintiffs would not be entitled to a verdict in their favor.'"

[Ed. Note.—For other cases, see *Mandamus*, Cent. Dig. §§ 378-380, 388-390; Dec. Dig. § 173.*]

5. MANDAMUS (§ 173*)—PROCEEDINGS—INSTRUCTIONS.

Another ground of the motion for new trial was that "the court erred in giving the following in charge to the jury: 'If you should find against the plaintiffs, and in favor of the defendants, that is, that the road is maintained in such manner (as the court has already explained) that reasonable loads could be continuously hauled over it with reasonable ease and facility, then it would be your duty to render a verdict finding in favor of the defendants.'" The error assigned upon this excerpt from the charge is that the court thereby instructed the jury that the road in question must not only be such that reasonable loads can be continuously hauled over it with reasonable ease and facility, but that it must be up to that standard also, as prescribed by sections 632 and 633 of the Code of 1910." The exception is without merit. Civil Code 1910, § 5441, authorizes judges of the superior courts, and makes it their duty upon a proper showing made to them, "to issue the writ of mandamus against such parties having charge of and supervision over the public roads of such county, and to compel by such proceedings the building, repairing, and working of such public roads as are complained of, up to that standard now required by existing laws of this state as embodied in said sections [two of them being sections 632 and 633], and so that ordinary loads, with ordinary ease and facility, can be continuously hauled over such public roads." Certainly a public road over which reasonable or ordinary loads cannot, with reasonable or ordinary ease and facility, be hauled is not up to the standard required by law in this state.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. §§ 378-380, 388-390; Dec. Dig. § 178.*]

6. APPEAL AND ERROR (§ 1078*)—REVIEW—ABANDONMENT OF ERROR.

The assignments of error upon the failure of the court to instruct the jury in certain particulars, not being referred to in the brief of counsel for plaintiff in error, must be considered as abandoned.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4256-4261; Dec. Dig. § 1078.*]

7. SUFFICIENCY OF EVIDENCE—REFUSAL OF NEW TRIAL—NO ERROR.

The evidence authorized the verdict, and the court did not err in refusing a new trial.

Error from Superior Court, Sumter County; Z. A. Littlejohn, Judge.

Mandamus proceedings by J. F. McMath and others against the Commissioners of Roads and Revenues of Sumter County. Judgment for plaintiffs, and defendants bring error. Affirmed.

R. L. Maynard, of Americus, for plaintiffs in error. W. T. Lane, of Americus, for defendants in error.

FISH, C. J. Judgment affirmed. All the Justices concur.

(128 Ga. 397)

POWELL v. FOWLER.

(Supreme Court of Georgia. July 11, 1912.)

(Syllabus by the Court.)

1. ALLEGATIONS OF FRAUD—NO DEMURRER.

No demurrer was filed raising the question of whether the charge of fraud in the petition was sufficient.

2. EXCHANGE OF PROPERTY (§ 8*)—REAL PROPERTY—REMEDIES OF PARTIES.

An exchange of lands was made between two parties. One of the parties sued the other, alleging that the defendant had fraudulently represented that the tract which he was to convey to the plaintiff contained 300 acres, when it in fact contained much less, and the plaintiff sought to recover proportionately for the shortage. Held, that the evidence as to the existence of actual fraudulent representations and the reliance thereon was sufficient to be submitted to the jury; but the only evidence as to the actual contents of the tract of land being the deed made to the defendant by the person from whom he purchased it, in which the tract was described as containing "240 acres, more or less," this was not sufficient to show the actual shortage to be 60 acres, and authorize a recovery on that basis.

[Ed. Note.—For other cases, see Exchange of Property, Cent. Dig. §§ 14-18; Dec. Dig. § 8.*]

3. MOTION FOR NEW TRIAL—OTHER GROUNDS NOT MERITORIOUS.

None of the other grounds of the motion for a new trial were meritorious.

Error from Superior Court, Fulton County; J. T. Pendleton, Judge.

Action between George B. Powell and J. R. Fowler. From the judgment, Powell brings error. Reversed.

R. J. Jordan and Simmons & Simmons, all of Atlanta, for plaintiff in error. Hill & Wright and R. R. Arnold, all of Atlanta, and J. P. Brooke, of Alpharetta, for defendant in error.

LUMPKIN, J. Judgment reversed. All the Justices concur.

(128 Ga. 298)

BOWEN et al. v. DRIGGERS.

(Supreme Court of Georgia. July 11, 1912.)

(Syllabus by the Court.)

1. REVERSIONS (§ 3*)—MERGER—FEE SIMPLE.

A testator devised a tract of land to his wife "for and during her life, until her death; then the above property to go back to the estate of the said [testator]." After the death of the testator his wife remarried and died. She was survived by her second husband. She left no children or descendants of children as the offspring of either marriage. Held that, by the will of the testator, his wife took a life estate in the land; and there being no other heir at the time of the testator's death, she inherited the reversion, and the two estates merged into a fee simple.

[Ed. Note.—For other cases, see Reversions, Cent. Dig. § 8; Dec. Dig. § 3.*]

2. DESCENT AND DISTRIBUTION (§ 61*)—PERSONS ENTITLED—MERGER OF ESTATES.

Upon the death of the woman in whom a fee-simple estate had vested by merger, her surviving husband inherited the property as her sole heir; and persons claiming to be heirs of the testator after the death of the life tenant acquired no title.

[Ed. Note.—For other cases, see Descent and Distribution, Cent. Dig. §§ 175-185; Dec. Dig. § 61.*]

Error from Superior Court, Toombs County; B. T. Rawlings, Judge.

Action by Louis Bowen and others against C. W. Driggers. Judgment for defendant, and plaintiffs bring error. **Affirmed.**

Williams & Giles, of Lyons, and P. W. Meldrim, of Savannah, for plaintiffs in error. Hines & Jordan, of Atlanta, for defendant in error.

LUMPKIN, J. [1] If a testator devises a life estate in land, the devisee takes only a life estate by virtue of the will. If the testator makes no provision as to what shall become of the reversion, upon his death it passes to and vests in his heir or heirs. Here the widow of the testator took a life estate under the will. No provision was made as to who should take the remainder. Therefore, upon the death of the testator, by inheritance it passed to his heir. It happened that the widow was his sole heir. Thus she took under the will a life estate, and as sole heir was vested with the remainder by inheritance. There is nothing to indicate any intention on her part to keep the two estates separate. They accordingly merged, and she became the owner in fee simple of the property.

[2] Upon her death her sole heir inherited from her. Persons who claim to be heirs of her first husband had no interest in the land, and no right to recover it from her second husband. It was accordingly proper to sustain a demurrer to an action filed for that purpose; the facts stated in the headnote appearing on the face of the petition. Civil Code, § 8929; Wilder v. Holland, 102 Ga. 44, 29 S. E. 134; Oliver v. Powell, 114 Ga. 592 (4), 40 S. E. 826; Smith v. Moore, 129 Ga. 644, 59 S. E. 915.

Judgment affirmed. All the Justices concur.

(128 Ga. 402)

EDENFIELD v. MILNER et al.

(Supreme Court of Georgia. July 11, 1912.)

(*Syllabus by the Court.*)

1. EXECUTION (§ 140*)—ENTRY OF LEVY—SUFFICIENCY.

An entry of levy by a constable in these words: "Georgia, Emanuel County. I have this day levied the within fi. fa. on one half interest in 123 acres, more or less, in the 58th District G. M., of said county, adjoining lands of John Edenfield Sr., and others, as the property of W. A. Oliver, defendant; legal notice given said W. A. Oliver; property pointed out by the plaintiff"—was too indefinite and uncertain to authorize the sale of the half interest in any particular tract of land. Civil Code, § 6026; Crawford v. Verner, 122 Ga. 814, 50 S. E. 958, and citations.

[Ed. Note.—For other cases, see Execution, Cent. Dig. §§ 334-341; Dec. Dig. § 140.*]

2. EXECUTION (§ 140*)—ENTRY OF LEVY—SUFFICIENCY.

Such a levy gave no authority to the sheriff to sell, not a one-half interest in the tract of land containing 123 acres, more or less, but

the entire interest in a tract described as containing 61½ acres, more or less.

[Ed. Note.—For other cases, see Execution, Cent. Dig. §§ 334-341; Dec. Dig. § 140.*]

3. LIMITATION OF ACTIONS (§ 72*)—COMPUTATION OF PERIOD—INFANCY OR PARTY.

The uncontradicted evidence showing that the plaintiff, who sued in her own right, was 25 years of age when the suit was brought, and that the other plaintiff, for whom she appeared as next friend, was 20 years of age at that time, prescription could not have run against either of them, and therefore it is unnecessary to determine whether the sheriff's deed would have been admissible as color of title.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 390-398; Dec. Dig. § 72.*]

4. SUFFICIENCY OF EVIDENCE—MOTION FOR NEW TRIAL.

The evidence was sufficient to authorize the recovery of a one-half interest in the land for which suit was brought, and there was no error in overruling the motion for a new trial.

Error from Superior Court, Emanuel County; B. T. Rawlings, Judge.

Action by M. O. Milner and others against John Edenfield, Jr. Judgment for plaintiffs, and defendant brings error. **Affirmed.**

Saffold & Larsen, of Swainsboro, for plaintiff in error. Williams & Bradley, of Swainsboro, for defendants in error.

LUMPKIN, J. Judgment affirmed. All the Justices concur.

(128 Ga. 406)

McAFEE et al. v. FLANDERS.

(Supreme Court of Georgia. July 11, 1912.)

(*Syllabus by the Court.*)

1. JUDGMENT (§ 7*) — DISQUALIFICATION OF JUDGE—SUBSTITUTE JUDGE.

Where an ordinary was disqualified from presiding in a proceeding to probate a will, on account of relationship to some of the parties, and called in the ordinary of an adjoining county, who presided in his stead, a judgment rendered by the latter was not void, although the disqualification was not entered on the record.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 13; Dec. Dig. § 7.*]

2. EVIDENCE (§ 373*) — DOCUMENTARY EVIDENCE—AUTHENTICATION.

Upon objection being made to the admission in evidence of a certified copy of the record in such case, on the ground that the ordinary of the county other than that where the case was pending was without jurisdiction, there was no error in admitting parol evidence of the disqualification, and the consequent request for the other ordinary to preside, and thereupon allowing the certified transcript to be introduced.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1581-1586, 1590, 1592, 1593, 1610, 1611; Dec. Dig. § 373.*]

3. EXECUTORS AND ADMINISTRATORS (§ 451*)—ACTIONS—INSTRUCTIONS.

It was error to charge: "I charge you, on the other hand, if you find from the facts and circumstances of this case that the defendants were named as executors in the will, and that, when this will was about to be set up and probated in solemn form, there was an agreement entered into by and between all of the heirs

of [the testator] that the estate should be collected and turned over to the widow, and the widow has distributed it under that agreement, then I charge you that the defendants would not be liable to the plaintiff in any amount whatever, and you should find for the defendants." And also in charging: "On the other hand, if you find that there was an agreement entered into, whereby all the heirs consented and agreed that the estate should be collected and turned over to the widow, and by her used, and it was further agreed by the heirs, the plaintiff included, that it was to be by her used and distributed, and it has been distributed by her in pursuance of that agreement, then I charge you that the defendants would not be liable." Such charges made the liability of the defendants depend, not only upon whether such agreement as that hypothetically stated had been made, and whether the defendants had delivered the property to the widow in accordance therewith, but also upon whether it had been distributed by her in pursuance of that agreement.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 1877-1882; Dec. Dig. § 451.*]

Error from Superior Court, Johnson County; B. T. Rawlings, Judge.

Action by S. A. Flanders against J. K. McAfee and others, executors of John A. McAfee. Judgment for plaintiff, and defendants bring error. Reversed.

John A. McAfee, of Johnson county, died testate. He devised a life estate to his wife in certain property, and a town lot in fee simple, with instructions to the executors to build a house upon it. He left certain specific legacies to named children, among them being a bequest of \$200 to the plaintiff, who was his daughter, "provided she has not received that amount above the \$200 given or desired to be given the others of my children." He directed that the remainder of his property should be kept together by his executors for the use and benefit of his wife, "provided, from misuse or adverse circumstances the profits from the bequest mentioned in item 1st, and item 2nd, become inadequate to the demands of my wife, Mary Ann Elizabeth McAfee." He then declared that whatever might remain of his estate after the death of his wife should be equally divided among his children named in the will, and appointed his two sons as his executors. His daughter sued the executors for the legacy of \$200 given to her by the will. The executors set up, among other defenses, that the will omitted one of the testator's children from the distribution, and that the heirs had entered into an agreement for a different mode of distribution, so as to admit such child of the testator to an equal share. The jury found in favor of the plaintiff. The defendants moved for a new trial, which was denied, and they excepted.

B. H. Moye and J. L. Kent, both of Wrightsville, and Hines & Jordan, of Atlanta, for plaintiffs in error. Wm. Faircloth, of Wrightsville, for defendant in error.

LUMPKIN, J. (after stating the facts as above). [1, 2] 1, 2. One ground of the motion for a new trial was that the court admitted in evidence a certified transcript of the record from the court of ordinary, probating the will of the testator. The ground of objection was that the judgment of probate was signed by the ordinary of Washington county, who was without jurisdiction to preside in Johnson county; it not appearing from the record that the ordinary of the latter county was disqualified. The court allowed the ordinary of Johnson county to testify that he was disqualified from presiding by reason of being the uncle of the children of the testator, and that he called in the ordinary of Washington county to preside for him, and then admitted the certified transcript. Error was assigned upon the admission of the parol evidence and also of the transcript. There was no error in such ruling. The proper and orderly method of procedure would have been to enter of record the fact of the disqualification of the ordinary of Johnson county and the consequent presiding of the ordinary of Washington county. This would have made the record speak all the facts, and have shown on its face the jurisdiction of the presiding ordinary. But if the disqualification in fact existed, and the ordinary of the adjoining county was therefore called in to preside, his judgment will not be held void because the reason for his presiding was not duly entered of record. Section 4785 of the Civil Code of 1910 contains two provisions, one as to matters presented to the ordinary "as such ordinary." In that event the statute declares that, "if any disqualification exists, he shall enter it upon the papers, and the ordinary of any adjoining county shall pass upon it and certify his action in the matter to the ordinary of the county where the business arose, and the latter shall record it." The second provision is "when any ordinary is disqualified to try any case or issue pending before the court of ordinary." In that event he shall call upon the ordinary of an adjoining county to preside on the hearing of such case or issue, provided that the judge of the county or city court, or, if none, the clerk of the superior court, may exercise the jurisdiction, without the necessity to call in the ordinary of another county. In the latter part of the section, which deals with the trial of cases before the court of ordinary, the statute does not in terms require an indorsement of the disqualification upon the papers. While it may be good practice to make such entry, and may have the advantage of furnishing a permanent memorial thereof, it is not made a statutory requirement.

[3] 3. If the evidence showed the facts hypothetically stated in the third headnote, the charge based upon them was too restrict-

ed. If the executors were authorized to deliver to the widow the property of the estate for use and distribution by her, their liability for special pecuniary legacies would not depend on whether she distributed the estate in accordance with the agreement or not. If the funds and personal property of the estate were rightfully delivered to her under such agreement, the executors would not be liable for the use and distribution which she made of them.

Judgment reversed. All the Justices con-
r.

(138 Ga. 306)

ADAMS et al. v. WHITE.

WHITE v. ADAMS et al.

(Supreme Court of Georgia. June 13, 1912.)

(Syllabus by the Court.)

1. REFORMATION OF INSTRUMENTS (§ 45*)—EVIDENCE—SUFFICIENCY.

The evidence authorized the finding of the jury that the plaintiffs were entitled to a reformation of the bond for title, as prayed for in their equitable petition.

[Ed. Note.—For other cases, see Reformation of Instruments, Cent. Dig. §§ 157-183; Dec. Dig. § 45.*]

2. VENDOR AND PURCHASER (§ 176*)—PERFORMANCE OF CONTRACT—PAYMENT OF PRICE—ABATEMENT.

Where land is sold by the acre, generally an apportionment for a deficiency is to be made proportionally to the number of acres in the deficiency; and under the evidence this case falls within the general rule.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 833-340; Dec. Dig. § 176.*]

3. REFORMATION OF INSTRUMENTS (§ 44*)—ADMISSIBILITY OF EVIDENCE.

It follows from the foregoing ruling that evidence tending to show that certain portions of the land were more valuable than other portions was irrelevant and immaterial, and should not have been admitted over objections duly made.

[Ed. Note.—For other cases, see Reformation of Instruments, Cent. Dig. §§ 155, 156; Dec. Dig. § 44.*]

4. REFORMATION OF INSTRUMENTS (§ 46*)—INSTRUCTIONS.

The court erred in giving instructions which authorized the jury, in case they found the sale of the land was by the acre at a fixed price per acre, to make any other reduction than one proportionally to the deficiency in acreage.

[Ed. Note.—For other cases, see Reformation of Instruments, Cent. Dig. §§ 157-183; Dec. Dig. § 46.*]

5. TRIAL (§ 340*)—VERDICT—CORRECTION.

The court did not err in refusing, on motion of the plaintiffs, "to correct and amend the verdict by striking therefrom the finding that the purchase price of the land be abated in the sum of \$1,000, and inserting in lieu thereof that the purchase price be abated in the sum of \$1,376," and to amend the verdict in certain other respects.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 795-799; Dec. Dig. § 340.*]

6. REFUSAL TO DIRECT VERDICT—No ERROR.

The court did not err in refusing to direct a verdict for the defendants.

Error from Superior Court, Newton County; L. S. Roan, Judge.

Action by E. H. Adams and others against Hugh White. To the judgment plaintiffs except, and defendant files a cross-bill of exceptions. Reversed on main bill of exceptions, and affirmed on cross-bill.

F. C. Foster, Sr., of Madison, for plaintiffs in error. Rogers & Knox, of Covington, for defendant in error.

BECK, J. E. H. Adams and others brought their equitable petition against Hugh White, seeking to reform a bond for title to 42 acres of land, "more or less," made by White to petitioners, so as to make the bond show that it was an obligation to convey 42 acres of land by the acre at \$100 per acre, and not a sale of the land by the tract, as it appeared by the terms of the bond. Petitioners prayed for an abatement of the purchase price of the land, and a reduction from the amount of certain promissory notes given therefor, on account of a deficiency of 13.76 acres in the tract sold, and to enjoin against certain suits of White against petitioners on the notes, then pending in the city court of Covington. White answered, denying petitioners' right to a reformation of the bond for title, and insisting that the land had been sold by the tract, and that petitioners were not entitled to a reduction in the purchase price in proportion to the deficiency in the number of acres of land. By way of cross-action White prayed for a judgment and decree against the plaintiffs for the full amount of principal, interest, and attorney's fees due on the notes. The alleged deficiency in acreage was admitted. At the conclusion of the introduction of evidence, the defendant moved that the court direct a verdict in his favor for the full amount of the notes, and against reformation of the bond for title. The motion was denied. Specific questions were submitted by the court to the jury, and in answer to these questions the jury found, in effect, that the contract between White and petitioners was for a sale of the land by the acre, and not by the tract; that there was a mutual mistake in drawing the bond for title, which showed that the sale was by the tract; and that the sum of \$1,000 should be deducted from the amount of the notes, and that White should recover of the plaintiffs \$1,415.19 principal, \$365.52 interest, and \$141.80 attorney's fees. The court thereupon entered a decree accordingly. The plaintiffs moved to amend the verdict by striking the finding that the purchase price of the land be abated in the sum of \$1,000, and inserting in lieu thereof that the purchase price be abated in the sum of \$1,376, on the ground that, the jury having

found that the sale was by the acre at \$100 per acre, the bond for title should be so reformed as to express a sale at \$100 per acre, and, it being admitted in the pleadings that there was a deficiency of 13.76 acres, it followed as a matter of law that the deficiency in acreage should be apportioned, and the purchase price abated at the rate of \$100 per acre, and that there should be a corresponding reduction in the amount of principal, interest, and attorney's fees recovered, and that the costs should be equitably apportioned between the parties according to this finding. The plaintiffs also filed their motion for a new trial upon the general grounds and certain special grounds. The court overruled both motions, and the plaintiff excepted. The defendant took a cross-bill of exceptions to the refusal to direct a verdict in his favor, and to the refusal of a new trial.

[1] 1. The evidence was sufficient to authorize the finding of the jury, in favor of the petitioners, that the sale of the land was by the acre at the price of \$100 per acre, and that the bond for title should be reformed as prayed.

[2] 2. Having found that the sale of the land was by the acre, and not by the tract, it follows that the plaintiffs were entitled to a reduction from the purchase price of an amount proportional to the deficiency in the acreage at the rate of \$100 per acre. In the case of *Kendall v. Wells*, 126 Ga. 343, 352, 55 S. E. 41, 45, it was said: "If land is sold by the acre, generally an apportionment for a deficiency is to be made proportionally to the number of acres in the deficiency. *Yost v. Mallicotte's Adm'r*, 77 Va. 610. But there are exceptional cases where it is otherwise. And the defendant in error in the main bill of exceptions insists that the present case is one of the exceptional cases, and cite, among other authorities to support this contention, the case of *White v. Adams*, 7 Ga. App. 765, 68 S. E. 271. This case is cited both as authority that cases like the present are to be classed as exceptional cases, and to show that this is an adjudication binding upon the parties; that it is one of the exceptional cases where the abatement of the purchase price should not be calculated "by mere comparison with the number of acres described in the bond for title with the admitted deficiency." We do not think that this is an adjudication binding upon the parties in the trial of the case in the superior court, made by the petition to reform the bond for title and the answer and the cross-petition filed in the equitable proceeding. The ruling in the Court of Appeals was based upon the status of the case as made under the strictly common-law proceeding in the city court, as modified by the admissions and concessions of the parties—where the plaintiff was clearly entitled to a verdict for the full amount of the notes for the purchase money—"that the plaintiff was

willing to allow a fair abatement of the purchase price." In the equitable proceeding, with which we are now dealing, the petitioners, who were the defendants in the suit at law in the city court, based upon the notes for the purchase money, became the plaintiffs and insisted upon their right to have the bond for title so reformed as to show that the land was sold by the acre, and to have an abatement made proportionally to the deficiency in the acreage.

Nor can we agree with our able Brethren of the Court of Appeals in the conclusion reached, and broadly stated, that this was such an exceptional case as took it out of the general rule, stated above, that "where land is sold by the acre, generally an apportionment for the deficiency is to be made proportionally to the number of acres in the deficiency." If this had been a sale of land by the tract, and not by the acre, and there had been a failure of title to any part of the tract sold, and that portion to which there was a failure of title had been more valuable on account of improvements upon it, or valuable mineral deposits, or because of a water power upon it, or was of greater value in proportion to acreage than the remainder of the tract because of similar facts to those enumerated, the purchaser would be entitled to an abatement of the purchase price in proportion to the value of that part of the lands which he did not obtain under the contract of purchase and sale because of such failure of title. But where there is no failure of title to any portion of the tract of land sold, and where the purchaser obtains the entire tract purchased and included in the boundaries by which it was described, and the land was sold at a fixed price per acre, there can be no deduction from the purchase price, other than proportionally to the deficiency in acreage. It is impossible to conceive of any rule by which the jury, in a case like the present, if instructed in the charge of the court to make "a fair abatement of the purchase price," would be guided. It is true that it appears from the evidence that that portion of the land immediately on Poplar street, because of its availability for building purposes, was worth more than other portions of the land. But from what part of the land could the jury deduct the 13.76 acres, the amount of the shortage, from the tract of land sold? Could they say that the shortage was on that part of the tract most remote from the street, or that the shortage was in the center of the tract, or that it was on either one of the two sides of the tract? Manifestly not. This case is one in which the general rule of an abatement of the purchase price proportionally to the deficiency in acreage should be applied.

[3] 3. It follows, from what we have said above, that evidence tending to show that certain portions of the land were more val-

uable than other portions was irrelevant and immaterial, and should not have been admitted over objections duly made. If the sale was by the tract, the vendor would have been entitled to recover the entire amount of the purchase money as represented by the purchase-money notes; but if by the acre, as the jury found to be the truth of the case, then the reduction should have been proportionally to the deficiency in acreage.

[4] 4. It was error for the court to charge the jury that, "if they found that the land was sold by the acre, they could answer 'how much abatement should be made from the sum of \$4,200 on that account, if any.'" For if, as we have ruled above, the sale was by the acre, the jury should have been instructed that they should make a reduction in the amount represented by the purchase-money notes proportionally to the deficiency in acreage.

[5] 5. The court did not err in refusing, on motion of the plaintiffs, "to correct and amend the verdict by striking therefrom the finding that the purchase price of the land be abated in the sum of \$1,000, and inserting in lieu thereof that the purchase price be abated in the sum of \$1,376," and to amend the verdict in certain other respects. While the jury's verdict fixing the amount of the abatement from the purchase price of the land was inconsistent with their finding that the sale of the land was by the acre, we do not think the court was authorized to amend the verdict and fix a different amount, and thus allow the plaintiffs a greater amount as a reduction from the amount of the purchase money than that which the jury had determined should be a proper amount of reduction.

The other exceptions to the court's rulings are without merit.

[6] 6. The court did not err in refusing to direct a verdict upon the defendant's motion therefor.

Judgment reversed on the main bill of exceptions and affirmed on the cross-bill. All the Justices concur.

(138 Ga. 399)

GAY v. PARISH.

(Supreme Court of Georgia. July 11, 1912.)

(Syllabus by the Court.)

1. EVIDENCE (§ 444*)—PAROL EVIDENCE AFFECTING WRITINGS—ERASURE.

Where a bidder at an administrator's sale, who failed to comply with his bid, was liable for the difference between the amount of such bid and what the property brought at a resale, and was sued therefor, and, shortly before the time for the trial, gave to the administrator a check having written upon it the words, "In full payment," of the suit, and the payee caused such words to be erased before indorsing and cashing the check, parol evidence was admissible to show the circumstances under which such check was given and the erasure was made, and to show whether it was in fact given and re-

ceived in full settlement or compromise of the liability, or only as a partial discharge thereof. [Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1929-1944, 2049; Dec. Dig. § 444.*]

2. EXECUTORS AND ADMINISTRATORS (§ 372*)—SALE OF PROPERTY—LIABILITIES OF PURCHASER—RESALE.

Where an administrator, under order of the court of ordinary, sold land at public outcry, and the bidder, after frequent urging, failed to comply with his bid, and the administrator thereupon notified him that he would resell the property, the bidder was liable, under the statute, for the difference between his bid and the amount which the property brought at a second sale, although the notice of resale did not expressly state that the bidder would be held liable for such difference.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 1518, 1527; Dec. Dig. § 372.*]

Error from Superior Court, Jefferson County; B. T. Rawlings, Judge.

Action by H. G. Parish, administrator, against W. S. Gay. Judgment for plaintiff, and defendant brings error. Affirmed.

Isaac S. Peeples, Jr., and Milton O. Barwick, both of Augusta, for plaintiff in error. R. N. Hardeman, of Louisville, for defendant in error.

LUMPKIN, J. [1] An administrator sold property; the terms being cash. The successful bidder failed to comply with his bid. The administrator readvertised the property and again sold it. At the second sale it brought less than at the first, and the administrator sued the purchaser for the difference, together with the cost of readvertisement. The suit was for \$614.15. The purchaser contended that he had settled it for \$324. He prepared and gave a check, payable to the administrator individually, for that amount. On the face of this check were written the words: "In full payment. H. G. Parish, Admr., Suit v. W. S. Gay." The evidence tended to show that the administrator refused to receive this check as full payment, or as a full adjustment of the suit, which was to be tried in a few days; but he was anxious to retain the check as a partial payment. There was no conflict in the evidence as to the difference between the two bids. After receiving the check, and before it was cashed, the words quoted were stricken from it. The plaintiff testified that he sought to find the defendant, in order to get the latter to do this; that he could not find the defendant; and that a bank officer or agent made the erasure. He also testified that, after he refused to receive the check in full payment, and stated that he desired it as a partial payment, the defendant expressed a willingness for him to keep it. The defendant contended that he had not agreed for the words to be stricken from the check, and that the plaintiff kept it to consult with heirs of the estate as to receiving it in full settlement, and then cashed it. He

admitted that the plaintiff did not in terms agree to receive it as a full settlement at the time of its delivery, but claimed that it was the amount agreed upon some time before. He denied that it was tendered back to him, or that he agreed for it to be taken as a partial payment.

The words indicating full settlement were stricken from the check before its indorsement. There was no written contract of settlement excluding parol evidence, within what is commonly known as the parol evidence rule, so as to bring the case within the ruling in *Southern Bell Telephone & Telegraph Co. v. Smith*, 129 Ga. 553, 59 S. E. 215, and *Pennsylvania Casualty Co. v. Thompson*, 130 Ga. 766, 61 S. E. 829. See, also, *Copeland v. Montgomery*, 8 Ga. App. 633, 70 S. E. 30. Whether the check was in fact delivered and received as a partial payment, or as full payment, and the circumstances under which the words were erased, were open to parol evidence, the check as drawn stated that it was "in full payment" of the suit. Palpably it was not a payment of the full amount of the liability. There was no error, either in admitting parol evidence, or in submitting to the jury the question raised.

[2] 2. The plaintiff testified that, upon the failure of the defendant to comply with his bid, he gave notice to the defendant of his intention to resell the property at the risk of the latter. The defendant was unable to remember this, and thought that the plaintiff said that if he did not comply with the bid there would be a resale, but said nothing about this being at his risk. The jury evidently believed the evidence on behalf of the plaintiff, as they had a right to do. A request was made to charge to the effect that there must not only be notice of an intention to resell, but also that the resale would be at the risk of the defendant as the original bidder, and that the advertisement of the second sale would not suffice for that purpose. Reliance was had upon the cases of *Green v. Ansley*, 92 Ga. 650, 19 S. E. 53, 44 Am. St. Rep. 110, and of *Davis Sulphur Ore Co. v. Atlanta Guano Co.*, 109 Ga. 607, 34 S. E. 1011. The distinction between these cases and the present one is that in them there was a sale by a private individual. Upon the failure of a bidder at an auction sale by an individual, if the seller desires to sue the defaulting bidder for damages, the question is, How much is he hurt? A private owner of land is not obliged to resell it at all. He may sell at private sale. According to some authorities, he may sue the bidder for the difference between the bid and the market value of the property, or he may notify the bidder that he will resell the property, and hold the bidder liable for the difference between his bid and what the property brings at the second sale. In such event, the cases above cited hold that there must be

notice to the bidder of the intention to pursue the latter course, in order to establish the difference in the bids as the measure of damages, at least where there has been no tender and refusal of the property. But in a public sale under legal process, such as by a sheriff under an execution, or an administrator under an order of court, if the bidder fails or refuses to comply with his bid, the statute gives to the officer the right to sue him for the purchase money, or to resell the property and hold the bidder liable for the difference between his bid and what the property brings at the second sale, if a less amount. The officer does not own the property, and has not the discretion of a private owner. He can only sell at public outcry in the manner pointed out by law. If he proceeds to resell, the statute fixes the liability of the first bidder. If, therefore, the administrator in the case now under consideration notified the defaulting bidder of an intention to resell, the statute gave to such bidder notice as to what might be the result of such resale, and his liability consequent thereon. Civil Code 1910, § 6071. The notice that the administrator intended to proceed with a resale as provided by the statute was notice enough to the defaulting bidder of what his liability would be under the statute. It would have added nothing to the notice if the administrator had said to the bidder that, upon a resale, the statute would render the latter liable, if the property brought less than at the first sale. None of the other grounds of the motion for a new trial require a reversal.

Judgment affirmed. All the Justices concur.

(128 Ga. 349)

BALDWIN v. STATE

(Supreme Court of Georgia. July 9, 1912.)

(Syllabus by the Court.)

1. CRIMINAL LAW (§ 918*)—TRIAL—RENDITION OF VERDICT—ABSENCE OF COUNSEL.

It is not cause for a new trial that the verdict was returned into court and received during the voluntary absence of the defendant's counsel, under the circumstances narrated in the opinion.

[Ed. Note.—For other cases, see Criminal Law. Cent. Dig. §§ 2163-2192, 2195, 2196, 2219-2224; Dec. Dig. § 918.*]

2. WITNESSES (§ 274*)—CROSS-EXAMINATION—CHARACTER OF DEFENDANT.

Where a witness called by the defendant testified to his good character from general reputation, it is allowable, on cross-examination, for the witness to testify to his having heard of specific instances of conduct tending to disprove the witness' estimate of the defendant's character.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 965, 966; Dec. Dig. § 274.*]

3. CRIMINAL LAW (§ 922*)—TRIAL—INSTRUCTIONS—NECESSITY FOR REQUESTS.

In the absence of a written request, ordinarily the failure of the court, in his charge, to

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

apply a rule of evidence to the testimony of a particular witness is not cause for a new trial. [Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2210-2218; Dec. Dig. § 822.*]

Error from Superior Court, Stewart County; Z. A. Littlejohn, Judge.

Jack Baldwin was convicted of murder, and he brings error. Affirmed.

G. Y. Harrell, of Lumpkin, for plaintiff in error. J. R. Williams, Sol. Gen., of Americus, and T. S. Felder, Atty. Gen., for the State.

EVANS, P. J. The plaintiff in error, Jack Baldwin, was convicted of the murder of Alice Scott. From the evidence and the defendant's statement, the jury were authorized to find: That the accused and the deceased had been living in a state of concubinage; that, having been informed that the deceased intended to marry another man, the accused went to a house where the deceased and this man were visiting, called the deceased to him, and, with a declaration that he intended to kill her, stabbed her 11 times, with the result that she died in 10 minutes from the wounds. The accused introduced a witness that he was in a drunken condition shortly before the homicide; and in his statement the accused admitted that he went to the house where the homicide occurred on the invitation of the deceased, but disclaimed knowing anything about inflicting the mortal wounds.

[1] 1. In his motion for new trial, the accused complains that the court received the verdict in the absence of his counsel. The trial judge certifies that during the term counsel for the accused had absented himself from the courtroom in other cases in which he was sole counsel, after the case had been submitted to the jury, resulting in delay in the effort to call counsel into the courtroom, and he was twice admonished by the court that if he voluntarily absented himself again the court would receive verdicts in his cases during his absence. When the jury in the present case came into the courtroom to render their verdict, the defendant was present; but counsel for defendant, without permission of the court, had absented himself from the courtroom. The judge directed an officer to look for counsel in the lawyers' consulting room. He was not there. Counsel was then called from the courtroom window, but not at the instance of the judge. The judge waited a little while for counsel to appear, and then received the verdict. The jurors were standing at the bar rail, on the outside of the space reserved for the bar, when the verdict was received. Counsel entered just as the jurors were taking their seats, not in the jury box, but just out of the bar railing. The judge could not say that the jurors did

not sit down where persons other than the jury were sitting; but few of the jurors were actually seated when counsel came into the courtroom. He was at once informed of the verdict and its nature, and made no request for a poll of the jury. Under these circumstances, the refusal to grant a new trial, on the ground of the absence of defendant's counsel at the time of the reception of the verdict, was not error. *Roberson v. State*, 135 Ga. 854, 70 S. E. 175; *Richards v. State*, 136 Ga. 67, 70 S. E. 868.

[2] 2. The accused called a witness to establish his character for peaceableness or violence. On cross-examination, this witness was allowed to testify that he had heard of the accused whipping the deceased a time or two, over the objection that the testimony was hearsay. There was no error in this ruling. Where a defendant calls a witness to establish his good character, and the witness testifies that from general reputation he regards the defendant's character as good, it is competent, on cross-examination, to elicit the witness' information of specific instances of conduct tending to disprove the witness' estimate of his character. *Dotson v. State*, 136 Ga. 243, 71 S. E. 164.

[3] 3. Complaint is made that the court failed to instruct the jury that the testimony to which reference is made in the preceding division of the opinion was admissible for the purpose of ascertaining the accuracy of the witness' knowledge of the defendant's character. There was no request for such an instruction. In the absence of a written request, the failure of the judge, in his charge, to apply a rule of evidence to the testimony of a particular witness is not cause for a new trial. *Holmes v. State*, 131 Ga. 806, 63 S. E. 347.

The verdict is supported by the evidence, and no reason appears for reversing the judgment refusing a new trial.

Judgment affirmed. All the Justices concur.

(138 Ga. 223)

WADLEY et al. v. JONES et al.

(Supreme Court of Georgia. May 15, 1912.)

(Syllabus by the Court.)

MORTGAGES (§ 341*) — FORECLOSURE UNDER POWER OF SALE—RIGHTS OF PURCHASER.

Where under the powers conferred by a trust deed executed in 1854, as set out in the statement of facts and opinion in this case, the second trustee, with the written consent of the surviving cestui que trust, conveyed real estate to a purchaser thereof for value, *held*, that the power of sale conferred on the first trustee survived to the second trustee as such.

(a) The purchaser of the land in controversy, which was conveyed to him by the second trustee with the written consent of the surviving cestui que trust, obtained a fee-simple title to the land so conveyed.

(b) In such case the children of the cestui que trust, on the death of the latter, took no interest in the lands in controversy conveyed

by the second trustee with the written consent of the surviving cestui que trust.

(c) The court erred in overruling the motion for a new trial in this case.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 1039, 1041; Dec. Dig. § 341.*]

Error from Superior Court, Jenkins County; B. T. Rawlings, Judge.

Action by Mattie A. Jones and others against W. M. Wadley, executor, and others. Judgment for plaintiffs, and defendants bring error. Reversed.

The petition, as amended, of Mattie A. Jones, James H. Anderson, and Howard Anderson, shows substantially the following: They are the surviving children of Susan J. Anderson, deceased, and bring their action against John Brady and others to recover a certain tract of land in Jenkins county containing 262½ acres more or less. The defendants are tenants of W. M. Wadley, executor of the estate of W. O. Wadley, deceased, and rent and work said land as croppers of said Wadley, executor. Petitioners claim title to the land and mesne profits since June 1, 1907. Wadley, executor, claims title to said land from Augustus H. Anderson, the husband in his lifetime of Susan J. Anderson. Petitioners claim title as follows: (a) A marriage contract in 1854 between Augustus H. Anderson and his wife, Susan J. Anderson, conveying the land in trust for Susan J. Anderson for life, and at her death to petitioners, who are surviving children of said marriage and the remaindermen under the said deed of trust. (b) Death of Susan J. Anderson in 1907.

The material parts of said deed of trust are as follows: "Whereas the daughter of Col. Augustus H. Anderson, before and at the time of her intermarriage with Augustus H. Anderson, Jr., was possessor of and entitled unto a considerable estate both real and personal property derived unto her by and under the will of her grandmother Jane Jones, formerly of said county and state, deceased, to wit, to a tract of land situated, lying, and being in said county, which will be more particularly described by reference to the division of the estate of the said Jane Jones, deceased, aforesaid, and which is a part and parcel of a tract of land on which the said testator resided at the time of her death, and of the following negro slaves, viz., Rose, Washington, Charles, Everline, Kilt, Wesley, Caty, Margurite, Sam, Abraham, and Littleton, together with the sum of ten thousand (\$10,000) dollars in money, the artificial increase of the said property since the division as aforesaid under the will of said deceased; and whereas the said Augustus H. Anderson is desirous of securing unto his said wife and to the issue of said marriage the aforesaid property: Now this indenture made and executed this 21st day of Feb., A. D. 1854, for and in consideration of the premises and of the love and

affection which he hath and doth bare unto his said wife Susan J. Anderson, and for the further consideration of the sum of ten thousand dollars which he acknowledges to have received at or before the sealing and of these presents, the receipt whereof is hereby acknowledged, hath granted, bargained and sold, and by virtue of these presents doth grant, bargain and sell, upon the following trusts, uses, limitations, and conditions, unto the trustees hereinafter to be nominated and appointed, for the uses hereinafter set forth, the foregoing described land and negroes and the sum of eight thousand dollars to be hereinafter appropriated, viz., to the said trustee for the joint and separate use, maintenance, and support of the said Augustus H. Anderson and his wife Susan J. Anderson, for and during the term of their and each of their lives, and to the survivor of them during his or her life, the corpus or principal of said property not to be subject or liable to any debt heretofore contracted for or to hereafter be contracted for by the said Augustus H. Anderson or the said Susan J. Anderson; and it is further stipulated that the aforesaid sum of eight thousand (\$8,000) dollars shall be vested in land, negroes, stock, or in such other property as the said Augustus H. Anderson and his said wife Susan shall consent and agree upon, which said property or stock when purchased shall be subject to all the uses, trusts, limitations, and conditions in this indenture set forth and declared. It is further stipulated that the said Augustus H. Anderson shall have the possession, custody and control of the aforesaid property, and that the artificial increase or proceeds shall be appropriated in so far as may be necessary to the support and maintenance of the said Augustus H. and the said Susan J. Anderson, and of their family. It is further stipulated that any of the aforesaid property now in possession or hereafter to be purchased may, upon the written consent of the aforesaid Augustus H. and Susan J. Anderson, be aliened, sold, and conveyed; but it is expressly required that the proceeds of such sale or sales shall be reinvested in such other property as the parties hereinbefore named shall require, and that when so invested the property so purchased shall be subject to all the uses, limitations, and conditions in this indenture set forth and declared. It is further stipulated and conveyed [covenanted?] that upon the happening of the death of the survivor of the said Augustus H. Anderson or the said Susan J. Anderson, the aforesaid property, with the natural increase of the female slaves, shall go to and vest in the children of the said Augustus H. Anderson and Susan J. Anderson, if any, share and share alike, in fee simple. It is further stipulated and covenanted that upon the happening of the death of either of the said Augustus H. Anderson or the said Susan J.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Anderson, leaving no issue or children capable of inheriting, that then and in that case the aforesaid property shall be vested and remain in the survivor, in fee simple forever, free from the aforesaid trust. It is further covenanted, stipulated, and agreed upon, that Wm. J. Rhodes be and he is hereby appointed trustee, for the purpose of carrying out the provisions of this indenture; and it is further understood and covenanted and declared that in the event of the trusteeship so as aforesaid becoming vacant by death or resignation or any other cause, that the said Augustus H. Anderson and Susan J. Anderson, or, in the event of the [death of] one of them, the survivor of them, shall have full power and authority to appoint, by this writing under seal such person as trustee as they may deem advisable and proper."

The defendants in their answer to the petition denied all of its material allegations. Evidence being submitted to the jury by both plaintiffs and defendants, on motion of the plaintiffs' counsel the court directed a verdict in favor of the plaintiffs for the premises described in the petition. A motion for a new trial was made by the defendants, and, being overruled, they excepted.

E. L. Brinson and W. H. Davis, both of Waynesboro, and Miller & Jones, of Macon, for plaintiffs in error. R. O. Lovett, of Atlanta, for defendants in error.

HILL, J. (after stating the facts as above). The crucial question in this case is, Did the power conferred by the trust deed on the first trustee to sell the fee-simple estate in the lands in controversy survive to the second trustee? It is insisted by the defendants in error that the power of sale conferred upon the first trustee was a personal trust and did not pass to his successor. But to this contention we do not agree. We shall endeavor to demonstrate from the recitals contained in the trust deed that the power of sale conferred upon the first trustee survived to the second trustee. In the marriage settlement of 1854 the husband was waiving his marital rights, by which, prior to the act of 1866, the title to the land would vest in him as the husband upon his reducing it to possession. He therefore executed a postnuptial contract whereby he conveyed all the property, real and personal, of which he was possessed from his wife, "unto the trustees hereinafter to be nominated and appointed." The word "trustees" in the above quotation is used in the record both in the plural and singular number. In the exhibit attached to the petition it is used in the singular, "trustee," but in the brief of the evidence, which contains what also purports to be a copy of the trust deed, the plural noun, "trustees," is employed. Which is correct we are unable to say from the record. If the maker of the instrument used the word "trustees," it is an added argument

to the effect that he intended the powers to survive to the second trustee who was to be appointed in case of the death of the first. If the word "trustee" was used, it would still not affect the conclusions here reached, for we think that what follows makes it manifest that the intention of the maker was that the power of sale conferred on the first trustee should survive to the second. And we are holding that it was the intention of the maker, as expressed in the instrument itself, which must control. See *Freeman v. Pendergast*, 94 Ga. 369, 389 (2), 21 S. E. 837.

The settlor provides that the sum of \$8,000 shall be vested in land, negroes, or stock, or in such other property "as the said Augustus H. Anderson and his said wife Susan shall consent and agree upon," etc. It is also stipulated that "the said Augustus H. Anderson shall have the possession, custody and control of the aforesaid property, and that the artificial increase or proceeds shall be appropriated, in so far as may be necessary to the support and maintenance of the said Augustus H. and the said Susan J. Anderson and of their family." It is further provided that any of the property "now in possession or hereafter to be purchased may, upon the written consent of the aforesaid Augustus H. and Susan J. Anderson, be aliened, sold and conveyed; but it is expressly required that the proceeds of such sale or sales shall be reinvested in such other property as the parties heretofore named shall require," etc. "It is further covenanted, stipulated, and agreed upon, that William J. Rhodes be and he is hereby appointed trustee for the purpose of carrying out the provisions of this indenture; and it is further understood, covenanted, and declared that in the event of the trusteeship so as aforesaid becoming vacant by death or resignation or any other cause, that the said Augustus H. and Susan J. Anderson, or, in the event of the [death of] one of them, the survivor of them, shall have full power and authority to appoint, by this [their?] writing under seal, such person as trustee as they may deem advisable and proper."

It seems clear from reading these provisions of the trust deed that the maker intended to reserve to himself and wife, or, in case of the death of either, to the survivor, the right to name the "trustees," and also the right to have the trustee, only upon the written consent of the beneficiaries, or either of them in case of the death of the other, alien, sell, and convey any of the property "now in possession, or hereafter to be purchased." The power to sell was clearly intended to be in the trustee as such, with the written consent of the beneficiaries, and not in any particular trustee. It was not a "personal trust" to be executed by one particular trustee only, but it was the clear intent to vest the power to sell in the trustee, whoever he might be, under the appointment of the settlor and his wife or ei-

ther of them on the death of the other. And herein lies the distinction between the present case and that of *Luquire v. Lee*, 121 Ga. 624, 49 S. E. 834, cited by the defendant in error. In that case the court held, under its facts, "that the power in the deed was not incident to the office of trustee, but personal to the trustee." The decision indicates a discretionary power in the trustee, but it is also said that "the grantor, if she wished to deprive the trustee of any discretion as to the sale and reinvestment, could very well have made it his duty to sell and reinvest at the will of Mr. and Mrs. Lee, thus constituting the trustee the mere conduit of passing the legal title. *Id.*, 121 Ga. 629, 49 S. E. 834. In the present case the land "may" be sold, but the discretion is reserved in the settlor and his wife, or the survivor in the event of the death of the other, and if it is sold it "shall be reinvested," not as the trustee may say, but "as the parties hereinbefore named [the settlor and his wife] shall require." Here the discretion is reserved by the trust deed in the grantor and the other cestui que trust, and the trustee cannot act except upon the written consent of the former. The trustee cannot exercise his discretion independently of the maker of the trust deed and his wife. The discretion was not in the trustee, but in both the trustee and them.

This case differs from the ordinary case of the appointment of a trustee for others. Here a man was creating a trust and naming a trustee for himself and wife with the power reserved in them to appoint a successor to the first trustee in case of his death, with like powers in and limitations on the second trustee. They could hardly be supposed to be lacking in confidence in themselves. They appointed the first trustee. If he died, they were to appoint his successor. He was not to be appointed by a court or by any one other than themselves. They retained possession of the property. Reinvestment was to be made only by their consent. The trust property was not to be sold at the discretion of the trustee alone, but with the consent of the husband and wife or the survivor. Again we ask, Did the power of sale provided by the trust deed survive to the successor of the first trustee? It seems clear from a careful reading of the trust deed that the maker intended the second trustee should have the same powers as the first. It would be strange indeed if the makers of the trust deed should appoint the first trustee with certain powers, reserve the right to appoint the second trustee, and then confer on the second trustee powers different from those conferred on the first trustee. The creator of the trust intended that both trustees should have the same powers. The power to convey attached to the office of trustee and not to the indi-

vidual, and this intent of the makers appears from the trust deed itself. In view of all the various indicia on the face of the trust deed, we hold that the powers conferred on the first trustee were intended to and did survive to the second trustee as such, and, this being so, it follows that, when the second trustee, with the written consent of the surviving cestui que trust, sold and conveyed the fee-simple title to the land in controversy, the purchaser obtained a fee-simple title thereto, and on the death of both cestuis que trust their children have no interest in the lands thus conveyed.

The court below therefore erred in overruling the motion for a new trial in this case. Judgment reversed. All the Justices concur.

(123 Ga. 334)

LOUISVILLE & N. R. CO. v. TROUT.

(Supreme Court of Georgia. June 13, 1912.)

(Syllabus by the Court.)

1. TRIAL (§ 210*)—INSTRUCTIONS—CREDIBILITY OF WITNESSES.

In an action to recover damages for personal injuries, where the recovery depended largely on the testimony of the plaintiff, and his testimony is attacked as being improbable, it is reversible error for the court to charge the jury: "In this connection I charge you that, if a witness swear to an improbable story, that in itself would not be sufficient to discredit him; but slight circumstances in conflict therewith might or might not be sufficient to authorize a jury to disbelieve his testimony, as the jury might determine from all the facts and circumstances proven in the case. But if a witness swear to an impossible story, then the jury will be authorized to disregard his testimony entirely, without any conflicting evidence other than the circumstances surrounding his story."

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 490-494, 501; Dec. Dig. § 210.*]

2. DAMAGES (§ 216*)—ASSESSMENT—INSTRUCTIONS.

For the reasons stated in the second division of this opinion, the following charge is inaccurate in the respects pointed out: "If he is entitled to recover at all, he is entitled to recover for the injury actually sustained, the pain and suffering endured, mental and physical; and as to this the law lays down no definite rule to govern the enlightened conscience of impartial jurors, so far as pain and suffering is concerned, and the rule is, not what you would have suffered it for, but what is plaintiff entitled to recover for the pain and suffering he has actually endured. He would also be entitled to recover for his lost time and doctor's bills paid out. If you find that his injuries are permanent, and his capacity to labor has been decreased on that account, you will determine what you will allow for that; that is, on account of his decreased capacity to labor. Determine what he was able to do at the time and just prior to the injury, and what he is able to do now. Find what his earning capacity was before and since, and the difference would be what he is entitled to recover on that account. Then you would get a fair average yearly value of his decreased capacity to labor, remembering that he might or might not have constant employment, that he might or might not continue to work, that he might vol-

untarily or otherwise abstain from labor, and, further, that as old age comes on his capacity to labor would naturally decrease; and having determined what would be a fair average yearly value of his decreased capacity to labor, then determine his expectancy—that is, how long he would probably live; then multiply the fair average yearly value of his services by his years of expectancy, and this would be the gross sum; then get the present value of that at 7 per cent., and that would be the amount, if any, you will find on that account, what you would allow him on account of decreased capacity to labor; then you would add together the various items, and the sum total would be the amount of your verdict."

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 548-556; Dec. Dig. § 216.*]

Error from Superior Court, Gordon County; A. W. Fite, Judge.

Action by James W. Trout against the Louisville & Nashville Railroad Company. Judgment for plaintiff, and defendant brings error. Reversed.

D. W. Blair, of Marietta, O. N. Starr, of Calhoun, and Tye, Peeples & Jordan, of Atlanta, for plaintiff in error. J. G. B. Erwin, Jr., of Calhoun, and Maddox, McCamy & Shumate, of Dalton, for defendant in error.

HILL, J. James W. Trout brought suit for damages against the Louisville & Nashville Railroad Company for alleged injuries to his person by the running of the defendant's trains. On the trial of the case the jury returned a verdict for the plaintiff. A motion for a new trial was overruled, and the defendant excepted.

[1] 1. The only assignments of error that need be considered are those with reference to the charge of the court. The following charge is alleged to be error: "In this connection I charge you that, if a witness swear to an improbable story, that in itself would not be sufficient to discredit him; but slight circumstances in conflict therewith might or might not be sufficient to authorize a jury to disbelieve his testimony, as the jury might determine from all the facts and circumstances proven in the case. But if a witness swear to an impossible story, then the jury will be authorized to disregard his testimony entirely, without any conflicting evidence other than the circumstances surrounding his story." It is insisted that this charge invades the province of the jury, by instructing them the amount of credit that should be given to the witnesses in the case; it being the province of the jury to determine for themselves the amount of credibility that should be given the testimony of all witnesses in the case, as well as to determine for themselves what fact or facts would be sufficient to discredit the witness, without an expression of opinion from the court. Undoubtedly the credit to be given witnesses is for the jury. The court may have intended the use of the word "discredit" in the sense of impeach; but discrediting a witness is not confined to total rejection of his evidence.

It is also used in the sense of disbelief in the accuracy of his testimony. It is not the province of the court to tell the jury what will discredit a witness. The jury may consider the evidence and determine for themselves what testimony is probable or improbable. The Minnesota Supreme Court has declared: "In all cases the positive testimony of an otherwise unimpeached witness can only be disregarded when its improbability or inconsistency furnishes a reasonable ground for doing so, and this improbability or inconsistency must appear from facts and circumstances disclosed by the evidence in the case. It cannot be arbitrarily disregarded by either court or jury, for reasons resting wholly in their own minds, and not based upon anything appearing on the trial." *Second Nat. Bank of Winona v. Donald*, 56 Minn. 491, 58 N. W. 269. The charge in the present case hereinabove quoted was calculated to confuse and mislead the jury, and to so instruct them is to invade their province, and is reversible error.

[2] 2. Complaint is also made of the following charge of the court to the jury: "If he is entitled to recover at all, he is entitled to recover for the injury actually sustained, the pain and suffering endured, mental and physical; and as to this the law lays down no definite rule to govern the enlightened conscience of impartial jurors, so far as pain and suffering is concerned, and the rule is, not what you would have suffered it for, but what plaintiff is entitled to recover for the pain and suffering he has actually endured. He would also be entitled to recover for his lost time and doctor's bills paid out. If you find that his injuries are permanent, and his capacity to labor has been decreased on that account, you will determine what you will allow for that; that is, on account of his decreased capacity to labor. Determine what he was able to do at the time and just prior to the injury, and what he is able to do now. Find what his earning capacity was before and since, and the difference would be what he is entitled to recover on that account. Then you would get a fair average yearly value of his decreased capacity to labor, remembering that he might or might not have constant employment, that he might or might not continue to work, that he might voluntarily or otherwise abstain from labor, and, further, that as old age comes on his capacity to labor would naturally decrease; and having determined what would be a fair average yearly value of his decreased capacity to labor, then determine his expectancy—that is, how long he would probably live; then multiply the fair average yearly value of his services by his years of expectancy, and this would be the gross sum; then get the present value of that at 7 per cent. and that would be the amount, if any, you will find on that account, what you would allow him on account of decreased

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

capacity to labor; then you would add together the various items, and the sum total would be the amount of your verdict." This charge is inaccurate in some respects; and, as the case is to be returned for another hearing, we point out the inaccuracies. In the first place, the court instructed the jury: "Find what his earning capacity was before and since, and the difference would be what he is entitled to recover on that account." The court doubtless meant to charge that, in using the difference in earning capacity as a basis of calculation, they should ascertain what was the diminution of such capacity resulting from the conduct of the defendant. There was some evidence tending to show that the plaintiff suffered from some ailment before the injury. Other causes than the conduct of the defendant might bring about an impairment in his earning capacity. The defendant would only be liable for the result of its own conduct; and therefore it was inaccurate to charge that the difference between the earning capacity before the injury and afterwards furnished the measure of the damages which he was entitled to recover, without reference to the cause of such diminution. Again, at one point in the charge the jury were instructed to "multiply the fair average yearly value of his services by his years of expectancy, and this would be the gross sum." From the context it would seem that the judge did not mean "the fair average yearly value of his services," but the fair average yearly value of the decreased capacity to labor and earn money resulting from the injury, if the plaintiff was entitled to recover therefor. Moreover, a recovery was sought, both for special damages, as to which there is one rule of calculating the amount recoverable, and also as to damages of another character touching which the amount is left to the enlightened conscience of impartial jurors. The reference to these different classes of damages claimed was such that the distinction was perhaps not as clearly drawn in the minds of the jury as it might have been; but these matters will doubtless be made more exact upon another trial.

Judgment reversed. All the Justices concur.

(138 Ga. 328)

ALABAMA GREAT SOUTHERN R. CO. v.
BROWN.

SAME v. FRY.

(Supreme Court of Georgia. June 13, 1912.)

(Syllabus by the Court.)

1. NONSUIT REFUSED—No ERROR.

The court did not err in refusing to grant a nonsuit.

2. RAILROADS (§ 401*)—OPERATION—INJURIES TO PERSONS ON TRACKS—INSTRUCTIONS.

The court did not err in charging the jury as follows: "When the plaintiffs have shown,

if they have, that the personal injury occurred, and the damage to the personal property was done on account of the running of the engine and cars of the defendant company, then the burden of proof would be upon the defendant company to show that it used all ordinary and reasonable care and diligence to prevent the injury, and, if it shows that, then it would not be liable at all; otherwise, it would be, provided Brown could not, by the use of ordinary care, have prevented the injury to himself and the property." The charge correctly stated the law, and was applicable to the issue.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1382-1390; Dec. Dig. § 401.*]

3. TRIAL (§ 194*)—OPERATION—INJURIES TO PERSONS ON TRACKS—QUESTIONS FOR JURY.

The court erred in instructing the jury as follows: "I charge you in this connection that it is the duty of the engineer and fireman to be upon their seats, at their posts of duty, looking ahead, unless otherwise engaged in other duties necessary, ordinary, and usual for the running of the engine and cars, or the train." Whether it was the duty of the engineer and fireman, at the time of the collision with one of the plaintiffs and with the personal property of the other plaintiff, to be upon their seats, was a question of fact for decision by the jury, and should have been left to them for their determination.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 413, 439-441, 446-454, 456-466; Dec. Dig. § 194.*]

4. RAILROADS (§ 401*)—OPERATION—INJURIES TO PERSONS ON TRACKS—INSTRUCTIONS.

The court did not err in charging the jury as follows: "The burden is upon the plaintiff, Brown, in the first instance to show that he was injured and damaged as he contends, and also upon the other plaintiff to show that his property was injured and damaged as he contends. If they have carried that burden, then the burden would be upon the defendant company to show that it used all ordinary and reasonable care and diligence to prevent the injury and damage to plaintiff."

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1382-1390; Dec. Dig. § 401.*]

5. DAMAGES (§ 216*)—ASSESSMENT—INSTRUCTIONS.

The charge in reference to the law for the ascertainment of damages for permanent injury was wanting in completeness and accuracy.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 548-555; Dec. Dig. § 216.*]

6. NEW TRIAL (§ 39*)—INSTRUCTIONS—REQUESTS—NECESSITY.

In the absence of a written request upon the subject, the omission to charge that, if the injury resulted from accident, there could be no recovery, was not such a failure to charge in regard to a distinct and substantive defense as will require the grant of a new trial.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 57-61; Dec. Dig. § 39.*]

7. TRIAL (§ 259*)—INSTRUCTIONS—REQUESTS—NECESSITY.

Failure of the court to charge the law applicable to the diminution of damages on account of contributory negligence, and a failure to charge that if the negligence of the plaintiff and the defendant company were equal the plaintiff could not recover, in the absence of pertinent written requests so to charge, is not cause for the grant of a new trial, under the facts of this case.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 648-650; Dec. Dig. § 259.*]

8. RAILROADS (§ 401*) — OPERATION — INJURIES TO PERSONS ON TRACKS — INSTRUCTIONS.
The other charges of the court complained of were not error for any of the reasons assigned.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1382-1390; Dec. Dig. § 401.*]

Error from Superior Court, Dade County; A. W. Fite, Judge.

Actions by J. P. Brown and by J. W. Fry, respectively, against the Alabama Great Southern Railroad Company. Judgments for plaintiffs, and defendant brings error. Reversed.

Maddox, McCamy & Shumate, of Dalton, for plaintiff in error. Foust & Payne, of Chattanooga, Tenn., for defendants in error.

BECK, J. J. W. Fry sued the Alabama Great Southern Railroad Company to recover damages for the killing of a team of horses, and the destruction of a wagon and set of harness, caused by the agents and employes of the railroad company in negligently and recklessly running against and upon the same with an engine and train of cars. He alleged that the engineer and fireman, in the exercise of ordinary care and diligence, could have discovered the wagon and horses upon the track in time to stop the train before reaching them, but that they failed to exercise ordinary care in stopping the train and preventing the collision. In the same court J. P. Brown filed suit against said railroad company to recover damages for injuries sustained at the time and place designated in the petition filed by Fry, and alleged that, while driving a team of horses along a public highway near a cut on defendant's railroad, the horses became so frightened and unmanageable on account of the approach of a train designated as No. 1, by reason of the unusual and unnecessary noises made by it and by the escape of steam and blowing of the whistle, the wagon and team and petitioner were carried over an embankment and into a cut on the railroad; that petitioner was rendered partially unconscious and unable to remove himself; that while he and the horses and wagon were in the cut, unable to get out, another of defendant's trains, designated as No. 6, negligently and recklessly ran upon and over petitioner and the horses and wagon, and in the collision petitioner was greatly injured, either by being struck by the engine and cars, or by portions of the horses or wagon or contents of the wagon being knocked against him with force and violence; and that at the point where this collision occurred the public constantly used the tracks and right of way of the defendant as a highway, and this practice was recognized and acquiesced in by the defendant. Upon the trial plaintiff Brown did not ask for a recovery on account of any negligence alleged

as to the operation of train No. 1, and the court instructed the jury that under the evidence no recovery could be had on account thereof.

The two cases were tried together. At the conclusion of the evidence on behalf of plaintiffs the defendant made a motion for a nonsuit in the case of Brown, which was overruled, and exceptions pendente lite were filed. The jury returned verdicts in favor of both plaintiffs. A motion for a new trial in each case was overruled, and the defendant excepted.

[1] 1. Under the evidence the right of the plaintiff to recover was a question of fact for the jury, and the court did not err in refusing to grant a nonsuit.

[2] 2. Complaint is made of the following charge of the court: "When the plaintiffs have shown, if they have, that the personal injury occurred and the damage to the personal property was done on account of the running of the engine and cars of the defendant company, then the burden of proof would be upon the defendant company to show that it used all ordinary and reasonable care and diligence to prevent the injury, and, if it shows that, then it would not be liable at all; otherwise, it would be, provided Brown could not, by the use of ordinary care, have prevented the injury to himself and the property." This charge is a substantial restatement of the provisions contained in sections 2780 and 4426 of the Civil Code, and is not open to the criticism made upon it.

[3] 3. The court charged the jury as follows: "Now, as I said before, the plaintiff Brown was a trespasser upon the railroad, whether he so willed it or not, so far as the railroad is concerned, or its liability is concerned; and as to trespassers I give you this in charge: As to trespassers upon the track of a railroad company, the duty to observe ordinary care and diligence for his protection does not devolve upon the company's servants in charge of the train until his presence upon the track becomes known to them. I charge you in this connection that it is the duty of the engineer and fireman to be upon their seats, at their posts of duty, looking ahead, unless otherwise engaged in other duties necessary, ordinary and usual for the running of the engine and cars or the train." Exception is taken by plaintiff in error to that part of the charge embraced in the last sentence thereof; and we are of the opinion that the court erred in laying down as a principle of law the proposition there stated. Whether in the exercise of due diligence, under all the facts and circumstances of the case, it was the duty of the engineer and fireman to be upon their seats looking ahead, unless otherwise engaged in their duties, was a question of fact for the jury to decide, and they should have

been permitted to decide that very material question unhampered by instructions from the court in the shape of a hard and fast rule of law. It was the duty of the employees of the railroad company engaged in running the engine at the time it struck the plaintiff Brown, and the horses and wagon belonging to the plaintiff Fry, to exercise the degree of care and diligence imposed upon them by law under the circumstances as they existed at that time, and the court could not properly go further than to submit to them the rule prescribing the degree of care and diligence which should have been observed by these employees; and when it went further, and stated broadly that "it was the duty of the engineer and fireman to be upon their seats, at their posts of duty, looking ahead," etc., the court stated absolutely as a rule of law that which might or might not be the law of this case, according to the opinion of the jury as to the existing facts at the time.

[4] 4. Another excerpt from the charge is brought under criticism by the motion. It reads as follows: "The burden is upon the plaintiff Brown, in the first instance, to show that he was injured and damaged as he contends, and also upon the other plaintiff to show that his property was injured and damaged as he contends. If they have carried that burden, then the burden would be upon the defendant company to show that it used all ordinary and reasonable care and diligence to prevent the injury and damage to plaintiff." This charge was not error. It merely placed upon the plaintiff the burden, in the first instance, of showing injury to person and property by the running of the defendant's cars in the manner alleged in the declaration, and then instructed the jury that, if injury had been shown as alleged, the burden was shifted to the defendant to show that it exercised all ordinary and reasonable care and diligence to prevent the injury complained of. And such is the law under the Code. Civil Code 1910, § 2780.

[5] 5. It is contended that the court erred in the following instructions to the jury: "But you could allow him for the breaking of his arm, if you find that it was broken, and the road liable therefor, and the time he lost on account of the broken arm, and the pain he endured on that account, and the difference between what he would be able to earn, but for the broken arm, and what he is now able to earn with the broken arm. You would ascertain that as best you can from the evidence, and determine what would be a fair average yearly value of the difference, what he would have been able to do, and what he is now able to do, and the difference would be the amount. You would ascertain, first, what would be a fair average yearly value of his services, and then multiply that by the years of his expectancy, how long he would probably live,

which you will arrive at from all the facts in the case, and that would give the gross amount, and you will then get the present value of that at 7 per cent., and this would be the amount of your verdict for Brown." This charge is criticised on the grounds: "(a) Because it is not a correct statement of law as to how to ascertain permanent damages; (b) because it fails to call the jury's attention to the contingencies that might or might not happen—the fact of old age coming on, and the decreased capacity of plaintiff to labor—that plaintiff might or might not secure continuous employment, that he might or might not continue in good health." The charge complained of is lacking in completeness and accuracy under the decision in the case of *L. & N. R. Co. v. Trout*, 75 S. E. 328, this day decided, and the decisions in *Central Railroad Co. v. Dottenheim*, 92 Ga. 425, 17 S. E. 662, *Florida Central, etc., Railroad v. Burney*, 98 Ga. 1, 26 S. E. 730, and *Central Railroad v. Thompson*, 76 Ga. 770.

[6] 6. Complaint is made that the court erred in failing to instruct the jury that, if the injury to the plaintiff was the result of an accident, the plaintiff was not entitled to recover. The failure of the court to charge the jury specifically what their finding should be in case they should determine from the evidence that the injury complained of resulted from an accident does not afford a ground for a new trial, in the absence of a written request to charge upon that subject. "An accident, as the term is used in connection with cases of this character, means an injury which occurs without being caused by the negligence of either the plaintiff or the defendant. That the defendant itself is free from fault furnishes it a defense, not that the plaintiff is faultless. Where the judge instructs the jury that, if the defendant has used all ordinary care and diligence, there can be no recovery, it cannot be said to add a distinct and substantive defense to also prove that the plaintiff is free from fault. A charge that if the injury resulted from an accident, and neither party was at fault, there can be no recovery, is in the nature of an elaboration or additional statement of the proposition that the defendant is not liable if it is without fault. It may be proper to give such a charge, if requested; but, being merely elaborative, it does not involve such a distinct defense as to make it error to fail to give it, in the absence of a request." *Savannah Elec. Co. v. Jackson*, 132 Ga. 563, 64 S. E. 682. This rule is applicable, also, to the ground of the motion for a new trial complaining of the failure of the court to charge the law that "no person shall recover damages from a railroad company for injury to himself or his property where the same is done by his consent or occasioned by his own negligence."

[7] 7. Elaboration of the ruling made in the seventh headnote is unnecessary. Savannah Elec. Co. v. Bennett, 130 Ga. 597, 61 S. E. 529; Savannah Elec. Co. v. Crawford, 130 Ga. 421, 60 S. E. 1056; Wrightsville & Tennille R. Co. v. Gornto, 129 Ga. 204, 210, 58 S. E. 769.

[8] 8. The defendant in the court below requested the court to charge as follows: "The plaintiff Brown being a trespasser, as I have charged you, relative to him the engineer and fireman were not bound to anticipate his presence upon the track and be on the lookout for him, and the duty to exercise ordinary care did not arise until the presence of Brown and the horses became known to those upon the engine; and if you find from the evidence that the engineer, as soon as he saw the objects upon the track, exercised all ordinary and reasonable care and diligence to prevent the injury, then the plaintiffs would not be authorized to recover." The court gave the charge as requested, with the addition of the words, "otherwise they might be." We do not think the giving of the request to charge with the words added by the court was error as against the plaintiff in error. The words added by the court, "otherwise they might be," had merely the effect of referring the jury to the general instructions upon the entire case, and made the question of defendant's liability referable to his charge in its entirety, without restating all the rules and principles of law which the jury would consider in passing upon the question of plaintiff's right to recover. But if the finding in the case had been in favor of defendant, and the plaintiffs in the court below, the defendants in error here, were challenging this portion of the court's instructions, a very different question would be raised. Inasmuch as the defendant in error is not as a matter of fact criticising the court's charge (having prevailed in the trial below), we merely call the court's attention (as the case is to be remanded for a new trial) to his unqualified instructions that Brown was a trespasser on the tracks of the defendant company. A trespasser is a wrongdoer; and if Brown, without fault upon his part, was thrown upon the tracks of the railway company, could he be a trespasser in the proper and legal meaning of that term?

Judgment reversed in both cases. All the Justices concur.

(138 Ga. 406)

HADDEN v. McQUEEN.

(Supreme Court of Georgia. July 11, 1912.)

(Syllabus by the Court.)

FRAUDULENT CONVEYANCES (§ 57*)—TRANSACTIONS INVALID—INSOLVENCY OF GRANTOR.

A bona fide sale of property, not made to hinder, delay, or defraud creditors, is not ren-

dered invalid because the vendor may have been insolvent at the time.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 138-142, 148, 150-158; Dec. Dig. § 57.*]

Error from Superior Court, Effingham County; W. W. Sheppard, Judge.

Claim by Mrs. B. G. Hadden to property levied on by N. McQueen as that of defendant. Judgment for plaintiff, and claimant brings error. Reversed.

H. B. Strange, of Statesboro, for plaintiff in error. E. A. Cohen, of Savannah, for defendant in error.

EVANS, P. J. This is a claim case. The claimant is the wife of the defendant. The property levied on is personality which the claimant contends she purchased from her husband at the time she purchased a tract of land from him. The claimant submitted evidence tending to show that at various times, beginning in 1905 and extending to 1907, her husband gave her certain money which she deposited in her own name in a named bank; that her husband bought at auctioneer's sale a certain tract of land and personality, and she lent him the money with which to pay for this land; that in 1908 he sold the land and personality to her in satisfaction of the debt; and that she paid for the same with the money which he had previously given her. The fl. fa. was issued on a judgment obtained in April, 1909.

The court instructed the jury: "That a conveyance made in payment of a bona fide debt, where the creditor [debtor?] or where the grantor in the conveyance is himself solvent at the time, if not made for the purpose to hinder, delay, or defraud other creditors, or if the conveyance is in good faith, untainted with fraud, it is a valid paper. * * * If you find by a preponderance of the evidence that the defendant in fl. fa. was owning the property and was solvent at the time, and he made a bona fide sale of it to his wife and received a consideration for it, that it would be a good transaction and a valid transaction. * * * If at the time the deed alleged to have been made, or the sale alleged to have been made, the title was in the defendant in fl. fa., and he was at the time solvent, and he sold this property to his wife for a valuable consideration, it would be, gentlemen, a valid sale." Exception is taken to these excerpts from the charge, on the ground that the court in his instruction to the jury made the validity of the sale depend on the solvency of the defendant in fl. fa. at the date the sale and conveyance were made.

A debtor, though insolvent, may prefer one creditor to another, and there is no inhibition of law against a bona fide sale of property by the owner thereof, though he may be solvent at the time of the sale. The

tendency of the court's instruction was to impress the jury that the sale by the defendant in *fi. fa.* to his wife would be invalid unless he was solvent at the time. So far as the record discloses, there was no lien against the defendant's property at the time it is contended that he made the sale to his wife. If the sale was made to her bona fide, and with no intent to hinder, delay, or defraud creditors, the sale would be upheld, notwithstanding he at the time may have been insolvent. As the case is to be tried over again, we express no opinion upon the evidence. The charge of the court was erroneous; and, as the evidence did not demand a verdict, a new trial will have to be granted.

Judgment reversed. All the Justices concur.

(128 Ga. 433)

BROWN v. COLE.

(Supreme Court of Georgia. July 11, 1912.)

(*Syllabus by the Court.*)

1. INJUNCTION (§ 163*)—RESTRAINING ORDER—DISSOLUTION—DISCRETION OF COURT.

The plaintiff sought to enjoin the defendant from prosecuting a distress warrant and also a warrant to dispossess him as a tenant holding over, on the ground that he was a purchaser of the land, and not a tenant, and was unable to give the statutory bond to prevent his dispossession as a tenant holding over. The defendant in his answer admitted that the plaintiff went into possession of the land as a purchaser, but averred that he had not paid any of the purchase money, and that subsequently he had attorned to the defendant, and that the rent was past due. On a motion to dissolve the restraining order, the court, after hearing evidence, passed an order dissolving the temporary restraining order, unless the plaintiff gave bond conditioned to pay the defendant the rent. If the plaintiff failed to give this bond, then, upon the defendant's giving bond conditioned to pay the plaintiff such damages as may be assessed on the final trial, the defendant was awarded possession of the land until the further order of the court, and the sheriff was directed to place him in possession. *Held:*

(1) There was no abuse of discretion in dissolving the temporary restraining order upon the plaintiff's failure to give bond. *Zorn v. Murray*, 127 Ga. 389, 56 S. E. 454.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 357-371; Dec. Dig. § 163.*]

2. INJUNCTION (§ 176*)—RESTRAINING ORDER—DISSOLUTION—DISCRETION OF COURT.

(2) That, although it would be the duty of the sheriff to proceed to execute the dispossessionary warrant as provided by the statute upon the failure of the plaintiff to give the bond required by the order, it was error for the court to grant a mandatory order ejecting the plaintiff from the land, and putting the defendant in possession. *Kerr v. Black*, 137 Ga. 832, 74 S. E. 535. Accordingly, the judgment refusing an injunction is affirmed, with the direction that the order be modified by vacating that part of it directing that the defendant be put in possession of the land upon the terms indicated in the order.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 389, 395; Dec. Dig. § 176.*]

Error from Superior Court, Dade County; A. W. Fite, Judge.

Action by Joe Brown against N. W. Cole. Judgment for defendant, and plaintiff brings error. Affirmed, with directions.

J. P. Jacoway, of Trenton, and Foust & Payne, of Chattanooga, Tenn., for plaintiff in error. H. P. Lumpkin, of La Fayette, Sam P. Maddox, of Dalton, and W. U. Jacoway, of Trenton, for defendant in error.

EVANS, P. J. Judgment affirmed, with direction. All the Justices concur.

BIRD v. STATE.

(Supreme Court of Georgia. July 11, 1912.)

Error from Superior Court, Toombs County; K. J. Hawkins, Judge.

Wiley Bird was convicted of crime, and brings error. Affirmed.

F. H. Saffold, of Swainsboro, for plaintiff in error. Alfred Herrington, Sol. Gen., of Swainsboro, T. S. Felder, Sol. Gen., and Hines & Jordan, all of Atlanta, for the State.

EVANS, P. J. No error of law is complained of, and the evidence supports the verdict. Judgment affirmed. All the Justices concur.

(11 Ga. App. 348)

WILSON v. CLARK. (No. 4,074.)

(Court of Appeals of Georgia. July 23, 1912.)

(*Syllabus by the Court.*)

ATTACHMENT (§ 287*)—PROPERTY SUBJECT—RIGHTS OF CLAIMANT.

A. was indorser on a promissory note made by B., payable to C. The note matured, and C. demanded payment. B. had no money with which to pay the note, and agreed with A. that, if A. would pay it, he would turn over to A. a certain piano which was in his (B.'s) possession and to which he had title. A. paid the note, and B., in pursuance of his promise, turned the piano over to A. Subsequently one of B.'s creditors levied an attachment upon the piano as the property of B., and A. interposed a claim. *Held* that, in the absence of any evidence tending to show the existence of bad faith in the transaction between A. and B., a verdict for A. was demanded.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. §§ 999-1017; Dec. Dig. § 287.*]

Error from Superior Court, Catoosa County; W. A. Fite, Judge.

Action by John W. Clark against J. M. Wilson. Judgment for plaintiff, and defendant brings error. Reversed.

J. H. Anderson, of Ringgold, Foust & Payne, of Chattanooga, Tenn., and Maddox, McCamy & Shumate, of Dalton, for plaintiff in error. Wm. E. Mann, of Dalton, for defendant in error.

HILL, C. J. John Clark sued out an attachment and had it levied upon a certain piano, which was claimed by Wilson. On the trial of the claim case, on appeal in the superior court, the jury returned a verdict

finding the property subject to the attachment. The claimant's motion for a new trial was overruled, and he excepted. The evidence discloses that Wilson, the claimant, was security on a promissory note made by one J. P. Roberts and payable to J. C. Bell, or order for \$167.45. The piano levied upon was the property of J. P. Roberts. After the note had matured, and before the levy, Bell, the holder of the note, demanded payment of Roberts and his surety. Roberts was unable to pay the note, and agreed with Wilson, his surety, that if he would pay this note he would turn over the piano to him as compensation. Wilson paid the note and took it up, and Roberts thereupon gave Wilson an order for the piano. Wilson sent a wagon to Ringgold to Roberts' home to get the piano, and while the piano was being moved from Roberts' house by Wilson's agent, sent for that purpose, it having been boxed by Wilson's agent and brought outside and placed on the porch of the house, the sheriff appeared with the attachment in favor of Clark and made his levy. These facts are undisputed. It thus appears that, not only had the title of the piano passed to Wilson for a valuable consideration, but the piano was actually in the possession of Wilson's agent before the levy of the attachment was made, and it would seem that this uncontradicted evidence would have demanded a finding in favor of the claimant.

The trial judge charged the jury to the effect that if Wilson paid the note for Roberts in good faith, and with no purpose to protect Roberts from his creditors, but "to protect himself and get the piano as a protection against having to pay the note, then it would be Wilson's property and not subject to the attachment," irrespective of whether there had been an actual delivery of the property to Wilson or not; but if, on the contrary, it was not done in good faith, but was done to protect Roberts against his creditors, the property would be subject, and it would also be subject if the purpose of Wilson in paying the note was to hinder and delay the creditors of Roberts. The latter part of this excerpt is excepted to on the ground that it was not authorized by the evidence. We think the objection is well founded. There is nothing in the evidence which indicates any scheme or combination on the part of Wilson and Roberts to defraud or delay the creditors of the latter. The suggestion, therefore, in this instruction, that the transaction between Wilson and Roberts might have been in bad faith and for the purpose of benefiting Roberts, raised an issue which was not in the case under the evidence, and probably prejudiced the jury against Wilson's claim. The view, however, which we take of the undisputed evidence, makes this question immaterial. The verdict was demanded for

the claimant, and was returned for the plaintiff, and the claimant's motion for a new trial, for this reason, should have been granted.

Judgment reversed.

(11 Ga. App. 361)

CONSTITUTION PUB. CO. v. DEAN.

(No. 4,215.)

(Court of Appeals of Georgia. July 23, 1912.)

(Syllabus by the Court.)

JUSTICES OF THE PEACE (§ 125*)—JUDGMENT—SIGNING—"RENDERED."

"A judgment rendered by a justice of the peace at the regular time and place of holding his court, but which was written out and signed at some other time and place in the district, is not void. The word 'rendered,' as used in section 462 of the Code [Civ. Code 1910, § 4705], refers to the making up and announcement of the judgment, and not to the clerical act of reducing it to writing."

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 390-392, 395-399; Dec. Dig. § 125.*]

For other definitions, see Words and Phrases, vol. 7, pp. 6082-6084.]

Error from Superior Court, Fulton County; Geo. L. Bell, Judge.

Action by Charles Dean against the Constitution Publishing Company. Judgment for plaintiff before a justice was affirmed on certiorari, and defendant brings error. Affirmed.

Dorsey, Brewster, Howell & Heyman and John K. MacDonald, Jr., all of Atlanta, for plaintiff in error. C. G. Battle and A. C. Corbett, both of Atlanta, for defendant in error.

POTTLE, J. For convenience and in order to expedite business the magistrate in the 1,026th district of Fulton county pursues a practice which may best be described by quoting from his answer, as follows: "That his regular and established court day is the fourth Monday in each month; that he has at every term of court numerous cases on his docket, so that it is impossible to dispose of all of them in one day; so that on said court day he calls the cases from the docket and renders judgment, where the suit is on an unconditional contract in writing, and no defense by plea or appearance is made, or where the suit is on account, with personal service on the defendant and no plea is filed or appearance made. All other cases are assigned for trial on a given day and hour. In order to do this, he has a calendar, and in this calendar each case is entered for the day and hour to which it is assigned for trial on the call. Cases are assigned for each successive week-day for some two or three weeks, as the number of cases require. In this way the continuity of the term is kept up. There is no intermission of a day from the call

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

day to the day at which the last case is assigned for trial, except Sundays. The foregoing was followed at November term, 1911. As the cases are reached on the calendar, he hears them and orally announces the judgment he renders, and makes a notation of it on the calendar. In the case of a judgment for the full sum sued for in favor of the plaintiff, the entry on the calendar is the single word, 'Judgment,' entered after or below the name of the case. In case the judgment is against the garnishee for failure to answer the summons of garnishment, the words written on the calendar are 'Judgment by default.'"

Summons of garnishment was served on the Constitution Publishing Company, returnable to the November term, 1911, of the justice's court. The garnishee, having mistaken the date for December, failed to answer. When the November term of the court arrived, the case against the main defendant and also against the garnishee was set down for December 9, 1911. On that day the justice first called the case against the principal defendant from the calendar upon which the case had been entered, and orally announced judgment in favor of the plaintiff, making a notation of the judgment on the calendar. He then called the case against the garnishee, and, no answer having been filed, entered a judgment in favor of the plaintiff by default, after announcing it, and made a notation of this judgment on the calendar. On December 11th, the magistrate entered both judgments upon the docket. On December 12th the garnishee tendered to the justice an answer, and asked that the answer be filed and the garnishment case be set down for trial. The justice declined to permit the answer to be filed, and declined to reopen the case, and this is complained of in the petition for certiorari, which was overruled by the judge of the superior court. The contention of the garnishee is that the judgment entered against it on December 11th was void, for the reason that the justice had no authority to orally announce his judgment, noting the same on the calendar, and then enter the judgment at a later date on his docket; that, no legal judgment having been entered against the garnishee on December 8th, the case stood over for trial at the next term of the court, since in the justice's court all continuances must be for the term, and that when the answer of the garnishee was tendered on December 12th there had never been a valid judgment against the principal defendant or against the garnishee.

This point is settled adversely to the contention of the garnishee by the decision of the Supreme Court in the case of *Ryals v. McArthur*, 92 Ga. 373, 17 S. E. 350: "A judgment rendered by a justice of the peace at the regular time and place of holding his

court, but which was written out and signed at some other time and place in the district, is not void. The word 'rendered,' as used in section 462 of the Code of 1882 [Civ. Code 1910, § 4705], refers to the making up and announcement of the judgment, and not to the clerical act of reducing it to writing." That decision was cited approvingly in *Scott v. Bedell*, 108 Ga. 205, 209, 33 S. E. 903, and again in *Hargrove v. Turner*, 108 Ga. 580, 583, 34 S. E. 1. See, also, *Brown v. Bonds*, 125 Ga. 833, 54 S. E. 933. It is true that this court, in *N. C. & St. L. Ry. v. Brown*, 3 Ga. App. 561, 60 S. E. 319, questioned the soundness of the decision in the *Ryals* Case, supra; but that decision is alike binding upon this court and the Supreme Court until reviewed and overruled in the manner prescribed by law. In our opinion it absolutely settles the question involved in the present case.

There is no merit in the contention that the garnishee should have been allowed to file the answer, because it mistook the term to which the summons was made returnable. The original summons is not before us, so that we can ascertain whether the summons is legible or not; and if the garnishee was in doubt as to the term to which it was required to make answer, it should have applied to the court for information.

Judgment affirmed.

(11 Ga. App. 338)

SUTTON v. FARMERS' UNION WAREHOUSE CO. (No. 3,984.)

(Court of Appeals of Georgia. July 23, 1912.)

(Syllabus by the Court.)

CORPORATIONS (§ 309*)—OFFICERS—RECOVERY OF MONEY PAID.

Where one was placed in charge of the business of a corporation, by its board of directors, as its general manager, with authority to conduct the business in accordance with his judgment, and from time to time paid out his money in settlement of existing valid debts of the corporation, the payments being made with the knowledge and acquiescence of a majority of the board of directors, *held*, in a suit by him against the corporation to recover the money so paid for its use and benefit, that the corporation was liable, and could not set up as a defense that money so paid was merely a voluntary payment, made without its authority.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1366-1373; Dec. Dig. § 309.*]

Error from City Court of Tifton; R. Eva, Judge.

Action by John Y. Sutton against the Farmers' Union Warehouse Company. Judgment for defendant, and plaintiff brings error. Reversed.

R. E. Dinmore, of Atlanta, and R. D. Smith, of Tifton, for plaintiff in error. W. A. Hawkins, of Valdosta, and J. S. Ridgill, of Tifton, for defendant in error.

HILL, C. J. John Y. Sutton brought suit against the Farmers' Union Warehouse Company, a corporation, on an open account for money which he had paid out for the use of the corporation. By consent the case was tried by the judge, without the intervention of a jury, and he found in favor of the plaintiff the sum of \$37.50. The plaintiff excepts to this finding.

The facts in the case, substantially stated, are as follows: The Farmers' Union Warehouse Company, through its board of directors, elected John Y. Sutton as the general manager of the company, with authority to take charge of its affairs and conduct its business. He found the corporation somewhat involved, and used from time to time his private funds in payment of its valid existing obligations. These payments were made by him with the knowledge and acquiescence of a majority of the officers and directors of the corporation. His suit was brought to recover the payments so made by him for the use and benefit of the corporation. It was agreed that, as an accounting was necessary to determine the amount actually due by the corporation, an expert accountant should be employed for the purpose of determining the exact amount, and that this accountant should act with the judge in the trial of the case and report his findings to the judge, but that the ultimate liability of the corporation, under the law, should be left to the determination of the judge. The accountant reported that the balance due the plaintiff was \$594. Included in this balance was the price of a typewriter which belonged to the plaintiff, and this amount was allowed by the judge in favor of the plaintiff; but he disallowed the balance of the account, on the ground that the payments made by the plaintiff while acting as the agent and general manager of the company were mere voluntary payments, and wholly unauthorized by the corporation.

The amount of the balance is not disputed; nor is it denied that the payments were made by the plaintiff for and in behalf of the corporation, in settlement of valid existing indebtedness, and that the corporation, as a matter of fact, received and enjoyed the benefit of the payments. It is also not denied that the management of the affairs of the corporation was left by the board of directors entirely to the general manager, with authority to use his own judgment in its management, and that his conduct in the affairs of the corporation had been very beneficial. The evidence showed that he paid the debts of the corporation and, in fact, transacted its entire business; the directors giving very little, if any, attention to its management. Some of the directors testified that they knew of the payment of these debts of the corporation by the general

manager, and that the payments were made, not only with their acquiescence, but with their approval. Other directors testified that they had no knowledge of the payment of these debts, and, so far as they knew, the general manager had no authority from the board of directors to pay them. It is not contended that these debts paid by the plaintiff were contracted ultra vires, or that they did not constitute valid existing obligations of the corporation. The sole contention is that the plaintiff, as the general manager and agent of the corporation, voluntarily paid these debts for the benefit of the corporation, without the authority of the directors. The evidence is clear that the corporation received, not only the services of the plaintiff, but also received his money, with the knowledge and approval of the majority of the directors.

If a corporation accepts the services of another, and actually receives and uses money advanced by him for its benefit, with the knowledge of its directors, it would be unjust to permit the corporation, under these facts, to resist the repayment of the money, on the ground that it was paid voluntarily and without authority. *Wood Mining Co. v. King*, 45 Ga. 42. A merchant, whose agent purchases goods on a credit, although the credit was unauthorized, cannot refuse to pay when he has received and sold the goods, especially where he has paid other bills made by the same agent. *McDowell v. McKenzie*, 65 Ga. 630. And it is well settled that an unauthorized contract, made by an assumed agent or real agent in excess of his authority, becomes binding upon his principal, if the latter accepts the benefit of the contract. Such acceptance amounts to a ratification. *Haney School Furniture Co. v. Hightower*, 113 Ga. 289, 38 S. E. 761, and citations. Here the evidence largely preponderates in favor of the contention that the plaintiff, as general manager, had express authority from the board of directors to advance the money to pay the debts of the corporation. Whether this is true or not, it is undisputed that he did pay these valid debts, and that the corporation got the benefit of his money. We think, therefore, that the learned trial judge erred in finding that the plaintiff was not entitled to recover the undisputed amount which he had paid out for the use of the corporation, and of which the corporation had received the full benefit. The question of whether he had express authority to pay the debts is not material, in view of the evidence that he was put in charge of the business of the corporation and intrusted with its entire management by the board of directors, and that these debts were paid by him for the use and benefit of the corporation, and accepted by it. Authority to pay these debts was implied; but whether it was or not, the actual

payment of valid debts against the corporation, and the use by the corporation of the plaintiff's money, entitled him to recover it back.

Judgment reversed.

(11 Ga. App. 329)

SAFFOLD v. STATE. (No. 4,125.)

(Court of Appeals of Georgia. June 5, 1912.)

On Motion for Rehearing, July 23, 1912.)

(*Syllabus by the Court.*)

On Motion for Rehearing.

1. CRIMINAL LAW (§ 935*)—NEW TRIAL—SUFFICIENCY OF EVIDENCE.

The evidence authorized the finding of the jury; and the trial judge did not abuse his discretion in overruling the motion for a new trial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2297, 2298; Dec. Dig. § 935.*]

2. CRIMINAL LAW (§ 756*)—TRIAL—INSTRUCTIONS—RECITALS OF EVIDENCE.

There is no merit in the assignment of error based upon the excerpt from the charge of the court; nor is the exception that the court erred by intimating an opinion as to what had been proved sustained by the record. It is permissible for the trial judge to state his recollection of what has been testified, when, in doing this, he does not intimate any opinion as to the weight which the jury should attach to the testimony, or that any statements which have been made are true.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1766-1771; Dec. Dig. § 756.*]

3. CRIMINAL LAW (§ 371*)—EVIDENCE—SIMILAR OFFENSES.

There was no error in the ruling upon the admissibility of the testimony to which objection was made. As to this point, the decision is controlled by the ruling of the Supreme Court in *Farmer v. State*, 100 Ga. 41, 28 S. E. 26. An intent to defraud is not a presumption of law, but a matter of fact for the jury. "A single act or representation, in many cases, would not be decisive, especially where the accused has sustained a previous good character. But when it is shown that he made similar representations, about the same time, to other persons, and by means of such representations obtained goods, all of which were false, the presumption is greatly strengthened that he intended to defraud." *Trogdon v. Commonwealth*, 72 Va. 862.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 830-832; Dec. Dig. § 371.*]

4. CRIMINAL LAW (§§ 721, 721½*)—TRIAL—ARGUMENT OF COUNSEL.

The solicitor general is not permitted to refer to the fact that the defendant has not made a statement; but he may properly comment upon the fact that the accused has failed to adduce testimony in rebuttal of evidence introduced by the state, tending to show his guilt.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1672, 1673; Dec. Dig. §§ 721, 721½.*]

(*Additional Syllabus by Editorial Staff.*)

5. FALSE PRETENSES (§ 6*)—ELEMENTS OF OFFENSE—"WRITING."

The word "writing," as used in Pen. Code 1910, § 249, making it an offense for any per-

son, by color of any counterfeit writing, to obtain from any person money or other valuable things, includes a "check."

[Ed. Note.—For other cases, see False Pretenses, Cent. Dig. § 4; Dec. Dig. § 6.*]

For other definitions, see Words and Phrases, vol. 8, pp. 7538-7542.]

Error from Superior Court, Fulton County; W. E. Thomas, Judge.

A. R. Saffold was convicted of being a common cheat and swindler, and brings error. Affirmed.

Mozley & Moss, of Marietta, for plaintiff in error. Hugh M. Dorsey, Sol. Gen., and E. A. Stephens, both of Atlanta, for the State.

RUSSELL, J. Judgment affirmed.

On Motion for Rehearing.

Upon the original investigation of the record and the briefs in this case, the point raised by the demurrer was maturely considered, and, in the opinion of the court, the demurrer was properly overruled; but, by inadvertence, the point was not dealt with in the decision.

In our opinion, the rulings in *Townsend v. State*, 92 Ga. 732, 19 S. E. 55, and *Brazil v. State*, 117 Ga. 32, 43 S. E. 460, have no application whatever to the question presented by the case at bar. In the *Brazil Case*, the indictment (which contained two counts, one charging forgery and the other that the accused did "falsely and fraudulently pass, pay, and tender in payment" the paper alleged to have been forged by him) was held to be sufficient; and the statement that "our penal laws fail to provide a punishment for uttering a bank check drawn in a fictitious name" is clearly obiter dictum, because that specific point was not before the court for decision. In the *Townsend Case*, Judge Simmons was dealing with an indictment based upon the second division of section 4453 of the Code of 1882 (now section 247 of the Penal Code of 1910), and the controlling question before the Supreme Court was whether a check upon a bank is a bill of exchange, within the meaning of that section; and the judgment was reversed solely because the court was of the opinion that a check is not a bill of exchange, within the purview of our criminal statutes. The indictment in the *Townsend Case* charged the defendant with making a bill of exchange in a fictitious name, and set out a check upon the Merchants' National Bank of Rome. In concluding the opinion, and showing that evidently the case was decided upon that point alone, the court held that, "the paper in question here being an ordinary bank check, it follows that the conviction under section 4453 was improper, and the court below erred in overruling the motion for a new trial." It is clearly to be seen that the trial court in the case at bar properly held that the indictment in the

present case was brought under the provisions of section 249 of the Penal Code of 1910; and therefore the question presented to us, instead of being, as in the Townsend Case, whether a check is a bill of exchange, is whether or not a check can properly be construed to be a "writing," under the terms of the above-stated section.

[5] We are of the opinion that, although criminal statutes are to be strictly construed, the broad generic term "writing" can aptly include the more specific term "check," and, therefore, that the court did not err in overruling the demurrer. It was properly held in the Townsend Case, *supra*, that in prosecutions under section 4453 of the Code of 1882 (now section 247 of the Penal Code of 1910) a distinction exists between the term "bill of exchange" and "check," for the reasons pointed out in the opinion. The accused in the case now before us, however, was not indicted under section 247 of the Penal Code, but is charged under the provisions and in the terms of section 249 with obtaining money by means of a false writing made in a fictitious name. It is true the paper set out is what is ordinarily called a "check"; it may be said to be a check, but it is none the less a "writing," and section 249 is intended to cover any case of obtaining goods or money on a false writing.

Section 247 is directed against the man who draws or makes the papers dealt with, or indorses or accepts them. Section 249 denounces the obtaining of goods or money, though the accused may not have written the writing which is used to defraud another. Section 247 refers only to cases in which a fictitious name is used. Section 249 punishes one who employs a false or forged writing, issued in the name of a real person, as well as him who employs a false writing made in a fictitious name. An essential element in the offense penalized by section 249 is the obtaining of goods or money, or both; one may violate section 247 without obtaining anything of value.

Motion for rehearing denied.

(11 Ga. App. 334)

GENERAL REDUCTION CO. v. THARPE.
(No. 4,168.)

(Court of Appeals of Georgia. July 2, 1912.)

(Syllabus by the Court.)

CORPORATIONS (§ 508*)—ACTIONS—VENUE—"OFFICE"—"PLACE OF BUSINESS."

The word "office" as used in Civil Code 1910, § 2259, is synonymous with "place of business." An action upon a contract with a mining corporation, which was made or was to be performed in a county where the corporation maintained a plant, together with a superintendent who was in control of its business and a large force of laborers, and a place for the transaction of such business as was necessary to the operation of the plant, may be brought in the county where the plant is located, notwithstanding the principal office of

the corporation was by its charter located in another county, where its board of directors met and its financial operations were carried on (citing 6 Words & Phrases, 4921).

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1935-1939, 1942-1946; Dec. Dig. § 503.*]

Error from City Court of Jeffersonville; L. D. Shannon, Judge.

Action by W. B. Tharpe against the General Reduction Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Robt. L. Berner, of Macon, for plaintiff in error. L. D. Moore, of Macon, for defendant in error.

POTTLE, J. An action was brought in the city court of Jeffersonville to recover for certain services alleged to have been performed by the plaintiff in hauling wood and fertilizer, and services of a like nature, and for the breach of a contract alleged to have been made by the defendant with the plaintiff to remove a certain quantity of clay at an agreed price per ton, and also for the value of a certain number of bushels of corn, which the plaintiff alleged the defendant, over the objection of the plaintiff, had removed from the land which the plaintiff had cultivated and appropriated to his own use. The defendant filed a plea to the jurisdiction, alleging that the city court of Atlanta and the superior court of Fulton county were the only courts which had jurisdiction of the action. The case was tried upon this special plea, and a verdict directed against the plea. The defendant's motion for a new trial was overruled, and error is assigned upon this ruling.

The defendant is a mining corporation, engaged in the business of mining clay in Twiggs county, Ga. It operates under a charter granted by the superior court of Fulton county, which fixes its principal office or place of business in the county of Fulton, and confers upon the corporation the power to open branch offices within and without the state. The defendant maintains and operates a plant for the mining of clay in Twiggs county. A superintendent resides at the plant and is in charge of its operations. There is a room at the plant for the use of the superintendent, with a table and a chair in it, and he does his writing in that room. He employs and pays off the laborers, and makes out a pay roll of the daily wages and sends it to the president of the company, or draws a draft on him, and in this way obtains the money to pay the hands. He does not keep any books, but keeps only a daily report, which he sends to the president of the company. He keeps a record of the clay that is shipped out, and to whom it is shipped, a record of the coal that is shipped to the plant, and also a record of any other goods bought for the plant. He

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

makes reports of these matters as often as they are called for. All contracts for the sale of clay are made in Atlanta, and remittances for such sales are sent there. All of the financial part of the company's business is carried on in Atlanta. The duties of the superintendent are generally to employ and discharge laborers, and overlook and supervise the operation of the business at the mine. There is no desk or safe in the room where the superintendent transacts his business. The superintendent does not remain in any particular place all of the time, but moves around and about the plant, superintending its operations.

The question for decision is whether under this state of facts, the verdict was properly directed against the plea to the jurisdiction. The correct determination of this question depends upon the construction of the act of October 16, 1885, entitled "An act to define where corporations, mining, or joint-stock companies may be sued, and to define how service of the suit may be effected." Acts 1884-85, p. 99. This statute is embodied in Civil Code 1910, § 2259, and is in the following language: "Any corporation, mining, or joint-stock company, chartered by authority of this state, may be sued on contracts in that county in which the contract sought to be enforced was made or is to be performed, if it has an office and transacts business there. Suits for damages, because of torts, wrong or injury done, may be brought in the county where the cause of action originated. Service of such suits may be effected by leaving a copy of the writ with the agent of the defendant, or if there be no agent in the county, then at the agency or place of business." Under the Constitution of this state a defendant can be sued only in the county in which it resides. Generally a domestic corporation resides where its principal office or place of business is located by its charter. But it is well settled that a corporation may have as many superadded statutory residences for special purposes, such as for purposes of suit, as the Legislature may see fit to prescribe. *Watson v. Richmond & D. R. Co.*, 91 Ga. 222, 18 S. E. 306; See, also *Etowah Milling Co. v. Crenshaw*, 116 Ga. 406, 42 S. E. 709. Under the statutes of this state all actions ex contractu against a corporation must be brought in the county where its principal office is located, unless the contract was made or was to be performed in a county where the corporation has an office and transacts business, in which event the suit may be brought either in the county where the principal office is located, or in the county where the contract was made or was to be performed. *Tuggle v. Enterprise Lumber Co.*, 123 Ga. 480, 51 S. E. 433.

We think it is clear that the evidence in the present record demanded a finding that the defendant had an office in Twiggs county

and transacted business there, within the meaning of Civil Code, § 2259. The word "office" has been defined as "a place where business is transacted." *English's Law Dictionary*, 584. Webster defines it to be "the place where a particular kind of business or service for others is transacted." See, also, *6 Words and Phrases*, p. 4920. The contention of the plaintiff in error that, when the principal office of a corporation is by its charter located in a given county, the suit must be brought there, cannot be sustained, in view of the provisions of section 2259 of the Civil Code. The suit may be brought in the county where the principal office is located; but it may also be brought in any other county where the defendant has an office and transacts business, upon any contract made or to be performed in the latter county. The word "office" is synonymous with the words "place of business," and the evident intention of the General Assembly was that whenever a contract was made with a corporation, or was to be performed, in any county where the corporation was transacting its business, suit to enforce the contract might be brought in that county.

In the present case it appears that the only plant which the defendant has is located in Twiggs county, that all of its mining operations are conducted there, that it maintains at this plant a superintendent and a large force of laborers, all under the control and management of the superintendent, and that the superintendent transacts for the corporation all of the business incident to the operation of its plant. Fulton county may be the location of the office of the company, that is to say, the principal office of the company, where its directors meet, and where its financial operations are conducted; but it certainly cannot be said that the corporation has not an office and a place of business in Twiggs county, where its mining operations are carried on. The mere fact that the corporation does not maintain an office in Twiggs county, with a desk and an iron safe and other articles usually found in an office of that character, is immaterial. Indeed, we are not prepared to say that it would be necessary to have even a room in a house occupied by an agent of the corporation. If a corporation has a place where its business is being carried on, and has an agent in charge of it, performing such acts as are necessary in carrying on its business, it has an office and a place of business, within the meaning of the statute.

There is nothing in the decision in *Dade Coal Co. v. Haslett*, 83 Ga. 549, 10 S. E. 435, in conflict with the views herein expressed. In that case it appeared that the principal office of the corporation was not fixed by its charter, nor was the company located in any particular county of the state. It selected Fulton county, and located its principal place of business there, for the purpose of elect-

ing its officers and conducting its financial operations. An action was brought against the corporation in the city court of Atlanta, to recover damages alleged to have been inflicted upon the plaintiff. The defendant set up, in a special plea to the jurisdiction, that all of its operations were located in Dade county, and all of its books relating to the shipment of the products of this company were kept in that county, in the office located therein; that all of its mining operations were carried on in Dade county, and that it maintained an office in Atlanta for the purpose of electing its officers and for the purpose of conducting its financial operations. The effect of the decision of the Supreme Court was that the city court of Atlanta had jurisdiction of the action. The court did not hold that the proper court in Dade county would not also have had jurisdiction. The corporation in that case really occupied the same position, under this decision of the Supreme Court, as if its charter had located its principal office in the county of Fulton. The suit might have been brought in Fulton county or in Dade county. And so we hold, in this case, that while the suit might have been brought against the defendant in Fulton county, it was likewise maintainable in Twiggs county. The purpose of the act of 1885 was not to curtail, but to enlarge, the venue of suits against domestic corporations. There was no error in directing a verdict against the plea to the jurisdiction. Judgment affirmed.

(11 Ga. App. 273)

HORKAN v. BEASLEY. (No. 3,727.)
(Court of Appeals of Georgia. July 2, 1912.)

(Syllabus by the Court.)

1. STATUTES (§ 227*) — CONSTRUCTION—TIME OF DOING ACT.

Where a statute directs the doing of a thing in a certain time, without any negative words restraining the doing of it afterwards, generally the provision as to time is directory, and not a limitation of authority; and in such case, where no injury appears to have resulted, the fact that the act was performed after the time limited will not render it invalid.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 808, 809; Dec. Dig. § 227.*]

2. COURTS (§ 66*) — TERM OF COURT—ADJOURNMENT.

Section 4877 of the Civil Code of 1910, which declares that "it shall be the duty of the judges of the superior and city courts to adjourn the regular and adjourned terms of said courts at least five days before the commencement of the next regular terms of said courts," is directory to the judges, and was not intended to take away from the presiding judge the inherent authority to control the continuance of a term of the court to meet the exigencies of the public business. An order or judgment rendered during a regular or adjourned term, and within less than five days from the commencement of the next regular term, is not for that reason invalid.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 231-242; Dec. Dig. § 66.*]

Error from City Court of Moultrie; J. D. McKenzie, Judge.

Action by G. A. Horkan against A. W. Beasley. Judgment for plaintiff. From an order vacating the same, plaintiff brings error. Affirmed.

Edwin L. Bryan, of Moultrie, for plaintiff in error. Jas. Humphreys, of Moultrie, and G. C. Edmondson, of Quitman, for defendant in error.

HILL, C. J. This was a suit on a promissory note, brought to the February term, 1911, of the city court of Moultrie, to which the defendant sought to set off an open account. The case was called for trial on June 13, 1911, which was at the May adjourned term of the court, when the plaintiff moved to strike the answer upon the ground that an open account could not be set off against an unconditional contract under seal. The court granted an order striking the answer, and thereupon allowed plaintiff to take judgment for the amount of the note. Subsequently, on August 10th, just four days prior to the convening of the regular August term of 1911, the presiding judge, without any formal application, granted an order vacating the judgment rendered on June 13, 1911, and reinstating the defendant's answer, and on August 24th thereafter by letter advised the plaintiff's attorney of the grant of this order. Immediately upon receipt of this letter, the plaintiff, through his attorney, filed a written motion, asking that the order vacating the judgment be itself vacated and declared void, upon the ground that the judge had no jurisdiction to render it, as the term of court at which the original judgment was granted had ended. This motion the court overruled, and to the order vacating the judgment the plaintiff excepted, upon the ground that, after adjournment by operation of law of the term of the court at which the judgment was rendered, the court had no power or authority to vacate, change, or in any way modify the same; said judgment being no longer in the breast of the court, and the court no longer having any power or authority to control it. The order vacating the judgment was as follows: "G. A. Horkan v. A. W. Beasley. Suit on note in the city court of Moultrie. June adjourned term, 1911. The above-stated case having been called in its regular order, and there having been filed a set-off in said case, and upon motion of plaintiff's counsel to strike the set-off, on the ground that a set-off could not be filed to a suit on a note, the set-off being an account, and, before allowing the order, stating to attorney for both sides that, in case the court should find any authority allowing the said set-off, the said case was to be reinstated, and the judgment taken to be set aside, and it appearing to the court, upon authority presented, and while the court is

still in session, that the same was error, it is hereby ordered that the judgment taken in said case stand upon docket as it was originally, ready for trial at the next term of the court as though no judgment had ever been taken. This the 10th day of August, 1911. J. D. McKenzie, Judge of the City Court of Moultrie."

[1] The order striking the defendant's answer is based solely upon the ground that the defendant was undertaking to set off an open account against a suit on an unconditional contract under seal. The order is not conditional, and not dependent upon any change of mind which might subsequently be caused by the presentation of authority, and the judgment rendered on the note is in the usual form. The statement of the presiding judge, thereafter incorporated in his order of August 10, 1911, vacating his judgment and reinstating the plea, cannot be accepted as in any manner qualifying the original order striking the defendant's plea and entering up final judgment in favor of the plaintiff. The statement made in the order of August 10, 1911, that "the court is still in session," it is insisted, should have no force and effect, in view of section 4877 of the Civil Code of 1910, which declares: "It shall be the duty of the judges of the superior and city courts to adjourn the regular and adjourned terms of said courts at least five days before the commencement of the next regular terms of said courts." The proviso to this section contained in the amendatory act of 1896 (Acts 1896, p. 49), making it inapplicable to any superior or city courts having as many as six terms per year, is not pertinent, as the city court of Moultrie is not within the class of courts covered by the proviso. The regular August term of the city court of Moultrie convened on August 14, 1911, and the order of the presiding judge, vacating his original judgment, was dated August 10, 1911, four days before the beginning of the August term of the city court of Moultrie. The plaintiff in error insists that under the section of the Code above quoted the June adjourned term of the city court of Moultrie adjourned automatically five days before August 14, 1911, and, therefore, that when the order of August 10th was passed the June adjourned term was at an end, and he had no authority to pass that order. It is well settled that after the expiration of the term at which a judgment is rendered it is out of the power of the court to amend it in any matter of substance, or in any matter affecting the merits. During the term, the record is said to be in the breast of the judge; after it is over, it is upon the roll. The power to amend *nunc pro tunc* is not revisory in its nature, and is not intended to correct judicial errors. Hence the express judgment of the court, however erroneous, cannot be corrected at a subsequent term. *McCandless v. Conley*, 115 Ga. 51, 41 S. E. 256; *Watkins v. Brizendine*, 111

Ga. 458, 36 S. E. 807; *Dyson v. Southern Railway Co.*, 113 Ga. 327, 38 S. E. 749.

[2] The question raised involves the construction of section 4877 of the Civil Code, *supra*. Is this section mandatory or directory? If mandatory, the June adjourned term of the court was at an end, and the order of the judge vacating his previous judgment was non *coram* judge. If the statute is simply directory, then the order vacating the judgment was valid. The language of the statute is that "it shall be the duty of the judges of the superior and city courts," etc.; but the use of the word "shall," in a statute, does not always make the statute mandatory. The word may be construed to be directory wherever the public interest or right is concerned. Courts have inherent power to control the times of adjournment, or to extend the terms as the business of the court may require, and this power should not be restricted, unless it is clear that it was the legislative intent to do so. And where it might injuriously affect the public interest to construe the terms of a statute as imperative, such construction will not be adopted, if it can be avoided. Suppose the superior court or the city court were actually engaged in the trial of an important case, which was not completed five days previous to the beginning of the next term; would it not seriously affect the public interest for the court to discontinue its term and render the trial nugatory? Or suppose the case on trial was of a criminal character, and not only the public interest, but the interest of the individual, demanded a speedy termination of the trial; was it intended by the Legislature that the term of the court should, regardless of the public interest or individual rights, automatically terminate five days previous to the beginning of the next term of the court? The language of the statute is: "It shall be the duty of the judges," etc. Suppose the judge should disregard this duty, and continue the term to within a less number of days from the beginning of the next term, because the business of the court demands it; would his action be illegal, and the judgments entered after the five days be nullities? We think not. The statutes of this state fix the time for the courts to be held and the terms to begin, and no court is held unless a judge is present to hold it, and the holding of the session of the court is postponed until the judge arrives and begins a session. *Perdue v. State*, 134 Ga. 305, 67 S. E. 810. In the *Perdue* Case the law provided that Pike superior court should be held on the first Monday in every October, and that Henry superior court, which is in the same circuit and presided over by the same judge, should be held on the third Monday in every October, and the trial of that case, which was a murder case, was pending in Pike superior court at its

October term, beyond the time when, under the law, Henry superior court should have convened, and the presiding judge continued the session of Pike superior court in order to complete the trial of the case. It was held by the Supreme Court that the two courts were not in session at the same time, and that the holding of Pike superior court on the third Monday in October was not illegal. While that decision is not exactly in point, it illustrates the power of the presiding judge to continue a session of the court until the trial of a pending case is concluded.

The purpose of the act codified in the section cited *supra* is simply the public convenience, and especially the convenience of the officers of the court in completing the minutes of the pending term and preparing for the business of the ensuing term, and where a statute requires an official act to be done by a given time for public purposes, it is generally construed as merely directory. In *re Heath*, 3 Hill (N. Y.) 42. It has been held that the most satisfactory and conclusive test of the question whether the provisions of a statute are mandatory or directory is whether the prescribed mode of action is of the essence of the thing to be accomplished; in other words, whether it relates to matters material or immaterial, to matters of convenience or of substance. *Gallup v. Smith*, 59 Conn. 354, 22 Atl. 334, 12 L. R. A. 353. And the Code section now under consideration, it seems to us, does not affect the substance of judicial action, but merely refers to matters of convenience, both as to the officers of the court and to those who may have business in the court. It is held that statutes fixing the time for the doing of an act are considered generally as only directory, where the time is not fixed for the purpose of giving a party a hearing or for some other important purpose; and where the statute directs the doing of a thing in a certain time, without any negative words restraining the doing of it afterwards, the provision as to time is generally directory, and not a limitation of authority; and in such case, where no injury appears to have resulted, the fact that the act was performed after the time limited will not of itself render it invalid. See *Gallup v. Smith*, *supra*, and authorities cited in the notes.

It cannot be said that a judgment rendered by a superior or city court in a case where such court has jurisdiction is invalid because the judgment was rendered within less than five days from the time when the next term of the court should commence. We think it very clear that the statute which is embodied in the Code section now under consideration is merely directory, and must be construed in connection with the inherent power of the court to control its terms as the exigencies of the

pending business require, and the fact that the June adjourned term of the city court of Moultrie was not finally adjourned by the presiding judge until four days before the beginning of the next term of the court, and the judgment complained of was rendered less than five days before, while still in that term, did not render the judgment invalid. Judgment affirmed.

(11 Ga. App. 338)

MACON, D. & S. R. CO. v. CALHOUN.
(No. 3,519.)

(Court of Appeals of Georgia. July 23, 1912.)

(Syllabus by the Court.)

1. STATUTES (§§ 74, 98*)—GENERAL AND SPECIAL LAWS—ORGANIZATION OF COURTS—UNIFORMITY.

The act approved August 6, 1909 (Acts 1909, p. 279), abolishing the city court of Mt. Vernon, and providing that all cases pending in that court shall be transferred to the superior court for trial, does not contravene article 1, § 4, par. 1, of the Constitution of the state (Civil Code of 1910, § 6391); nor does it violate article 6, § 9, par. 1, of the Constitution (Civil Code of 1910, § 8527). *Macon, Dublin & Savannah R. Co. v. Calhoun*, 138 Ga. 165, 74 S. E. 1030, Supreme Court of Georgia, decided May 15, 1912.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 76, 110, 111; Dec. Dig. §§ 74, 98.*]

2. COURTS (§ 52*)—TRANSFER OF CAUSES—COURTS OF SAME STATE.

The superior court of Montgomery county has full and complete jurisdiction of all cases transferred to it from the city court of Mt. Vernon, under the terms of the aforesaid act.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 184-192; Dec. Dig. § 52.*]

3. CHARGE NOT ERRONEOUS.

The excerpt from the charge excepted to, considered in connection with the entire charge, contains no material or prejudicial error.

4. APPEAL AND ERROR (§ 1002*)—REVIEW—QUESTIONS OF FACT.

The controlling questions raised by the record are issues of fact, on which the evidence is in conflict, and which are settled by the verdict.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 8985-8987; Dec. Dig. § 1002.*]

Error from Superior Court, Montgomery County; J. H. Martin, Judge.

Action between the Macon, Dublin & Savannah Railroad Company and C. H. Calhoun. From a judgment, the railroad company brings error. Affirmed.

See, also, 74 S. E. 1030.

Minter Wimberly and Akerman & Akerman, all of Macon, and W. L. Wilson, of Mt. Vernon, for plaintiff in error. M. B. Calhoun, of Mt. Vernon, and Eschol Graham, of McRae, for defendant in error.

PER CURIAM. Judgment affirmed.

POTTLE, J., not presiding.

(11 Ga. App. 341)

YOUNG v. PENINSULAR NAVAL STORES CO. (No. 4,024.)

(Court of Appeals of Georgia. July 23, 1912.)

*(Syllabus by the Court.)***1. SUFFICIENCY OF PETITION.**

The allegations of the petition set forth a cause of action.

*(Additional Syllabus by Editorial Staff.)***2. ESTOPPEL (§ 72*)—EQUITABLE ESTOPPEL—GROUNDS—APPLICATION OF DEPOSITS.**

Where a principal has a sum of money on deposit with his factor, and a third person under contract with the principal offers to pay the full amount of the principal's note held by the factor, but the factor accepts only the amount of the note less the deposit, the note not being due and the third person thereafter becomes insolvent, the factor is liable to the principal for the amount of the deposit.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. § 188; Dec. Dig. § 72.*]

Error from Superior Court, Brooks County; W. E. Thomas, Judge.

Action by R. B. Young against the Peninsular Naval Stores Company. Judgment for defendant, and plaintiff brings error. Reversed.

Branch & Snow, of Quitman, for plaintiff in error. Denmark & Griffin, of Valdosta, for defendant in error.

HILL, C. J. This case is here on exceptions to the judgment sustaining a general demurrer and dismissing the petition.

The facts alleged in the petition are as follows: Plaintiff had been engaged in the naval stores business, and the defendant had acted as his factor. In the course of his business he had been accustomed to ship naval stores to the defendants, who would sell them for him, and, after paying expenses and deducting commissions, would hold the remainder subject to the plaintiff's draft. Plaintiff sold to Frank L. Gibson his turpentine property, and entered into a contract with Gibson, by which the latter was to pay, as a part of the consideration for the property, plaintiff's note for \$3,000, held by defendant, which was not due until May 1, 1910. When the sale was made, plaintiff had on deposit to his credit with defendant, on open account, \$450.42, which was subject to plaintiff's draft at any time. On January 31st, three months before this note fell due and while the money due the plaintiff was still deposited with the defendant, Gibson went to the office of the defendant in Jacksonville for the purpose of complying with his contract and paying the note. It is expressly alleged that Gibson was at that time ready, willing, and able to pay the note, and offered to do so. The defendant declined to accept the \$3,000 in payment of the note from Gibson, but did accept from Gibson for the note an amount less than its face, and charged the balance due on

the note to the open account. The allegation is also specifically made that Gibson at the time of the institution of the present suit was insolvent, and is still insolvent. On demand the defendant refused to pay the \$450.42 to the plaintiff, and the suit is to recover that amount.

In our opinion the application by the defendant, the Peninsular Naval Stores Company, of the amount due the plaintiff, which it held subject to his draft, in part payment of the note which it held against him and which was not due, was unauthorized, especially in view of the fact that Gibson offered to pay to the defendant the whole amount of the note in accordance with his agreement with the plaintiff. The defendant, without making any investigation as to Gibson's authority to pay less than the full amount of the note, refused to accept Gibson's tender of the full amount, and accepted from him a less amount. The allegations of the petition are that Gibson was ready, able, and willing to pay the note in full, and offered to do so, and that the defendant declined to accept the cash; and these allegations are admitted by the demurrer to be true. In other words, it must be accepted as a fact that the defendant deliberately refused to accept the full amount of the note which Gibson offered to pay, and which, under Gibson's contract with the plaintiff, he was bound to pay to the defendant; and the defendant, by investigation or inquiry, could have found that Gibson was not authorized to pay less than the full amount, and was not authorized to receive from the defendant any credit by open account in part discharge of the note. The legal and actual effect was that Gibson paid to the defendant \$450.42 which belonged to the plaintiff, and which was subject to the plaintiff's draft, without making any inquiry as to his right or authority to accept this credit on the note, and without endeavoring to find out whether the credit on this open account was a proper payment on the note. Of course, the plaintiff was under no duty to put the defendant on notice of his contract with Gibson, for he was under no duty to pay the note until its maturity on May 1st.

The defendant could properly have refused to accept payment on the note when Gibson offered payment upon the ground that the note was not then due; but, if it accepted payment, it was under a duty to accept the payment as tendered, and it had no right to charge against the plaintiff the \$450.42 due him and subject to his draft, as part payment of the note, which was not due until three months thereafter. The general rule is that a creditor cannot apply a deposit to an indebtedness that has not matured. 5 Cyc. 553. Of course, this general rule is subject to the exception where the debtor or owner of the deposit is insolvent. This un-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.

warranted application of the deposit to the plaintiff's unmatured note left Gibson indebted to the plaintiff, under his contract, in the sum of \$450.42, and this sum cannot be collected by the plaintiff out of Gibson, for the reason, as alleged, that Gibson is insolvent. Now, if the defendant had accepted the tender of Gibson, the only tender that he was authorized to make or that the defendant was authorized to accept, to wit, payment of the full amount of the note in cash, the defendant would still have held on deposit the \$450.42 belonging to the plaintiff and which was subject to his draft. It was the unauthorized appropriation of this deposit by the defendant on the note, instead of accepting the cash from Gibson, that has resulted in loss to the plaintiff. Now, who should lose this money, the plaintiff or the defendant? Even conceding to the defendant good faith and good motive in making the application of the deposit to the note as part payment, and in refusing to accept the full amount tendered, we must also concede that the plaintiff cannot be charged with any lack of good faith in offering to pay in cash his note which was not matured. It was the refusal of the defendant to accept the cash from Gibson that put it in the power of Gibson to commit a legal wrong upon the plaintiff by refusing to pay the balance of his note which he owed to the plaintiff, or (which is the same thing) put it out of the power of Gibson, by reason of Gibson's subsequent insolvency, to pay this balance to the plaintiff. The loss is not due to any act of the plaintiff, but is solely due to the unauthorized act of the defendant, which makes applicable the familiar doctrine that, "when one of two innocent persons must suffer by the act of a third person, he who put it in the power of the third person to inflict the injury must bear the loss." Civil Code 1910, § 4537. Did not the defendant put it in Gibson's power to commit a legal wrong upon the plaintiff; that is, by a refusal or inability to pay the balance which Gibson owed to plaintiff under the contract? We think so, because the allegations of the petition are distinct that Gibson was ready, able, and willing to pay the full amount of the note, and offered to pay the same to the defendant, who declined to accept it, and the allegation is also made that Gibson, at the time when the present suit was instituted, was insolvent, and is still insolvent. We think that justice and equity require that the defendant should be held responsible for this loss. The loss was due alone to the defendant's refusal to accept the cash from Gibson, and the unauthorized credit of plaintiff's deposit on the note.

The position here stated becomes more clearly manifest upon an examination of the copy of the contract between Gibson and the plaintiff, which is attached to the peti-

tion. It appears from this contract that the plaintiff's turpentine farm and still were sold by him to Gibson subject to a mortgage which the plaintiff had made to the defendant to secure this very note for \$3,000 which Gibson was to pay, and Gibson's contract was to assume the payment of this note. Gibson's title to this place was subject to the lien of the mortgage, and he could not dispose of the place until the mortgage was paid in full. Now, when the defendant surrendered to Gibson the plaintiff's note, marked "paid," this was in legal effect a satisfaction of this mortgage, and took it out of the power of the plaintiff to compel Gibson to comply with his contract; for Gibson could then sell the place free from the mortgage. As a result of this negligent conduct and unauthorized act on the part of the defendant, the plaintiff has been deprived of his leverage, in the form of this mortgage, to force Gibson to pay the note, or to pay the \$450.42 which he unquestionably owes to plaintiff on his contract, and he has sold this place and has become insolvent.

We conclude that under the allegations of the petition a cause of action was set up, and the judge erred in sustaining the demurrer thereto.

Judgment reversed.

(11 Ga. App. 235)

WHITE CO. v. AMERICAN MOTOR CAR CO. (No. 4,159.)

(Court of Appeals of Georgia. July 2, 1912.)

(Syllabus by the Court.)

1. PRINCIPAL AND AGENT (§ 44*)—CONTRACT—RIGHT TO RESCIND.

Where, in an entire contract, an agency to sell certain articles manufactured by one of the parties is created for a specified territory, and in furtherance of such agency an order is given by the agent for the delivery at a future date of a certain number of the articles, for the purpose of being resold by the agent, a stipulation in the contract that the agent shall have the right to cancel the contract at any time, upon notice to his principal, relates both to the creation of the agency and to the order for the articles described in the contract.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. § 72; Dec. Dig. § 44.*]

2. CONTRACTS (§ 305*)—AGENCY—CONSTRUCTION.

An agent may be discharged for faithless or insubordinate conduct; but if one agree with another to pay the latter for the services of an employé to be furnished by him, it is the duty of the employer to notify the person sending the agent of any dissatisfaction with the latter's services, and the person sending the agent is entitled to recover of the employer any sums paid to the agent under the agreement, even though the agent's services were unsatisfactory, if no notice thereof was given to the person making the payment.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1398, 1399, 1400, 1463, 1464, 1467-1475; Dec. Dig. § 305.*]

Error from City Court of Atlanta; A. M. Calhoun, Judge.

Action by the White Company against the American Motor Car Company. Judgment for defendant, and plaintiff brings error. Affirmed, with directions.

Walter C. Hendrix and Mayson & Johnson, all of Atlanta, for plaintiff in error. Dorsey, Brewster, Howell & Heyman and John K. MacDonald, Jr., all of Atlanta, for defendant in error.

POTTLE, J. The White Company, a non-resident corporation, sued the American Motor Car Company upon an open account. The defendant admitted the correctness of the account, except as to an item of \$75, charged for the services of an automobile salesman whom the plaintiff had sent to the defendant at the latter's request. The defendant also in its answer claimed a set-off in the sum of \$400; it being alleged that the plaintiff had been paid this sum by the defendant, and had not accounted for it in the account sued on. The case was submitted to a jury, and a verdict was returned in favor of the defendant, finding against the item of \$75 charged in the account sued on, and in favor of the defendant's claim of \$400. The plaintiff's motion for new trial was overruled.

[1] 1. The case turns mainly upon the construction of a written contract between the parties. The plaintiff was a manufacturer of automobiles, and the defendant was engaged in the business of selling automobiles at retail. The contract was, in substance, as follows: Plaintiff agreed to sell defendant five automobiles at a specified price. Defendant ordered these five cars to be shipped upon specified dates in the future, covering a period of about nine months. Defendant paid the plaintiff \$500, receipt of which was acknowledged by the plaintiff, "the same being a deposit of \$100 on each of the automobiles ordered above; the balance due on each car shipped to be paid by sight draft attached to bill of lading. All money deposited hereunder at any time shall be and become the property of the first party, as liquidated damages, if second party fails to take any of the automobiles as ordered." Defendant was to have the exclusive sale in Fulton county, Ga., of the automobiles manufactured by the plaintiff. Defendant agreed to order, accept, and pay for the automobiles, upon the terms and conditions specified in the contract, and to sell no machines except in the territory mentioned in the contract, or at a less price than the retail catalogue price, to have on hand at all times one or more demonstrating cars, to report on or before the 10th of each month, the number of each automobile sold during the previous month, with the name and address of each purchaser, and not to contract for the sale of any other cars without obtaining the consent of the plaintiff and certain other automobile manufacturers. It was mutually

agreed that the contract was to be subject to strikes, fire, delay, or other causes beyond the control of the plaintiff; that the plaintiff should have the right to reject any order for goods made by the defendant, as it might deem fit; that, if the defendant should sell cars in territory other than in Fulton county, plaintiff had the right to charge defendant the full retail price received by the defendant. The contract contained the further stipulation: "This agreement to take effect from and after its acceptance by said first party, which acceptance is evidenced only by the signature of an officer or branch office manager, acting within his authority, of the said first party hereunto, and the same is to continue in force until September 1, 1908; but it may be dissolved by either party giving notice, and in case of violation of this contract by said second party the first party may cancel it without notice. This contract supersedes all contracts of prior dates."

The contract was regularly accepted by the plaintiff, and one of the cars shipped out, accepted, and paid for by the defendant. A second car was also shipped, but while en route to Atlanta the defendant notified the plaintiff in writing that it desired to dissolve and cancel the contract. In response to this notice the plaintiff wrote to the defendant, acknowledging receipt of the notice of dissolution, and stating that, while the notice was received too late to stop the second car, which had been shipped, as soon as freight charges were ascertained the plaintiff would bill defendant for the charges. There is no issue in the case as to this second car. It is inferable, from the testimony, that this matter was satisfactorily adjusted between the parties. The plaintiff contends that under this contract there was a completed sale of the five automobiles to the defendant, and that, the defendant having failed to take and pay for four of the cars, it became, under the contract, indebted to the plaintiff in the sum of \$400 as liquidated damages. The defendant contends that the stipulation in the contract that the plaintiff should be allowed to retain the \$400 in case of a breach by the defendant, while denominated "liquidated damages" in the contract, was really in the nature of a penalty; that the plaintiff would be entitled to recover only the actual damages which it had sustained, and that there was no proof of any such damages. The defendant further contends that, even if this provision in the contract is valid and enforceable, nevertheless it had a right, under the express terms of the contract, to dissolve it by giving notice to the plaintiff, and that the stipulation giving the right of dissolution applied to the whole contract, both that part of it which created an agency to sell automobiles and that part in which the defendant had agreed to take and pay for five automobiles.

In our opinion the contract was an entire one. The plaintiff appointed the defendant its agent to sell automobiles in a specified territory. It was expected that the defendant would be able to place at least five of the cars, and a preliminary order for this number of cars was given. Taking the whole contract together, a fair construction of it is that, if the defendant ascertained that it would be unable to place the plaintiff's cars in the territory mentioned in the contract, it would have a right to dissolve and cancel the entire contract. In other words, the order for the cars was inseparably connected with the agency of the defendant. If the agency was dissolved or ceased to exist by any act on the part of either the plaintiff or the defendant, under the contract the plaintiff was under no obligation to furnish the cars, and the defendant was under no obligation to take them. The defendant was not buying the cars under this contract for its own use. That was well understood by both parties. But the cars were ordered for the purpose of being resold at retail, and the only fair interpretation which can be given to the contract is that if the defendant could not resell these cars, and could not create a market for them in Fulton county, Ga., it would have the right to notify the plaintiff to this effect, and thereupon the contract would cease, and the defendant would be under no further obligation to take any cars under the terms of the contract.

The stipulation giving the defendant the right to cancel the contract was inserted therein for the defendant's benefit, and the evident purpose of it was to guard against loss to the defendant by reason of its inability to create a market for the plaintiff's cars and to resell cars which it had ordered under the contract. Unless the contract be given this construction, the result would be that, although it was well known and well understood between the parties that the defendant did not desire the cars for its own use, yet if it failed to sell the cars it would be bound to take and pay for them, though they would be practically worthless to the defendant for the purpose for which they were ordered. Again, if the stipulation as to cancellation applied only to that part of the contract which created the agency, then the result would be that the defendant would be no longer the plaintiff's agent, and authorized to sell its cars in Fulton county, yet it would have on hand five cars which it had been unable to dispose of as the contract contemplated would be done. There is nothing in the contract which shows that the parties intended that the stipulation in reference to the notice of cancellation should apply only to one portion of the contract, and, being an entire one, there is no reason for holding that upon notice given the whole contract was not dissolved—the

part relating to the purchase of machines described in the contract, as well as the agency for the sale of machines in the future.

This being, in our opinion, the proper construction to be given the contract, it is unnecessary to determine the question whether the stipulation relating to the retention of the \$400 as liquidated damages is enforceable. The whole contract having been dissolved, the plaintiff was bound to return to the defendant the \$400 held on deposit as part payment on the cars which were not shipped out.

[2] 2. It appears, from the correspondence and testimony of witnesses, that after the execution of the contract the defendant desired the services of an expert salesman for the cars manufactured by the plaintiff. The defendant wrote to the plaintiff, asking that such a salesman be sent to Atlanta, and agreeing to pay the salesman \$25 a week for his services. It appears from the evidence that for convenience an arrangement was made whereby the salesman was to be paid by the plaintiff, and the defendant was to reimburse the plaintiff for the amount so expended. The salesman came, and remained in Atlanta for three weeks; but his services were unsatisfactory. According to the testimony for the defendant, he was intoxicated a part of the time, and refused to sell cars in the defendant's territory, but claimed the right to go outside of this territory and solicit orders for cars. The salesman did not arrive promptly upon the date on which he was to have reached Atlanta, under the terms of the agreement between defendant and plaintiff. It is undisputed that the defendant did not notify the plaintiff that the services of the agent were unsatisfactory, but allowed the salesman to remain in Atlanta for a period of three weeks, knowing at the time that he was being paid \$25 a week by the plaintiff, and that it expected to be reimbursed this sum by the defendant. Under the circumstances it was clearly the duty of the defendant to notify the plaintiff promptly that the services of the salesman were unsatisfactory and that the defendant would not pay for the same. If the contract had been made directly with the salesman, the case would have been altogether different. The grossly negligent and improper and insubordinate conduct of the salesman, as shown by the testimony of the defendant's witnesses, was such as to have clearly justified its refusal to pay the salesman anything. But, in view of the fact that the defendant knew that the plaintiff was to pay the salesman and look to the defendant for reimbursement, it was clearly the duty of the defendant to have notified the plaintiff not to pay the salesman. In the absence of such notice, the plaintiff had a right to assume that the services of the salesman were satisfactory, and,

under the undisputed evidence, the plaintiff was entitled to recover the \$75 paid the salesman under the agreement with the defendant.

The defendant having recovered a verdict for \$109.23, besides interest, direction is given that the sum of \$75, together with interest thereon from April 17, 1908, at the rate of 7 per cent. per annum, be written off from the verdict and judgment, that the costs of this writ of error be taxed against the defendant in error, and that the judgment of the court below, overruling the motion for a new trial, be affirmed.

Judgment affirmed, with direction.

(11 Ga. App. 230)

SHEPPARD v. JOHNSON. (No. 4,148.)

(Court of Appeals of Georgia. July 2, 1912.)

(Syllabus by the Court.)

HIGHWAYS (§§ 172, 184*)—NEGLIGENCE—AUTOMOBILES.

In view of the provisions of section 4 of the act approved August 13, 1910 (Acts 1910, p. 91), regulating the use of automobiles, it is negligence per se to operate an automobile along one of the public highways of this state from one hour after sunset to one hour before sunrise without having displayed on the front of the machine at least one white light, throwing a light at least 100 feet in the direction in which the machine is going. The evidence in the present case authorized a finding that the defendant was negligent in failing to display upon his machine such a light as that described in the act of 1910, and that this omission of duty contributed to the plaintiff's injury. The evidence also authorized a finding that the plaintiff could not, by the exercise of ordinary care, have avoided the consequences of the defendant's negligence after the same became apparent to her. While the evidence preponderated in favor of the defendant upon the question of negligence, there was some evidence to authorize a verdict in favor of the plaintiff, and, no errors of law having been committed, this court is without power to set aside the verdict.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 459, 460, 471-474; Dec. Dig. §§ 172, 184.*]

Error from City Court of Sandersville; E. W. Jordan, Judge.

Action by C. T. A. Johnson against W. H. Sheppard. Judgment for plaintiff, and defendant brings error. Affirmed.

The suit was for damages claimed to have been sustained as a consequence of an automobile, owned and driven by the defendant, having run into a wagon owned by the plaintiff and being driven on one of the public highways. The collision occurred about 7 o'clock at night, at a point where the highway was intersected by another public road. The allegations of negligence are: (1) That the defendant did not have any light displayed on the front of his automobile at the time of the collision; (2) that he was running at an unlawful rate of speed, to wit, 15 miles per hour or more; (3) that

the defendant did not give any warning of his approach by bell, horn, gong, or other signal; (4) that the defendant was intoxicated, and was guilty of negligence in driving an automobile in that condition. Defendant answered, denying all of the allegations of negligence, and averring that he was in the exercise of all ordinary care and diligence, and that the collision between plaintiff's wagon and the automobile was unavoidable. Plaintiff recovered, and the case is here on exceptions to the judgment overruling a motion for a new trial.

Evans & Evans, of Sandersville, for plaintiff in error. Gross & Swint, of Sandersville, for defendant in error.

POTTLE, J. (after stating the facts as above). The only question presented for decision is whether or not the verdict in the plaintiff's favor was supported by the evidence. There was no presumption of negligence against the defendant, and consequently the burden was on the plaintiff, not only to prove injury as alleged, but to prove that the defendant was guilty of some one or more acts of negligence set forth in the petition, and that such negligence was the proximate cause of the injury received by the plaintiff. By the act approved August 13, 1910, it is provided that from one hour after sunset to one hour before sunrise there shall be displayed on the front of every automobile and machine of like character, while being operated on or along any of the public highways of the state, at least one white light, throwing a bright light at least 100 feet in the direction in which the machine is going, and also on the rear of each machine at least one red light, which shall effectually illuminate the number tag on the rear. The act further provides, in section 5, that no person shall operate a machine on one of the highways of this state described in the act "at a rate of speed greater than is reasonable and proper, having regard to the traffic and use of such highway, or so as to endanger the life or limb of any person or the safety of any property, and upon approaching a bridge, dam, high embankment, sharp curve, descent, or crossing of intersecting highways and railroad crossings, the person operating a machine shall have it under control and operate it at a speed not greater than six miles per hour." A further provision in the act is that, on approaching pedestrians or persons operating other vehicles on the highway, the driver of the automobile "shall give reasonable warning of its approach by the use of a bell, horn, gong, or other signal, and use every reasonable precaution to insure the safety of such person or animal." Acts 1910, p. 92.

Under the provisions of this act it is negligence per se for one to drive an automobile along one of the public highways of this

state without displaying at least one white light, of the character described in the act, in front of the machine. It is also negligence per se to approach a public road crossing at a speed greater than six miles per hour, or to approach any person on the highway without giving reasonable warning of the approach by the use of a bell, horn, gong, or other signal. If an automobile collide with a person on one of the public highways of this state in the nighttime, without having displayed in front of the machine such a light as is described in the act above cited, and injury result to him, he would be entitled to recover, unless he could, by the exercise of ordinary care, have avoided the consequences of the defendant's negligence after he became aware of its existence. While using a public highway at any point and at any time, whether in the daytime or nighttime, no greater speed can be used than is "reasonable and proper, having regard to the traffic and use of such highway, or so as to endanger the life or limb of any person or the safety of any property." The maximum rate of speed that can be used by an automobile along the public highway is not fixed by the act at any point on the highway, except when approaching a bridge, dam, high embankment, sharp curve, descent, or crossing of intersecting highways, or railroad crossing. The question as to what speed is reasonable and proper under the circumstances is a question for the jury in each case. There may be circumstances in which 25 or 30 miles an hour, or even a greater rate of speed, would not be unreasonable or improper. On the other hand, circumstances may arise where 10 miles an hour would be neither reasonable nor proper.

The great object and purpose of the act of 1910 was to require the drivers of automobiles to so handle their motors as to protect pedestrians and other persons on the highway. The act recognizes that the driver of an automobile has an equal right to the public highway with any other person, but it is provided that this right shall be exercised only in the manner and upon the terms and conditions prescribed by that act. The public highways belong to the state. The state has a right to regulate the manner in which they shall be used, and when the General Assembly prescribes certain rules and regulations which must be observed by a particular class of persons who use the highways, if damage results to another using the highway, in consequence of a failure to observe such rules and regulations, a prima facie case of liability is made out. The General Assembly, in the passage of the act of 1910, saw fit to prescribe definitely the maximum rate of speed which could be attained when approaching a public crossing or a railroad crossing on the public highway, and this rate of speed was fixed at six miles per hour. Courts are not concerned as to whether

er this is the proper rate of speed to be fixed; but, under the terms of this act, whenever it appears that the driver of an automobile has approached a crossing along the public highway at a greater rate of speed than six miles per hour, and a person on the highway at or on the crossing is injured, he is entitled to recover for such injury, unless it should appear either that the violation of this portion of the act was not the proximate cause of the injury, or that the person injured could have avoided the consequences of the negligence in exceeding the rate of speed fixed by the act, after he discovered such negligence. A failure to give warning upon approaching a person upon the highway, by the ringing of a bell, horn, gong, or other signal, is negligence per se, and if one going in the same direction as the automobile shall be injured, a prima facie case for recovery would be made upon proof of failure to give the statutory warning without reference to the rate of speed at which the machine is being driven.

The question, therefore, is whether, in view of the provisions of this act of the General Assembly, the plaintiff made out a case which entitled her to recover. In considering this question it must be borne in mind that, so far as this court is concerned, the jury settles absolutely all disputed issues of fact. If one witness testifies to a single fact which supports the verdict, this court has no power to interfere, unless an error of law has been committed, even though a hundred witnesses testify to a contrary state of facts. The plaintiff testified that she was driving along the public highway at or very near a public road crossing near the town of Tennesse, at a place where an electric light was shining brightly; that she did not hear any signal from the automobile; that when the machine struck the wagon it knocked the wagon round in the road and broke the wagon, and knocked down the mule hitched to it, threw the plaintiff down in the wagon, and injured her in the back and side and head, breaking the coupling pole attached to the wagon. When first on the stand the plaintiff testified that the lights on the automobile were burning, but when recalled at a later stage of the trial she testified as follows: "There was but one light on Mr. Sheppard's machine at the time of the accident, and it was so dim that it appeared to be several hundred yards from us when I first saw it, and actually ran into us before we knew it was anyways close to us. It ran into us almost simultaneously with my seeing it, and was actually into us before I realized how close they were on us." The defendant himself, while denying that he was running at an excessive rate of speed, and averring that his automobile had proper lights displayed in front of it, testified that when he saw the plaintiff he gave a signal of his approach, sounding the horn, and that when he saw the wagon he was

running about 6 miles an hour. He further testified that his machine was in "intermediate" gear, and that in that gear it was impossible to run his car up the grade at that point on the highway at a greater speed than 10 miles an hour. There was no evidence to support the allegation that the defendant was intoxicated. The act of intoxication would not be, in and of itself, such negligence as to authorize recovery. It might be pleaded and proved by way of inducement, for the purpose of illustrating the negligent conduct alleged against the defendant; but if one, even though intoxicated, should drive his machine in a proper manner and observe the rules and regulations prescribed by the act of 1910, an injury inflicted by his machine would not render him liable merely because he may have been under the influence of intoxicants at the time the injury occurred.

In the present case the preponderance of evidence was in favor of the defendant, and tended to disprove every allegation of negligence set forth in the petition; but, without reference to other allegations of negligence, there was some evidence to support the averment that the defendant did not have displayed on his automobile such a light as is described in the act of 1910, and the jury were authorized to find that this omission contributed to the injury sustained by the plaintiff. An effort was made to impeach the plaintiff by evidence of contradictory statements previously made; but it was exclusively a question for the jury as to whether they would believe the plaintiff, notwithstanding she was thus contradicted, or would credit the testimony of the witnesses brought to impeach her. Where there is any evidence, or any legitimate inference deducible from any evidence, which, under any theory of law, will support a verdict returned by the jury, this court has no power to interfere, unless some material error of law has been committed.

No such error having been committed in the present case, it follows that the judgment overruling the motion for new trial must be affirmed.

(11 Ga. App. 353)

BEAGLES v. AUGUSTA RY. & ELECTRIC CO. (No. 4,133.)

(Court of Appeals of Georgia. July 23, 1912.)

(Syllabus by the Court.)

1. **NEW TRIAL (§§ 132, 156*)—PROCEEDINGS TO PROCURE—CONTINUANCE—BRIEF OF EVIDENCE.**

A motion for a new trial was timely filed during the term at which the trial was had, and a hearing thereon was fixed for a day in vacation, and, when the motion was filed, an order was granted giving the movant until the hearing of the motion, whether it should take place on the day set in the order or at some subsequent date, in which to prepare and present for approval a brief of the evidence, and

on the day as fixed by the original order the hearing of the motion was continued by an order to another date, "under all the terms, rights, and privileges contained in the said original order," and on the latter date the hearing of the motion was again postponed to a later date, "under all the terms, rights and privileges contained in the said original order." *Held*, on the dates to which the hearing of the motion had been postponed the presiding judge had full jurisdiction of the motion and full discretionary power to continue the hearing of the motion from time to time, and there was no error nor abuse of his discretion in refusing to sustain a motion to dismiss the motion for a new trial on the ground that no brief of the evidence had been presented on the day set for the approval of the court.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 273-275, 316; Dec. Dig. §§ 132, 156.*]

2. **NEW TRIAL (§ 132*)—PROCEEDINGS TO PROCURE—BRIEF OF EVIDENCE—DISCRETION OF COURT.**

Whether the movant was guilty of laches in preparing and presenting for the approval of the court a brief of the evidence by the time fixed in the last order for the hearing of the motion for a new trial was a matter to be determined by the trial judge. *James v. John Flannery Co.*, 6 Ga. App. 811, 66 S. E. 153, and citations; *Ward v. Ward*, 124 Ga. 714, 68 S. E. 473, and citations.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 273-275; Dec. Dig. § 132.*]

Error from City Court, Richmond County; Wm. F. Eve, Judge.

Action between Geo. W. Beagles and the Augusta Railway & Electric Company. From the judgment, Beagles brings error. Affirmed.

Isaac S. Peebles, Jr., and Thos. F. Harrison, both of Augusta, for plaintiff in error. Boykin Wright and Geo. T. Jackson, both of Augusta, for defendant in error.

HILL, C. J. Judgment affirmed.

(10 Ga. App. 149)

GRUSIN v. STATE. (No. 3,682.)

(Court of Appeals of Georgia. Nov. 20, 1911.)

(Syllabus by the Court.)

1. **CRIMINAL LAW (§ 590*)—CONTINUANCE—GROUNDS—DILIGENCE OF APPLICANT—DISCRETION OF COURT.**

There was no abuse of discretion in overruling the motion for a continuance.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1316, 1317; Dec. Dig. § 590.*]

2. **REVIEW OF EVIDENCE.**

The evidence amply authorizes the verdict of guilty, and no error of law appears.

(Additional Syllabus by Editorial Staff.)

3. **INTOXICATING LIQUORS (§ 230*)—CRIMINAL PROSECUTIONS—ADMISSIBILITY OF EVIDENCE.**

In a prosecution for violating the prohibition law, testimony of a police officer that he gave a person \$1 to see if he could buy some whisky, and that he went and returned with a bottle of whisky and another bottle half full, was admissible in connection with testimony of

the person referred to as to having delivered the whisky.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. § 290; Dec. Dig. § 230.*]

4. WITNESSES (§ 240*)—EXAMINATION—LEADING QUESTIONS—DISCRETION OF COURT.

The allowance of a leading question is a matter within the discretion of the trial judge.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. § 795; Dec. Dig. § 240.*]

5. CRIMINAL LAW (§ 686*)—TRIAL—RECEPTION OF EVIDENCE—REOPENING CASE.

Reopening a case for the reception of additional evidence is discretionary with the trial court.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 1619, 1620, 1625, 1626; Dec. Dig. § 686.*]

6. INTOXICATING LIQUORS (§ 230*)—CRIMINAL PROSECUTIONS—ADMISSIBILITY OF EVIDENCE.

Where a warrant for arrest for the sale of intoxicating liquors was issued on February 20th, testimony that defendant sold whisky to the witness on February 20th in connection with his positive testimony that the sale was on Sunday, when in fact the calendar showed that that date was on Monday, was admissible; the jury being authorized to believe that he was correct as to the day of the week, but that the sale was on the 19th.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. § 290; Dec. Dig. § 230.*]

7. CRIMINAL LAW (§ 762*)—TRIAL—INSTRUCTIONS—OPINION AS TO FACTS.

In a prosecution for violating the prohibition law, an instruction that if the jury found that defendant carried on any mercantile business or a "near beer" establishment, and that he had prohibited liquors at his "near beer" saloon, he would be guilty of violating the law, and that that makes the crime complete, was not objectionable as an intimation of opinion as to the facts by the last statement.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 1731, 1750, 1754, 1758, 1759, 1769; Dec. Dig. § 762.*]

Error from City Court of Richmond County; W. F. Eve, Judge.

J. Grusin was convicted of violating the prohibition law, and brings error. Affirmed.

Isaac S. Peebles, Jr., for plaintiff in error. J. C. O. Black, Sol., and John M. Graham, for the State.

RUSSELL, J. Grusin was convicted under an accusation charging him with having violated the prohibition law by selling intoxicating liquors, and by keeping such liquors on hand at his place of business. He excepts to the refusal of a new trial.

As to the general grounds of the motion for a new trial, it is sufficient to say that there was proof that on the day alleged in the accusation a policeman, who searched the grocery store and adjoining "near beer" saloon of the accused, found in both places a large quantity of whisky in bottles, enough to make a wagon load, and that the accused begged him not to take it all, but to take "just enough to make out a good case," and that others testified to both the keeping and

the frequent selling of intoxicating liquors by the accused at his place of business.

[1] The next ground of the motion for a new trial is that the court refused the defendant a continuance upon the following showing: The defendant testified that he was arrested and was required to sign two appearance bonds, one for his appearance before the recorder of the city of Augusta on the charge of violating the city ordinance as to keeping liquor on hand for illegal sale, the other for his appearance at the city court on the charge of violating the state prohibition law; that he understood that his trial before the recorder was for the purpose of determining not only as to violation of the city ordinance, but also as to whether there was sufficient evidence to bind him over to the city court, the recorder being also a committing officer; that the trial before the recorder resulted in his dismissal, and he was under the impression that this dismissal carried with it a dismissal of the state charge; that at the March term of the city court, at which the motion for a continuance was made, he looked over a list of the cases assigned for that term, published in one of the daily newspapers of the city, and his case was not listed there; that he was notified the day before the trial that his case would come up about 3 o'clock in the afternoon, and he immediately employed counsel to defend him; that "there was a witness, Annie Spires, in Columbia county, Ga., who was present on the Sunday that John Bird contended that he bought whisky from defendant, and who would have testified that defendant sold no whisky, but he had not had an opportunity to procure said witness at the present trial, and had not had an opportunity to prepare his defense." The defendant's counsel stated that he could not safely go to trial, owing to the fact that he was employed the day before in the afternoon, and had not had an opportunity to examine the witnesses. Although the accusation had been drawn a week before the trial, and the case had been assigned for trial, the solicitor did not sign the accusation until the night before the trial. It was testified that the defendant's bondsman had been notified several days before the case came up for trial that it would be tried. The defendant denied that he had received notice from his bondsman, but it is stated that "his bondsman had called up his place and stated that said case would be tried on the 14th of April, and told his clerk, who notified defendant." The trial was on the 20th of April. The warrant on which the accusation was based was sworn out on the 20th of February, and its issuance was immediately followed by his arrest and the giving of the bond by which he obligated himself to appear at the March term of the court to answer this charge. There was no abuse of

discretion in refusing a continuance on this state of facts. "The party making an application for a continuance must show that he has used due diligence." Penal Code 1910, § 991. It can hardly be seriously contended that this defendant used due diligence, when, instead of regarding the requirement of his appearance bond and making due inquiry as to his case in the state court, he assumed that he was relieved from any further duty in the matter by the dismissal of a different charge against him in a municipal court and by the fact that the recorder did not bind him over upon a charge which he had already given bond to answer in the state court, or that he was entitled to rely upon a newspaper report which did not mention his case in giving a list of cases assigned for trial, especially when "his bondsman had called up his place and stated that said case would be tried on the 14th of April," which date was six days before the date of the trial, "and told his clerk, who notified defendant." It was his own fault if his counsel did not have sufficient time to prepare his defense. Moreover, it appears that after the employment of counsel, there was a part of a day, a night, and until 3 o'clock in the afternoon of the next day, in which to prepare for trial. It does not appear that his counsel was ill or occupied with other cases. The witnesses were few, and there is nothing to indicate that in the development of the facts anything would have been gained for the defendant by delay, or that he was not as well defended as he would have been if a postponement had been granted. Only one of his witnesses was absent, and the statement that he "had not had an opportunity to procure said witness at the present trial" falls short of the showing required by Penal Code 1910, § 987. Besides, it seems that her testimony would have been of merely negative character, and would have related to but one sale, and the case was abundantly made out by proof as to other sales and as to the keeping of liquor. Injury to the accused must clearly appear before a reversal will be granted for refusal to postpone. *Hightower v. State*, 9 Ga. App. 236, 70 S. E. 1022.

[3] It is complained that the court erred in admitting testimony of Britt, a police officer, as follows: "Gus Hughes and Felix Apperson brought that whisky to me at the police headquarters. I have tasted pretty near all kinds of gin, and it is intoxicating. I gave Gus Hughes \$1 to see if he could buy some whisky. He remained away probably three-quarters of an hour or an hour, when he returned and brought me that bottle of whisky and another bottle half full." The sole objection made to this testimony was that "any sayings had out of the presence of the defendant would not be binding upon the defendant, and were hearsay." This testimony, however, does not give any sayings;

and it was clearly admissible in connection with the testimony of Gus Hughes as to his having delivered to this witness whisky which he had bought from the defendant with \$1 which had been given to him by the witness for that purpose.

[4] The allowance of a leading question, as to which complaint is made in the sixth ground of the motion for a new trial, was a matter within the discretion of the trial judge.

John Bird testified to a sale of whisky by the defendant to one Stetson on "the 20th of last February." This testimony was objected to (1) because it was not offered until after the state had made out its main case and rested, and the defendant had put in his evidence, and it was not in rebuttal, but related to a separate criminal transaction from the one made out in the main case; and (2) because it was irrelevant, the date of the warrant being the 20th of February, and it being incumbent on the state to show that the sale occurred prior to the issuing of the warrant.

[5] Reopening the case for the reception of additional evidence was discretionary with the court; and the defendant was not surprised by this testimony, for a postponement of the case had been asked before the trial began, in order to procure a witness to rebut it.

[6] As to the date of the sale, the witness testified positively that the day was Sunday. The calendar shows that the 20th of February was on Monday. The jury were authorized to believe that he was correct as to the day of the week and in error as to the day of the month; that is, that the date of this sale was the 19th, instead of the 20th. The judge instructed them that they could not consider any sale occurring after the swearing out of the warrant.

[7] There is no merit in the contention that the statute forbidding the expression or intimation of an opinion by the court as to the facts, in charging the jury, was violated by the statement, "that makes the crime complete," etc., in the following instruction: "If you find that he carried on any mercantile business or carried on a 'near beer' establishment, and that he had prohibited liquors at his 'near beer' saloon, then he would be guilty of violating the law, even if there is no evidence of a sale or giving away. That makes the crime complete—having it at his place of business." Reading in connection with its immediate context the extract from the instructions of the court on the effect of evidence of good character, it is not subject to the objection made in the motion for a new trial. Besides, there was no evidence on which to base a charge on this subject.

There is no other ground requiring a new trial.

Judgment affirmed.

(128 Ga. 407)

WILKES v. GROOVER et al.

(Supreme Court of Georgia. July 11, 1912.)

*(Syllabus by the Court.)***1. DEEDS (§ 144*) — CONSTRUCTION — CONDITION SUBSEQUENT OR LIMITATION.**

An owner of land conveyed it by warranty deed to his grandson, upon the expressed consideration of natural love and affection "and in consideration of support and maintenance of the said [grantor] and his wife." The deed contained this clause: "It is further provided herein that should the said [grantee] voluntarily refuse and fail to care for and maintain the said [grantor] and his wife, that that fact will cancel, annul, and void this deed." *Held*, that the provision as to avoidance created a condition subsequent.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 469, 470, 472; Dec. Dig. § 144.*]

2. DEEDS (§§ 165, 166*) — CONDITION SUBSEQUENT — WAIVER.

The grantor having survived his wife, if the grantee did not comply with the condition as to maintenance, the grantor had the right to enter and repossess himself of the land, if he saw fit to do so. But he could waive such right; and, if he accepted such partial support as was given as being a compliance and waived a forfeiture, after his death, his administrator could not recover the land from the grantee.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 521, 522-525; Dec. Dig. §§ 165, 166.*]

3. TRIAL (§ 255*) — INSTRUCTIONS — NECESSITY FOR REQUEST.

The exceptions as to failure to charge, in the absence of requests, are without merit.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 627-641; Dec. Dig. § 255.*]

4. APPEAL AND ERROR (§ 273*) — PRESENTING QUESTIONS IN TRIAL COURT — RECEPTION OF EVIDENCE.

An exception that the court did not rule out certain evidence, without showing what objection was made thereto when offered, furnishes no ground for reversal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1620-1680, 1764; Dec. Dig. § 273.* Trial, Cent. Dig. §§ 256, 257, 689, 690, 694-696.]

5. WITNESSES (§ 159*) — COMPETENCY — TESTIMONY AS TO TRANSACTIONS WITH DECEDENT.

Where a deed was made which contained the provision stated in the first headnote above, and, after the death of the grantor, his administrator filed a petition against the grantee, alleging that the latter had voluntarily failed and refused to care for and maintain the grantor and his wife and seeking to have the deed canceled, and to recover possession of the premises with mesne profits and damages on account of the cutting and removing of timber therefrom, the grantee was not a competent witness to testify as to what care and maintenance he had furnished to the grantor.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 664, 666-669, 671-682; Dec. Dig. § 159.*]

Error from Superior Court, Liberty County; W. W. Sheppard, Judge.

Action by A. C. Wilkes, administrator, against James J. Groover and others. Judgment for defendants, and plaintiff brings error. Reversed.

L. L. Thomas, of Glennville, and Hines & Jordan, of Atlanta, for plaintiff in error. Way & Burkhalter, of Reidsville, for defendants in error.

LUMPKIN, J. [1] The provision contained in the deed, and which is set out in the first headnote, created a condition subsequent, not a limitation. *Shannon v. Fuller*, 20 Ga. 566; *Moss v. Chappell*, 126 Ga. 196 (5), 54 S. E. 968, 11 L. R. A. (N. S.) 398; Civil Code, § 3717.

[2] If the grantee voluntarily failed or refused to comply with such condition in the deed, the grantor had a right of re-entry for condition broken. He was not obliged to declare a forfeiture or to re-enter. The evidence tended to show at least some degree of care and maintenance furnished to him and his wife. If it was not a full compliance with the obligation resting upon the grantee, the grantor could, if he chose, accept it as a sufficient compliance and waive the forfeiture. It cannot be declared, however, as an arbitrary rule that the mere failure of the grantor to re-enter or to bring suit before his death amounted to a waiver. By way of illustration, if in such a case the grantor became insane or imbecile, or was upon a lingering bed of sickness before his death, his failure to take action might not evidence an intention to waive a breach of the condition. The mere fact that the grantor did not bring suit before his death is not conclusive evidence of a waiver. But if he did waive any breach of condition that might have existed, his waiver would bind his administrator and his heirs. If he did not waive any breach of the condition which may have existed, the right of re-entry or recovery would survive him.

3, 4. The third and fourth headnotes need no elaboration.

[5] 5. The action was brought by the administrator of the deceased grantor against the grantee. The basis of it was that the grantee had voluntarily failed to supply the care and maintenance for which he was obligated under the terms of the deed, and had thus committed a breach of the condition subsequent contained therein. The grantee was allowed, over objection, to testify, in substance that he had complied with the obligation, and to give various instances in which he had furnished such care and maintenance to the grantor. This was error. *Parker v. Ballard*, 123 Ga. 441 (1), 51 S. E. 465; Civil Code, § 5858, par. 1; Acts 1900, p. 57. The furnishing of care and maintenance by the grantee to the grantor was a transaction between the two. The grantee was no more competent to testify to this than if the question had been whether he paid the grantor a pecuniary consideration. The distinction between transactions with a deceased person and independent facts in no way involving transactions with such persons is

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

pointed out in *Nugent v. Watkins*, 129 Ga. 382, 58 S. E. 888. The Code provision just referred to must be considered in connection with the act of 1900, *supra*.

The decision in *Horton v. Smith*, 115 Ga. 66, 41 S. E. 253, in no way conflicts with the ruling now made. In that case the grantor in a deed brought a suit against the administrator of the grantee to recover for an alleged violation of a contract to support the plaintiff. Pending the action the plaintiff died, and his administrator was made a party. Two of his children, who were not parties to the suit, though interested in the result, were held competent to testify that the defendant had not furnished support and maintenance to their father. This in no way involved any transaction between the defendant and the witnesses, but between the defendant and another person. The case arose prior to the act of 1900, and was not affected by it.

Judgment reversed. All the Justices concur.

(138 Ga. 282)

BUICK MOTOR CO. v. THOMPSON.
(Supreme Court of Georgia. June 13, 1912.)

(Syllabus by the Court.)

1. **CONTRACTS (§ 57*)—REQUISITES AND VALIDITY—MUTUALITY.**

If mutual promises are relied on as a consideration to support a contract, the obligations of the contract must be mutually binding upon the respective parties.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 345, 352, 353; Dec. Dig. § 57.*]

2. **CONTRACTS (§ 10*)—REQUISITES AND VALIDITY—MUTUALITY.**

If parties agree that one will buy and the other sell articles of a certain character at stated prices, without specifying any number or amount of such articles, leaving the purchaser to give orders, the giving of an order or orders for certain things included in the offer to sell, before its withdrawal or termination, makes a contract as to the things so ordered, and the contract is no longer unilateral as to them.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 21-40; Dec. Dig. § 10.*]

3. **SALES (§ 411*)—REMEDIES OF PARTIES—ACTION FOR BREACH OF CONTRACT—PLEADING.**

A corporation manufacturing automobiles wrote to a person, agreeing that not later than a fixed date it would, "conditions permitting," supply him with goods of its manufacture at certain specified prices, that it was agreed that such person should not sell the cars outside of a certain county, that the contract could be terminated upon 10 days' written notice, that he should make reports of sales made by him, and that the receipt of \$200 was acknowledged as a deposit, to be retained by the company and returned to the other party at the termination or cancellation of the contract, provided a full and complete settlement of all accounts due to the company had been made. An acceptance of this agreement was written under the communication of the company, and signed by the person to whom it was addressed. *Held* that, in a suit for a breach of contract in failing and refusing to

furnish cars ordered by such person from the company, it was not incumbent on the plaintiff to allege and prove that conditions permitted the defendant to supply him with the machines ordered.

(a) A petition which alleged such a breach of contract, and that the company had frequently promised to send the automobiles, but had finally failed and refused so to do, was not demurrable, on the ground that it failed to allege that conditions permitted the defendant to do so.

[Ed. Note.—For other cases, see *Sales*, Cent. Dig. §§ 1161-1164; Dec. Dig. § 411.*]

Error from Superior Court, Fulton County; W. D. Ellis, Judge.

Action by D. V. Thompson against the Buick Motor Company. Judgment for plaintiff, and defendant brings error. Affirmed.

D. V. Thompson brought suit against the Buick Motor Company. The petition contained two counts. The first alleged substantially as follows: The defendant entered into a contract with the plaintiff, of which a copy was attached to the petition. The plaintiff deposited the \$200 specified in the contract, and became the sales agent for defendant in Mitchell county, and at once opened an agency for the sale of automobiles, and devoted his time to securing orders therefor. He was not to be paid any salary, but was to receive, for the orders secured or which could be secured by him, the difference between the "list" and "price" figures, as shown on the contract. Where no "quantity limit" was placed upon a particular model, the orders which he could secure, and the number of such models which the defendant should deliver, were not limited. A list was set out, stating certain orders which the plaintiff sent to the defendants during the months of April to July, 1909, inclusive, together with the model for which each order was given, the "price," and the amount of compensation claimed upon such orders, respectively. At various times the defendant promised to have the cars shipped, in order that they might be delivered to the purchasers, but finally failed and refused to deliver them, thus breaking its contract. The plaintiff could have made three additional sales, described, had the defendant complied with its contract. He did not actually send in the orders and make the sales, because the defendant had broken its part of the contract and did not ship the machines for which orders had previously been sent in. The plaintiff, in endeavoring to get the defendant to comply with its part of the contract and ship the cars for which he had secured orders, incurred an expense of \$60 on account of trips to Atlanta. Damages were laid at \$2,260. The second count differed from the first in alleging that the defendant wrote to the plaintiff a letter on August 14, 1909, after the date for the expiration of the contract by its terms (July 31st), extending the time, and that he accepted the proposition contained in this letter. All of

the orders sent by him to the defendant were within the time thus extended, though some of them were after August 31st. The other allegations were similar to those in the first count, including the averment that the defendant at various times promised to have the cars shipped, in order that they might be delivered, but finally failed and refused to do so.

The contract relied on was headed "Memorandum," and was dated January 21, 1909. It was directed, like a letter, to "D. V. Thompson, Pelham, Ga." It proceeded as follows: "Until further advised, but not later than July 31, 1909, provided the handling of your business is not in conflict with policy of our company, the Buick Motor Company, will, the conditions permitting, supply you with goods of its manufacture, herein described by letter and number (and more particularly described in its 1909 catalogue), at the following prices and terms." Then followed a list, of which the following item will serve as an illustration:

Model.	List.	Price.	Quantity	Limit.
F.	\$1250.00.	\$800.00.		1.

It then contained the following: "It is expressly understood and agreed that none of the above models will be sold by you to parties residing outside of the following territory, viz.: Mitchell county. It is hereby agreed that this contract can be terminated upon ten days' notice to this effect given in writing. It is also understood and agreed that, within five days from the date of sale by you of any Buick automobiles, you will furnish the office of the Buick Motor Company at Atlanta, Georgia, with a report of such sale, giving the name and address of the party purchasing same, the motor and serial number, the model sold, and the price paid. The receipt of two hundred and 00/100 (\$200.00) dollars is hereby acknowledged as a deposit, same to be retained by the Buick Motor Company and returned to you at the termination or cancellation of this contract, provided a full and complete settlement of all accounts due the Buick Motor Company has been made." This paper was signed by the company, and followed by the word "Accepted," and by the signature of the plaintiff.

The letter attached as an exhibit to the second count of the petition was dated August 14, 1909, and contained the following: "Replying to your letter of August 12th, beg to say that we have a deposit of \$200.00 from you, and, if you wish it, will be very glad indeed to send you check immediately; but, in the event we do this, we will not be able to ship you any more cars, as your contract would then be canceled. We think that within a short time we will be able to give you quite a few of them, and probably before our 1910 prices and contracts are out. We therefore ask you to advise us whether or not you will want to get some cars within the next 30 days, which, of course, you could do

if your deposit remains with us, or if you prefer having us return the deposit to you."

To the petition the defendant interposed a demurrer containing general and special grounds. It was overruled, and the defendant excepted.

Anderson, Felder, Rountree & Wilson, of Atlanta, for plaintiff in error. Colquitt & Conyers, of Atlanta, for defendant in error.

LUMPKIN, J. (after stating the facts as above). Thompson sued the Buick Motor Company for a breach of contract. The defendant filed a demurrer, which was overruled, and it excepted. In addition to the general grounds there were also certain special grounds; but they are not urged or referred to in the brief of counsel for plaintiff in error, and therefore, under the uniform ruling of this court, will be treated as abandoned, and we will deal with the general grounds only.

[1, 2] 1, 2. It was urged that the contract was unilateral, and that it did not bind the plaintiff to buy, and accordingly did not bind the defendant to sell. Where mutual promises are relied on as the consideration to support a contract, the obligations of the contract must be mutually binding upon the respective parties. *Morrow v. Southern Express Co.*, 101 Ga. 810, 28 S. E. 998. This does not exclude the fact that one may, for a valuable consideration other than such mutual promises, bind himself by an option or offer to sell on certain terms during a specified time. In such a case he is bound to keep the offer open during the specified time, for the other party to accept or decline to buy. If acceptance is made within the time prescribed, the transaction then ceases to be a mere option or offer, and becomes a contract to sell and buy. *Simpson & Harper v. Sanders & Jenkins*, 130 Ga. 265, 60 S. E. 541.

It was contended, on behalf of the plaintiff in error, that this agreement belonged to the class first mentioned; that there was no consideration for the making of the contract, unless there were mutual promises; that in any event the defendant in error did not bind himself to buy cars, and the plaintiff in error was not bound to sell cars; that the agreements limiting sales by the defendant in error to Mitchell county, declaring the contract terminable on 10 days' notice, requiring a report of any sales made, and a deposit of \$200 by the defendant in error, were not considerations for the making of the contract, so as to bind the plaintiff in error to sell to the defendant in error any automobiles. If it should be conceded that the agreements as to territory and reports were merely regulatory, in case sales were made to the defendant in error, and that the deposit was not a payment or such part performance as to be a consideration for a promise to sell, but only a guaranty of settlement if sales should be made, still how stands the

case? An offer to sell on certain terms, without consideration therefor, is unilateral, and may be withdrawn before acceptance. After acceptance while still open and an agreement to buy, it ceases to be unilateral and becomes bilateral and binding. *Black v. Maddox*, 104 Ga. 157, 30 S. E. 723. If the offer is not for any specified amount, or an amount determinable by proof, such as what is necessary for a certain purpose, but is generally to furnish upon order, then the giving of an order for a certain thing or amount included in the offer, before its withdrawal or termination, makes a definite and fixed contract as to the thing or things so ordered. *McCaw Mfg. Co. v. Felder & Rountree*, 115 Ga. 408, 41 S. E. 664; *Harrison & Garrett v. Wilson Lumber Co.*, 119 Ga. 6, 45 S. E. 730; 1 Page, Con. 456, § 307.

The first count of the petition alleged in effect that, during the time specified in the contract for its continuance and in accordance with its terms, the defendant in error received orders and made sales of several automobiles. The second count, in addition to the original contract, set out a letter treating the contract as continuing after the time fixed for its expiration, and the taking of orders and the making of sales while it was in force. Each of them alleged promises by the defendant to ship the cars ordered, and a subsequent failure and refusal to do so. In the first count was an allegation seeking to set up liability on account of certain cars not ordered; but, if it did not set out a right of recovery as to such item, that would not furnish ground to dismiss the entire case.

[3] 3. It was contended on behalf of the plaintiff in error that the words "conditions permitting," in the contract, created a condition precedent, and that it was incumbent on the plaintiff to allege that conditions permitted, and also (as stated in the brief) that "these words reserved to the company the decision as to whether conditions permitted." For the defendant in error it was argued that, if these words have any force to relieve the company of liability, they do not create a condition precedent, but such conditions should be set up by way of defense, and also that the allegations showed a waiver by promise to deliver the machines. If those words created a condition precedent, the burden of alleging and showing the happening of the event would be on the plaintiff. If they created a condition subsequent, the burden of setting it up would rest on the defendant. If the contention of the plaintiff in error is correct, the entire agreement as to sales amounted to no more than this: If the defendant in error desired to buy, and the plaintiff in error thought the conditions permitted it to sell, there would be a trade; otherwise, not. Such an agreement would amount to no contract at all as to sales. It can hardly be supposed that these parties went through the idle form of making a written proposition and an accept-

ance merely to declare that there might be a trade if each desired to make it. They fixed a limit of time for the operation of the contract, and the number of certain models which might be ordered, provided for a termination of the contract on 10 days' notice, and stated the making of a deposit of \$200 by the defendant in error. Was all this an elaborate method of declaring that no contract was actually intended to be made, but only in case one party ordered cars and the other thought conditions permitted their sending them? What conditions? What was to be considered—the number of cars on hand, or of orders already accepted from others, or the capacity of the manufactory, or the number of laborers whom the company might see fit to employ or discharge, or its financial condition, or the general financial condition of the country, or the condition of the weather, or what conditions?

It will be readily seen that if the words "conditions permitting" create a condition precedent, and impose on the defendant in error, suing for a breach of such contract, the duty of pleading and proving that conditions permitted the plaintiff in error to fill the orders, it places on him an impossible burden. On the other hand, if there were conditions legitimately excusing the plaintiff in error from performance, they were peculiarly within its knowledge. It has been held that, where one of two contracting parties prepares a written or printed contract and obtains the signature of the other party, if it contains ambiguous terms, and such ambiguity is not explained, the construction which goes most strongly against the party so preparing it will be generally preferred. *Moorefield v. Fidelity Mutual Life Insurance Co.*, 135 Ga. 186, 69 S. E. 119, and citations. In *Griswold v. Scott*, 13 Ga. 210, suit was brought on a written contract by which the defendant acknowledged the receipt from the plaintiff of a gin, "and if on trial it performs well, I promise to pay said Griswold [the plaintiff], or bearer, \$80, for value received, by the 25th of December, 1910." It was held that this created a condition subsequent, that the vendee was prima facie liable to pay the specified amount, and that the defendant could set up that the machine failed to perform well on the trial of it.

Considering the contract involved in this case as a whole, we are of the opinion that the words "conditions permitting" did not create a condition precedent, requiring the plaintiff in the court below, defendant in error here, to allege and prove that conditions permitted before he would be entitled to recover. Whatever force they may have may be invoked by the defendant in the court below by way of defense. Moreover, the defendant in error alleged that at various times the plaintiff in error promised to have the cars shipped, in order that they might be delivered to the purchasers from him, but that the company finally failed and refused

to do so. There was no error in overruling the general demurrer to the petition.

Judgment affirmed. All the Justices concur.

(138 Ga. 287)

THOMPSON v. STATE.

(Supreme Court of Georgia. June 12, 1912.)

(Syllabus by the Court.)

1. CRIMINAL LAW (§ 959*)—NEW TRIAL—PROCEEDING TO PROCURE—CONTINUANCE.

Where one convicted of murder has made a motion for a new trial, and the same is set for hearing in a county other than that in which the trial was had, and the defendant offers and the court allows an amendment to the motion, setting up that certain witnesses residing in the county in which the case was tried know facts which are material to his case and refuse to testify thereto voluntarily by affidavit or otherwise, and that such testimony is newly discovered, all of which is supported by proper affidavits, it is error for the court to refuse to grant the motion of the defendant, contained in such amendment, that the court continue the hearing and afford him its aid in procuring the desired testimony. Civ. Code 1910, §§ 5918, 5919, do not apply to the case above outlined.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2406-2411; Dec. Dig. § 959.*]

2. CRIMINAL LAW (§ 959*)—NEW TRIAL—PROCEEDING TO PROCURE—HEARING.

It is error for the trial judge before whom a motion for a new trial is pending in a criminal case to receive and consider an affidavit of a witness whose testimony is material and favorable to the state, after the hearing of the motion for a new trial is closed and before his judgment on the motion is made up; no previous notice of such affidavit having been given to the defendant or his counsel.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2406-2411; Dec. Dig. § 959.*]

Error from Superior Court, Jefferson County; B. T. Rawlings, Judge.

Will Thompson was convicted of murder, and brings error. Reversed, with directions.

Will Thompson was tried and convicted of murder, without recommendation. The record discloses that from the date of his arrest the defendant was confined in jail, in a county different from the one in which the homicide occurred, until the day before his trial; that he was, from poverty, unable to employ counsel, and counsel were appointed to defend him by the court at the trial, who have since not represented him; and that he has since secured other counsel. After the verdict the counsel appointed by the court made a formal motion for a new trial, which seems not to have been pressed by them. The motion for a new trial was set for hearing in a county different from the one in which the trial took place. At the time and place set for the hearing the motion was continued to still another county and on another date. At the latter time and place, the present counsel for the plaintiff in error offered an amend-

ment to the original motion for new trial, which was allowed, and also moved the court for a continuance of the motion for a new trial, which amended motion was in part as follows:

"Because, since the trial and rendition of the verdict in said case, certain material evidence, not merely cumulative or impeaching in its character, but relating to and proving new and material facts, has been discovered by the movant; said evidence being in substance as follows, to-wit: Haman Green, who is a resident of Avera, will testify on another trial as follows: That he saw the latter part of the tragedy in which Mr. Claude Humphrey was shot by the movant, and saw what transpired immediately at and before the time of the shooting, and the facts and circumstances as he knows them are that the deceased and his brother, Mr. Carlos Humphrey were together and were following movant at very close range. His attention was first attracted by some statement made by deceased to movant (the exact words of which he did not catch), to which statement movant replied, 'That's all right, white folks,' and continued walking away from deceased and his brother. Deceased then remarked to movant, 'You don't believe I'll do it, do you?' to which movant again replied, 'That's all right, white folks,' and kept on walking away from the deceased and his brother, who were still following movant. Deceased then turned to his brother, and, handing something to him (either a bundle or little satchel), said, 'Here, Carlos, hold this; I'll show the damned son of a bitch whether I'll do or not,' and immediately rushed on movant; and, as movant partially turned on his approach, deceased struck movant in the face and immediately threw his right hand to his hip pocket in an effort, apparently, to draw his pistol, the while clutching and holding movant with his other hand; and while the deceased was thus in the act of drawing his weapon movant got his pistol out first and fired upon the deceased. Movant had no weapon and made no attempt or effort to draw one until after deceased had struck him and was apparently actually endeavoring to draw his pistol from his hip pocket. After the shooting witness was sure that the deceased had killed movant and was surprised to learn otherwise. Witness was only 10 or 15 feet from the parties at the time of the shooting, and was in a position to see and did see just what happened between them. Antony Kelly, who is a resident of Avera, in said county of Jefferson, will testify on another trial as follows: That immediately after the shooting he saw a fresh wound on movant's neck, made apparently by a knife cut, and that the wound was bleeding. Dr. J. C. Raley, who is a resident and practicing physician of Avera, in said county of Jefferson, will testify on another trial that movant was forced to kill the deceased

in order to save his own life, and will give the particulars of the killing as he saw them. This witness has refused and still refuses to give movant or his counsel an affidavit setting forth his knowledge of the particular facts and circumstances, or to voluntarily tell them the particulars of the killing as he saw and knows them; but he has stated enough to movant's counsel and to others, as shown by the affidavits of J. W. Neal and D. W. Barfield hereto attached, to prove clearly and positively that he saw the shooting and knows the truth of the transaction, and that his testimony will be most favorable to movant, and will exonerate him from criminal blame. Movant attaches hereto and makes a part of this ground of his amended motion for a new trial the affidavits, respectively, of M. M. Williams (and the supporting affidavit of W. H. Walden, M. M. Williford, Tom May, and J. H. Wilcher), J. W. Neal, D. W. Barfield, G. F. Dixon, and M. M. Williams jointly, J. R. Phillips, J. C. Newsome, and A. R. Wright, which affidavits show the truth of the existence of the material testimony set forth in this ground of the amended motion, and that the same was unknown to movant and his counsel before the trial. Movant also attaches his own affidavit as a part of this ground of the motion. Movant asserts and shows to the court that he has diligently sought to obtain from the above-named witnesses, Haman Green, Antony Kelly, and Dr. J. C. Raley, affidavits setting forth their testimony as above narrated; but each firmly and positively refuses to voluntarily give the same, stating that they will not testify until required to do so by the court. Movant therefore prays that the court take such action and grant such order as will require the witnesses above named to appear and give their testimony to be used for and on behalf of movant upon this motion for a new trial and upon this ground thereof, and to that end that a time and place be fixed to and at which said witnesses may be subpoenaed to appear and give their testimony in accordance with the provisions of law, and that this motion be continued until such time. In addition to the foregoing it can be proved, on another trial, as shown by the attached affidavit of J. H. Wilcher, that Carlos Humphrey, brother of the deceased, was a participant with the deceased in the difficulty, and with the deceased was making a deadly assault with a deadly weapon upon movant at the time of the shooting, and that the said Carlos Humphrey has since the trial admitted and stated 'that the reason he did not kill William Thompson was because it was dark, and he could not see where he was cutting him, and his knife blade was too short to reach through his clothes'; and movant has reason to believe that the said Carlos Humphrey will so testify upon another trial, as the facts above stated are the truth, and movant has the right to

rely upon the witness admitting and testifying the truth. The said Carlos Humphrey was not present at the trial of movant, and was inaccessible at the time; he being too sick to attend the court, as is shown by the record in said case."

The required affidavits accompanied the motion in support of it. The motion to continue was overruled by the court.

Between the date of the motion to continue and the judgment overruling the motion for a new trial, the court received on the part of the state, without notice to the defendant, and considered, the following affidavit of Dr. J. C. Raley: "Personally appeared J. C. Raley, a practicing physician at Avera, Ga., who makes this affidavit for the purpose of being used in the above motion, and on oath says that he has never said to any one that the defendant Will Thompson had to kill the deceased; nor has he ever said that the deceased made the defendant kill him; nor has deponent ever said that the said Will Thompson was justified in killing the deceased; and this deponent says that he knows no facts that are material in said case." The court overruled the motion for a new trial, and the defendant excepted.

A. R. Wright, of Sandersville, for plaintiff in error. Alfred Herrington, Sol. Gen., of Swainsboro, Hines & Jordan, of Atlanta, T. S. Felder, Atty. Gen., and R. N. Hardeman, of Louisville, for the State.

HILL, J. (after stating the facts as above). [1] 1. We think the court erred, under the facts of this case, in not granting a continuance of the hearing of the motion for a new trial, as asked by the plaintiff in error. The record shows that the defendant had been confined in jail in a different county from that in which the homicide occurred, from the date of his arrest until the day previous to the trial, and that from his poverty the defendant was unable to employ counsel to represent him and prepare for his trial. The court, on the day before the trial, appointed counsel to defend the plaintiff in error; and after representing him at the trial and making a formal motion for a new trial, the attorneys so appointed, it seems, no longer represented him. The newly discovered evidence appears not to have been known to the original or present counsel, or to the plaintiff in error, nor under the facts of this case do we well see how it could have been. When the present counsel for the plaintiff in error came into the case, he discovered the evidence and asked a continuance of the motion in order to secure and present it for the consideration of the court. The witnesses refused voluntarily to testify for the plaintiff in error, and counsel asked a continuance of the motion in order that the process of the court could be invoked to compel the witnesses to give evidence. The

testimony, if true, is material and vital to the defense. By what method could the defendant get this testimony for use on the hearing?

In cases heard on affidavits, including motions for a new trial, Civil Code, § 5918, provides a method of forcing testimony from an unwilling witness who is a resident of the county in which the *suit is pending*. Application is made to the clerk of the superior court of that county and subpoena obtained, calling upon the witness to appear at the hearing, when the trial judge can require the witness to answer questions propounded to him, or can appoint a commissioner for that purpose, or, the witness consenting, his affidavit may then be prepared and sworn to. Section 5919 provides that in cases where the witness resides out of the county (that is, construing the two sections together, out of the county in which the *suit is pending*), subpoena may be obtained from the clerk of the superior court of the county of the residence of the witness, and the witness thus be required to appear before some officer of that county authorized to administer oaths, and answer written questions prepared for him, the answers to be reduced to writing, sworn to before the officer and by the latter forwarded to the clerk of the court in which the *case is pending*, as in case of interrogatories. It seems that the Legislature by these two sections was providing for only two contingencies: By section 5918, to obtain the testimony of an unwilling witness at a hearing on written testimony in the county in which the case or suit was pending, when the witness resided in that county; and by section 5919, when the witness resided out of the county in which suit or case was pending. A criminal case is pending in the county in which the venue for trial is laid. If the motion for a new trial is granted, wherever passed upon, it is granted for a new trial in the county of the venue. The effect of an order for the hearing of a motion for a new trial subsequently to the regular adjournment of the term of court at which the trial is had is to keep that term of the court open with respect to that particular case until the hearing and determination of the motion at the time it is first set, or pursuant to further specific orders of continuance passed on the day set for the hearing. *Herz v. Frank*, 104 Ga. 638, 30 S. E. 797; *Atlanta Ry. Co. v. Strickland*, 114 Ga. 998, 41 S. E. 501.

The present case was pending in Jefferson county. A hearing of the motion was set in Washington county. The witnesses whose newly discovered testimony the defendant sought to obtain by compulsion resided in Jefferson county, where the case was pending. If the defendant had any right under these sections, therefore, it was to proceed under section 5918; but this could not avail him, because it provides only for an attendance of the witnesses at a hearing

in that county, and the hearing was set elsewhere. He had no method, under the general law, of compelling witnesses to attend a hearing in a county other than that of their residence. If Penal Code, §§ 1143, 1147, are applicable to hearings of this kind held outside of the county of the residence of a witness, they do not give a defendant an absolute right to compel the attendance of a witness, but only upon procuring subpoena signed by the clerk and solicitor general. If there be any general inherent power in the court to compel a witness, under the circumstances of this case, to testify for the defendant, its exercise is discretionary with the court, and the defendant by the motion itself was seeking the aid of the court in procuring evidence which he had no absolute legal method of securing. If the motion for a continuance had been granted and a hearing set in Jefferson county, the defendant could have then proceeded under section 5918 to make his showing as to what the witnesses would testify with respect to the circumstances attending the homicide, of which, according to the affidavits filed with the motion, they were eyewitnesses. We think a sufficient showing was made with respect to the diligence of the defendant and his counsel in discovering the alleged testimony and of the nature thereof; and upon the showing made by the defendant and that he could not secure voluntary evidence from the witnesses, it was the duty of the court to continue the hearing and set it at such time and place as would give the defendant the opportunity of forcing the witnesses to testify concerning the facts material to his case, of which they were alleged to have knowledge.

[2] 2. Error is assigned in that the court, between the time of the hearing of the motion for a new trial and the rendition of judgment overruling it, permitted the state's counsel to file with and read to the judge the affidavit of a witness for the state which was antagonistic to the defendant's case, that this was done without notice to or knowledge of the defendant or his counsel, and that this affidavit was considered by the judge in forming his judgment overruling the motion. We find no criminal case in which this precise question was involved; but the rulings in a number of civil cases, by analogy, would seem to apply. And if the rule laid down in civil cases is to reverse the judgment in such cases, how much more strongly ought it to apply to a criminal case, where personal liberty and life are involved. In the case of *Atlantic, etc., Ry. Co. v. Cordele*, 125 Ga. 373 (4), 54 S. E. 155, it was held: "The presiding judge who heard the issues involved in the application for injunction, including the questions of whether the required removal was in fact for the convenience and welfare of the public or only for the benefit of another corporation, whether there was a necessity for the proposed change, whether

the proposed act would be unreasonable or arbitrary, and what would be the effect, if any, upon the operation and property of the plaintiff, having stated, in his order refusing to grant an injunction, that he heard evidence and argument, and also that 'this order [is] granted after a personal inspection and observation of the tracks and surroundings of the street crossing and tracks involved,' and it thus appearing that the judge's personal inspection and observation were made an integral part of his judgment, and it not appearing that this was done with the consent of counsel or parties, the judgment will be reversed, with direction that the case be heard upon the evidence which may be introduced, unless inspection by the judge as part of the proceedings be had with the consent of both parties." And see *Horton v. Fulton*, 130 Ga. 466 (4), 60 S. E. 1059; *Sylvania Water Co. v. Overstreet*, 124 Ga. 235, 52 S. E. 164; *City Bank of Macon v. Kent*, 57 Ga. 286 (24).

We hold, in view of the peculiar facts of this case, that the judgment of the court below overruling the motion for a new trial should be vacated and set aside, and the motion for a new trial be set for hearing at such time and place as will afford the plaintiff in error an opportunity to examine his witnesses according to the provisions of the law as contained in Civil Code, § 5918 et seq., or in such other manner as may be provided by law, and that the trial judge will rehear the motion and the testimony of the witnesses, and pass upon the motion for a new trial in the light of the showing made as to the newly discovered evidence, if produced at the next hearing.

Judgment reversed, with direction. All the Justices concur.

(11 Ga. App. 368)

ROGERS v. STATE. (No. 4,227.)

(Court of Appeals of Georgia. July 23, 1912.)

(Syllabus by the Court.)

CRIMINAL LAW (§ 955*)—NEW TRIAL—DISMISSAL OF MOTION—BRIEF OF EVIDENCE.

Under the ruling in *Blount v. State*, 9 Ga. App. 575, 71 S. E. 877, and rulings cited therein, the judge of the trial court was compelled to dismiss the motion for a new trial, because of the failure to comply with the order, passed during term, requiring that a brief of the evidence should be made out and tendered for approval within a specified time.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2368-2372; Dec. Dig. § 955.*]

Error from Superior Court, Cobb County; N. A. Morris, Judge.

Andrew Rogers, Jr., was convicted of crime, and brings error. Affirmed.

Chas. H. Griffin and Geo. F. Gober, both of Marietta, for plaintiff in error. J. P. Brooke Sol. Gen., of Alpharetta, for the State.

HILL, C. J. This case is here on exceptions to the judgment dismissing the motion for a new trial. The facts are as follows:

During the term of the court at which the verdict of guilty was rendered the defendant filed and had approved his motion for a new trial, and during the term an order was passed setting down the hearing of the motion "on the 11th day of May, 1912, in vacation, at Marietta, Ga."; and it was further ordered that "movant have until the 4th day of May, 1912, to prepare and file in the clerk's office and present for approval a brief of the evidence in the case, and the presiding judge may enter his approval thereon at any time either in term or vacation." On the 4th day of May, 1912, the judge of the superior court passed the following order (after stating the case): "The above-stated motion having been set for the 11th day of May, 1912, at Marietta, in vacation, and by the terms of the order fixing said hearing, etc., it was ordered that the defendant file in the clerk's office a brief of the evidence on this the 4th day of May, 1912, it appearing to the court that the stenographer has been unable to write out the evidence and furnish the same to counsel for movant, it is ordered that the movant have until the hearing, whenever it may be, to make out, file, and present for approval a brief of the testimony in said case. This 4th day of May, 1912." The above order was passed in vacation.

On May 11, 1912, when the motion for new trial came on to be heard in accordance with the original order passed during the term, the solicitor general made a motion to dismiss the motion for a new trial upon the following grounds: "This case was tried, and the defendant convicted, and a motion for a new trial made during the March term, 1912, of Cobb superior court. The hearing of the motion was fixed by regular order of the court for May 11, 1912. In the same order movant was directed to file a brief of the evidence and present the same for approval on or by May 4, 1912. The March term of said court was adjourned on March 23, 1912. On May 4, 1912, N. A. Morris, judge of said court, at the request of defendant's counsel, signed an order granting the defendant additional time, to wit, until the hearing of said case, to file and present a brief of the evidence. There was no brief of the evidence filed and presented on or by May 4, 1912, as required in the original order. Movant says that the order granted by the judge on May 4, 1912, is a nullity and is void, because the court was not in session and the judge had no jurisdiction to grant said order. Wherefore movant insists that said motion for new trial should be dismissed, because no brief of evidence has been filed and approved in the manner required by law, nor in the manner and within the time pointed

out by the order granted to the movant when the court was in session and had jurisdiction of said case." The court granted the motion and dismissed the motion for a new trial.

Under the above recital of facts there was nothing else that the court could do. It has been repeatedly held by the Supreme Court and this court that when, by an order passed in term, a motion for a new trial is set to be heard on a particular day, and the same order requires the movant to present a brief of the evidence for the approval of the judge in vacation on another day, prior to that set for the hearing, the judge is without jurisdiction, on the day fixed for the presentation of the brief, to lawfully extend the time for such presentation. *Blackburn v. Alabama Midland Railway Co.*, 116 Ga. 936, 43 S. E. 366; *Blount v. State*, 9 Ga. App. 575, 71 S. E. 877, and citations.

Counsel for the plaintiff in error endeavors to take the case out of this well-settled rule because of the following facts: When the order nisi was made on the original motion, the matter of the brief of evidence was discussed by counsel with the presiding judge, who stated to counsel that, in the event the court reporter was unable to furnish the record so that the brief could be filed in vacation, he (the judge) would protect the movant. Subsequently, on the 11th day of April, the court was convened in special session, at which time counsel for the movant called up the question of the preparation of the brief of evidence, and stated to the court that the stenographer would probably be unable to furnish the record so that the brief could be filed by the time fixed in the original order. At this time, while the court was in session, and when an order protecting the movant's rights could have been taken, the court stated to the movant's counsel that he would protect the movant, and it would be unnecessary to take an order. On the 4th day of May, the time that the order required that the brief be filed the stenographer had not presented a brief of the evidence to counsel, and on that day the judge, at the request of counsel for movant, passed an order extending the time for filing the brief of the evidence until the hearing, whenever it might be. It was not disputed that the stenographer had not furnished or written out the evidence, and it was not disputed that the judge had promised movant's counsel in that event to protect the movant in his rights in reference to the filing of the brief of the evidence.

The order granted on the 4th day of May showed that the judge endeavored to fulfill his promise; but the trouble was that the judge on that day in vacation had no jurisdiction to pass the order, and it was a mere nullity, and therefore could not operate as a protection to the movant. Under the

facts, in the absence of any order to extend the time for the preparation and the filing of the brief of the testimony taken in term, the judge was without any power to fulfill his promise to protect the movant. The law took away from him any jurisdiction to pass the order on May 4th, in vacation; and there being no brief of evidence prepared and filed on that day, as provided by the order previously passed in term, the judge was absolutely without jurisdiction to pass any order in the case, and he was bound to dismiss the motion, in obedience to the repeated rulings of the Supreme Court and of this court. It has also been repeatedly held that the failure or inability of the stenographer to furnish to counsel for the movant a transcript of his notes of the brief of the testimony in time to make a brief to present to the court furnishes to the movant no excuse for his failure to do so. *Guthrie v. Hendley*, 8 Ga. App. 101, 68 S. E. 654, and citations.

Counsel for the plaintiff in error requests that we review and reverse the decision in *Blount v. State*, 9 Ga. App. 575, 71 S. E. 877. We cannot comply with this request. That decision announces no novel or original proposition of law, but simply follows the repeated rulings of the Supreme Court on the same subject. Under the facts recited in the bill of exceptions as approved by the trial judge, we would personally be glad to give the movant an opportunity to present and have heard his motion for a new trial; but, under the repeated rulings controlling this case, we are powerless to do so, and, under the conceded facts, the judgment dismissing the motion for a new trial must be affirmed.

Judgment affirmed.

(11 Ga. App. 350)

WILKINS v. BARNES. (No. 4,109.)

(Court of Appeals of Georgia. July 23, 1912.)

(Syllabus by the Court.)

PARENT AND CHILD (§ 13*)—TAKING OF MONEY—PARENT'S PROMISE TO REPAY—CONSIDERATION.

Where a minor unlawfully took possession of money of another, and appropriated it to his own use, no legal obligation was imposed upon his parent to repay the money to the owner, and an agreement or promise of the parent to do so was nudum pactum and unenforceable.

[Ed. Note.—For other cases, see *Parent and Child*, Cent. Dig. §§ 145-151; Dec. Dig. § 13.*]

Error from Superior Court, Walton County; H. C. Hammond, Judge.

Action by J. B. Wilkins against A. C. Barnes. Judgment for defendant, and plaintiff brings error. Affirmed.

W. O. Dean, of Monroe, for plaintiff in error. Walker & Roberts, of Monroe, for defendant in error.

HILL, C. J. Wilkins brought suit against Barnes in a justice court on an account, and the case was appealed to the superior court. In the latter court the presiding judge, at the conclusion of the plaintiff's evidence, directed a verdict for the defendant, and the plaintiff excepted. The facts are as follows: The plaintiff's son and the defendant's son, two minors about 16 years of age, took and carried off from the plaintiff \$102 of the plaintiff's money, which they spent, and the two boys were arrested and brought to Athens and lodged in jail. The two fathers went to Athens for the purpose of rendering assistance to their boys. The defendant had no money. The plaintiff proposed to the defendant that he would pay the expenses of the arrest, which amounted to \$8, and the boys could be released from custody, if the defendant would agree to pay him back in the fall a half of this amount, and \$55, half of the amount of money which the two boys had taken from the plaintiff and spent without authority. The defendant agreed to do this. The boys were thereupon discharged. Subsequently the defendant paid to the plaintiff \$4, being a half of the \$8 costs which had accrued in the arrest of the boys, but refused to pay a half of the money which the boys had spent, and the suit was brought by plaintiff to recover this half, based upon the promise of the defendant to pay it.

At the conclusion of the evidence the defendant moved for a nonsuit, and the court stated that the defendant could take either a verdict or an order of nonsuit. The defendant elected to take a verdict. The proper procedure would have been the grant of a nonsuit, if the plaintiff was not entitled to recover under the evidence. This fact is immaterial, however, in view of the fact that we think it very clear, under the undisputed evidence, that the agreement which the defendant made to repay the plaintiff the money which the boy had spent was a mere nudum pactum, and was not enforceable. It is insisted by the defendant that the case is within the statute of frauds, and the agreement to pay, not being in writing, was void. It is insisted by the plaintiff that it was an original agreement, and, further, that the payment by the plaintiff of the \$4, was such part performance of the contract as would take it out of the statute.

Irrespective of whether the case is within the statute of frauds or not, as the contract would have been without any consideration even if it had been in writing, the question is unimportant. We affirm the judgment because, under the admitted facts, the contract sued upon was simply nudum pactum.

It is contended by the plaintiff that the contract was a binding obligation on the parent because it was an assumption by the father of the debt of his minor son. The

answer to this is that the father, under the facts of the case, was under no legal obligation to pay the debt of his minor son, incurred as this one was. While a parent might be willing to pay the debt of his minor child, he is under no valid obligation to do so, unless for necessities furnished the minor under certain circumstances.

Judgment affirmed.

(11 Ga. App. 354)

WATSON v. NORTH AMERICAN ACCIDENTAL INS. CO. (No. 4,143.)

(Court of Appeals of Georgia. July 23, 1912.)

(Syllabus by the Court.)

1. APPEAL AND ERROR (§ 1195*)—DISPOSITION OF CAUSE—EFFECT OF DECISION.

When this case was previously before this court, it was held that under the undisputed evidence the plaintiff was as a matter of law not entitled to recover, and for that reason the verdict was set aside, and a new trial granted. *North American Accident Insurance Co. v. Watson*, 6 Ga. App. 193, 64 S. E. 693. On the second trial the evidence was substantially the same as on the first trial, and the trial court did not err in granting a nonsuit.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4661-4665; Dec. Dig. § 1195.*]

2. APPEAL AND ERROR (§ 1195*)—REVIEW—QUESTIONS OF FACT.

The decision of this court when the case was first here was a conclusion of law, based upon uncontroverted facts, and is in no sense at variance with the repeated rulings that this court is without jurisdiction to determine mere issues of fact. The decision as there announced will not be reviewed; a majority of the court being satisfied with its soundness. In addition to other citations in the opinion, then delivered (6 Ga. App. 193, 64 S. E. 693), see *United Benevolent Society v. Freeman*, 111 Ga. 355, 36 S. E. 764.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4661-4665; Dec. Dig. § 1195.*]

Russell, J., dissenting.

Error from Superior Court, Fulton County; J. T. Pendleton, Judge.

Action by O. H. Watson against the North American Accidental Insurance Company. Judgment for defendant, and plaintiff brings error. Affirmed.

Frank L. Neufville, of Atlanta, for plaintiff in error. Shepard Bryan, of Atlanta, for defendant in error.

HILL, C. J. Judgment affirmed.

POTTLE, J. (concurring specially). Without committing myself to all the reasoning in the opinion of the CHIEF JUDGE when this case was before the court the first time, I agree that the case was rightly decided by the majority of the court on the facts. Moreover, I question the right of this court to review and overrule a decision previously made in the same case. I am inclined to think that the judgment rendered when the case was here before is res adjudicata. See

Ingram v. Mercer University, 102 Ga. 226, 29 S. E. 273, and citations; Evans v. Nail, 7 Ga. App. 133 (2), 66 S. E. 543.

RUSSELL, J. I dissent for the reasons stated in my former dissenting opinion (6 Ga. App. 199, 64 S. E. 693); and while I agree that, primarily, the ruling herein announced by the majority of the court would be res judicata as to this case, even if it should be later reviewed and overruled as to other cases, still I conceive it to be within the prerogative of a court of last resort in any case, should the identical point be again presented which was previously adjudicated in the particular case (if the court should be convinced that the prior judgment was wrong), to correct that judgment, so as to relieve even that particular case from the operation of the rule. If this court can modify, withdraw, or reverse its opinion in one case, why not in another? The reason for the application of the principle of res judicata to the particular case in which the ruling was made I apprehend to be due to the fact that the rights of the parties involved in the particular case are fixed thereby, and all subsequent rulings of the lower court concerning the case must be in conformity with the decision of the court of review. Naturally it could not be held to be error upon the part of the trial court to try the case according to the precepts of the court of review.

The principle of res judicata is generally applied in a case which has been reviewed from necessity for the reasons above stated, and because it is not likely that the court of review will in that case have an opportunity of correcting the error, if there was an error in its prior decision. But if in any case, as in this, the opportunity is presented of reviewing the prior decision, it is certainly within the power of the court to declare the true law. What I have said above does not affect the present case, because a majority of the court still adheres to its previous decision; but I cannot concur in the opinion of Judge POTTLE that a prior ruling in a pending case cannot be changed by the court of review. The rule might be different if the case had been concluded, or if all opportunity to consider its controlling questions had passed, but this case is still before us, and no final judgment has ever been rendered.

(92 S. C. 135)

DAVIS v. MILADY et al.

(Supreme Court of South Carolina. July 30, 1912.)

1. HOMESTEAD (§ 118*) — DISPOSITION — "WAIVED"—"WAIVER."

The word "waived" in Const. art. 3, § 28, providing that a homestead set off and recorded shall not be waived by deed of convey-

ance, mortgage, or otherwise, unless executed by both husband and wife, does not exclude a grant or mortgage, or any other disposition which may be included in the word "otherwise," a waiver is an intentional relinquishment of a known right.

[Ed. Note.—For other cases, see Homestead, Cent. Dig. §§ 192, 195, 203-209, 216, 217; Dec. Dig. § 118.*]

For other definitions, see Words and Phrases, vol. 8, pp. 7375-7381, 7831-7832.]

2. HOMESTEAD (§ 118*) — DISPOSITION — DEVISE—"OTHERWISE."

Const. art. 3, § 28, includes a devise, and prevents the alienation of the homestead, either by deed or devise, or in any other manner, unless the wife joins the husband in the disposition.

[Ed. Note.—For other cases, see Homestead, Cent. Dig. §§ 192, 195, 203-209, 216, 217; Dec. Dig. § 118.*]

For other definitions, see Words and Phrases, vol. 6, pp. 5105-5113.]

3. HOMESTEAD (§ 118*)—SETTING OFF HOMESTEAD—RIGHTS ACQUIRED.

Const. art. 3, § 28, does not create any new estate, but the title in the husband is burdened with the homestead for the enjoyment of himself and wife.

[Ed. Note.—For other cases, see Homestead, Cent. Dig. §§ 192, 195, 203-209, 216, 217; Dec. Dig. § 118.*]

4. HOMESTEAD (§ 136*)—SETTING OFF HOMESTEAD—RIGHTS ACQUIRED.

A husband who purchased land subsequent to Const. art. 3, § 28, and laid it off as a homestead, could not, without the assent of the wife, devise it during her life, so as to deprive her of the benefits of the homestead, but, after her death, a devise would be valid.

[Ed. Note.—For other cases, see Homestead, Cent. Dig. §§ 249, 250; Dec. Dig. § 136.*]

Fraser, J., dissenting in part.

Appeal from Common Pleas Circuit Court of Richland County; T. H. Spain, Judge.

Action by F. G. Davis, administrator of John Milady, deceased, against Susan Milady and others for the construction of the will of deceased. From a judgment construing the will, defendant Trannie Cooper appeals. Modified.

W. H. Townsend, of Columbia, for appellant. John J. Earle, Shand & Shand, and Barron, Moore, Barron & McKay, all of Columbia, for respondent.

WATTS, J. John Milady acquired a tract of land in 1900. It was assigned to him as a homestead in 1902 and the assignment recorded. He died in 1910, survived by a widow, Susan Milady, and his next of kin were some cousins, owing no debts contracted prior to 1896 and leaving of force a will whereby he devised this tract of land to a stranger without assent, written or otherwise, of his surviving widow. This action was commenced to obtain a construction of the will of John Milady. All issues of law and fact were referred to A. D. McFadden, Esq., master for Richland county, to try all issues and report his findings of facts and conclusions of law. His report and exceptions thereto and the decree of his honor,

Judge Spain, and exceptions thereto should be set out in the report of the case.

The only question on this appeal is whether the devise under the will of John Milady is valid; the master holding that it was, and the circuit court reversing the master's report, and Susan Milady denies that the devise is valid. Such devise would be valid if testator had died prior to the Constitution of 1895, or if the homestead had been laid off to him prior to 1895 (*Bostick v. Chovin*, 55 S. C. 429, 33 S. E. 508; *Beaty v. Richardson*, 56 S. C. 186, 34 S. E. 73, 46 L. R. A. 517) or, perhaps, if he had purchased the land prior to 1895. In *Ex parte Bullock*, 58 S. C. 239, 36 S. E. 563, no homestead had been laid off. So, too, in *Geiger v. Geiger*, 57 S. C. 521, 35 S. E. 1031.

[1] But the Constitution of 1895 (article 3, § 28) provides "that after a homestead has been set off and recorded the same shall not be waived by deed of conveyance, mortgage or otherwise, unless the same be executed by both husband and wife, if both be living." See, also, Code of Laws 1902, § 2630. This limitation of the power of disposition was not in the Constitution of 1868, and therefore was purposely added to make some change in the rights which the court had held to exist under the former instrument. Judge Cooley says the court "must lean in favor of a construction which will render every word operative, rather than one which may make some idle and nugatory. This rule is applicable with special force to written constitutions in which the people will be presumed to have expressed themselves in careful and measured terms corresponding with the immense importance of the powers delegated, leaving as little as possible to implication. It is scarcely conceivable that a case can arise when a court would be justifiable in declaring any portion of a written constitution nugatory because of ambiguity." *Cooley's Const. Lim.* § 58. What is the force of the word "waived"? It is clear that it cannot exclude a grant or a mortgage or any other disposition which may be included in the word "otherwise." In *R. & L. Dict.* p. 1342, it is said: "A person is said to waive a benefit when he renounces or disclaims it. * * * A waiver may be expressed or implied." And the *Century Dictionary* defines it to be "the intentional relinquishment of a known right." Therefore a deed or devise would be a relinquishment of a right of ownership, and a devise of the right of inheritance which the party waiving would otherwise possess. A deed operates as a grant, but also as an estoppel and as a waiver.

[2] The other word which requires a construction is the word "otherwise." Does it include a devise? We think so. The Constitution intended to prevent the alienation of the homestead when once set off, either by deed or devise or in any other manner, unless the wife joined with the husband in

the execution of the conveyance, whether by deed, mortgage, or whatever means it was attempted to be conveyed or waived. Prior to 1895 it was held by the courts that the homestead allowed under the Constitution of 1868 did not prevent the head of a family from conveying it, mortgaging it, or devising it. The framers of the Constitution of 1895 knew this when they declared that, after a homestead had been set off and recorded, it could "not be waived by deed of conveyance, mortgage or otherwise, unless the same be executed by both husband and wife, if both be living. This prevents an alienation by deed or an incumbrance by mortgage, except by an instrument signed by both husband and wife, if both be living, and in our opinion was intended by the framers of the Constitution of 1895 to include every species of disposition, permanent or temporary, which would deprive the family for whose benefit, and by reason of whose existence, the homestead was allowed. Therefore, the word "otherwise" was intended to include leases, devises, dedication, grants of right of way, confession of judgment with waiver of homestead claim, and every other possible device by which a husband might deprive his family of the homestead upon whose existence alone he had been able to keep it away from his creditors.

In the case of *Larson v. Reynolds*, 13 Iowa, 579, 583, 81 Am. Dec. 446, 447, it appears that under the law of that state a conveyance of a homestead is of no validity unless the husband and wife concur in and sign the same, and that such provision prevented a valid mortgage by the husband alone, nor is it made good by the subsequent death of his wife. The court further says: "Upon his death she has a right to continue in its occupation, and it cannot be taken from her by his will or devise." The Mississippi courts have held in *McDonald v. Sandford*, 88 Miss. 633, 41 South. 369, 117 Am. St. Rep. 758, 9 Ann. Cas. 1, a mortgage executed by the husband alone is held to be an absolute nullity. In that case Chief Justice Whitehead says: "Whatever name may be given to the wife's interest in the homestead, whether it be called an estate or an interest, or a claim, or a right or a veto power merely, it is such an interest or a right as the statute requires to be conveyed by deed, and a deed to the homestead without the wife joining in the conveyance has been correctly held in *Gulf v. Singleton*, 78 Miss. 772 [29 South. 754], to be an absolute nullity." In *Thomas v. Craft*, 55 Fla. 842, 46 South. 594, 15 Ann. Cas. 1118, the court, construing the provision of the Florida Constitution that a homestead should not be alienable without the joint consent of husband and wife, held as to the word "alienable" that "no instrument is effectual as an alienation or a conveyance or transfer of title or of any interest in the homestead real estate without

the joint consent of husband and wife when that relation exists." This position is also sustained in *Griffith v. Griffith*, 59 Fla. 512, 52 South. 609, 138 Am. St. Rep. 138, 21 Ann. Cas. 246. "A power in the husband to terminate this freehold with his life by disposing of the land in his will is inconsistent with the spirit and intent of the statute as manifested in the clauses declaring that no release or waiver, except by deed, and no deed from husband alone without his wife should be valid in law; and that the exemption should continue after his death for the benefit of his widow and children." *Brettun v. Fox*, 100 Mass. 235. In Nebraska the homestead of a married person cannot be conveyed or incumbered unless the instrument by which it is conveyed or incumbered is executed and acknowledged by both husband and wife, and it was held in *Kolke v. Wolff*, 78 Neb. 504, 111 N. W. 134, 11 L. R. A. (N. S.) 99, that this prevented a lease of the homestead by the husband alone, and he recovered the land from the lessee.

[3] This court has held that the homestead provisions do not create any new estate. Chief Justice McIver says in *Stewart v. Blalock*, 45 S. C. 64, 22 S. E. 775: "It is well settled, in this state at least, that the homestead provisions create no new estate and do not invest estates already existing with any new qualities or subject them to any restrictions, but simply secure a right of exemption by forbidding the use of the process of the court to sell certain property for the payment of debts"—citing *Elliott v. Mackorell*, 19 S. C. 242, and *Chalmers v. Turnipseed*, 21 S. C. 126.

[4] We are of the opinion that John Milady having purchased this land subsequent to the Constitution of 1895, and laid off to him as a homestead in 1902, and no assent by the wife having even been given, he had no power to devise it so that the devise would take effect during his wife's, Susan Milady's, life, and thereby deprive her of the benefits of the homestead. At the time the homestead was set off, his family consisted of his wife and himself. The homestead was allowed for their benefit and by reason of their existence and once set off could not be disposed of, permanently or temporary, in any manner, whatsoever, by deed, mortgage, devise, or otherwise, except that both husband and wife joined in the conveyance by whatever name it was called, so as to deprive the family of the homestead upon whose existence he had been able to keep it away from his creditors. Once set apart as a homestead, it had to remain in tact as a homestead for the benefit of both, as long as both or either lived, unless both joined in the conveyance. John Milady having died, Susan Milady, his widow, is entitled to enjoy undisturbed the possession of this homestead during her natural life, but, after her death,

it goes as devised by John Milady. The title to the property was in him, and under the case of *Stewart v. Blalock*, supra, no new estate was created, but only his fee burdened with the homestead for the enjoyment of himself and wife, and after his wife's death his devise will be valid. We do not think by the fundamental and organic law, even such as a constitutional convention has as to how people shall be governed or by an act of the General Assembly of the state, they can dictate to a person how his property shall be disposed of finally and take the disposition of it out of his hands. Under the Constitution of 1895 (article 3) it gives the Legislature power to enact laws to exempt a homestead from sale, etc., under process of court, and discharges the title to the homestead from all debts then existing, etc., but it does not create any new estate, and in our opinion in the case at bar Mrs. Milady has the right to continue in exclusive occupation and enjoyment of the homestead during her natural life and at her death it goes as devised under the will of John Milady. Judgment of circuit court should be modified as indicated by the views herein expressed.

Judgment modified.

GARY, C. J., and WOODS and HYDERICK, JJ., concur.

FRASER, J. (dissenting). I cannot concur in so much of the opinion of Judge WATTS as limits the invalidity of the devise to the life of the widow. It seems to me that a waiver in which the wife does not join is void, whether the waiver is by deed, mortgage, devise, or otherwise, and that this position is fully sustained by the authorities cited.

(92 S. C. 120)

STATE v. JOHNSON et al.

(Supreme Court of South Carolina. July 25, 1912.)

1. CRIMINAL LAW (§ 598*)—CONTINUANCE—ABSENCE OF WITNESSES.

The trial of an indictment against defendants was continued by the state from a day when all of defendants' witnesses were present, having been regularly subpoenaed, with announcement by the solicitor for the state and by defendants' attorney that all witnesses must attend the first day of the next term of court. Defendants, relying upon the original subpoena and service and the notice in open court, did not resubpoena their witnesses for the next term, and, on the ground of their absence, moved to continue, supporting the motion by affidavit reciting what they expected to prove by such witnesses. The motion was overruled, and the court also refused to require the state to admit what the absent witnesses would swear to, if present. *Held*, that there was no abuse of discretion.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 1335-1341; Dec. Dig. § 598.*]

2. CRIMINAL LAW (§§ 586, 1151*)—APPEAL—DISCRETION OF LOWER COURT — CONTINUANCE.

The granting or refusing of a continuance is within the discretion of the trial judge; and an appellate court will not disturb his decision, except in a clear case of abuse of discretion.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1311, 3045-3049; Dec. Dig. §§ 586, 1151.*]

Hydrick and Fraser, JJ., dissenting.

Appeal from Common Pleas Circuit Court of Anderson County; R. W. Memminger, Judge.

George Johnson and Enoch Ware were convicted of violating the dispensary law, and they appeal. Affirmed.

A. H. Dagnall, of Anderson, for appellants. Solicitor P. A. Bonham, for the State.

WATTS, J. The agreed statement of facts in the case show that the appellants were tried and convicted, in their absence, of violating the dispensary law, in the court of general sessions for Anderson county, at the January term of court, 1912, and duly sentenced by his honor, Judge Memminger. The indictment was found against them at the September term of court, 1911, and the case was continued by the state at that time. All of the defendants' witnesses were present, having been regularly subpoenaed. When the case was continued, the solicitor announced in open court that all witnesses must be on hand the first day of the next term of the court, and defendants' attorney made a similar announcement to defendants' witnesses. Defendants did not resubpoena their witnesses for the January term of the court, relying upon the original subpoena and service and notice in open court at the September term. At the call of the case for trial on the first day of the term in January, 1912, none of defendants' witnesses were present, and defendants moved to continue the case until the next day, or until the next term, as none of defendants' witnesses were present, and also asked that a rule be issued against defendants' witnesses. This motion was supported by affidavit reciting these facts, and also set forth what defendants expected to prove by these witnesses. The motion was overruled, and the case ordered to trial. The court also refused to require the state to admit what the absent witnesses would swear to, if present. After sentence, appellants appeal and allege error on the part of his honor in forcing the case to trial, and allege error and abuse of discretion on his part in not requiring the state to admit what absent witnesses would swear to, if present.

[1, 2] A careful examination of the whole record in the case will fail to disclose that his honor in any manner abused his discretion. Granting or refusing a continuance is within the discretion of the trial judge; and

an appellate court will not disturb his decision, except in a clear case of abuse of discretion. *Latimer v. Latimer*, 42 S. C. 209, 20 S. E. 159; *State v. Murphy*, 48 S. C. 5, 25 S. E. 43.

Possibly it was unfortunate that the defendants' witnesses were not present; but his honor had all of the facts of the case before him, and, after conviction, if he was not satisfied of their guilt, it is reasonable to suppose that he would have set the verdict aside, and have allowed them another chance to get the witnesses. The exceptions are overruled.

Judgment affirmed.

GARY, C. J., and WOODS, J., concur. HYDRICK and FRASER, JJ., dissent.

(32 S. C. 146)

RAMSEY v. HILL.

(Supreme Court of South Carolina. July 30, 1912.)

1. SALES (§ 417*)—SALES OF ANIMALS—UN- SOUNDNESS—QUESTION FOR JURY.

In an action for damages from the unsoundness of a mule purchased by plaintiff, evidence held to support a finding that the mule was unsound at the time of sale.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 1173; Dec. Dig. § 417.*]

2. TRIAL (§ 105*)—EVIDENCE—SUFFICIENCY.

Where incompetent testimony is received without objection, it becomes competent and cannot be disregarded on a motion for nonsuit.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 260-266; Dec. Dig. § 105.*]

3. SALES (§ 439*)—WAIVER—BURDEN OF PROOF.

A seller of an unsound mule has the burden of proving the buyer's waiver of unsoundness to prevent a recovery for damages sustained in consequence of the unsoundness.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1253-1260; Dec. Dig. § 439.*]

4. SALES (§ 420*)—WAIVER—BURDEN OF PROOF.

Whether a buyer of a mule waived unsoundness at the time of sale held, under the evidence, for the jury.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 1202; Dec. Dig. § 420.*]

Hydrick, J., dissenting.

Appeal from Common Pleas Circuit Court of York County; R. C. Watts, Judge. "To be officially reported."

Action by Elias Ramsey, as administrator of A. W. Ramsey, deceased, against W. L. Hill, doing business under the name and style of the Hill Banking & Mercantile Company. From a judgment for plaintiff, defendant appeals. Affirmed.

W. W. Lewis, of Yorkville, for appellant. Thos. F. McDow, of Yorkville, for respondent.

GARY, C. J. The plaintiff, as the administrator of A. W. Ramsey, who died in October, 1908, brings this action for the balance

amounting to \$400.25, alleged to be due upon an account, an itemized statement of which is attached to the complaint as an exhibit. One of the items in the account, amounting to \$150, is for damages alleged to have been sustained by reason of the unsoundness of a mule sold by the defendant to plaintiff's intestate on the 2d of March, 1908. The defendant, in its answer, denied various items of the account, among which was the item of \$150 for the unsoundness of the mule, as to which it also alleged that, "if there ever was any unsoundness in said mule, same was waived by plaintiff's intestate." The jury rendered a verdict in favor of the plaintiff for \$100, whereupon the defendant made a motion for a new trial, which was refused, and the defendant then appealed. The appellant's attorney in his argument says: "The appeal presents two questions for consideration: (1) There was absolutely no testimony that the mule sold plaintiff's intestate was unsound at time it was sold, and no testimony from which such an inference could be drawn. (2) That, even if the mule was unsound when sold, the plaintiff and his intestate both waived same."

[1] We proceed to the consideration of the first question. The plaintiff testified as follows: "Q. Mr. Ramsey, do you know the mule that your son got from Hill? A. Yes, sir. Q. How long have you had it in your possession? A. It is going on to four years. Q. Well, sir, he agreed to give \$200, and gave a mortgage for it? A. Yes, sir. Q. What kind of a mule was that? A. It was a mule, a weakly mule, and was not able to do any day's work. Q. Was it an unhealthy mule? A. It was not to say a sickly mule. It was a weak mule, couldn't do a day's work. Q. Was it able to do any work? A. No, sir; might plow for a few days, then give out. Q. Was \$200 a sound price for a good mule? A. At that time it was. Q. About what part of a day's work could this mule do? A. This mule would give out about 9 or 10 o'clock; lie down. Q. You never saw a mule like that before? A. Never in my life. Q. Did she eat heartily? A. No, sir. She didn't eat heartily no time. Q. What in your judgment was the value of that mule at the time she was sold? A. I wouldn't have had the mule, Mr. McDow. Mr. Lewis (Defendant's Attorney): Ask him if he knew the condition of the mule at the time it was sold. Q. Well, I will ask him that. A. I didn't know anything about it, then. Q. How long after the mule was sold until you did know it? A. About two weeks. Mr. McDow (Plaintiff's Attorney): I submit that is close enough, your honor. The Court: I think so. Q. Is that the condition of the mule to-day? A. Yes, sir. The mule never has been right." In the first place, the long continuance of the mule's condition tended to show that the weakness was inherent or chronic; and the jury might reasonably have inferred that it

existed prior to the sale to plaintiff's intestate. In the second place, not only was the foregoing testimony introduced without objection, but, at the suggestion of plaintiff's attorney, his honor, the presiding judge, ruled that testimony as to the condition of the mule two weeks after the sale was competent, and there was no exception to this ruling.

[2] If testimony is received without objection, which would otherwise be incompetent, it becomes competent, and cannot be disregarded upon a motion for nonsuit, but its sufficiency must be left to the jury. *Ashe v. Railway*, 65 S. C. 134, 43 S. E. 393.

We will now consider the second question, which relates to waiver.

[3] The burden was on the defendant to prove waiver of the alleged unsoundness of the mule. A. W. Ramsey, the purchaser of the mule, was dead, and for this reason his administrator was at great disadvantage in meeting the defendant's claim that he had made no complaint of the defects in the mule.

[4] The jury were at liberty, however, to reject the defendant's testimony that no complaint had ever been made to him. The following extract shows that his testimony was not necessarily convincing on that subject: "Q. Now, Mr. Hill, didn't Mr. Wallace Ramsey bring this mule back to you in his lifetime, and ask you to take it back? A. Why, no, sir. Q. Sir? A. Never did. Q. Now, didn't he do it, and tell you he would give you \$25 to take it back? A. I don't remember anything about that. Q. Think; I want you to remember. If he did do it, you don't remember it. If he didn't do it, you don't remember it. A. I know one thing, that he didn't make any complaint about anything being unsound." The plaintiff testified that he did complain of the mule after his son's death. The evidence does not show conclusively that the plaintiff voluntarily paid the claim of the defendant. On the contrary, there was evidence that A. W. Ramsey was defendant's tenant, and that his cotton crop was hauled to the defendant's gin, that the defendant retained it, and placed the proceeds on the account, and that the plaintiff was all the time claiming an allowance of credit on account of the weakness of the mule. There was abundant ground in the evidence for the jury to reject the defense of waiver.

Judgment affirmed.

WOODS and FRASER, JJ., concur.
WATTS, J., disqualified.

HYDRICK, J. (dissenting). According to the evidence in this case, plaintiff's son and intestate bought a mule from defendant for \$200, and gave defendant his note for that amount, dated March 5, 1908, payable October 1, 1908, secured by chattel mortgage. He

kept the mule and made a crop with it. He died in October, 1908. While there is some evidence that the mule was "weakly," there is not a particle of evidence that any complaint was ever made to the defendant by plaintiff's son as to her condition during his life, or that he ever tendered her back to defendant. Nor is there any evidence that plaintiff himself ever made any complaint to defendant about the mule or tendered her to defendant after he was appointed administrator of his son's estate. Plaintiff himself says that, when he was settling with defendant in the fall of 1908, he asked him if he was not going to take off something on account of the condition of the mule, and that defendant said he would not. Nevertheless, plaintiff paid the defendant and kept the mule two years longer, and in 1910 brought this action.

No principle of law or of justice is better settled than that money paid voluntarily, with full knowledge of all the facts, cannot be recovered back. *Hardaway v. Railway*, 90 S. C. 475, 73 S. E. 1020. There is not a title of evidence that plaintiff did not know all the facts when he paid for the mule, or that the payment was not voluntary. On the contrary, his own evidence is that he did know of her defects, and asked defendant to deduct something from the purchase price on account of them, which defendant declined to do. I know of no principle of law or justice that will permit plaintiff to recover the money paid under such circumstances.

(92 S. C. 95)

R. E. ALLEN BRO. & CO. v. BURNETT.
(Supreme Court of South Carolina. July 20, 1912.)

1. FRAUDS, STATUTE OF (§ 107*)—SUFFICIENCY OF MEMORANDUM.

There was sufficient written memorandum to take a contract of sale out of the statute of frauds, where there was a memorandum made to the "Spartan Grain & Flour Company," though the buyer traded under the name "Spartan Grain & Mill Company," and where there were letters from the buyer, referring to and admitting the contract, and letters from the seller to the buyer, calling on him to order the goods out, and inclosing a bill therefor.

[Ed. Note.—For other cases, see *Frauds, Statute of*, Cent. Dig. §§ 212, 213; Dec. Dig. § 107.*]

2. SALES (§ 52*)—CONTRACT—EVIDENCE.

On an issue as to the existence of a contract for a sale of flour, letters written by the buyer to the seller, admitting the contract and requesting a cancellation thereof, were admissible.

[Ed. Note.—For other cases, see *Sales*, Cent. Dig. §§ 118-144, 1045; Dec. Dig. § 52.*]

3. CONTRACTS (§ 176*)—PROVINCE OF JUDGE—CONSTRUCTION OF CONTRACT.

It is the province of the trial judge to construe all written contracts in suit.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 767-770, 917, 956, 979, 1041, 1097, 1825; Dec. Dig. § 176.*]

Appeal from Common Pleas Circuit Court of Spartanburg County; Ernest Gary, Judge.

Action by R. E. Allen Bro. & Co. against Warren Dupre Burnett. Judgment for plaintiff, and defendant appeals. Affirmed.

Carson & Boyd, of Spartanburg, for appellant. Sanders & De Pass, of Spartanburg, for respondent.

WATTS, J. This cause was tried before Judge Ernest Gary and a jury on November 22, 1911. The plaintiff brought action to recover damages for breach of contract for sale of 1,000 barrels of flour for future delivery to the defendant at the price of \$6.35 per barrel on March 31, 1910, on which date the defendant's right to order out the flour expired. The plaintiff alleged the price of flour went down, and he was damaged in the sum of \$750 by reason of the defendant's failure to order the flour out. The complaint alleged that it was the bona fide intention of the parties that the flour should be actually delivered and received in kind. The answer admitted that the defendant was doing business under the name of Spartan Grain & Mill Company; denied all the other allegations of the complaint, and set up as defense the statute of frauds. Verdict was rendered for plaintiff, and defendant appeals on exceptions set out in the record. These exceptions raise practically three questions:

[1] (1) The sufficiency of the written memorandum to take the case out of the statute of frauds. The record shows that when attorney for plaintiff offered in evidence the memorandum referred to and testified to as made by R. E. Allen, Jr., defendant's attorney simply objected to the introduction of the memorandum, and stated no grounds of objection. In addition to this, the defendant in his evidence admits purchasing the flour, and the letters of defendant to plaintiff, three in number, admitted by the evidence of defendant, establish the fact that the defendant purchased the flour. Defendant, while testifying, admitted that he had purchased the flour; and his reason for not taking it was that he was overstocked. In the case of *Louisville Co. v. Lorick & Lowrance*, 29 S. C. 533, 8 S. E. 8, 2 L. R. A. 212, it was decided that there was a memorandum made by the salesman, and afterwards there was a letter written by the defendant, countermanding the same; that the two papers together constituted a sufficient writing to take the case out of the statute of frauds. Here we have the memorandum made out to the Spartan Grain & Flour Company, instead of to the Spartan Grain & Mill Company; but we have the admission of the defendant in his testimony that he was the Spartan Grain & Mill Company, and that he purchased the flour. We have in evidence letters from the defendant company, referring to and admitting the contract to

purchase the flour; also letters from the plaintiff to defendant, calling on defendant to order the flour out, and inclosing a bill for the flour. This is a sufficient compliance to take it out of the statute of frauds. This exception is overruled.

[2] Exceptions 2 and 3 question the rulings of the court on the admissibility of the evidence over defendant's objection. The letters referred to in the exceptions are from the defendant to the plaintiff. They were competent, as far as they went, to show an admission on the part of the defendant that he had purchased the flour and admitted the contract and wished a cancellation of it. Any admission in the letters as to whether the parties had made the contract in dispute was competent to go to the jury. They were admitted for this purpose, and were competent to that extent. They were not admitted for the purpose of showing an offer of compromise had been made, but to establish the fact that the contract of sale had been entered into. The issue here was, Was there a contract entered into between the parties? and any admission on the part of defendant, either orally or in writing, to establish that fact or elucidate it was competent to go to the jury. In considering the question whether the evidence offered is an offer of compromise or the admission of a fact, the court says, in *Hartford Bridge Co. v. Granger*, 4 Conn. 143: "The law on this subject has often been misconceived; and it is time that it would be firmly established. It is never the intentment of the law to shut out the truth, but to repel any inference which may arise from the proposition made, not with design to admit the existence of a fact, but merely to buy one's peace. If an admission, however, is made *because it is a fact*, the evidence to prove it is competent, whatever motive can have prompted the declaration." In the same case the court says that the question to be considered is, What was the view and intention of the party making the admission? If the intention was to admit a fact, then the testimony is competent.

In *Colburn v. Groton*, 66 N. H. 151, 28 Atl. 95, 22 L. R. A. 763, we find: "The preliminary question always is, not merely whether an admission of a fact was made during a settlement or negotiation, but whether a statement or act was intended to be an admission. It is a question, not of time or circumstance, but of intention. An offer of payment, whether accepted or rejected, is evidence, when the party making it understood it to be and made it as an admission of his liability." "Any declaration or admission made by a party to a suit against his or her interest, either in or out of court, can be established by any one who heard the declaration or admission." *McGahan v. Crawford*, 47 S. C. 578, 25 S. E. 127. "The voluntary declarations or admis-

sions of a party to a civil suit against his interest are clearly receivable in evidence." *McGahan v. Crawford*, 47 S. C. 578, 25 S. E. 127. These exceptions are overruled.

[3] Exceptions 4 and 5 allege error on the part of the circuit judge in charging on the facts and passing upon the force and effect of the testimony, and excluding from the jury the consideration of any facts in the case, except the amount of damages sustained by the plaintiff, and in not setting aside the verdict of the jury and granting a new trial. An inspection of the whole record will show that the contract in the case is made up by the memorandum of sale, the correspondence between the plaintiff and defendant, and the admissions by the defendant. It is the duty of the judge to construe all contracts which are in writing. We do not think that the record anywhere shows any reversible error on the part of his honor, the circuit judge.

The exceptions are overruled, and judgment of the circuit court affirmed.

GARY, C. J., and WOODS, HYDRICK, and FRASER, JJ., concur.

(92 S. C. 123)

JOHNSON v. BONNER.

(Supreme Court of South Carolina. July 26, 1912.)

1. APPEAL AND ERROR (§ 1003*)—REVIEW—SUFFICIENCY AND WEIGHT OF EVIDENCE.

Questions, in actions at law, as to the sufficiency of evidence to sustain a verdict, and as to preponderance of evidence, cannot be considered by the Supreme Court on appeal.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3938-3943; Dec. Dig. § 1003.*]

2. TRIAL (§ 25*)—ORDER OF PROOF.

Defendant, having admitted plaintiff's case and set up an affirmative defense, was entitled to the opening and reply.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 44-75; Dec. Dig. § 25.*]

3. TRIAL (§ 68*)—ORDER OF PROOF.

The trial judge did not abuse his discretion in allowing plaintiff to introduce evidence at the close of the case, preserving defendant's right to reply.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 158-163; Dec. Dig. § 68.*]

4. CHATTEL MORTGAGES (§ 229*)—RECOVERY OF CHATTEL—INSTRUCTIONS.

Defendant is not entitled to complain of qualified instructions on the effect of a release relied on by defendant, where the trial court instructed on the question of release without restriction or qualification.

[Ed. Note.—For other cases, see *Chattel Mortgages*, Cent. Dig. §§ 479-483; Dec. Dig. § 229.*]

5. CHATTEL MORTGAGES (§ 229*)—REPLEVIN—INSTRUCTIONS.

In an action to recover possession of a chattel, mortgaged to plaintiff and sold by the mortgagor to defendant, it was proper to instruct that, in the absence of proof by defendant, plaintiff was entitled to recover, where

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

the sole question raised by the answer was that the mortgage had been released.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. §§ 479-483; Dec. Dig. § 229.*]

6. APPEAL AND ERROR (§ 499*)—REVIEW—ADMISSION OF EVIDENCE.

An exception to the admission of testimony is not reviewable, where the record shows no objection to the testimony.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2295-2298; Dec. Dig. § 499.*]

7. CHATTEL MORTGAGES (§ 229*)—BONA FIDE PURCHASER OF GOODS—PLEADING.

In an action for possession of a chattel, mortgaged to plaintiff and sold by the mortgagor to defendant, the doctrine of bona fide purchaser was not available to defendant, where the answer relied on a release of the mortgage.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. §§ 479-483; Dec. Dig. § 229.*]

Appeal from Common Pleas Circuit Court of Cherokee County; Robt. Aldrich, Judge.

Action by H. M. Johnson, trading as the Gaffney Live Stock Company, against E. B. Bonner. Judgment for plaintiff, and defendant appeals. Affirmed.

Ottis & Dobson, of Spartanburg, for appellant. Butler & Hall, of Gaffney, for respondent.

FRASER, J. The plaintiff brought this action, in claim and delivery, for the possession of the mule described in the mortgage set up in the complaint.

The mortgage was executed by one William Sam'l Lipscomb, from whom the defendant bought the mule. The answer of the defendant alleges "that the said mule is in his possession, and admits, on information and belief, the execution of the mortgage referred to in said paragraph and the outstanding indebtedness on the same, but alleges that the said mule was released from the lien of said mortgage by the agreement and facts hereinafter set out." The defendant further set up that the mule seized in this action was turned over to this defendant by the said Lipscomb, by agreement with the plaintiff, in place of another mule, also under mortgage, which the plaintiff had previously seized, and that before the exchange the plaintiff had released his mortgage on the mule sued for.

For a third defense, the defendant alleges "that defendant, having paid \$200 in good and lawful money to W. S. Lipscomb for the mule which was seized first by plaintiff, and having accepted the mule described in the complaint herein in the place and stead of said mule, as a complete satisfaction for the purchase price paid, as aforesaid, and relying on the agreement and release on the part of plaintiff, as hereinbefore set forth, and not having any knowledge or notice that the said plaintiff had or would make

any further interest or claim whatever on the said mule, is a bona fide purchaser for value, without notice, from the said W. S. Lipscomb."

It is thus seen that there was but a single question in the case: Did the plaintiff release the mortgage on the mule? The answer to that question was one of fact for the jury, with which this court has nothing to do. That question the presiding judge distinctly and unmistakably presented to the jury. In order not to complicate the matter and confuse the mind of the jury, the judge refused all requests to charge. When there is but a single question, the clearest and shortest statement that can be made is much to be commended.

The jury found for the plaintiff, and the defendant appealed upon the following exceptions:

[1] 1. (1) "Because the presiding judge erred in not granting a new trial to defendant on his motion for same, in that the evidence, as adduced before the jury at the trial of this case, was not sufficient to support the verdict of the said jury."

(2) "Because the presiding judge erred in not granting a new trial, in that the testimony clearly shows, by the preponderance of the evidence, that the plaintiff had released the mule referred to in the complaint, and had no right to bring claim and delivery for the possession of same."

Mere insufficiency of evidence and preponderance of evidence cannot be considered by this court in actions at law, and these exceptions are overruled.

[2, 3] 2. (3) "Because the presiding judge erred in allowing the witness H. M. Johnson to testify in reply after the defendant had closed its testimony in reply, the said presiding judge having forced said defendant to open the testimony in the case, in that same was in violation to the rule of evidence and prejudicial to the case of defendant."

The defendant, having admitted the plaintiff's case and set up an affirmative defense, was entitled to the opening and reply. His honor had the right to allow the introduction of the evidence after the other evidence had closed, preserving the defendant's right to reply. The defendant, however, not only did not claim this right, but strenuously denied it. This exception is overruled.

[4] 3. (4) "Because the presiding judge erred in failing to charge the jury the legal bearing of a release in law; and, further, that said release need not be in writing, where same referred to personal property, as defendant requested should be done."

(5) "Because the presiding judge erred in failing to charge the jury that, if the plaintiff did verbally release the said mule from the lien of the mortgage, under which same was seized in this action, as contended by defendant, the plaintiff was estopped from recovering same under this action; defend-

ant having requested that the jury be charged as to same."

His honor presented the question of a release without any restrictions or qualifications, and, as presented, included any form of release. The defendant has no right to complain. This exception is overruled.

[5] 4. (6) "Because the presiding judge erred in holding that the answer of defendant would entitle plaintiff to a judgment, in case defendant put up no testimony, and in further holding that defendant should open the testimony, in that the said answer did not admit that the said mortgage debt was past due, nor that plaintiff was entitled to the possession of said mule, nor that same was in the possession of defendant at the time of seizure."

The sole question raised by the answer was that the mortgage had been released, and that was an affirmative defense; and, unless made out by proof, the plaintiff was entitled to judgment. The question as to whether the debt was due or not was not raised in the circuit court, although his honor called for the reason. The objection there was as to a "demand." This exception is overruled.

5. (7) "Because the remarks of the presiding judge as to the plaintiff being entitled to judgment, if defendant put up no testimony, had a tendency to prejudice the case of defendant in the minds of the jury." It is not prejudice, but prejudicial error, that entitled one to a new trial. This exception is overruled.

[6] 6. (8) "Because the presiding judge erred in allowing the witness H. M. Johnson to testify as to the amount of money that he had lost on the party, W. Sam Lipscomb, from whom defendant had purchased the said mule, as said testimony was not relevant, and tended to prejudice defendant's rights." The record shows no objection to this testimony; hence this exception cannot be considered.

[7] 7. (9) "Because the presiding judge erred in not charging the jury as to the defense of innocent third purchaser for value, and without notice; same being set up as a defense in the answer of defendant, and there being some evidence to support said defense." The want of notice was based upon the release. The defendant pleaded the release of this very mortgage. Purchaser for value, without notice, does not apply.

8. (10) "Because the presiding judge further erred in his charge to the jury, in that he used the following language: 'Now, a great many questions have been brought out in this case by the parties on both sides that I do not think are germane to the issues in any respect whatever; therefore I am not going to incur the case with these propositions. The questions for you to decide are those which I have presented to you; they are the rules that are pertinent to this sub-

ject, and those are the only questions. I am going to leave them thus, because they will decide the points you may have on that issue.' By charging thus, the presiding judge thus in effect charged on the evidence in the case, taking from the consideration of the jury the issues referred to in the above exceptions, and narrowing the compass of the case in the minds of the jury to an extent particularly prejudicial to defendant's rights." What has already been said fully disposes of this exception, and it is overruled.

The judgment of this court is that the judgment appealed from is affirmed.

WOODS and HYDRICK, JJ., concur.
GARY, C. J., and WATTS, J., concur in the result.

(93 S. C. 254)

RICHARDSON v. ATLANTIC COAST LUMBER CORPORATION.†

(Supreme Court of South Carolina. July 22, 1912.)

1. ESTOPPEL (§ 38*)—DEEDS—AFTER-ACQUIRED TITLE.

Where the grantor of land, with the usual covenants, had no title, but afterwards acquired it, he is estopped to claim that he did not have title at the time of the sale; and the after-acquired title inures to the benefit of his grantee.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. §§ 99-107; Dec. Dig. § 38.*]

2. ESTOPPEL (§ 45*)—BONA FIDE PURCHASERS—NOTICE—RECORDS.

At the time of a conveyance of land, the title to a portion of it was of record in a person other than the grantor, and such person was in possession. The grantor later obtained a conveyance from such owner, but reconveyed before his first grantee had knowledge of the conveyance, and without notice to the later grantee of the prior conveyance. *Held*, that the first grantee is estopped to rely on the record of the conveyance to him as constructive notice to the subsequent purchaser without actual notice, because of his own constructive notice of his grantor's lack of title, and so cannot assert his title as a cloud on that of the later taker.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. § 112; Dec. Dig. § 45.*]

3. VENDOR AND PURCHASER (§ 231*)—BONA FIDE PURCHASERS—NOTICE—RECORDS.

A grantor conveyed land, the title to which was of record in another, who later conveyed to him, but accepted a reconveyance without actual knowledge that there had been a transfer, including such land, prior to the time the grantor acquired title. *Held*, that to require a grantee in good faith to search the records prior to the time his grantor obtained title would entail upon him too much inconvenience, contrary to the spirit of the recording act and public policy, and, as the grantor's title was clear after the conveyance to him, the prior conveyance could not be asserted as a cloud on the later.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 487, 513-539; Dec. Dig. § 231.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep't Indexes

† Rehearing dismissed December 2, 1912.

Appeal from Common Pleas Circuit Court of Marion County; S. W. G. Shipp, Judge.

"To be officially reported."

Action by Thomas Monroe Richardson against the Atlantic Coast Lumber Corporation. From a judgment for plaintiff, defendant appeals. Affirmed.

M. C. Woods, of Marion, for appellant.
L. M. Gasque and A. F. Woods, both of Marion, for respondent.

GARY, C. J. This appeal raises the question whether the record of a deed conveying certain lands, with the usual covenants of warranty, which includes a tract of which the grantor was not then owner, but which was subsequently conveyed to him by the owner, and afterwards reconveyed to the owner by him, affords such constructive notice as will prevent the owner from relying upon the plea of purchaser for valuable consideration, without notice, against the grantee of the recorded deed, when it appears that the owner was in the actual possession of his land, under a previously recorded deed, at the time it was wrongfully conveyed.

The facts are thus stated in the brief of the appellant's attorney: "B. Talley Richardson and T. Monroe Richardson are father and son, and reside together in Button's Neck township, Marion county. On February 24, 1899, B. Talley Richardson conveyed to Tilghman Lumber Company, with general warranty, certain timber and easement on 168 acres, more or less. This conveyance was duly recorded. By successive conveyances, also all duly recorded, the timber and easements conveyed by Richardson to Tilghman Lumber Company became the property of Atlantic Coast Lumber Corporation. It subsequently transpired that Richardson did not own all of the land within the boundaries, on which he undertook to convey the timber and easements, but that the boundaries in his grant included about 25 acres that belonged to his son, T. Monroe Richardson. On October 22, 1904, while the grant to Tilghman Lumber Company was still of force, T. Monroe Richardson conveyed to B. Talley Richardson the 25 acres in question, and B. Talley Richardson became the owner in fee of all of the land embraced within the boundaries of the timber deed. B. Talley Richardson retained title to the 25 acres until November 8, 1907, a little over three years, when he conveyed the same back to T. Monroe Richardson. In 1908 the Atlantic Coast Lumber Corporation, claiming under the grant to Tilghman Lumber Company, which was still of force, entered upon the entire tract of land and cut the timber therefrom, including the 25 acres which originally belonged to T. Monroe Richardson, which T. Monroe Richardson had conveyed to his father, B. Talley Richardson, and which B. Talley Richardson had reconveyed to his son, T. Monroe Richardson. T.

Monroe Richardson then sued for damages for the timber cut, and recovered a verdict for \$750 actual damages and \$150 punitive damages. The Atlantic Coast Lumber Corporation in due time appealed to this court, and the cause now comes to this court on the exceptions set forth in the record."

To which should be added the statement that the respondent, T. M. Richardson, went into possession of the 15 acres of land under a deed from J. T. and Martha Dimery, dated the 3d of May, 1892, which was recorded on the 21st of July, 1892, and he has continued in actual possession thereof without interruption, except by the alleged trespass of the defendant, until the commencement of this action.

In the language of the appellant's attorneys, the ruling of his honor, the presiding judge, was as follows: "Defendant claimed at the trial below, and still claims under this state of facts, that when B. Talley Richardson acquired the title to the land on which his son's timber stood, under his general warranty, the title to the timber which stood on this land immediately inured to the benefit of the grantees of the Tilghman Lumber Company, and became vested in them. His honor ruled and charged that, had B. Talley Richardson continued to hold title to the land which originally belonged to his son, he would be estopped from denying the title of Tilghman Lumber Company's grantees, but that his son would not be estopped from denying such title, unless the son had actual notice of the claim of the grantee of the Tilghman Lumber Company; and, further, that the fact that the deed of the Tilghman Lumber Company and its grantees being recorded was no notice with which the son was chargeable." We shall discuss this question at some length, as it is, perhaps, one of the most important, affecting the title to real estate.

[1] The principle is settled beyond controversy in this state that if a grantor conveys land, with the usual covenants of warranty, to which at that time he has no title, but afterwards acquires a title, he is estopped from claiming that he did not have title at the time of the sale; and the after-acquired title inures to the benefit of his grantee. *Craig v. Reeder*, 3 McCord, 411; *Robertson v. Sharpton*, 17 S. C. 592; *Gaffney v. Peeler*, 21 S. C. 55. But the question now under consideration has not heretofore been judicially determined in this state.

The principle is thus stated in *Pom. Eq. Jur.* vol. 2, § 658: "If the records show a good title vested in the vendor at a certain date, and nothing done by him after that time to impair or incumber the title, it would seem that the policy of the registry acts is thereby accomplished; the purchaser is protected; he is not bound to inquire further back, and to ascertain whether the vendor has done acts which may impair his

title, prior to the time at which it was vested in him, as indicated by the records. This view is supported by many decisions—it seems by the weight of authority—which hold that a purchaser need not prosecute a search for deeds or mortgages, made by his own vendor, further back than the time at which the title is shown by the records to have been vested in such vendor; or, in other words, a purchaser is not bound by the registry of deeds or mortgages from his vendor, made prior to that time."

When B. T. Richardson reconveyed the land to T. M. Richardson on the 8th of November, 1907, there was nothing upon the record indicating that B. T. Richardson had ever acquired any other title than that derived from T. M. Richardson on the 22d of October, 1904.

Section 214 of Wade on Notice is as follows: "The purchaser is not charged with notice from the record of conveyances from his grantor, prior to such grantor's acquisition of title. In such cases the subsequent purchaser would not be estopped by the record of a mortgage from his grantor prior to the date of his grantor's deed. To hold otherwise would be to impose on the purchaser the duty of examining the records indefinitely." And in section 216 the same author says: "Upon both principle and authority, it seems more consonant with the recording acts to absolve purchasers from the duty of examining the records for conveyances from their grantors prior to the time when they had a title to convey."

In *Wheeler v. Young*, 76 Conn. 44, 55 Atl. 670, the rule is thus stated: "To carry this doctrine to the extent of giving priority to the title of one who, from his negligent failure to examine the records, has been induced to purchase land of a person having no title, over that of one who, without negligence, in good faith and for value, and without knowledge of such prior deed, has purchased after his grant, or has acquired title from one having both the legal and record title, is opposed to the principles of equity and to the spirit of our registry laws. * * * The doctrine of estoppel is one which, when properly applied, 'concludes the truth in order to prevent fraud and falsehood, and imposes silence on a party only when, in conscience and honesty, he should not be allowed to speak.' *Van Rensselaer v. Kearney*, 11 How. 297 [13 L. Ed. 703]."

In the case of *Doswell v. Buchanan's Executors*, 3 Leigh (Va.) 365, 23 Am. Dec. 280, the court uses this language: "The enrollment and registry acts of England and our recording acts are expressly declared to be made for the benefit of subsequent purchasers; to protect them from secret conveyances. These acts, then, ought not to be turned to the injury of those for whose benefit they were made, unless it be in obedience to some express provision contained in them. But

there is none such. They declare that all deeds, etc., shall be void as to subsequent purchasers, unless duly recorded; but they nowhere declare that such recording shall charge the subsequent purchasers with notice of the deed. If not recorded, the deed is void as to him; if recorded, it is only so far valid that it passes to the bargainee the title it purports to convey, provided the bargainor had that title; if he had it not, the deed cannot pass it, though recorded, nor will the putting of it on record affect the conscience of a subsequent purchaser of the legal title with the equity which the deed raised between the bargainor and the bargainee. The laws had no such intention; nor will their words bear such construction. That this is settled doctrine in England, there are many cases to show"—citing numerous cases.

The court, in the case of *Bingham v. Kirkland*, 34 N. J. Eq. 229, thus discusses the effect that would follow if the record in such cases should be construed to give constructive notice: "It would involve a search against every person whom the title in its transmission had ever touched, not merely for the period during which such person held the title, but for a period anterior thereto, during which any incumbrance might have been made and still exist. Such a construction of the scope of constructive notice, imputed to a subsequent purchaser by our recording acts, is opposed to the sentiment of the bar of this state, as it has existed from the earliest period of their enactment. The system of searching practiced, so far as I know or have been informed, without any deviation, has been to trace the line of record title, and search against each owner during the period that he held the title. The titles to the real estate in this state rest upon searches made in conformity to this view. And it is a sensible view. No one is supposed to convey or incumber property which he does not own. 'Non dat qui non habet.'"

In *Blake v. Graham*, 6 Ohio St. 580, 67 Am. Dec. 360, the rule is thus stated: "It is well settled that the record or registry of a deed is constructive notice only to those who claim through or under the grantor by whom such deed was executed. * * * In the last-named case (*Bates v. Norcross*, 14 Pick. [Mass.] 224), the court says: 'To hold the proprietors of land to take notice of the records of deeds, to determine whether some stranger has without right made conveyances of their lands, would be a most dangerous doctrine, and cannot be sustained with any color of reason or authority. * * * These rules rest upon the obvious reason that a searcher can be fairly supposed to be made acquainted with the contents of such deeds only as, in the process of tracing link by link his chain of title on the record, necessarily pass under his inspection.'"

Judge Hare, in a note to the *Duchess of Kingston's Case*, 2 Smith's Lead. Cas. (8th Ed.) 734, says: "It necessarily tends to give a vendee, who has been careless enough to buy what the vendor has not to sell, a preference over subsequent purchasers, who have expended their money in good faith, and without being guilty of negligence." He was therefore opposed to a doctrine that was so unjust.

In the case of *Ford v. Unity Church*, 120 Mo. 498, 25 S. W. 394, 23 L. R. A. 561, 41 Am. St. Rep. 711, to which there is a valuable and exhaustive note, the court quotes with approval the following language from Mr. Rawle's excellent work on Covenants for Title, as follows: "This rule, when applied to the case of a bona fide purchaser for value, without notice, cannot harmonize with the spirit of our registry laws in force in this country, and leads to the position, which certainly cannot be considered as tenable, that a purchaser must search the registry of deeds, not only from the time when his grantor acquired title, but also for a series of years before that time, in order to discover whether he had previously made any conveyance (though without title) to any other person; for, if he had, that person, according to this doctrine, holds the estate as against this person, and, if the property has passed through several hands, a similar search must be made as to each." After making this quotation, the court uses this language: "He says nothing is more simple than what is termed 'the line of title.' It is that the first purchaser should search the title for the deed to his vendor, and trace the title thence back to its source. If he finds no title in him, as would have been the case here, then it is his fault if he takes the deed. Now, as to the second purchaser—one who buys after the vendor acquires a title. He searches until he finds the deed to his vendor, and traces the title back to its source. He finds it regular, and that since his vendor acquired the title he has not conveyed to any one else. He is not expected to look for conveyances from his vendor prior to the time the vendor acquired the title. 'Yet,' as Mr. Rawle says, 'according to the practical effect of the doctrine now being considered, and apart from counterequities, the purchaser who has brought himself within all the provisions of the registry laws, is not protected at all, if his vendor had, before he had acquired title, conveyed to another, with covenants, a title which was without existence or value.'"

The court announced the rule just stated, although the following statute was then of force: "If any person shall convey any real estate by conveyance, purporting to convey the same in fee simple absolute, and shall not at the time of such conveyance have the legal estate in such real estate, but

shall afterwards acquire the same, the legal estate subsequently acquired shall immediately pass to the grantee, and such conveyance shall be void, as if such legal estate had been in the grantor at the time of the conveyance."

[2, 3] The reasons which gave rise to the rule in such cases are: (1) That the grantee is estopped by his conduct from relying upon the record as constructive notice to a subsequent purchaser for value, without notice, because he is guilty of an act of wrong by failing to exercise due diligence to ascertain whether his grantor has a good title, and thus by his negligence participate in casting a cloud upon the title of the owner. (2) A contrary doctrine would not only entail much inconvenience in searching the records, but would render titles to land, to a great extent, uncertain; such a result being against the spirit of the recording acts, as well as against public policy.

The rule is especially applicable in the present case, for the reason that both the grantor and grantee had at least constructive notice of T. M. Richardson's title, not only from the fact that he was in possession, but from his recorded deed. The exceptions raising this question are overruled.

All other questions presented by the exceptions are either dependent upon the conclusions hereinbefore announced, or the appellant has failed to show that there was prejudicial error.

Judgment affirmed.

HYDRICK, WATTS, and FRASER, JJ., concur. WOODS, J., disqualified.

(92 S. C. 14)

STATE v. HERTZOG et al.

(Supreme Court of South Carolina. July 12, 1912.)

1. CONSTITUTIONAL LAW (§ 83*)—IMPRISONMENT—VIOLATION OF CONSTITUTION.

Cr. Code 1902, § 338, providing that it shall be the duty of any contractor or contractors, in the erection or repairing of any building, to pay all laborers, subcontractors, and materialmen out of the money furnished for such erection or repairing, and that said laborers, subcontractors, and materialmen shall have the first lien on such money, but that nothing shall prevent any contractor from borrowing money on such contract, and that no contractor who shall expend money loaned upon such contract or received thereon, and on that account fail to pay any laborers, subcontractors, or materialmen, shall be deemed guilty of a misdemeanor, punishable by imprisonment, is not a violation of the Constitution in providing imprisonment for debt; the offense arising out of the wrongful misappropriation of money received under the contract.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 150-151½; Dec. Dig. § 83.*]

2. CONSTITUTIONAL LAW (§ 48*)—CONSTRUCTION OF STATUTES—VALIDITY.

It is the duty of the court, when a statute can be given a reasonable meaning consistent

with the Constitution, to construe it as having such meaning, in order to uphold its validity.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 46; Dec. Dig. § 48.*]

3. CONSTITUTIONAL LAW (§ 238*)—EQUAL PROTECTION OF LAW—REASONABLE CLASSIFICATION.

Nor is the above section a violation of Const. U. S. Amend. 14, or Const. art. 1, § 5, in depriving building contractors of the equal protection of laws by an arbitrary classification; the state having a wide discretion in making classifications in the exercise of its police power, and building contractors being usually of a much less financial responsibility than railroad and paving contractors.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 688-699, 706-708; Dec. Dig. § 238.*]

4. CRIMINAL LAW (§ 15*)—REPEAL—GENERAL LAW—SPECIAL LAW—OFFENSES.

Cr. Code 1902, § 337, contains the general law for the punishment of the offense of disposing of personal property which is subject to liens; while section 338, enacted subsequently, makes it a misdemeanor for building contractors to dispose of moneys received under the contract, without paying laborers, materialmen, and subcontractors. Held that, as the latter section specifically applies to offenses of building contractors, those offenses are taken out of the scope of the general provision of the earlier section.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1, 16-20; Dec. Dig. § 15.*]

5. CRIMINAL LAW (§ 1030*)—APPEAL—PRESENTATION OF GROUNDS OF REVIEW IN COURT BELOW.

An objection that a criminal statute is unconstitutional, because its penal provision is not a subject expressed in the title of the act, not having been raised in the court below, cannot be reviewed on appeal.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2619-2621, 2629, 2632, 2653; Dec. Dig. § 1030.*]

Gary, C. J., and Watts and Fraser, JJ., and De Vore, Circuit Judge, dissenting.

Appeal from General Sessions Circuit Court of Marlboro County.

"To be officially reported."

E. L. Hertzog and R. H. Rudisall were indicted for disposing of money subject to a statutory lien, and from an order denying a motion to quash the indictment, they appeal. Modified and affirmed.

The following are the reasons of appeal which the court requests shall be published:

"First. Because the indictment contains three counts, two under the act of 1896 [Act March 2, 1896, 22 St. at Large, p. 198], as amended by the act of 1897 [Act March 2, 1897, 22 St. at Large, p. 487]. And the third under the act making it a misdemeanor to dispose of property under a lien without the written consent of the lienor, and cannot be sustained as to the third count of the indictment, for the reason that the special remedy provided by the acts of 1896 and 1897 is exclusive and must be pursued.

"Second. Because the indictment does not state facts sufficient to constitute an offense,

as to the first and second counts, against the laws of South Carolina, in that the statute under which it is brought is in violation of article 1, § 24, of the Constitution, which is as follows, 'No person shall be imprisoned for debt, except in cases of fraud,' in that the statute makes the mere failure of the contractor, erecting buildings, to pay laborers or persons furnishing materials received by him, a misdemeanor, without providing that the failure to pay must be fraudulent, or that there must be fraud on the part of the contractor in failing to do so. The statute punishes a person by imprisonment for failing to pay a debt.

"Third. In that the said statute is in violation of Article 1, § 5, of the Constitution of South Carolina, which is as follows: 'The privileges and immunities of citizens of this state and of the United States under this Constitution shall not be abridged, nor shall any person be deprived of life, liberty or property, without due process of law, nor shall any person be denied the equal protection of the laws.'

"(A) In that contractors, building houses, are only made indictable for failure to pay over to laborers and materialmen money received by them, while all other contractors are exempt from indictment.

"(B) The statute does not give equal protection to other kinds of laborers than laborers on buildings, and to other materialmen than those furnishing materials for buildings.

"(C) The statute discriminates in favor of laborers on buildings and persons furnishing materials for buildings, and against all other kinds of laborers and materialmen.

"(D) The statute does not give the equal protection of the law to a class similarly situated, because all laborers are to be classified together, and all materialmen are to be classified together; whereas in the statute only laborers on buildings and persons furnishing materials on same are entitled to be paid, else the contractor makes himself criminally liable.

"(E) All contractors belong to a class similarly situated. But this statute discriminates against contractors erecting buildings, makes them liable to indictment for doing that which other contractors may do with impunity.

"Fourth. The statute is in conflict with the fourteenth amendment to the Constitution of the United States, in that it does not afford equal protection of the laws.

"Fifth. Because by the terms of the act the offense of breach of trust with fraudulent intent is not created, for the reason that the lien is created on the property of the contractor, and not on that of the laborer or person furnishing materials, and there could be no breach of trust in the using of money, which is his own property, by the contractor."

Solicitor J. Monroe Spears, of Darlington, D. D. McColl, J. W. Le Grand, and J. K. Owens, all of Bennettsville, for the State. Nicholls & Nicholls, of Spartanburg, and Townsend & Rogers, of Bennettsville, for appellants.

WOODS, J. This appeal is from an order of the court of general sessions, refusing to quash an indictment against the defendant containing counts charging disposition by him of money subject to a statutory lien, in violation of sections 337 and 338 of the Criminal Code. Section 337 is the familiar statute which, in general terms, made a criminal offense the disposition of any personal property upon which a lien exists, without paying the lien debt, or depositing the amount of it with the clerk of the court.

[1, 2] The case turns mainly on the constitutionality of the penal provisions of section 338, which reads as follows: "It shall be the duty of any contractor or contractors, in the erection, alteration or repairing of buildings in the state of South Carolina, to pay all laborers, subcontractors and materialmen for their lawful services and material furnished out of the money received for the erection, alteration or repairs of buildings upon which said laborers, subcontractors and materialmen are employed or interested, and said laborers, as well as all subcontractors and persons who shall furnish material for said building, shall have a first lien on the money received by said contractor or contractors for the erection, alteration or repair of said buildings in proportion to the amount of their respective claims. Nothing herein contained shall make the owner of the building responsible in any way: Provided, that nothing contained in this section shall be construed to prevent any contractor or contractors or subcontractors from borrowing money on such contract. Any contractor or contractors or subcontractors who shall, for other purposes than paying the money loaned upon said contract, expend and on that account fail to pay to any or all laborers, subcontractors and materialmen out of the money received as provided in this section and as admitted by such contractor or contractors, or as may be adjudged by any court of competent jurisdiction, shall be deemed guilty of a misdemeanor, and upon conviction, when the consideration for such work and material shall exceed the value of one hundred dollars, shall be fined not less than one hundred dollars nor more than five hundred dollars, or imprisonment not less than three months nor more than twelve months; and when such consideration shall not exceed the value of one hundred dollars, shall be fined not more than one hundred dollars or imprisoned not longer than thirty days: Provided, said contractor or contractors or subcontractors may have the right of arbitra-

tion by agreement with said laborers, subcontractors and materialmen."

The specific charge against the defendant under this section is that, as a contractor for the alteration and repair of certain buildings of W. S. Mowry, he collected \$1,723.12, and expended it for other purposes than paying the money loaned on the contract, and on that account failed to pay R. J. Easterling Company for material furnished to the amount of \$606.62.

Defendant contends that the criminal enactment of section 338 is unconstitutional, in that (1) it provides imprisonment for debt without proof of fraud; and (2) it arbitrarily discriminates against contractors for buildings by creating a lien on money received by them in favor of subcontractors, laborers, and materialmen, and by making them criminally liable for failure to apply the money received on their contracts to the discharge of the lien, while no such burdens are imposed on other contractors.

If the court can discern in the statute any reasonable meaning consistent with the Constitution, it must adopt that as the true meaning, in order to uphold the statute. Taking the section in its entirety, it cannot fairly be construed to provide for imprisonment for the mere failure to pay a debt. The first paragraph impresses on the money received by the contractor on his contract a lien in favor of laborers, subcontractors, and materialmen. The second paragraph enacts that, if the contractor shall pay out the specific fund which has come into his hands, and which must remain there subject to the lien, for other purposes than paying the money loaned on his contract, and on that account fail to pay laborers, subcontractors, and materialmen out of the money so subject to their lien, then he shall be deemed guilty of a misdemeanor. This being so, the natural and, indeed, the only reasonable construction of the statute is that it makes penal, not the mere failure to pay a debt, but the disposition by the contractor of a specific sum of money held by him under a lien, so as to defeat the lien. Under this construction, the statute does not violate the constitutional inhibition against imprisonment for debt, except in cases of fraud. On this point the case falls entirely outside the principle on which *Ex parte Hollman*, 79 S. C. 9, 60 S. E. 19, 21 L. R. A. (N. S.) 242, 14 Ann. Cas. 1105, was decided, and within the rule laid down in *State v. Barden*, 64 S. C. 207, 41 S. E. 959.

[3] Unsound, also, is the objection that the statute violates the fourteenth amendment of the Constitution of the United States and section 5, art. 1, of the Constitution of this state. The rules with respect to the legislative power under the fourteenth amendment have been thus restated by the Supreme Court of the United States, in the recent case of *Lindsley v. Natural Carbonic Gas Co.*, 220 U. S. 61, 31 Sup. Ct. 337, 55 L.

Ed. 369: "(1) The equal protection clause of the fourteenth amendment does not take from the state the power to classify in the adoption of police laws, but admits of the exercise of a wide scope of discretion in that regard, and avoids what is done only when it is without any reasonable basis, and therefore is purely arbitrary. (2) A classification having some reasonable basis does not offend against that clause, merely because it is not made with mathematical nicety, or because in practice it results in some inequality. (3) When the classification in such a law is called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed. (4) One who assails the classification in such a law must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary."

A like construction has been placed by this court on section 5, art. 1, of the state Constitution, which, on this point, is like the fourteenth amendment of the Constitution of the United States. *Simmons v. Western Union Telegraph Co.*, 63 S. C. 430, 41 S. E. 521, 57 L. R. A. 607; *Johnson v. Spartan Mills*, 68 S. C. 339, 47 S. E. 695, 1 Ann. Cas. 409. The classification here is far from being arbitrary. Contractors for the erection, alteration, and repair of buildings in the main, do work on a much smaller scale than contractors for railroads or streets or other works. Many, if not the majority, of the former are men of small means, and generally their laborers, subcontractors, and materialmen must be paid, if paid at all, from the funds received on the contract. Without casting about for other reasonable grounds of classification, it is enough to say that the defendant has not discharged the burden which the law places on him of showing that the classification is altogether arbitrary.

[4] The motion to quash the third count of the indictment, framed under section 337 of the Criminal Code, we think, should have been granted. Section 337 contains the general law for punishment of the offense of disposing of personal property under liens. Section 338, enacted later, contains the special provisions on the same subject applicable only to liens in favor of certain persons on certain moneys in the hands of contractors for the erection, repair, and alteration of buildings. Construing the two statutes together, it is manifest that section 338 must be regarded as taking the special liens and the disposition of money subject to them out of the general provision of law contained in section 337, and providing a different and an exclusive punishment for the disposition of money subject to such liens. It follows that, for the criminal disposition of money subject to the lien provided for in section

338, a contractor can be indicted only under that section.

[5] The point that the statute now standing in the Criminal Code as section 338 was not enacted as required by the Constitution, because the penal provision is a subject not expressed in the title of the act as passed in 1896, not having been made in the circuit court, is not available to the defendant in this court.

The judgment of the circuit court is modified according to the views herein expressed.

HYDRICK, J., and ERNEST GARY, PRINCE, GAGE, MEMMINGER, WILSON, SEASE, and FRANK B. GARY, Circuit Judges, concur.

GARY, C. J. (dissenting). This is an appeal from an order refusing to quash an indictment, charging the defendant with a violation of sections 337 and 338 of the Criminal Code, which are as follows:

Section 337: "Any person or persons, who shall sell or dispose of any personal property, on which any mortgage or other lien exists, without the written consent of the mortgagee or lienor, or the owner or holder of such mortgage or lien, and shall fail to pay the debt secured by the same, within ten days after such sale or disposal, or shall fail in such time to deposit the amount of the said debt with the clerk of the court of common pleas for the county in which the mortgage or lien debtor resides, shall be deemed guilty of a misdemeanor, and on conviction thereof, shall be imprisoned," etc.

Section 338: "It shall be the duty of any contractor or contractors, in the erection, alteration or repairing of buildings in the state of South Carolina, to pay all laborers, subcontractors and materialmen for their lawful services and material furnished out of the money received for the erection, alterations or repairs of buildings upon which said laborers, subcontractors and materialmen are employed or interested, and said laborers, as well as all subcontractors and persons who shall furnish material for said building, shall have a first lien on the money received by said contractor or contractors for the erection, alteration or repair of said buildings in proportion to the amount of their respective claims. Nothing herein contained shall make the owner of the building responsible in any way: Provided, that nothing contained in this section shall be construed to prevent any contractor or contractors or subcontractors from borrowing money on such contract. Any contractor or contractors or subcontractors, who shall, for other purposes than paying the money loaned upon said contract, expend and on that account fail to pay to any or all laborers, subcontractors and materialmen out of the money received as provided in this section and as admitted by such contractor or con-

tractors, or as may be adjudged by any court of competent jurisdiction, shall be deemed guilty of a misdemeanor, and upon conviction, when the consideration for such work and material shall exceed the value of one hundred dollars, shall be fined not less than one hundred dollars nor more than five hundred dollars, or imprisonment not less than three months nor more than twelve months; and when such consideration shall not exceed the value of one hundred dollars, shall be fined not more than one hundred dollars or imprisoned not longer than thirty days: Provided, said contractor or contractors or subcontractors may have the right of arbitration by agreement with said laborers, subcontractors and materialmen."

The appellant's exceptions will be reported.

The first question that will be considered is whether laborers, subcontractors, and materialmen have a lien, under section 338, for services rendered and material furnished by them, on money received by the contractor from those with whom he entered into the contract to erect the buildings, etc.

The appellant's attorneys, in their argument, contend that the act of 1896 (Act March 2, 1896, 22 St. at Large, p. 198), whose provisions are incorporated in the Criminal Code as section 338, is unconstitutional, on the ground that it violates section 17, art. 3, of the Constitution, which provides that "every act or resolution having the force of law shall relate to but one subject, and that shall be expressed in the title." This question, however, is not properly before the court for consideration, as it was not urged on circuit, and there has been no ruling upon it.

As the statute, in express terms, gives a lien to laborers, subcontractors, and materialmen, it must be held that they have such right, unless it is obnoxious to some other provision of the Constitution. And it is next contended that it is repugnant to section 24, art. 1, of the Constitution, which provides that "no person shall be imprisoned for debt, except in cases of fraud."

The title of the act of 1896 is "An act to require contractors, in the erection, alteration or repairing of buildings, to pay laborers, subcontractors and materialmen for their services and material furnished." Our construction of that act is that section 1 thereof was intended to provide a civil remedy to protect the rights of laborers, subcontractors and materialmen. It creates a lien in their favor on money received by the contractor for the erection, alteration, or repairing of buildings, and likewise makes it the duty of the contractor to pay them, for their services and the material furnished, out of the money received by the contractor. Section 2 was intended to punish the contractor criminally for failing to pay the laborers, subcontractors, and material-

men out of the money received by him for the erection, alteration, or repairing of buildings. The act was not intended to punish him for disposing of property under lien. The title of the act and the language of section 2 show that it was not intended to provide a punishment for disposing of property under lien (as the word "lien" is not mentioned in either of them), but for failure to pay the amount due the laborers, sub-laborers, and materialmen. Section 2 of the act of 1896 is therefore repugnant to section 24, art. 1, of the Constitution. *Ex parte Hollman*, 79 S. C. 9, 60 S. E. 19, 21 L. R. A. (N. S.) 242, 14 Ann. Cas. 1105; *Bailey v. Alabama*, 219 U. S. 219, 31 Sup. Ct. 145, 35 L. Ed. 191.

The next question to be determined is whether the first and second sections of the act of 1896 are so interdependent that one cannot operate without the other. The rule is thus stated in *Cooley's Con. Lim.* p. 209: "If, when the unconstitutional portion is stricken out, that which remains is complete in itself, and capable of being executed, in accordance with the apparent legislative intent, wholly independent of that which was rejected, it must be sustained. * * * If a statute attempts to accomplish two or more objects, and is void as to one, it may still be in every respect complete and valid as to the other. But if its purpose is to accomplish a single object only, and some of its provisions are void, the whole must fall, unless sufficient remains to effect the object, without the aid of the invalid portion. And, if they are so mutually connected with and dependent upon each other, as conditions, considerations, or compensations for each other, as to warrant the belief that the Legislature intended them as a whole, and, if all could not be carried into effect, the Legislature would not pass the residue independently, then, if some parts are unconstitutional, all the provisions which are thus dependent, conditional, or connected must fall with them." See, also, *Gilreath v. Greenville*, 63 S. C. 75, 40 S. E. 1023.

Section 1 of the act of 1896 was intended to create a civil remedy; while section 2 had in contemplation a criminal proceeding for the punishment of a contractor who failed to pay the parties therein mentioned out of the money received by him. The two remedies are, in every respect, separate and distinct; and there is no reasonable ground for supposing that the Legislature would not have enacted section 1, if it had known that section 2 could not be carried into effect.

The appellant's attorneys recognize this principle; for, in their argument, they say: "We do not contend that the first section is unconstitutional, for the reason that the power of the Legislature to create liens by statute cannot be denied; but we contend that the second section is unconstitutional."

The next question for consideration is

whether the statute is in violation of section 5, art. 1, of the Constitution, which is as follows: "The privileges and immunities of citizens of this state, and of the United States under this Constitution, shall not be abridged, nor shall any person be deprived of life, liberty or property, without due process of law, nor shall any person be denied the equal protection of the laws."

The principle is thus stated in the case of *Simmons v. Telegraph Co.*, 63 S. C. 425, 41 S. E. 521, 57 L. R. A. 607: "Legislation is not unequal nor discriminatory, in the sense of the equality clause of the Constitution, merely because it is special or limited to a particular class. The decisions of the United States Supreme Court establish that the Legislature has power to make a classification of persons or property, for public purposes, provided such classification is not arbitrary and bears reasonable relation to the purpose to be effectuated, and that the equality clause is not violated, when all within the designated class are treated alike."

The case of *Gulf, C. & S. F. Ry. v. Ellis*, 165 U. S. 150, 17 Sup. Ct. 255, 41 L. Ed. 666, decides that the classification must not be arbitrary; that is, "must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed." Also that such classification must be "based upon some reasonable ground, some difference which bears a just and proper relation to the attempted classification, and is not a merely arbitrary selection." This language is quoted with approval in *Porter v. Railway*, 63 S. C. 169, 41 S. E. 108, 90 Am. St. Rep. 670, *Simmons v. Telegraph Co.*, 63 S. C. 425, 41 S. E. 521, 57 L. R. A. 607, and *Oil Co. v. Spartanburg*, 66 S. C. 37, 44 S. E. 377. These authorities are conclusive of this question; and show that the classification is not obnoxious to section 5, art. 1, of the Constitution.

The appellant also contended that the act of 1896 was inimical to the fourteenth amendment of the United States Constitution, which provides that no state shall deny to any person within its jurisdiction the equal protection of the laws. What has just been said disposes of this question.

Construing the valid portion of section 338 with section 337 of the Criminal Code, it will be seen that section 338 creates a lien on money received by contractors in the manner therein mentioned; and that section 337 is applicable to such a lien. Section 337 was construed by the court in the case of *State v. Barden*, 64 S. C. 206, 41 S. E. 959, and it was held that it was not in conflict with section 5, art. 1, of the Constitution.

The defendants cannot be tried under that count of the indictment charging a violation of section 338 of the Criminal Code, but can be tried under section 337 for unlawfully disposing of the money covered by the lien

described in section 338 of the Criminal Code.

For these reasons, I dissent.

WATTS, J., concurs.

FRASER, J. (dissenting). I do not see my way clear to concur in either of the opinions which have been prepared in this case. It would be a needless waste of time and space to again copy the statutes. I know the Supreme Court, in *State v. Barden*, 64 S. C. 207, 41 S. E. 959, held that section 337 is constitutional; but be it remembered that we are now in the court en banc, the great constitutional court of this state; and, if the court en banc is bound by any other decision, it certainly is bound by its own decision in *Ex parte Hollman*, 79 S. C. at page 13, 60 S. E. at page 21, 21 L. R. A. (N. S.) 242, 14 Ann. Cas. 1105: "We shall not discuss at length the doctrine of stare decisis. It seems obvious it has less force when the constitutional right of the citizen to his personal liberty is involved than in those cases involving the fixedness of property rights and the regularity of procedure. With the profoundest respect for the judges who delivered and concurred in these opinions, we cannot avoid the conclusion that the statute in question provides for imprisonment for debt without proof of fraud, and therefore attempts to deprive the citizen of one of the personal rights guaranteed by the Constitution of the state."

It seems to me we are bound to follow the *Hollman Case*, and not the *Barden Case*, which, in my judgment, is overruled by the *Hollman Case*. In my opinion, the cases are hopelessly in conflict, and the decision of the court en banc must govern. In the *Hollman Case*, at 79 S. C. at page 16, 60 S. E. at page 22, 21 L. R. A. (N. S.) 242, 14 Ann. Cas. 1105, this court says: "The legislative power to make acts criminal and punishable by imprisonment cannot be extended to an invasion of the rights guaranteed the citizen by the Constitution. It is impossible to frame a valid statute punishing by imprisonment the exercise of the right to religious liberty, or the right to petition for the redress of grievances, or the right to be exempt from imprisonment for debt, except in a case of fraud. These are all constitutional rights, which cannot be abridged under the guise of legislation against crime. The exercise of them cannot be crime."

The province of this court is to decide principles, rather than cases. The principle decided in the *Hollman Case* is that imprisonment for nonpayment of debts is allowed only in cases of fraud. In the *Reeder Case*, the court held that motive or intent is immaterial. No other construction is possible. Intent is not in the statute, and no court is justified in supplying it.

Section 337, in short, provides, that, if

any one, with knowledge of the existence of the lien, shall sell any personal property, without the written consent of the lienee, and shall fail to pay the debt within 10 days (deposit is equivalent to payment), he shall be guilty of a misdemeanor, and be fined or imprisoned, or both.

The statute, in the Hollman Case, provided for a willful default without just excuse, and yet the statute was declared to be unconstitutional, because willfulness and inexcusable conduct did not necessarily mean fraudulent conduct. Section 337 contains no such modifying words. Let me illustrate. A mortgagor has in his possession personal property worth \$1,000, covered by a mortgage for \$700. By the act of God, two-thirds of it is destroyed. The mortgagor finds a purchaser for the remnant at a price far beyond its market value. He is offered \$800 for the remnant to-day. He cannot raise the other \$100. What shall he do? Shall he sell and save the mortgagee as much as possible, and take the imprisonment and the inheritable shame of a convict to himself and family, or shall he refuse and save himself at the expense of his creditor? He meets the mortgagee and tells him the condition of affairs. The mortgagee verbally urges the sale, not merely consents. The sale is made. The entire purchase price is delivered to the mortgagee. The mortgagor, not being able to pay the balance of the mortgage debt within 10 days, is, under this statute, liable to imprisonment. Why is he imprisoned? I know of no other answer than that he did not pay the other \$100, i. e., the debt. There certainly is no fraud here. Imprisonment for failure to pay a debt, in the absence of fraud, is declared, in the Hollman Case, to be unconstitutional and beyond legislative power. For these reasons, I am unable to concur in the opinion which sustains section 337.

Section 338, in my judgment, is even worse. This section gives a lien on the money received by contractors for the erection, alteration, or repair of buildings in favor of laborers, subcontractors, and materialmen who have taken part in the construction, etc., of buildings. Why not bridges, roads, factories, etc.? Is not the finished product just as much the result of their labor, attention, and material in the one case as the other? But it is said that there would be too many involved in one case and only a few in the other. I do not think the classification is based on fact. It seems to me that it depends on the size of the bridge and the size of the house. I have seen the statement in an industrial paper that a skyscraper is a bridge on end. It seems to me that there are many kinds of workmen required for the perpendicular bridge, that have no necessary place in the horizontal bridge—for instance, stone masons, brick masons, electricians, plumbers, decorators, painters, etc.—and yet, if the bridge be perpendicular, there is a lien; but, if the bridge be horizontal, there is none. I fail to see

the reasonableness of the classification. But, even if the one is complex and the other simple, it is new doctrine to me that the law can deal only with simple questions.

Again, it is said that the true basis of criminality is that the law makes the contract price a trust fund, and when the contractor does not pay the lien debt he has committed a breach of trust. If that be granted, it still would not sustain the statute, because a breach of trust, to be criminal, *must be with fraudulent intent*. Neither fraud nor anything that imports fraud is contained in this statute. Indeed, the whole intent of the statute, as I see it, is to procure imprisonment for failure to pay the debts, without the necessity to prove fraud. While the statute opens wide the door for fraud, it has only bonds and imprisonment for an honest but unfortunate contractor.

Again, let me illustrate my view. A contractor to build a house. Those with whom he has contracted for his supplies have failed. The price of supplies has risen, and so has labor. The contract price is \$10,000. It has cost A. \$11,000 to build, and he has no other money with which to pay the debts. Under section 337, we have seen that debt means all that is due, every cent. A. has collected \$5,000 on his contract and paid it, every cent, to the laborers, subcontractors, and materialmen. What is A. to do? If he collects the remaining \$5,000 and prorates that among the three classes, he is to be fined or imprisoned for the failure to pay these debts in full. If A. still had the \$10,000, of course, he could pay the \$6,000. The excuse that he has paid the first \$5,000 to these very people does not avail. The statute allows one, and only one, excuse. A. can borrow money on the contract and repay that; but there is no other excuse allowed. If A. is dishonest, his way is clear. He borrows on his contract, puts the money in his pocket, and goes unwhipped of the law. The honest man, who simply miscalculates or is unfortunate, is imprisoned for nonpayment of his debt; while the real criminal is unpunished.

With all of its harshness, section 337 does provide that its provisions shall not apply to those who have no knowledge or notice of the lien. Not so with section 338. No knowledge or notice is necessary. Where a contractor has several contracts in different cities or widely separated places, he must have a foreman on each contract, authorized to contract bills in emergencies. To a knowledge of each of these bills, the contractor is held by a criminal liability. More marvelous still, the contractor is charged with prophetic knowledge of the future determination of courts and juries. These, too, he must pay, or be imprisoned. Ex parte Hollman, 79 S. C. at page 15, 60 S. E. at page 22, 21 L. R. A. (N. S.) 242, 14 Ann. Cas. 1105: "However completely he may show his good faith, and however fully the court and jury may be convinced of his good faith, conviction must

follow, unless the jury think he had just cause to abandon the contract, or that the service required was not reasonable."

Under section 338, the contractor is denied the mercy or justice of the jury. His condemnation is sure, absolute, and unescapable. It makes no difference what the court and jury may think. They do not have to think at all. The questions for them are; Did the prisoner get money on the contract? Did he pay all the debts? If he did not pay all the debts, was he prevented solely because he paid it on a loan on the contract? (It makes no difference for what purpose the money was borrowed, or what he did with the proceeds of the loan.

It seems to me that the statute allows the contractor to divest the vested lien of the three classes. It violated the equal protection of the laws, and provides imprisonment for the nonpayment of debts.

For these reasons, I cannot concur in any opinion which sustains the conviction of the defendants.

DE VORE, Circuit Judge. I concur, for the reason that sections 337 and 338, Or. Code, are unconstitutional, in that they authorize imprisonment for debt, even if there be no fraud involved in the act or acts condemned by said two sections, and made misdemeanors.

(92 S. C. 43)

TRAYNHAM v. CHARLESTON & W. C. RY. CO.

(Supreme Court of South Carolina. July 13, 1912.)

COMMERCE (§ 33*) — TRANSPORTATION OF FREIGHT—"INTERSTATE COMMERCE"—DELAY.

Plaintiff purchased a car of guano which was delivered for transportation from Charleston, destination at Barksdale, both within the state, a part of the route over defendant's railway, however, being through the state of Georgia. *Held*, that such shipment constituted interstate commerce, since the transportation was and hence was not subject to Act Feb. 15, 1907 (25 St. at Large, p. 490), imposing a penalty on carriers for delay.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 26; Dec. Dig. § 33.*]

For other definitions, see Words and Phrases, vol. 4, pp. 3724-3731.]

Hydrick, Fraser, Gage, Rice, and Sease, JJ., dissenting.

"To be officially reported."

On rehearing. Reversed.

For former opinion, see 71 S. E. 813.

F. Barron Grier, of Greenwood, and Simpson, Cooper & Babb, of Laurens, for appellant. W. R. Richey, of Laurens, for respondent.

GARY, C. J. This is an action for the recovery of a statutory penalty and for damages alleged to have been sustained by the plaintiff in consequence of an unreasonable

delay on the part of the defendant in transporting certain articles of merchandise.

The allegations of the complaint, material to the consideration of the questions involved, are as follows: "That heretofore, to wit, on the 4th day of March, 1907, the Ashpoe Fertilizer Company delivered to the Atlantic Coast Line Railroad Company at Charleston, S. C., ten tons of guano, consigned to Z. R. Traynham, at Barksdale, in Laurens county, and state aforesaid. That at Yemassee in the state aforesaid, on March 5, 1907, the Atlantic Coast Line Railroad Company delivered the car containing said guano to the defendant the Charleston and Western Carolina Railway Company for transportation to the plaintiff at Barksdale, S. C. That the distance between Yemassee and Barksdale, both of which are in the state of South Carolina, is not over 200 miles by the nearest railroad route. That although the said car of guano was received by the defendant on March 5, 1907, and the defendant was requested to make prompt shipment thereof, the said car of guano was not delivered to the plaintiff, until the 6th day of April, 1907. That, by and under the statute law of South Carolina, all common carriers doing business in this state are required to transport to its destination all freight received by them for transportation, not exceeding the following limit, * * * and for failure to comply with the said statute, such common carrier so failing shall be subject to a penalty of \$5 per day for every day of delay in excess of the time herein above limited."

The defendant denied that the delivery of the guano at its destination was unreasonably delayed, and alleged that the delay was caused by an unusually heavy movement of freight at that time over the line of the defendant, which caused its yards and tracks to be blocked at the transfer points, and made it impossible to reach the car and move it at an earlier day. The defendant also alleged that the shipment was subject to the laws relating to interstate commerce, and not to state legislation, by reason of the fact that the defendant's line of railway, over which the guano was being transported, lies partly in the state of South Carolina and partly in the state of Georgia. The jury rendered a verdict in favor of the plaintiff for \$60, and the defendant appealed.

The testimony shows that the shipment began and terminated at its destination in this state; that a part of defendant's line, over which it was necessary for it to transport the goods, lies within the state of Georgia.

The first question that will be considered is whether it was an interstate or an intrastate shipment. The cases of *Sternberger v. Railway*, 29 S. C. 510, 7 S. E. 886, 2 L. R. A. 105; *State v. Holleyman*, 55 S. C. 207,

31 S. E. 362, 33 S. E. 366, 45 L. R. A. 567; *Frasler & Co. v. Railway*, 81 S. C. 162, 62 S. E. 14; *Hunter v. Railway*, 81 S. C. 169, 62 S. E. 13; and *Hanley v. Kansas City Ry.*, 187 U. S. 617, 23 Sup. Ct. 214, 47 L. Ed. 333, determine beyond question that it was an interstate shipment.

In the case of *Hunter v. Railway*, 81 S. C. 169, 62 S. E. 13, the same railroad company was involved, and the facts in every respect were similar to those now under consideration, except in that case the delay occurred in the state of Georgia. The title of the act then and now before us for interpretation is: "An act to prevent delays, in the transportation of freight, by railroads in this state." The first section provides: "That from and after May 1, 1904, all railroad companies, doing business in this state, shall transport to its destination all freight received by them for transportation within the state. * * *" 24 St. at Large, p. 671. In that case the court used this language: "Construing the words 'transportation within the state' according to their exact and natural meaning, they do not embrace interstate transportation. (Citing authorities.) The statute, therefore, cannot have operation beyond the territory of the state, and should not be so construed as to interfere substantially with transportation in its interstate feature. * * * Transportation is a part of commerce, and it must be held that the transportation in this instance was not wholly within the state, but was in part within the state of Georgia, and was therefore interstate transportation." If no other language had been used by the court in that case, it would be unnecessary to cite authorities to show that the statute of this state is inapplicable. But the court left open the question whether a case is embraced within the terms of the statute when the delay takes place wholly in this state.

In *Hanley v. Kansas City Ry.*, 187 U. S. 617, 23 Sup. Ct. 214, 47 L. Ed. 333, the court quotes with approval the following language from *Pacific Coast S. S. Co. v. Railroad Commissioners* (C. C.) 18 Fed. 10, 9 Sawy. 253: "To bring the transportation within the control of the state as part of its domestic commerce, the subject transported must be within the entire voyage under the exclusive jurisdiction of the state."

An interstate transportation is continuous in its nature, and, if a state statute could have the effect of breaking the continuity of transportation, it would necessarily interfere with interstate commerce. *State v. Holleyman*, 55 S. C. 207, 31 S. E. 362, 33 S. E. 366, 45 L. R. A. 567. As an interstate transportation must be regarded as an entirety, it is difficult to conceive how a delay may take place within a state without being affected by causes operating at some other place on the line of railroad, even in another state. It would certainly be an onerous burden on

interstate commerce to hold that a shipment, during its actual transportation, could be subjected to state legislation at any point on the line whatever, before it reached its destination.

It is the judgment of this court that the judgment of the circuit court be reversed.

WATTS, J., and ERNEST GARY, COPEs, PRINCE, SPAIN, FRANK B. GARY, and SHIPP, Circuit Judges, concur.

GAGE, Circuit Judge (dissenting). Granting that the shipment was betwixt the states, the mixed issue made is this: Does the requirement of the statute that the car of fertilizers should not be halted in this state except for "good and sufficient cause" constitute a burden upon or hindrance of the carriage of the fertilizers? The testimony does not prove it as a fact, and no just inference shows it as the law.

In my judgment the statute is a valid exercise of the state's power now, and the result below was right and ought to be affirmed.

HYDRICK, J. (dissenting). Lest others may be unjustly criticized for my shortcoming, I want to say that I am solely responsible for the delay in the filing of the decision of the court in this case. The opinion of the Chief Justice was prepared before the case was heard by the court en banc. The opinion of Mr. Justice FRASER was prepared and sent to me within a few weeks thereafter. Since then the papers have been in my hands. Circumstances beyond my control have prevented the preparation of this opinion at an earlier date. I venture to think, however, that the importance of the question involved to the people of this state justifies the taking of all the time that was necessary for its thorough consideration.

The action was brought to recover the penalty of \$5 a day which the statute of this state (25 Stat. p. 490) allows consignees, who are injured by the delay, to recover of carriers for every day of unreasonable delay in the transportation of freight within this state. The defendant received the shipment March 5th, but failed to carry it to destination till April 6, 1907, a delay of more than 30 days, notwithstanding the distance between the points of shipment and destination is not over 200 miles. Notwithstanding both points are within this state, defendant's road runs for a distance of some 20 miles outside the state and through the city of Augusta, Ga. This circumstance affords the defense chiefly relied upon, to wit, that the shipment was interstate, and therefore the state statute does not apply, and, if it does, that it is void, because it is an unlawful interference with and burden upon interstate commerce.

The court instructed the jury as follows: "If the jury find that the car was delayed in South Carolina by reason of conditions

existing on the road of defendant in the state of Georgia, then you must find for the defendant. If the jury find that the delay in the shipment occurred wholly within this state, then I charge you that the plaintiff is entitled to recover \$5 per day for every day the car was delayed in this state, less the time allowed by the statute, Sundays excluded, provided you find that the delay was not brought about by good and sufficient cause. If you find that the delay was brought about by good and sufficient cause, you must find for the defendant, or, if you find that the delay occurred in the state of Georgia, you must find for the defendant." Under these instructions, the verdict of the jury settles the questions of fact in plaintiff's favor that the shipment was unreasonably delayed while it was within this state, and that the delay was due to conditions existing wholly within this state. The questions raised by the expressions, other than the validity of the statute, as applied to the shipment in question, do not require discussion.

The title of the act is: "An act to prevent delays in the transportation of freight in this state." What kind of delays did the Legislature have in mind? The language of the title answers: "Delays in the transportation of freight." Occurring where? Answer: "Within this state." It is clear, therefore, that the Legislature realized and had in mind the limitations upon its power, and, knowing that it could not penalize delays occurring beyond the borders of the state, did not attempt to do so, but, by the language used, made it clear that its intention was to penalize only such delays as occurred within its jurisdiction. This intention is shown also by a consideration of the act as a whole, and especially by the language of the first part of the first section which reads: "That * * * every common carrier doing business in this state shall transport to its destination all freight received by them for transportation within this state within a reasonable time after receipt thereof, not exceeding the following times, after midnight of the day of the receipt thereof, to wit: Between points not over one hundred miles apart, seventy-two hours; between points over one hundred and not over two hundred miles apart, ninety-six hours; and between points over two hundred miles apart, one hundred and twenty hours." To limit the meaning of the words "within this state" here used solely to a modification of the word "transportation," so as to make the language mean that the physical act of transporting must be wholly within the state, is a construction so narrow and technical as to do violence, not only to the legislative intent, but also to the legislative intelligence. The court knows, and must assume that the Legislature knew, that some of the railroad companies doing business in this state, and especially the larger systems,

transport great quantities of freight from point to point within the state by carrying it over lines which run in part beyond the borders of the state. The language used, construed in the light of this fact, plainly shows the intent that the act should apply to all shipments from one point in the state to another point in the state, without regard to whether the actual physical movement was wholly within the state at every stage thereof or not.

In the first place, it will be conceded that the shipment in question is interstate. This court has expressly decided that point. *Hunter v. Railway*, 81 S. C. 173, 62 S. E. 13. But it does not follow by any means that, because it is an interstate shipment, the carrier cannot be penalized under the state law for delay in the transportation of such a shipment, occurring wholly within the state. It seems to me that the fundamental error into which some of my learned Brethren have fallen is that, because the shipment is interstate, it necessarily follows that the carrier is not subject to the state laws with regard to the transportation of it. The power of the states to compel, by proper legislation, interstate carriers and others engaged in interstate commerce to discharge their duties to the public, either those imposed by the common law or by statutes reasonably exerting the police power of the state, has been affirmed so often by the Supreme Court of the United States, whose decisions upon that question are final and controlling, that it can no longer be questioned. That great court has never denied the power of the states, in the absence of any regulation by Congress, to enact such laws when they are only a reasonable exercise of the police power of the states and do not burden or interfere with interstate commerce, although they may incidentally affect it. I shall therefore rely chiefly upon the decisions of that court to sustain the application of the statute of this state to the shipment in question.

Celerity in the movement of freight is of the utmost importance in the promotion of commerce. The statute in question, so far from hindering or burdening commerce, is actually an aid to it by stimulating the carriers to the exercise of proper diligence in the transportation of freight. "A state statute imposing a penalty on railroad companies for the detention of freight more than a limited time after it is received for shipment, without the consent of the shipper, is not void as a regulation of interstate commerce even as applied to freight to be shipped to another state, since the enforcement of such statute would expedite and not obstruct interstate traffic." 17 A. & E. Enc. L. (2d Ed.) 103.

In *Sherlock v. Alling*, 93 U. S. 99, 23 L. Ed. 819, Mr. Justice Field, speaking for the court, said: "It may be said, generally that the legislation of a state, not directed against commerce or any of its regulations,

but relating to the rights, duties, and liabilities of citizens, and only indirectly and remotely affecting the operations of commerce, is of obligatory force upon citizens within its territorial jurisdiction, whether on land or water, or engaged in commerce, foreign or interstate, or in any other pursuit."

In *Western Union Tel. Co. v. James*, 162 U. S. 650, 16 Sup. Ct. 934, 40 L. Ed. 1105, a statute of the state of Georgia, imposing a penalty on telegraph companies for failure to transmit and deliver telegrams "with impartiality and good faith and with due diligence," was sustained and enforced in its application to an interstate telegram. The statute was assailed upon the same ground as the statute here in question, to wit, that it infringed upon the power vested in Congress by the Constitution "to regulate commerce with foreign nations and among the several states." The court held that telegraphic messages from one state to another constitute a part of interstate commerce and come within the protection of the commerce clause of the Constitution; that, if the statute could be construed as regulating commerce between the states, it was void; that enactments which may incidentally affect interstate commerce and the persons engaged in it do not necessarily constitute regulations of that commerce within the meaning of the Constitution; that "legislation which is a mere aid to commerce may be enacted by a state, although at the same time it may incidentally affect commerce"; that a provision for the delivery of telegraphic messages at a station within the state need have no effect upon the conduct of the telegraph company with regard to the performance of its duties outside the state; that obedience to the statute would not unfavorably affect the company or embarrass it in the course of its business; and hence, in the absence of any regulation by Congress, the statute was valid. As observed by the court in that case, the statute undertook to do nothing more than compel the telegraph company to perform its duty. The court said: "The statute in question is of a nature that is in aid of the performance of a duty of the company that would exist in the absence of any such statute, and it is in no wise obstructive of its duty as a telegraph company. It imposes a penalty for the purpose of enforcing this general duty of the company. The direction that the delivery of the message shall be made with impartiality and in good faith and with due diligence is not an addition to the duty which it would owe in the absence of such a statute. Can it be said that the imposition of a penalty for the violation of a duty which the company owed by the general law of the land is a regulation of or an obstruction to interstate commerce within the meaning of that clause of the federal Constitution under discussion? We think not.

No tax is laid upon any interstate message, nor is there any regulation of a nature calculated to at all embarrass, obstruct, or impede the company in the full and fair performance of its duty as an interstate sender of messages. We see no reason to fear any weakening of the protection of the constitutional provision as to commerce among the several states by holding that, in regard to such a message as the one in question, although it comes from a place without the state, it is yet under the jurisdiction of the state where it is to be delivered (after its arrival therein at the place of delivery), at least so far as legislation of the state tends to enforce the performance of the duty owed by the company under the general law. So long as Congress is silent upon the subject, we think it is within the power of the state government to enact legislation of the nature of this Georgia statute. It is not a case where the silence of Congress is equivalent to an express enactment." Again the court said: "While it is vitally important that commerce between the states should be unembarrassed by vexatious state regulations regarding it, yet, on the other hand, there are many occasions where the police power of the state can be properly exercised to insure a faithful and prompt performance of duty within the limits of the state upon the part of those who are engaged in interstate commerce. We think the statute in question is one of that class, and, in the absence of any legislation by Congress, the statute is a valid exercise of the power of the state over the subject."

That case cannot be distinguished in principle from this, for unquestionably it is the duty of carriers, under the general law, to transport freight to its destination within a reasonable time after receipt of it. The statute we are now considering imposes no new duty. It only penalizes the failure to perform the duty imposed by the general law, and implied as an element of the contract of carriage. While it fixes the limits of time within which shipments shall be carried from place to place within given distances, it, in effect, if not in terms, declares the times so fixed to be reasonable, and it even goes further and allows the carrier to relieve itself from the liability incurred by failing to comply with its provisions by proving that such failure was due to good and sufficient cause. But it was expressly decided in *Western Union Tel. Co. v. Commercial Milling Co.*, 218 U. S. 406, 31 Sup. Ct. 59, 54 L. Ed. 1088, 21 Ann. Cas. 815, 36 L. R. A. (N. S.) 220, that "a regulation of interstate commerce, which would be valid if rested upon the common law of the state, is no less valid because made by a state statute." Syllabus. In that case, a statute of Michigan, which made telegraph companies liable in damages for mistakes, errors, or delays caused by

negligence in the transmission or delivery, or for the nondelivery of any repeated or unrepeatd message, was sustained notwithstanding it was applied in a case where the message was sent from the state of Michigan into the state of Missouri, and the negligence by which it was lost occurred in the state of Illinois.

In *Chicago, etc., R. Co. v. Solan*, 169 U. S. 133, 18 Sup. Ct. 289, 42 L. Ed. 688, the validity of a statute of Iowa, prohibiting railroad companies from limiting their liability as common carriers, was affirmed and applied, though the plaintiff was injured while on an interstate train and making an interstate journey. The court said: "Railroad corporations, like all other persons and corporations doing business within the territorial jurisdiction of a state, are subject to its law. It is in the law of the state that provisions are to be found concerning the rights and duties of common carriers of persons or of goods, and the measures by which injuries resulting from their failure to perform their obligations may be prevented or redressed. Persons traveling on interstate trains are as much entitled, while within a state, to the protection of that state as those who travel on domestic trains. A carrier exercising his calling within a particular state, although engaged in the business of interstate commerce, is answerable, according to the law of the state, for acts of nonfeasance or of misfeasance committed within its limits. If he fails to deliver goods to the proper consignee at the right time and place, or if by negligence in transportation he inflicts injury upon the person of a passenger brought from another state, the right of action for the consequent damage is given by the local law. It is equally within the power of the state to prescribe the safeguards and precautions foreseen to be necessary and proper to prevent by anticipation those wrongs and injuries which, after they have been inflicted, the state has the power to redress and to punish. The rules prescribed for the construction of railroads, and for their management and operation, designed to protect persons and property otherwise endangered by their use, are strictly within the scope of the local law. They are not, in themselves, regulations of interstate commerce, although they control, in some degree, the conduct and the liability of those engaged in such commerce. So long as Congress has not legislated upon the particular subject, they are rather to be regarded as legislation in aid of such commerce and as a rightful exercise of the police power of the state to regulate the relative rights and duties of all persons and corporations within its limits."

The last decision by the Supreme Court of the United States upon this subject is *Western Union Tel. Co. v. Crovo*, 220 U. S. 364, 31 Sup. Ct. 399, 55 L. Ed. 498, and it is directly in point. A statute of the state

of Virginia made it the duty of telegraph companies doing business in the state to receive and transmit dispatches faithfully, impartially and with substantial accuracy, as promptly as practicable, and in the order of delivery to the company, with the privilege of giving preference to certain classes of messages, and imposed a penalty of \$100 for failure to comply with its provisions. Crovo delivered a message to be sent from Richmond, Va., to Brockton, N. Y. He sued for and recovered the penalty for the negligent failure to promptly transmit the message, alleging that the negligence occurred within the state, to wit, in the office at Richmond. The court, per Mr. Justice Lurton, states the question to be decided as follows: "The only question for decision is whether a statute of the state of Virginia, which imposes a penalty for the failure to transmit a dispatch received at an office of the company in the state for transmission to a person in another state, is a valid exercise of the power of the state; the delay occurring in the state." The answer to that question is given by the court in the following language: "The requirement of the Virginia statute as here applied is a valid exercise of the power of the state, in the absence of legislation by Congress. It is neither a regulation of, nor a hindrance to, interstate commerce, but is in aid of that commerce. The case is clearly governed by *Western U. Tel. Co. v. James* and *Western U. Tel. Co. v. Commercial Milling Co.*, both above cited." Upon what principle can that case be distinguished from this?

In *Bagg v. Wilmington, etc., R. Co.*, 109 N. C. 279, 14 S. E. 79, 14 L. R. A. 596, 28 Am. St. Rep. 569, the Supreme Court of North Carolina held that "a state statute compelling the shipment of freight within a certain time after receiving it, under a penalty for default, is not an unconstitutional regulation of interstate commerce, as to freight for shipment out of the state, as it tends, not to trammel or obstruct, but to expedite such commerce." Syllabus. That case is also directly in point. The statute imposed a penalty of \$25 a day for every day over five that any railroad allowed freight received by it for shipment to remain unshipped. The court held the statute valid as a proper exercise of the power of the state, as applied in a case where the shipment was from a point in North Carolina to a point in South Carolina. A like principle was involved and decided by this court and sustained by the Supreme Court of the United States in *A. C. L. R. Co. v. Mazursky*, 216 U. S. 122, 30 Sup. Ct. 378, 54 L. Ed. 411, where the validity of the statute of this state, imposing a penalty of \$50 on common carriers for failure to adjust and pay, within the times therein specified, claims for loss of or damage to freight while in the possession of such carriers, was affirmed, though it was applied to interstate shipments. To the same effect is the case of *Skipper v. Railway*, 75 S. C.

276, 55 S. E. 454, 7 L. R. A. (N. S.) 388, 117 Am. St. Rep. 901, 9 Ann. Cas. 808, sustaining section 1710, vol. 1, Code 1902, as applied to interstate shipments, and the principle there decided has been affirmed by the Supreme Court of the United States. *Richmond, etc., R. Co. v. R. A. Patterson Tob. Co.*, 169 U. S. 311, 18 Sup. Ct. 335, 42 L. Ed. 759.

Under the reasoning and authority of the cases hereinbefore cited, I conclude that the statute under consideration is not an unlawful interference with or burden upon interstate commerce, when applied to delays occurring wholly within the state, and that it was intended to be applied only in cases of delay occurring within the state.

Therefore I think the judgment of the circuit court should be affirmed.

RICE and SEASE, Circuit Judges, concur.

FRASER, J. I feel bound to file a dissent to the opinion of the majority of the court in banc in this case on account of the exceeding great importance of the questions involved.

Railroads are quasi public highways. It is the state's business to maintain highways, and, when the state allows its business to be conducted by private persons or corporations, it ought not to lose its power to control the management of them. If the federal Supreme Court shall limit the power of this state to control its own affairs, it will be time enough to concede the loss. If this court surrenders the state's rights, the state is helpless. If this court erroneously upholds the state's power to control the highways within its borders, there is a right of appeal to the Supreme Court of the United States, and the error can be corrected. The respondent here would have no standing with the federal authorities. He concedes they have no jurisdiction. The power of this state to control commerce between its own citizens ought not to be surrendered.

In the view I take of this case, it is necessary to consider appellant's last exception. The appellant refers us to *Frasier & Co. v. Railway Co.*, 81 S. C. 162, 62 S. E. 14. In that case it appears that the strike had been on for more than a month when appellant undertook to transport this car load of guano. It is true that, in the absence of instructions, the transportation company has the right to fix the route, but in fixing the route it seems to me they are bound to fix a possible route, and, when they fix a route they know to be an impossible route, they are responsible for nondelivery in the specified time. The statute allows the transportation company to change the route designated by the shipper when the designated route will be interrupted or incapable of being used at the time, by strike or casualty, preventing the running of its trains.

As to the interstate commerce feature of

this case, I would say: Commerce is the interchange of commodities between the contracting parties. When the contracting parties are citizens of different states, our scheme of government has placed the control in the federal government, which is common to both. Where the contracting parties are citizens of the same state, the control is assigned to the state of which both are citizens. The line of division between these two ought to be clearly defined. The federal government ought to be accorded cheerful obedience in its management of interstate commerce, but the state courts ought to be jealous to guard the rights of the state to control intrastate commerce. Now is this inter or intra state commerce? Both of the contracting parties are residents of this state. Both termini are situated in this state. It does not seem to me that the bare fact that in the course of transportation it passed for a short distance beyond the limits of the state can change the nature of the transaction. It is said that transportation is a part of commerce. Manifestly this is true. Otherwise there would be little intrastate commerce and no interstate commerce. It seems to me that the contract of the parties, and not the method of transportation, fixes the nature of the commerce and the jurisdiction of the federal and state governments. It seems to me that the case of *State v. Holleyman*, 55 S. C. 207, 31 S. E. 362, 33 S. E. 366, 45 L. R. A. 567, sustains this view where the method of transportation was the most primitive, but protected by the nature of the contract.

The fact that the state of South Carolina cannot punish an offense committed in Georgia does not deprive the state of the power to punish for an offense committed in South Carolina. *Lehigh Valley Railroad Co. v. Commonwealth of Pennsylvania*, 145 U. S. 192-205, 12 Sup. Ct. 806, 36 L. Ed. 672. "The tax under consideration here was determined in respects of receipts for the proportion of the transportation within the state, but the contention is that this could not be done because the transportation was an entire thing, and in its course passed through another state than that of the origin and destination of the particular freight and passengers. There was no breaking of bulk or transfer of passengers in New Jersey. The point of departure and the point of arrival were alike in Pennsylvania. The intercourse was between those points and not between any other points. Is such intercourse, consisting of continuous transportation between two points in the same state, made interstate because in its accomplishment some portion of another state may be traversed? Is the transmission of freight or messages between two places in the same state made interstate business by the deviation of the railroad or telegraph line onto the soil of another state? * * * It should be remembered that the question does not arise as to

the power of any other state than the state of the terminal, nor as to taxation upon the property of the company situated elsewhere than in Pennsylvania, nor as to the regulation by Pennsylvania of the operations of this or any other company elsewhere, but it is simply whether, in the carriage of freight and passengers between two points in one state, the mere passage over the soil of another state renders that business foreign which is domestic. We do not think such a view can be reasonably entertained, and are of opinion that this taxation is not open to constitutional objection by reason of the particular way in which Philadelphia was reached from Mauch Chunk."

I do not see that the Lehigh Valley Case is overruled by any of the cases cited. In these cases there was an effort to fix charges for transportation and to punish for offenses committed outside of the states whose laws were invoked. Of course they failed. The state cannot control transportations outside of their territorial limits. The question in each case was the jurisdiction of the several arms of the state government, and the courts held that these arms could not reach so far. It is true in the case of *Fraser & Co. v. Railway* the court does call it interstate business, but, when the court said "there was no evidence that the delay occurred in this state," it was without jurisdiction to render any judgment except to dismiss the proceedings. The same is true of the Hunter Case.

In the Hanley Case and the Sternberger Case the question was the right of State Railroad Commissions to fix rates outside of the state, and it is conceded that they had none. The nature of the commerce was not involved, therefore the name by which it was called is not binding. In the case at bar the contracting parties were of this state, the termini in this state, and the delay for which judgment was given occurred in this state.

It is my opinion that the judgment of the court below ought to be sustained.

(92 S. C. 283)

GUARANTY CO. OF NORTH AMERICA v.
CHARLES.†

(Supreme Court of South Carolina. July 30, 1912.)

CONTRACTS (§ 127*)—ILLEGALITY—OUSTING JURISDICTION OF COURTS.

A provision, in an indemnity bond given to protect a company against loss on a bond of guaranty, that vouchers or other proper evidence of payment of loss by the company should be conclusive evidence (except for fraud) against the indemnitor, was invalid; it being not only an attempt to make the company the sole arbiter of the indemnitor's liability and deprive the court of jurisdiction to try any fact in relation thereto, but being also against public policy.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 608-615; Dec. Dig. § 127.*]

Appeal from Common Pleas Circuit Court of Greenville County; Ernest Gary, Judge. "To be officially reported."

Action by the Guaranty Company of North America against John H. Charles, Sr. From judgment for plaintiff, defendant appeals. Reversed and remanded.

The following are the exceptions referred to in the opinion:

"The defendant appeals to the Supreme Court from the judgment entered upon the verdict rendered in this case at November term, 1910, and will move the Supreme Court to reverse the same and grant a new trial upon the following exceptions:

"(1) The presiding judge erred in admitting in evidence the statements, Exhibits A, B, C, D, E, F, and G, upon the ground that the same are copies, and that the originals are the best evidence thereof.

"(2) The presiding judge erred in admitting in evidence the statements, Exhibits A, B, C, D, E, F, and G, upon the ground that they are ex parte statements furnished by the express company to the plaintiff, and that the defendant should not be bound thereby.

"(3) The presiding judge erred in holding that the voucher or receipt signed by Southern Express Company showing a payment by the Guaranty Company to the express company of \$424.40 on account of claims held by the express company against J. H. Charles, Jr., for defaults in his duty as messenger, was, under the defendant's contract of guaranty, conclusive evidence (except for fraud) of the fact and amount of his liability thereunder, and in directing a verdict for the plaintiff upon this ground. Specifications: (1) Said stipulation is unreasonable. (2) Said stipulation is contrary to public policy and therefore void. (3) Said stipulation has the effect of ousting the courts of jurisdiction in determining the fact and amount of the alleged defaults of the messenger. (4) Such stipulation amounts to constituting the Guaranty Company the absolute arbitrator and Supreme Court in its own case, which is unreasonable, contrary to public policy, and void. (5) Such stipulation amounts to the absolute submission to an arbitrator, before any controversy has arisen, all matters of dispute that may arise under a contract, and depriving the courts of their supervisory control of such disputes, which is unreasonable, contrary, to public policy, and void. (6) Such stipulation amounts to the submission to one of the parties to a contract the final and absolute decision of questions arising under the contract, depriving the other party of his right to inquire into the reasonable care and honest judgment of such arbitrator; the object of the contract not being to gratify taste, serve personal convenience, or satisfy individual preference.

"(4) The presiding judge erred in holding

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes
† Rehearing denied August 12, 1912.

that the contract of the defendant could not be impeached except for fraud, that there was no evidence of fraud, and in directing a verdict for the plaintiff upon this ground. Specifications: (1) The defendant should have been allowed to show that the statements furnished to the Guaranty Company by the express company showing alleged defaults of the messenger were incorrect and unfounded in fact. (2) There was sufficient evidence of fraud, gross negligence, and collusion to require the submission of this issue to the jury. (3) The defendant had the right to show that the statements and settlement between the Guaranty Company and the express company were not the result of reasonable care and honest judgment; that there was sufficient evidence of these facts to require the submission of this issue to the jury.

"(5) The presiding judge erred in not holding that the defendant was not liable for the suit brought upon his guaranty after J. H. Charles, Jr., attained his majority on November 29, 1908, for the reason that said contract of guaranty provides that 'when the above-named party reaches mature age this obligation becomes canceled.'"

Cothran, Dean & Cothran, of Greenville, for appellant. Haynsworth & Haynsworth, of Greenville, for respondent.

GARY, C. J. The following statement appears in the record: "This action was instituted in the court of common pleas, for Greenville county, on the 8th day of October, 1909. The plaintiff prays judgment for the sum of \$424.40 with interest from December 2, 1908, that being the amount paid by the plaintiff to Southern Express Company, under a bond in which the plaintiff was surety, for the faithful performance of duty on the part of John H. Charles, Jr., a messenger employed by Southern Express Company. Before the said bond was executed, the plaintiff secured an obligation from John H. Charles, Sr., in the nature of a guaranty, dated May 22, 1906. The plaintiff brings this action against the defendant, John H. Charles, Sr., for the said sum, upon the obligation of said guaranty. The case was tried before Judge Ernest Gary and a jury at Greenville, November term, 1910. At the close of the testimony, the plaintiff's attorneys made a motion that the court direct a verdict in its favor, for the full amount claimed, upon the ground that the receipt of the plaintiff, for the money paid by it to Southern Express Company, on account of the alleged defaults of the messenger, John H. Charles, Jr., was conclusive of the fact and amount of such defaults, and could not be impeached by the defendant, except for fraud, and that there was no evidence of fraud. Whereupon the presiding judge directed the jury to find a verdict, in favor of the plaintiff, in the sum of \$481.40; that being the amount claimed with interest. Up-

on which verdict judgment has been duly entered, and from which the defendant appeals."

A copy of the bond which is set out in the complaint (omitting the formal parts thereof) is as follows: "May 25, 1906. Know all men by these presents, that I, J. H. Charles, of Greenville, S. C., in consideration of the issue of a bond of guarantee, by the Guaranty Company of North America for Southern Express Company, on behalf of my son, John H. Charles, Jr., not yet of age, hereby agree that I will protect and immediately indemnify said Guaranty Company of North America, against any and all loss, damage or expense it may sustain or become liable for, in consequence of such bond or renewal or extension thereof, hereby admitting that the vouchers or other proper evidence, showing payment by the said Guaranty Company of any such loss, damage or expense, shall be conclusive evidence (except for fraud), against me and my estate, of the fact and amount of my liability hereunder, to said Guaranty Company. It being understood, that when the above-named party reaches mature age, this obligation becomes canceled."

The defendant in his answer alleges: "That any payment made by the plaintiff to Southern Express Company, on account of any alleged loss, sustained by reason of the misconduct of the said John Henry Charles, Jr., has been paid without justification, without settlement with the said John Henry Charles, Jr., voluntarily, when there was no defalcation or other wrongdoing, on the part of the said John Henry Charles, Jr., and in fraud of the defendant's rights in the premises. That John Henry Charles, Jr., attained his majority on the 29th of November, 1908."

The defendant appealed upon exceptions, which will be reported.

The question in the case is whether there was error, on the part of his honor, the presiding judge, in ruling that the vouchers or other evidence, showing payment of loss by the plaintiff, alleged to have been sustained by the Southern Express Company, as the result of misconduct, on the part of John Henry Charles, Jr., was conclusive evidence (except for fraud) of the defendant's liability under his said bond.

While the bond upon its face merely purports to prescribe a rule of evidence, to be applied upon the trial of the case by the court, nevertheless, it is, in effect, an agreement to submit to the plaintiff, as arbitrator, all issues (except fraud) that might arise between it and the defendant, leaving the court powerless to do more than pass a formal order, confirming the award made by the plaintiff, as was done in this case, thus absolutely depriving the defendant of his right to be heard upon the merits of the case.

There are two reasons why the direction of the verdict was erroneous. In the first place, the terms of the bond showed an attempt to oust the court of its jurisdiction, to try any fact upon which the plaintiff's cause of action depended; fraud in this case being a defense.

In the case of *Herbemont v. Percival*, 1 McMul. 59, the syllabus, which correctly states the question decided, is as follows: "The plaintiff and defendant entered into a special written agreement to submit the matters in dispute between them to counsel, but no particular counsel was named, or time when the matter was to be submitted; defendant agreeing to pay, according to the instructions of the counsel, and, in default of their getting a decision, then the plaintiff was to file a bill in the court of equity, and the decree of that court was to be conformed to, by the defendant. This was held to be an agreement to arbitrate. An agreement to arbitrate, or a bond to submit to arbitration, may be the subject of a suit, when the damages stipulated, or the penalty, will authorize a recovery; but such an agreement or bond would not deprive either party of his remedy in the courts, or oust them of their jurisdiction, in regard to the matter in dispute." This case is cited with approval in *Smith v. Thomson*, 1 Strob. 344. This is in accord with the general doctrine, which is thus stated in 2 *Encyc. of Law*, 571: "Where the parties to a contract enter into an absolute agreement, or covenant, that, in case a dispute should arise under such contract, all matters in difference between them relating thereto shall be submitted to arbitration, is void on grounds of public policy, because to give effect to it would be to oust the courts of their jurisdiction." This question has undergone judicial investigation in *Jones v. Enoree Water Co.*, in which the opinion has just been filed.

In the second place, it would be against public policy, if the action of the plaintiff was not to be tested by the rules of common sense and reason. The principle is thus stated in *Thompson v. Security Co.*, 63 S. C. 290, 41 S. E. 464: "When the object of a contract is to gratify taste, serve personal convenience, or satisfy individual preference, the benefit which the promise derives therefrom is of a personal nature, and his pleasure, which he has in view in entering into the contract, consists in its performance to his satisfaction. The personal character of such a contract is an element entering into it of which the promisor is bound to take notice. If the promisee was not allowed to be the sole arbiter of the due performance of the agreement in such cases, he might be compelled to accept what, in his estimation, was of no value or benefit to himself, and which would have deterred him from entering into the contract. In other cases the reasonableness of the promisee's action, in determining the question, is the

element entering into the contract, and a disregard of this element is in the nature of a fraud on the rights of the promisor. It is bad faith and unfair dealing for a person to act unreasonably, in an ordinary business transaction, when there is nothing in the contract of a personal nature. The action of the insurance company in the case under consideration was not dependent upon taste or upon any fact of a personal nature, but solely upon the existence of a fact, in an ordinary business transaction, and it would be bad faith for it to refuse to be governed by reason and common sense in determining the existence of such fact."

There are special reasons why these principles are applicable to the case under consideration. Not only was the amount, but the fact whether anything was due by the defendant was to be determined by an interested party, and there was no provision in the contract that the defendant should have the right to be heard.

It is the judgment of this court that the judgment of the circuit court be reversed, and the case remanded for a new trial.

WATTS and FRASER, JJ., did not hear this case.

WOODS, J. I concur in the result. The case stands entirely apart from the case of *Jones v. Enoree Power Co.*, 75 S. E. 452, recently decided. There the contract was that the single issue of the amount of the damages arising from backwater, caused by the raising of a dam, should be decided by a board of impartial arbitrators as a condition precedent to the right of action; and by the consensus of judicial authority such a contract is valid. Here the contract is that the Guaranty Company, one of the parties to the contract, should be the judge, not of a particular fact, but of the liability of the other party, and that its determination as to his liability should be conclusive. Such a contract is against public policy and invalid, because it is an attempt to substitute for the tribunals established by law a contract tribunal to determine, not some particular, anticipated issue of fact, but the issue of ultimate liability dependent on all the facts and the law. The authorities holding such an attempt futile are cited in *Jones v. Enoree Power Company*.

Even if this contract so limited the matter to be decided by the plaintiff that it would not be invalid as an effort to oust the courts of jurisdiction, yet it is an attempt to make one of the parties the final judge in his own case of a matter of ordinary business accounting as distinguished from matters of personal fancy, taste, convenience, or preference. At the most, such a stipulation cannot be effective further than to make the conclusion of the party in whose favor it is made *prima facie* evidence of the fact of default. *Thompson v. Fidelity, etc., Co.*, 63 S.

C. 290, 41 S. E. 464; *Fidelity, etc., Co. v. Eickhoff*, 63 Minn. 170, 65 N. W. 351, 30 L. R. A. 586, 56 Am. St. Rep. 464.

HYDRICK, J., concurs.

(92 S. C. 127)

CHARLESTON CONSOL. RY. & LIGHTING CO. v. CITY COUNCIL OF CHARLESTON.

(Supreme Court of South Carolina. July 29, 1912.)

1. MUNICIPAL CORPORATIONS (§ 590*)—PUBLIC SERVICE CORPORATION—FIXING CHARGES.

The state will not be presumed to have intended to delegate to municipal corporations the power to fix the charges of public service corporations, unless such intention is clearly and unmistakably expressed.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1309; Dec. Dig. § 590.*]

2. MUNICIPAL CORPORATIONS (§ 619*)—POWERS—CHARGES OF PUBLIC SERVICE CORPORATION.

While the state's power to fix charges of a public service corporation is not conferred upon cities, and a city cannot fix such charges, unless the right to do so is expressly reserved in the franchise under which the public service corporation operates, yet, where this right is so reserved, the city may fix such charges.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1359; Dec. Dig. § 619.*]

3. MUNICIPAL CORPORATIONS (§ 619*)—POWER—FIXING RATES FOR GAS AND ELECTRICITY.

Act Feb. 13, 1912 (27 St. at Large, p. 551), amending Act Feb. 23, 1910 (27 St. at Large, p. 564), creating a public service commission authorized to fix charges for gas and electricity, did not abrogate a right to fix charges, which was expressly reserved by the city of Charleston in the franchise granted to a public service corporation, where the commission had not undertaken to fix such rates.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1359; Dec. Dig. § 619.*]

4. EVIDENCE (§ 83*)—OFFICIAL ACTS—PRESUMPTION.

The members of a city council will be presumed to act justly and without prejudice in fixing the rates to be charged by a public service corporation for gas and electricity.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. § 105; Dec. Dig. § 83.*]

At chambers. Original petition for temporary injunction by the Charleston Consolidated Railway & Lighting Company against the City Council of Charleston. Denied, and relief ordered for consumers.

B. A. Hagood, W. C. Miller, and J. P. K. Bryan, all of Charleston, for petitioner.

WOODS, J. In this action for injunction to restrain the city council of Charleston from enforcing an ordinance fixing the rates to be charged by the Charleston Consolidated Railway & Lighting Company for light, heat, and power, the question now to be decided is whether a temporary injunction should be granted, restraining the city council from enforcing the ordinance pending

the hearing of the cause by the Supreme Court.

By resolution, dated April 9, 1910, the city council of Charleston granted separate franchises to the Charleston Edison Light & Power Company, the Charleston Gas Light Company, and Charleston Consolidated Railway, Gas & Electric Company, allowing these corporations, their successors and assigns, the use of the streets of the city for the erection of poles and other appliances "necessary or proper for the efficient furnishing of light, heat, and power to the city and citizens of Charleston." The franchise was limited to the period of 37 years from March 23, 1910. These corporations afterwards leased all of their property, including the franchises, to the petitioner, the Charleston Consolidated Railway & Lighting Company. The resolution granting the franchise contained the following sections:

"Section 4. Provided always, and this franchise and permission is given upon the express understanding and provision that the several grants and franchises herein made are expressly subject to the Constitution and laws of the state of South Carolina, and are to be so understood and accepted by the said mentioned companies; that is to say, the foregoing grants and franchises are only and so far as the city council has the right and may lawfully grant the same, and that the said respective companies shall indemnify and save harmless the said city council from all suits, actions, claims or damages arising from the exercise by said companies of the rights herein given, or any part thereof.

"Section 5. All and above-mentioned grants and franchises, and every part and portion thereof, are subject to all the ordinances, rules and regulations of the city council of Charleston now existing, or which may be hereafter adopted, governing the construction, erection, conduct, management of, and rates charged for light, heat and power furnished to the city and citizens by all the above-mentioned companies, and also subject to the right of the city council to modify or change the rules and regulations herein provided or contained in the general ordinances of the city council."

On October 10, 1911, the city council, under this resolution, fixed the charges to be made for gas and electricity, and the petitioner complied with the prescribed schedule. The arc lights for the streets were supplied, however, under a special contract with the city running from July 1, 1908, to July 1, 1912. On June 11, 1912, the city council, by ordinance, provided for a material reduction of the charges for gas and electricity furnished the city and private consumers, the reduction to go into effect at the expiration of the special contract for arc lights, July 1, 1912.

In maintaining that the city council had no authority to fix the rates to be charged for gas and electricity by the ordinance of June 11, 1912, the petitioner's counsel lay down, in substance, these propositions: First. The power to fix compulsory rates to be charged by a public service corporation is a power belonging to the state as a sovereign; and the state has never delegated that power to the city council of Charleston. Second. Even if the charter conferred such power on the city council, it was withdrawn by the statute of 1912, providing for the regulation of rates by a commission. Third. If the power to fix the rates to be charged by the petitioner was acquired by the city council under the agreement to that effect contained in the franchise, that agreement was also abrogated by the statute of 1912. Before entering upon the discussion, it may be well to remark that, as the franchise in this case was not exclusive, the act of 1902 (23 St. 1039), providing for exclusive franchises for furnishing light and water to cities and towns, and the conditions on which they may be granted, has no application.

The first proposition is, no doubt, sound; but in accepting it an important distinction is to be observed between power to fix by compulsion the rates to be charged by a corporation acting under a franchise which confers on the city council no power to fix rates, and power to fix rates contracted for by the city council in a franchise granting the use of the city streets or other privileges.

The following rule, stated in 1 Dillon on Municipal Corporations, § 89, was adopted in *Luther v. Wheeler*, 73 S. C. 83, 52 S. E. 874, 4 L. R. A. (N. S.) 746, 6 Ann. Cas. 754, as that supported by unbroken authority: "It is a general and undisputed proposition of law that a municipal corporation possesses and can exercise the following powers, and no others: First, those granted in express words; second, those necessarily or fairly implied in or incident to the powers expressly granted; third, those essential to the declared objects and purposes of the corporation—not simply convenient, but indispensable. Any fair, reasonable doubt concerning the existence of power is resolved by the courts against the corporation, and the power is denied."

[1] The state's power to regulate by compulsion the charges of public service corporations is one of such vast and increasing importance to the public that the courts will not attribute to the state the intention to part with it, or to delegate it, unless the intention is clearly and unmistakably expressed. *Home Telephone & Telegraph Co. v. Los Angeles*, 211 U. S. 265, 29 Sup. Ct. 50, 53 L. Ed. 176; 3 Dillon on Mun. Corp. § 1325. The numerous authorities on the subject are cited in 29 Cyc. 724.

[2] The charter of the city of Charleston, after enumerating many subjects, including

streets, concerning which the city council may legislate, empowers the council to make "in general every other by-law or regulation that shall appear to them requisite and necessary for the security, welfare, and convenience of said city or for preserving peace, order, and good government within the same." Section 1999 of the Civil Code confers like power on the councils of all the towns and cities of the state. These general provisions concerning the management of purely municipal affairs do not express an intention to confer on the municipality the state's power of fixing rates to be charged by public service corporations. Hence, if the petitioner were operating under a state or municipal franchise containing no agreement on the subject, the city council would have no power to fix the rates to be charged.

But, on the other hand, the general control of the streets conferred on the council does carry with it the power to grant a franchise for the use of the streets, for a purpose beneficial to the municipal public, on such conditions as the council may see fit to impose, including the condition that the council may fix the rates; and when the public service corporation accepted the franchise it submitted to and was bound by the conditions. The principle is recognized in *South Bound Ry. Co. v. Burton*, 67 S. C. 515, 46 S. E. 340. The cases on the subject are collected in 28 Cyc. 866, 876, 880.

[3] This rule seems too obvious for extended discussion. Indeed, the petitioner does not deny that the contract embodied in the franchise resolution was valid and binding in all its parts when it was entered into, and that it conferred on the city council the right to fix rates. But the position taken is that the agreement between petitioner and the city council that the latter should regulate the rates was made subject to the state's sovereign power to assert its control over the rate to be charged by public service corporations; and that the state has exercised that power by the statute of 1912, providing for a commission, on which was conferred the power, and has thus destroyed the right to fix rates, conferred on the council by the franchise contract.

It is true that the franchise was granted and accepted in view of the state's power to regulate the rates to be charged, and it may be that the state could, by statute, supplant any rate fixed by the council under the contract. *Spring Valley Water Co. v. Schottler*, 110 U. S. 347, 4 Sup. Ct. 48, 28 L. Ed. 173; *Home Telephone & Telegraph Co. v. Los Angeles*, supra; *Louisville & Nashville R. R. Co. v. Mottley*, 219 U. S. 467, 31 Sup. Ct. 265, 55 L. Ed. 297. Taking the view most favorable to the petitioner, and assuming that the state has reserved that power, I think it clear that, until the commission has exercised its power to fix a different rate, that provided by the contract

stands. The statute relied on by the petitioner is that passed in 1910 (28 St. 564), and amended in 1912 so as to include the county of Charleston (27 St. 551). Sections 1 and 2 are as follows:

"Section 1. Be it enacted by the General Assembly of the state of South Carolina, that there shall be created a public service commission of three reputable and competent citizens of this state, to be appointed by the Governor, by and with the consent of the Senate, who shall be authorized to fix and establish in all cities of this state, now or hereafter incorporated under any general or special law of this state, maximum rates and charges for the supply of water, gas or electricity furnished by any person, firm or corporation to such city and the inhabitants thereof, such rates to be reasonable and just.

"Sec. 2. That upon complaint in writing of twenty or more citizens to the mayor or council of such city, that any person, firm or corporation is charging an unjust or unreasonable rate for water, gas or electricity, furnished by the same, the said city, mayor or council may request the public service commission to summons such person, the members of such firm or the officers of such corporation to appear before them, with their books relating to such matters, when such examination shall be made as may be necessary to determine whether or not the said rates are unjust or unreasonable; and if upon such examination the said public service commission shall determine that the said rates are unreasonable or unjust, and it shall be their duty to fix such rates to be paid for water, gas or electricity as they may deem to be just and reasonable: Provided, that in case the said public service commission shall fix unjust and unreasonable rates the same may be reviewed and determined by the circuit court of the county in which such city is located."

[4] Giving the broadest meaning and full force to the statute, it empowers the commission to make a maximum rate lower or higher than that which it may find fixed by the public service corporation itself, or by some agency which has fixed the rate under the authority of the corporation. Until the commission acts, the power of the corporation to provide its rates is unhampered by the statute. If there had been no contract with the city council with respect to rates, and the Charleston Consolidated Railway & Lighting Company had given notice on June 11, 1912, that after July 1, 1912, it would charge certain rates for its service, those rates would have been legal until the commission had prescribed different rates. The rates fixed by the city council, under the express authorization of the Consolidated Railway & Lighting Company, stand on precisely the same footing as if the company

itself had fixed them. Instead of retaining the right to prescribe its own charges for its service, the company, as the sole consideration for a very valuable franchise, appointed the city council to take its place in the exercise of the right. It is no ground for the repudiation of the appointment and authorization that the state has asserted its right to determine whether the rates fixed under the contract are just and reasonable. It is important to observe that there is no allegation in the complaint that the rates prescribed by the city council are unreasonable. Nor is there any claim that the contract was invalid, because unreasonable and oppressive, in that it gave the city council absolute power in a matter in which it was an interested party. The members of the city council have no personal interest, but act on their responsibility as public officials; and the presumption is that they will act justly and without prejudice. *Spring Valley Water Co. v. Schottler*, supra; *Home Telephone & Telegraph Co. v. Los Angeles*, supra.

The argument in support of petitioner's claim was presented with great ability orally at the hearing and afterwards in writing. Large interests are involved; and, if petitioner's contention should be ultimately sustained, much loss would be entailed by a refusal to grant the injunction. Under these conditions, if I had a serious doubt, it would be resolved in favor of the petitioner, and the injunction granted. But, for the reasons stated, the matter seems plain to me beyond all doubt, and the injunction must be refused.

It is therefore ordered that the application for the temporary injunction be refused, and that the restraining order heretofore granted be revoked. It is further ordered that the petitioner credit each consumer who maintains a current account the excess charged or collected for light, heat, or power since July 1, 1912, over the rates fixed by the city council to go into effect on that day; and that in cases where the account has been closed that the petitioner pay such excess by check delivered in person or mailed to the consumer.

(23 S. C. 81)

STATE ex rel. LYON, Atty. Gen., v. McCOWN et al.

(Supreme Court of South Carolina. July 19, 1912.)

1. STATES (§ 119*)—APPROPRIATIONS—STATE WAREHOUSE.

The appropriation of state money by the State Warehouse Act (Laws 1912, p. 707) is not a violation of Const. art. 10, § 11, prohibiting the appropriation of public revenues to private purposes; the operation of the warehouse for which the money is appropriated be-

ing a public purpose, and the statute being within the state's police powers.

[Ed. Note.—For other cases, see States, Cent. Dig. § 118; Dec. Dig. § 119.*]

2. STATES (§ 150*)—INCREASE OF INDEBTEDNESS — STATE WAREHOUSE — "ORDINARY STATE BUSINESS."

The State Warehouse Act (Laws 1912, p. 707), in so far as it provides for an issuance of bonds and an increase of the public debt, without first submitting the question to the qualified voters, violates Const. art. 10, § 11, prohibiting an increase in the state debt without the consent of the voters except for the "ordinary" and current business of the state; the building of warehouses not being "ordinary" state business, and the bonds not being intended to be for a debt of the state.

[Ed. Note.—For other cases, see States, Cent. Dig. § 144; Dec. Dig. § 150.*]

For other definitions, see Words and Phrases, vol. 6, p. 5027.]

3. CONSTITUTIONAL LAW (§ 211*)—EQUAL PROTECTION OF LAW—STATE WAREHOUSE.

The State Warehouse Act (Laws 1912, p. 707) is not violative of Const. art. 1, § 5, providing that no person shall be denied the equal protection of the laws, nor of the similar provision of the federal Constitution, though it makes no provision for the care or storage of any commodity other than lint cotton.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 678; Dec. Dig. § 211.*]

4. STATES (§ 136*)—STATE WAREHOUSE—RECEIPTS—"SCRIP," CERTIFICATES, OR OTHER EVIDENCE OF STATE INDEBTEDNESS."

The warehouse receipts authorized to be issued under the State Warehouse Act (Laws 1912, p. 707) are not "scrip, certificates, or other evidence of state indebtedness" within the meaning of Const. art. 10, § 7, restricting the issuance of such paper.

[Ed. Note.—For other cases, see States, Cent. Dig. § 133; Dec. Dig. § 136.*]

5. STATES (§ 131*)—APPROPRIATIONS—STATE WAREHOUSE.

The State Warehouse Act (Laws 1912, p. 707), in so far as it makes appropriation for both the years 1912 and 1913, violates Const. art. 10, § 2, providing for an annual tax sufficient only to defray the estimated state expenses for each year and for any existing deficiency.

[Ed. Note.—For other cases, see States, Cent. Dig. § 129; Dec. Dig. § 131.*]

6. STATES (§ 119*)—PLEDGING OF CREDIT—STATE WAREHOUSE.

Laws 1912, p. 986, § 40, authorizing money to be borrowed on the state's credit for the carrying out of the provisions of the act to establish a state warehouse commission (Laws 1912, p. 707), is not violative of Const. art. 10, § 6, providing that the credit of the state shall not be pledged for private purposes.

[Ed. Note.—For other cases, see States, Cent. Dig. § 118; Dec. Dig. § 119.*]

7. STATUTES (§ 64*)—PARTIAL INVALIDITY.

Since the State Warehouse Act (Laws 1912, p. 707) remains incomplete and ineffective to carry out the legislative intent after that part of it which is unconstitutional is stricken out, the entire act is void.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 58-66, 195; Dec. Dig. § 64.*]

"To be officially reported."

Petition by the State, on the relation of J. Fraser Lyon, as Attorney General, against J. W. McCown and others, as State Ware-

house Commission. Judgment for petitioner.

The following is a copy of the statute (Laws 1912, p. 707) referred to in the opinion:

"An act to create and operate a state warehouse system for storing cotton and other commodities.

"Section 1. Be it enacted by the General Assembly of the State of South Carolina: That there shall be elected forthwith by the General Assembly three commissioners, who shall constitute a board, to be hereafter known as the State Warehouse Commission. The term of office shall be for two, four and six years, the members of the board deciding by lot the respective terms of each. In case of a vacancy by death or otherwise on the board of commissioners, the Governor shall appoint a person to fill such vacancy until the next regular session of the General Assembly, when an election shall be held as provided for in this section.

"Sec. 2. The chairman of the board thus created shall be designated by the General Assembly at the time of the election provided for in section 1 of this act, whose duty it shall be to preside at all meetings of the commission and have general supervision of the management of the business of the commission, subject, however, to the approval of the majority of the members of said commission; and it shall be his further duty to enforce and carry out all such rules and regulations as may be adopted by said commission for the control and management of the business provided for in this act.

"Sec. 3. It shall be the duty of the State Warehouse Commission to provide by purchase, lease or otherwise a system of warehouses at the most eligible sites in this state capable of storing not less than 250,000 bales of cotton, and the commission is hereby given power and authority to employ clerks, architects and such other agents and employes as in their judgment they deem necessary, and adopt rules and regulations not contrary to the provisions herein set forth, which, in their judgment, are necessary to carry out the intent and purposes of this act; and the said commission shall have the power to enter into contracts with relation to the matters contained herein, and may sue and be sued in any of the courts of this state: Provided, that only the property held by the said Warehouse Commission for the purposes herein mentioned shall be answerable in any suit or action against them.

"Sec. 4. The manager of the state warehouses shall be appointed and his duties prescribed by the board of commissioners, who shall fix the compensation of such manager, and the said manager shall be subject to removal by the board of commissioners whenever, in their judgment, the public interest demands it.

"Sec. 5. The board of commissioners shall

appoint expert cotton graders whose compensation shall be fixed by the board, and the said cotton graders shall be subject to removal by the board of commissioners whenever, in their judgment, the public interest demands it.

"Sec. 6. The State Warehouse Commission is empowered to acquire such property as they may deem necessary to carry out the purposes of this act, such property to be acquired by lease or purchase, and said commission is empowered to establish a compress in connection with said warehouse system at any point or points in this state where, in the judgment of said commission, it is necessary or practicable to carry out the purposes of this act.

"Sec. 7. All lint cotton properly baled and such other commodities as the commission deem proper shall be received for storage at said state warehouses, and the charges for same shall be fixed by the State Warehouse Commission. Each bale of cotton shall be weighed, graded and numbered so as to be identified at all times, the grades to be according to the standard grades adopted by the United States government. The person depositing the cotton or other commodities shall be given a receipt from the State Warehouse Commission, signed by the manager of the warehouses in which the cotton or other commodity is stored, which receipt shall give the weight, grade and number of each bale of cotton or description of other commodity. The said receipts to be transferable only by written assignment, and the cotton or other commodities which it represents deliverable only upon the production of the original receipt, which is to be marked 'cancelled' when the cotton or other commodity is taken from the warehouse. All cotton or other commodities on storage shall be fully insured.

"Sec. 8. The State Warehouse Commission is hereby and herein authorized and empowered to issue coupon bonds in an amount not to exceed \$250,000.00 in denominations not less than \$500.00 each, and running for a term of thirty (30) years from the date of issue, bearing interest at a rate not to exceed six (6%) per cent. per annum, the interest on said bonds to be payable semiannually, and to execute as security for said bonds a mortgage or deed of trust on any real estate said commission may then own, with the right to said commission to retire by purchase any or all of said bonds at the end of twenty (20) years from the date of issue, the proceeds of said bonds to be used only for carrying out the objects and purposes of this act. In the meantime and until said commission shall find itself able to issue and negotiate the sale of said bonds as herein provided, it shall have power and authority to borrow money upon the notes of said commission not exceeding the sum of \$250,000.00, said notes to run for not exceeding five (5) years, and to bear interest at

a rate not exceeding six (6%) per cent. per annum, said notes being subject to renewal from time to time in the discretion of said commission, and the proceeds of said notes to be used in carrying out the objects and purposes of this act, and that as security for the money so borrowed on said notes said commission shall have the right to pledge by way of mortgage or deed of trust any property, real, personal or mixed, which it may then own: Provided, that said notes shall be taken up and retired when the bonds herein provided for have been issued, negotiated and sold: Provided, further, that the bonds and the notes herein provided to be issued are not to be a debt or obligation of the state of South Carolina: Provided, further, that nothing contained in this section is intended to prohibit said commission from borrowing temporarily, from time to time, on its notes, such amounts of money, not exceeding \$20,000.00, as it may find necessary for the proper conduct of the business of said commission.

"Sec. 9. In fixing the charge for handling and storing cotton, the commission shall, in addition to providing a sinking fund to retire the bonds provided in section 8, also provide a sinking fund for the retirement of the amount advanced by the state, in fifty years.

"Sec. 10. The charges on cotton shall, after the system herein provided for has been put into operation, cover all current operating expenses, it being the intention of this act to make this system self-sustaining and at the same time give storage at actual cost as nearly as practicable.

"Sec. 11. The Warehouse Commission shall have the power to acquire, by lease, any standard built cotton warehouse in the several towns of the state and operate them in all respects, under the provisions of this act, as applied to the state warehouse. That each commissioner, when elected or appointed under this act before entering upon the duties herein imposed, shall execute to the state his official bond in the sum of \$25,000.00 each for the faithful performance of their duties.

"Sec. 12. And the managers, graders, or other officers at any warehouse operated by the state, shall execute such bonds for the faithful performance of their duties as may be required by the State Warehouse Commission. The premiums on all bonds required of officers and employees under the terms of this act shall be paid out of the funds of the commission.

"Sec. 13. Any person offering cotton for sale in the open market can have his cotton weighed and graded at any warehouse operated by the state, and shall receive his certificate setting forth the number, weight and grade of each bale. The fee for such services not to exceed the sum of twenty-five cents for each bale so weighed and graded.

"Sec. 14. The compensation of the chairman shall be \$2,100.00 per annum, and the compensation of the other members of the board shall be \$6.00 per day for each day's attendance and two and one-half (2½) cents per mile for each mile actually traveled, and other necessary expenses actually incurred in the discharge of their duties hereunder.

"Sec. 15. The state board shall make an annual report of the operations of the warehouse system to the General Assembly.

"Sec. 16. The sum of \$5,000.00 is hereby appropriated for the contingent expenses of said board and \$250,000.00 divided into two equal annual installments of \$125,000.00 in 1912 and \$125,000.00 in 1913 to carry out the purposes of this act is hereby appropriated: Provided, that the Attorney General of the state immediately after the approval of this act shall institute in the Supreme Court a proceeding against the said commission for the purpose of determining the constitutionality of this act, and that no part of the moneys herein and hereby appropriated shall become available until the termination of said proceedings.

"Sec. 17. This act shall go into effect immediately upon its approval by the Governor.

"In the Senate House the sixteenth day of February in the year of Our Lord one thousand nine hundred and twelve."

Attorney General Lyon, for the State.
John L. McLaurin, of Bennettsville, and
Duncan C. Ray, of Columbia, for respondents.

GARY, C. J. This is a petition to the court, in the exercise of its original jurisdiction, in which the petitioner prays that an act of the Legislature (Laws 1912, p. 707) entitled "An act to create and operate a state warehouse system, for storing cotton and other commodities," be declared unconstitutional, and that the respondents be enjoined from attempting to enforce its provisions. The return of the respondents to the rule to show cause why the prayer of the petitioner should not be granted was formal, and merely submitted the question involved to the consideration of the court. A copy of the act will be set out in the report of the case.

The circumstances under which the court should declare a statute unconstitutional, the police power, and the unlimited power of the Legislature, except when controlled by constitutional provisions, are discussed, at length, in the case of *State v. Aiken*, 42 S. C. 222, 20 S. E. 221, 26 L. R. A. 345, and that case renders unnecessary the further discussion, in a general way, of these questions, in this proceeding.

The grounds upon which the petitioner contends that the act is unconstitutional are designated by the letters "a," "b," "c," "d," "e," "f," "g," and "h," and will be considered in regular order.

[1] (a) "It appropriates public revenues to private purposes, and provides that the state, through her public officers, engage in an enterprise, in no way incident or relating to any governmental function or matter, the warehouse system provided for therein, being solely for the benefit of private individuals, and is violative of section 11, art. 10, of the Constitution." The ultimate solution of this proposition depends upon the question whether the said act can be construed as a police regulation. The title of the act shows that its object was to create and operate a state warehouse system for storing cotton and other commodities. It will be observed it was not the intention of the statute that the state should become the owner of the cotton or other commodities deposited in the warehouse, nor that the state should operate the warehouse for the purpose of profit. The object of the act may be stated in few words. The cotton growers in this state, and the merchants to whom a large portion of the staple is delivered, in payment of indebtedness for supplies consumed in its production, are, as a rule, unable to hold it but for a short time after the crop is gathered; and a "forced sale" means a sacrifice of profits to them. Knowing this fact, certain speculators, by combination of capital, and manipulation of the money market, are able, for a short time, by reducing the circulating volume of money, to depress the cotton market and fix an unreasonably low price for the cotton crop. They would not, however, be able to control the price but for a short time, and the object of the statute was to give protection to the public, during this period, from an enforced sale of the cotton crop. We deem it unnecessary to discuss at length the manner in which this unreasonable depression in price affects not only the cotton grower, but the people generally, as well as every department of the government, and every governmental agency in the state. In passing this statute, the state was clearly within the exercise of its police power, which in its last analysis simply means the state's right of self-defense. The case of *Barfield v. Stevens Mercantile Co.*, 85 S. C. 186, 67 S. E. 158, and the cases therein cited, tend to show that the act in question, was for a public and not a private purpose.

(b) "It provides that the state shall engage in a private business, not incidental or necessary to the exercise of the police power." What has just been said disposes of this ground.

[2] (c) "It provides for an issue of bonds, and an increase of the public debt, without first submitting the question as to the creation of such new debt to the qualified electors of this state at a general election, in violation of section 11, art. 10, of the Constitution." Section 11, art. 10, of the Constitution, is as follows: "To the end that the public debt of South Carolina may not

hereafter be increased, without the due consideration and free consent of the people of the state, the General Assembly is hereby forbidden to create any further debt or obligation, either by the loan of the credit of the state, by guaranty, indorsement or otherwise, except for the ordinary and current business of the state, without first submitting the question, as to the creation of such new debt, guaranty, indorsement or loan of its credit, to the qualified electors of this state, at a general state election; and unless two-thirds of the qualified electors of this state, voting on the question, shall be in favor of increasing the debt, guaranty, indorsement or loan of its credit, none shall be created or made." There are two reasons why this ground must be sustained: (1) The building of warehouses is not one of the ordinary functions of government. Therefore the issuing of bonds for such purposes cannot be properly regarded as embraced within the words "the ordinary and current business of the state." (2) It appears upon the face of the statute that the bonds were not intended to be a debt or obligation of the state. Bonds can only be issued, under section 11, art. 10, of the Constitution, when a debt or obligation of the state is thereby created.

[3] (d) "It is discriminatory and denies the equal protection of the law, in that no provision is made for expert grading, classifying, weighing, or otherwise putting in a marketable condition, any commodity other than lint cotton, and does not compel the acceptance for storage of any commodity other than lint cotton." The petitioner does not state whether the statute denies the equal protection of the laws, under the state or federal Constitution. The rule in such cases, arising under the federal Constitution, is thus clearly stated by Mr. Justice Van Devanter, in *Lindsley v. N. C. Gas Co.*, 220 U. S. 61, 31 Sup. Ct. 337, 55 L. Ed. 369: "(1) The equal-protection clause of the fourteenth amendment does not take from the state the power to classify in the adoption of police laws, but admits of the exercise of a wide scope of discretion in that regard, and avoids what is done only, when it is without any reasonable basis, and therefore is purely arbitrary. (2) A classification having some reasonable basis does not offend against that clause, merely because it is not made with mathematical nicety, or because in practice it results in some inequality. (3) When the classification in such a law is called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts, at the time the law was enacted, must be assumed. (4) One who assails the classification in such a law must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary." This language also shows that the

classification is not repugnant to section 5, art. 1, of the state Constitution, which provides that no person shall be denied the equal protection of the laws. The case of *State v. Aiken*, 42 S. C. 222, 20 S. E. 221, 26 L. R. A. 345, shows that when a statute is declared to be a police regulation, and the state takes charge of the business, the objection that it is a monopoly cannot properly arise.

[4] (e) "It provides for issuing receipts for commodities stored in warehouses, transferable by written assignment, which receipts are certificates of indebtedness, issued contrary to section 7, art. 10, of the Constitution." Section 7, art. 10, of the Constitution, is as follows: "No scrip, certificate, or other evidence of state indebtedness shall be issued, except for the redemption of stock bonds, or other evidence of indebtedness previously issued, or for such debts as are expressly authorized in this Constitution." Section 7 of the statute under consideration contains these provisions: "The person depositing the cotton or other commodities, shall be given a receipt from the State Warehouse Commission, signed by the manager of the warehouse, in which the cotton or other commodity is stored, which receipt shall give the weight, grade and number of each bale of cotton, or description of other commodity. The said receipts to be transferable only by written assignment, and the cotton or other commodities which it represents, deliverable only upon the production of the original receipt, which is to be marked 'cancelled,' when the cotton or other commodity is taken from the warehouse." It is only necessary to refer to the foregoing language of said section, to show that the receipt therein mentioned, in no respect whatever, partakes of the characteristics of "scrip, certificate or other evidence of state indebtedness."

[5] (f) "It makes appropriations for both the years 1912 and 1913, contrary to the provisions of section 2, art. 10, of the Constitution." Section 2, art. 10, of the Constitution, is as follows: "The General Assembly shall provide for an annual tax sufficient to defray the estimated expenses of the state for each year, and whenever it shall happen that the ordinary expenses of the state for any year shall exceed the income of the state for such year, the General Assembly shall provide, for levying a tax for the ensuing year sufficient, with other sources of income, to pay the deficiency of the preceding year, together with the estimated expenses of the ensuing year." Section 16 of said act provides that "the sum of \$250,000.00, divided into two equal annual installments of \$125,000.00 in 1912, and \$125,000.00 in 1913, to carry out the purposes of this act, is hereby appropriated." If the Legislature contemplated the expenditure of the \$250,000 during the year 1912, then it was necessary to include the whole amount, in the

estimated expenses of the state for 1912, in providing for the annual tax for that year. If, however, it was not contemplated to expend \$125,000 thereof until 1913, then that sum could only be properly included in the estimated expenses for the year 1913, in making provision for the annual tax for that year. Therefore the appropriation of \$125,000 of said amount was in violation of the Constitution.

(g) "It attempts to apply a tax to an object not stated in the law, and thereby violates section 3, art. 10, of the Constitution." Section 3, art. 10, of the Constitution, is as follows: "No tax shall be levied except in pursuance of a law, which shall distinctly state the object of the same, to which object the tax shall be applied." Section 16 of the act appropriates \$250,000 to carry out the purposes thereof. We have already shown that \$125,000 of said amount was not appropriated in the manner provided by law. If it should hereinafter be determined that the entire act must be declared null and void, then it will present a mere abstract question, whether the remaining \$125,000 was properly appropriated.

[8] (h) "The said act, together with section 40 of 'An act to make appropriation to meet the ordinary expenses of the state government for the fiscal year, commencing January 1st, 1912, and to provide for a tax sufficient to defray the same' [Laws 1912, p. 968], provides for pledging the credit of the state for the benefit of private individuals, owners of lint cotton in bales, in violation of section 6, art. 10, of the Constitution of South Carolina; that section 40 of said appropriation act is hereto attached and made a part of this petition, and marked 'Exhibit B.'" Section 40 of the act just mentioned is as follows: "That in anticipation of the taxes hereinbefore levied, the Governor and the State Treasurer and the Comptroller General be, and they are hereby, empowered to borrow, on credit of the state, so much money from time to time, as may be needed to meet promptly, at maturity, the interest which will mature on the first day of July and on the first day of January of each year on the valid debt of the state, and to pay the current expenses of the state government, for the present fiscal year, and for pensions, and for carrying out the provisions of an act to establish a State Warehouse Commission, if the same be declared constitutional by the Supreme Court of the state: Provided, that the sum so borrowed shall not exceed six hundred thousand (\$600,000) dollars." Section 6, art. 10, of the Constitution, provides that "the credit of the state shall not be pledged or loaned, for the benefit of any individual, company, association or corporation; and the state shall not become a joint owner of, or stockholder in any company, association, or corporation. * * *

This ground is disposed of by the conclusion that the act was intended as a police measure, and therefore necessarily related to a subject that was public in its nature.

[7] The last question to be determined is whether the portions of the act that have been declared unconstitutional render it null and void in its entirety. The rule is thus stated in Cooley's Con. Lim. (6th Ed.) pp. 211, 212, and quoted with approval in *Utsey v. Hiott*, 30 S. C. 360, 9 S. E. 338, 14 Am. St. Rep. 910, and *Murph v. Landrum*, 76 S. C. 21, 56 S. E. 850: "If, when the unconstitutional portion is stricken out, that which remains is complete in itself, and capable of being executed in accordance with the apparent legislative intent, wholly independent of that which was rejected, it must be sustained. The difficulty is in determining whether the good and bad parts of the statute are capable of being separated within the meaning of the rule. If a statute attempted to accomplish two or more objects, and is void as to one, it may still be, in every respect, complete and valid as to the other. But if its purpose is to accomplish a single object only, and some of its provisions are void, the whole must fall, unless sufficient remains to effect the objects, without the aid of the invalid portion, and if they are so mutually connected with and dependent upon each other, as conditions, considerations, or compensations for each other, as to warrant the belief that the Legislature intended them as a whole, and if all could not be carried into effect the Legislature would not pass the residue independently, then, if some parts are unconstitutional, all the provisions, which are thus dependent, conditionally or connected, must fall with them." Tested by these principles, the entire act must be declared unconstitutional. Of course, the conclusion that the statute under consideration is void in its entirety does not mean that in its general scope it is not a police regulation, but that it cannot be given effect in its present form, by reason of its failure, in certain respects, to comply with the requirements of the Constitution.

It is the judgment of this court that the act herein mentioned is null and void, and that the respondents be enjoined from attempting to carry its provisions into effect.

WATTS and FRASER, JJ., concur. HYDRICK, J., concurs in the result. WOODS, J., did not sit.

(92 S. C. 175)

LOWRY v. ATLANTIC COAST LINE R. CO.
(Supreme Court of South Carolina. Aug. 2, 1912.)

APPEAL AND ERROR (§ 272*)—SCOPE OF REVIEW—REQUESTS TO CHARGE.

Exceptions to requests to charge, submitted after the charge, as well as after the argument, in violation of rule 11, providing that

requests to charge must be submitted before argument, will not be considered.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1611-1619; Dec. Dig. § 272.*]

Appeal from Common Pleas Circuit Court of Lee County; J. W. De Vore, Judge.

Action by Charley Lowry against the Atlantic Coast Line Railroad Company. From a judgment for plaintiff, defendant appeals. Affirmed.

McLeod & Dennis, of Bishopville, and H. E. Davis, of Florence, for appellant. L. D. Jennings, of Sumter, for respondent.

FRASER, J. The following statement is taken from appellant's argument: "This is an action for damages for personal injury, caused by the plaintiff being struck by a locomotive of the defendant at a public crossing in the city of Sumter. The plaintiff alleged that he was injured as a result of the failure of the defendant to give the statutory signals at the crossing. The defendant alleged that the proper signals were given, and alleged, further, that the defendant was guilty of contributory negligence, in that the injury was the result of the plaintiff having fallen asleep upon the track of the defendant. The trial resulted in a verdict for the plaintiff for the sum of nine hundred and ninety-nine (\$999) dollars. The defendant appealed from the judgment on this verdict."

Argument.

The error alleged was the failure of the circuit judge to charge certain requests submitted by the defendant's attorney. The record shows that after the charge of the trial judge the attorneys for the defendant handed up several requests to charge. When this was done, the following remarks were made by the judge and the plaintiff's attorney: "This request No. 1 here I think is a charge on the facts. You make me tell the jury what state of facts is negligence, and the law says I cannot do that. Mr. Jennings: Are those requests handed up by the defendant? Court: Yes, sir. Mr. Jennings: I have heard nothing about them, and I do not know. I think they were not handed up in time, under the rule of the court. The Court: Yes, sir; I am looking over them now. Mr. Jennings: They ought to be handed up before argument. The Court: I think I have covered most of the requests in my general charge; and they were handed up so late I have not time to see whether or not they are in proper shape. Glancing over them casually, I think I have covered all of them."

Rule 11 says: "Before argument of the case commences, the counsel on either side shall read and submit to the court in writing such propositions of law as they propose to rely on, which shall constitute the request to charge."

Whatever may be said of the right of opposing counsel to know, before he makes his argument, the propositions of law upon which opposing counsel rely, in this case the presiding judge said "they were handed up so late I have not time to see whether or not they are in proper shape." There is no use to have a rule to protect the trial judge, unless an appellate court will enforce the rule.

As all the exceptions refer to the requests to charge, submitted not only after argument, but after the charge, they will not be considered.

The judgment of this court is that the judgment appealed from be affirmed.

GARY, C. J., and WOODS, HYDRICK, and WATTS, JJ., concur.

(92 S. C. 177)

LANCASTER et al. v. SOUTHERN RY., CAROLINA DIVISION.

(Supreme Court of South Carolina. Aug. 8, 1912.)

1. APPEAL AND ERROR (§ 1066*)—HARMLESS ERROR—INSTRUCTIONS.

Where under the evidence it seems that the jury could not have reached, with reason, any other conclusion than that due care required defendant carrier to furnish a light and stool for women alighting from the train, error in instructing that it is a carrier's duty to furnish the same is harmless, though due care does not always require the furnishing of them.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4220; Dec. Dig. § 1066.*]

2. CARRIERS (§ 319*)—INJURY TO PASSENGER ALIGHTING—PUNITIVE DAMAGES.

In view of a carrier's duty to exercise the highest degree of care for safety of passengers, its failure to provide either a stool or light for a woman passenger in getting off the train at a place away from the station, and where there was considerable distance between the car step and the ground, was some evidence of a wanton disregard of an obvious duty, as regards punitive damages.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1340, 1342, 1344; Dec. Dig. § 319.*]

Appeal from Common Pleas Circuit Court of Spartanburg County; R. C. Watts, Judge.

"To be officially reported."

Action by Grace Lancaster and another against the Southern Railway, Carolina Division. Judgment for plaintiffs. Defendant appeals. Affirmed.

Sanders & De Pass, of Spartanburg, for appellant. R. A. Hannon and Jno. Gary Evans, both of Spartanburg, for respondents.

WOODS, J. The plaintiff recovered a judgment for physical injuries under testimony from herself and her husband tending to prove that she was a passenger on defendant's train on the night of January 31, 1909, intending to leave the train at Spartanburg Junction; that when a stop was made just before reaching the station the agents of

the defendant called, "All out for the Junction"; that in alighting from the train in response to the call she fell from the train and suffered a miscarriage, to her great pain and injury; and that the fall was due to the defendant's breach of duty in calling on her to leave the train before reaching the junction, at a place where the distance between the lowest step of the car and the ground was so great as to make alighting unsafe without a stool, and its negligence in not furnishing a stool or lights or assistance to enable her to alight in safety. The defendant introduced testimony from the attending physician and other physicians tending to prove that the plaintiff's miscarriage was inevitable, though it might have been hastened by the fall. Mrs. Case, the companion of the plaintiff who was a witness for the defendant, testified that she got off the train just ahead of the plaintiff and observed no fall, but she confirmed the testimony of the plaintiff that the place where they alighted was not the station, and that to reach the station they had to walk in a very narrow path along an embankment. Against this evidence that the stop was made away from the station and at a place where due care for the safety of passengers leaving the train manifestly required a light and a stool, the only evidence offered by the defendant was that of the flagman, Isaacs, who did not remember whether the station had been called before the train reached the junction, and testified that, while to the best of his recollection the train stopped at the usual place with the passenger coach opposite the station building where there was a gravel walk, yet he could not say positively where it stopped.

[1] The main question is whether, in view of this evidence, the following instruction was a charge on the facts, in that the presiding judge undertook to tell the jury what particular things due diligence required the carrier to supply: "The jury is charged that it is the duty of a railroad company to provide suitable and reasonably safe places for its passengers to alight from its trains, and to provide a stool or steps, or other appliances, properly and safely placed so as to reasonably avoid injury to its passengers alighting from its trains."

The general rule is well established that the province of the judge on issues of negligence is to instruct the jury what degree of care is required, leaving to the jury to decide what particular precautions due care required. We should have been better satisfied if the circuit judge had omitted the words we have italicized; but, looking at the matter in a practical way, it seems safe to say that the error of including them was not prejudicial. In view of the positive and undisputed evidence on the part of the plaintiff as to the call, "All out for the Junction,"

and the positive and direct evidence on the part of the defendant as well as the plaintiff that the train was stopped before it reached the station, that the step was very high, and that the landing was very narrow and on the verge of a steep incline, opposed only by the recollection of the flagman who could not swear positively, it seems to the court that the jury could not have reached, with reason, any other conclusion than that due care required that the defendant should furnish a light and stool for women alighting from the train. While it is not true that due care always requires the carrier to furnish stools or other appliances for passengers to alight, conditions shown here by the evidence, beyond reasonable doubt, did require such precautions.

[2] The other exceptions depend on the proposition that there was no evidence to support a verdict for punitive damages. Considering the duty so well known to carriers to exercise the highest degree of care in providing for the safety of its passengers; the failure attributed to it by the witnesses to provide either a stool or a light for the plaintiff in getting off the train at the place described was some evidence of a wanton disregard of an obvious duty.

The judgment of this court is that the judgment of the circuit court be affirmed.

GARY, C. J., and HYDRICK and FRASER, JJ., concur. WATTS, J., disqualified.

(22 S. C. 169)

DIMERY v. BENNETTSVILLE & C. R. CO.
(Supreme Court of South Carolina. Aug. 2, 1912.)

1. APPEAL AND ERROR (§ 275*)—EXCEPTIONS IN TRIAL COURT—NECESSITY OF RULING.

An exception to the refusal of requested instructions not shown by the case to have been presented to and ruled upon by the court will not be considered.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1566, 1567, 1647; Dec. Dig. § 275.*]

2. RAILROADS (§ 391*)—ACTION FOR INJURIES—DEFENSES—CONTRIBUTORY NEGLIGENCE.

Where a railroad wantonly or recklessly inflicts personal injuries on one who has caught her foot between the rails at a switch, the defense of contributory negligence is not available.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1317, 1326-1330; Dec. Dig. § 391.*]

3. RAILROADS (§ 396*)—ACTION FOR INJURIES—NEGLIGENCE—INFERENCE.

From the fact that a railroad company without signal or lookout ran an engine backwards at great speed over a portion of its track which the public, including women and school children, had been in the habit of using as a thoroughfare with the acquiescence of the railroad company, the jury might infer a spirit of indifference to persons on the track, and a conscious failure to observe due care.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1341-1343, 1357; Dec. Dig. § 396.*]

4. RAILROADS (§ 400*)—INJURIES TO PERSON ON TRACK—JURY QUESTION.

Where the evidence was conflicting as to whether a lookout was kept on an engine backing rapidly over a portion of track frequented by the public, and as to whether signals were given, and as to whether the trainmen saw or should have seen plaintiff whose foot was caught in the track or heard or should have heard her cries of distress, the questions were for the jury.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1385-1381; Dec. Dig. § 400.*]

Appeal from Common Pleas Circuit Court of Marlboro County.

"To be officially reported."

Action by Georgia Dimery against the Bennettsville & Cheraw Railroad Company. Judgment for defendant, and plaintiff appeals. Reversed.

J. K. Owens, of Bennettsville, for appellant. Stevenson, Stevenson & Prince, of Cheraw, Townsend & Rogers, and McColl & McColl, for respondent.

HYDRICK, J. This is an action for damages for an injury sustained by plaintiff in the following manner: While walking along the defendant's railroad, she got her foot caught between a rail of the main line and a switch rail, and while so held upon the track an engine and train of cars came along, and ran over her leg just above her foot, and crushed it so that her foot had to be cut off.

[1] The exceptions are numerous, long and involved, being fifteen in number and covering nine pages of the "case," but we are at liberty to consider only one of them, because the others are based upon the alleged refusal to charge certain requests, and it appears only in the exceptions that such requests were presented to the court. It has been frequently held that an exception will not be considered, unless it appears in the "case" that the ruling or finding complained of was made. *Sloan v. Courtenay*, 54 S. C. 314, 32 S. E. 431, and cases cited where the reasons for this rule are given. It would have been sufficient, if it had been stated in the "case" that the plaintiff presented certain requests to charge, and that they are correctly set out in the exceptions.

The action was based upon the alleged negligence, recklessness, and wantonness of de-

fendant in running its train of cars backward through a populous part of the town of Bennettsville, at a rapid rate of speed, without lookout or signal, at a point where its track was used by the public as a walkway with its knowledge and acquiescence. Besides a denial of the allegations of the complaint, the principal defense relied upon was contributory negligence. The court refused to submit to the jury the issue of recklessness and wantonness, holding that there was no evidence to support the allegations thereof.

[2] As the defense of contributory negligence is not available to defendant, if the injury was recklessly or wantonly inflicted, the alleged recklessness and wantonness of defendant was a vital issue; and therefore, if the evidence required the submission of that issue to the jury, the failure to do so was reversible error.

[3] There was evidence tending to prove that at the place where the injury occurred the defendant's track was used by the public—men and women and children—going to and from town and school and church, just like it was a public street, and that it was so used with the knowledge and acquiescence of defendant; that the train of cars was run backwards, the tender being in front of the engine, very fast over the track so used, without lookout, and without signaling its approach by ringing the bell or blowing the whistle. From this the jury might have inferred a spirit of indifference to the rights of those so using the track, or a conscious failure to observe due care for their safety. *Sanders v. Railway*, 90 S. C. 331, 73 S. E. 356.

[4] There was conflict in the testimony as to whether a proper lookout was kept and the approach of the train signaled by the ringing of the bell or blowing the whistle, and also as to whether, if a proper lookout had been kept, the signals of distress given by plaintiff's sister and others near her, when it was first discovered that she could not get off the track, could have been seen in time to stop the train before injuring her. But these questions should have been submitted to the jury.

Reversed.

GARY, C. J., and WOODS, WATTS, and FRASER, JJ., concur.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

(92 S. C. 204)

HILL v. HILL et al.

(Supreme Court of South Carolina. Aug. 7, 1912.)

PARTITION (§ 9*)—MINOR HEIRS—RECOVERY.

Where, in an action to confirm a fair, though unauthorized, parol partition agreement, entered into with minor heirs in 1904, it appeared that their interest had increased in value, and was worth double the amount to be paid for it under the agreement, they were entitled to its present value.

[Ed. Note.—For other cases, see Partition, Cent. Dig. §§ 26-32; Dec. Dig. § 9.*]

Appeal from Common Pleas Circuit Court of Clarendon County; J. W. De Vore, Judge.

"To be officially reported."

Action by J. R. Hill against Jack N. Hill and others. From judgment confirming report of referee, defendants appeal. Modified.

The following is the report of referee:

"On December 19, 1873, one C. W. Weeks conveyed in fee unto W. F. Hill, F. A. Geddings, H. M. Brown, A. P. Hill, J. R. Hill, and A. K. Hill, the latter subsequently marrying John G. Kolb, the tract of 50 acres of land described in the complaint.

"Many years ago N. H. Hill, the father of the above grantees, and with whom they live upon the said tract of land, verbally swapped some of this land that ran near the residence of a neighbor, by the name of Aaron Kolb, for a piece of land lying near the residence of the said N. H. Hill. It is true there is no satisfactory evidence of the exact quantity of land thus exchanged, nor is there any satisfactory evidence of where it lay by metes and bounds; but there is evidence that Aaron Kolb cultivated some 3 or 4 acres of this 50-acre tract near his home, and that N. H. Hill cultivated some 7 or 8 acres of what is claimed was the Kolb land near the farmer's house, and that Kolb had a small pasture upon some more of the land many years ago; but, as I view the agreement of the parties, hereinafter referred to, at time of parol partition, it does not make any difference where the exchanged lands lay, or the quantity thereof.

"On January 8, and 13, 1904, respectively, W. F. Hill and T. A. Geddings conveyed all their interest in said 50-acre tract of land to J. Nelson Brown, and on February 12, 1904, A. P. Hill conveyed all his interest in said tract to John R. Hill, as trustee for the latter's wife during her life, and at her death to be divided between her children, who are the defendant Hill children in this action, with power to trustee to sell and reinvest upon same limitations.

"A. K. Hill, afterwards Alice Kolb, died in 1903, leaving as her heirs her husband, John Kolb, and her children, Viola Lackey, Tabitha Harris, Marion Kolb, Frank Kolb, Ronald Kolb, Susan Kolb, Rosa McLeod, and her grandchildren, Eva Wise and Jessie Wise,

children of a predeceased daughter, Henry Wise, and the said husband afterwards died, leaving the same children and grandchildren as his heirs. Thus it will be seen the owners of the 50-acre tract, after the aforesaid conveyances, were the plaintiff, John R. Hill, with one interest in his own right and one as trustee, J. Nelson Brown, with two interests, H. N. Brown, with one interest, and the Kolb children and grandchildren, with one interest; each interest amounting to $8\frac{1}{2}$ acres of land.

"In 1904 these in interest, or their representatives, met to partition the 50-acre tract, having with them a surveyor, and undertook to cut off the Kolb interest first, beginning with the survey near the old Kolb residence, when they were held up by the widow of old man Aaron Kolb, who objected to running around the original lines of the 50-acre tract, unless John P. Hill gave up the land alleged to have been swapped by Aaron Kolb to N. H. Hill. I find it was then and there agreed between old Mrs. Kolb, the grandmother of the Kolb children, Mrs. Viola Lackey, who was represented by her husband, Milton Lackey, Mrs. Tabitha Harris, who was present on the one side, and John R. Hill on the other, that they would cut off the Kolb interest adjoining their residence upon other property of theirs, and that John R. Hill would pay the Kolbs the value of one interest, or of $8\frac{1}{2}$ acres, for the tract of land back of the Hill residence, whatever it might be, of bay and upland. It might be said this agreement by those of age could not bind the minor Kolb heirs; but, as the defendants' attorney is asking that equity be done, I think the rights of all concerned, because of the many irregular acts in connection with this land, will be best subserved by ratifying what was done on this occasion. Certainly Mrs. Lackey and Mrs. Harris are estopped from contending to the contrary.

"The partition was had, and $8\frac{1}{2}$ acres were set aside to the Kolb heirs, 25 acres to the Browns, and what turns out to be 32 acres to the plaintiff, John R. Hill. The plaintiff, John R. Hill, contracted to sell this 32 acres, together with 3.6 acres conveyed to him by his mother in July 7, 1883, calling it all 20 acres, more or less, to the defendant C. H. Broadway for \$750.

"Upon investigation, it was found that the parol partition was ineffectual to divest the interest of the minor Kolb children in the 32 acres allotted, as aforesaid, to John R. Hill. The defendant Broadway declined to comply; hence the Browns and plaintiff convey all their interest in the $8\frac{1}{2}$ acres allotted to the Kolbs unto them, and Marion Kolb and Rosa McLeod, two of the Kolb children, convey all their interest in the portion allotted unto the plaintiff unto him, by deed dated January 15, 1910.

"Then this action was brought against the cestuis que trustent in the trust deed afore-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

said, some of whom were minors, to cut them off, upon payment of the value of their interest in land sought to be sold Broadway, and against the rest of the Kolb children, Mrs. Harris and Mrs. Lackey being two of them, and whom I have already held are bound and estopped by the partition and agreement, alleging the premises of the parol partition that plaintiff had conveyed all his interest in Kolb share to them, and asking, upon the court ascertaining the fairness of the partition, that it be ratified and confirmed, and that all those who have not conveyed to plaintiff be adjudged to have no interest in the part allotted to him, as aforesaid.

"The plaintiff's attorney upon the trial earnestly contended that the portion of the defendants' answer setting up the alleged swap of land that did not belong to old man Hill for land of Kolb was foreign to plaintiff's cause of action to ratify verbal partition, and should be stricken out; and, while I may have been wrong in not sustaining the motion and the objection to testimony to establish such a defense, I have decided to stand by my ruling, and do what I conceive to be justice on day of partition.

"I find from the testimony the value of $8\frac{1}{2}$ acres of this 50-acre tract in 1904 was \$100, the highest price fixed by any of the witnesses, and that John R. Hill must account to the Kolb heirs for this sum, with legal interest from January 13, 1904, which was about the day of partition and agreement; this amounting on the day of this report to \$149. Upon the payment of this amount into court, or to those legally entitled to receive it, I find that the plaintiff is entitled to be adjudged to be the owner of whatever land Kolb swapped to Hill; the defendants alleging this to be 25 acres, and designated on the Brown diagram as 'A.'

"I find whatever land Kolb swapped to Hill was under mortgage at the time of exchange, and this, together with the small value placed upon the swamp land in those days, may account for the inequality in acreage of part shown to have been used by Hill.

"I find from the testimony the present value of the trust property $8\frac{1}{2}$ acres, to be \$200.

"I recommend that upon the payment to the clerk of this court of the sum of \$750 by the defendant C. H. Broadway that the plaintiff and the said clerk be ordered to convey unto the said C. H. Broadway, in fee, the 35.6 acres of land, described in the complaint as 20 acres, more or less, but more particularly described upon the Brown diagram as follows: All that piece, parcel, or tract of land lying, being, and situate in the county of Clarendon, state of South Carolina, containing 35.6 acres, more or less, and bounded on the north by lands formerly of H. J. McLeod, now said to belong

to Harriet Brown, and lands of Bruce Bradham, and east by lands of J. N. Brown and H. M. Brown, south by a tract of land said to have been exchanged by Aaron Kolb with N. H. Hill, and west by lands of the estate of M. Levi, and that all other parties to this action be adjudged to have no interest therein.

"I further recommend that out of this sum the clerk do pay to the Kolb children of age, and to the parents or guardians of those under age, according to their interest therein, the sum of \$149.11 found to be due them, as aforesaid; that \$200 thereof be paid to John R. Hill, trustee, to be invested in land for his children, upon the same limitations as the $8\frac{1}{2}$ acres is held for them; that provision be made in the decree for the payments to the defendants A. A. Strauss and J. A. Weinberg of so much of the remainder as may be necessary to satisfy their mortgages, if any they have, they not being proven before me, and the balance, if any, to the plaintiff, John R. Hill, or his attorney.

"I think this disposes of all questions before me in this difficult matter. All of which is respectfully submitted."

Charlton Du Rant, of Manning, for appellants. W. C. Davis, of Manning, for respondent.

HYDRICK, J. This action was brought to have a parol partition confirmed by the court, because some of the parties in interest were, and still are, minors. The Kolb heirs set up a special defense, which appears in the report of the referee, where the facts are clearly stated. The report was confirmed and made the judgment of the court. The referee finds that, in 1904, an agreement was made, whereby the one-sixth undivided interest of the Kolb heirs in the 50-acre tract was set off to them next to their residence, and adjoining a tract which they inherited from their father; and the plaintiff, John R. Hill, was to pay them the value of his share in the Hill tract for the Kolb tract which lay near the Hill residence, for which, it is said, his father had exchanged an equal quantity in value of the Hill tract near the Kolb residence. He also finds that the agreement was fair and beneficial to all concerned, and that this interest was worth \$100 at the date of the agreement, and recommends that plaintiff be required to pay the Kolb heirs that amount, with interest from that date, and that their title to the tract near the Hill residence be confirmed in plaintiff. The referee also finds that the value of an interest in the Hill tract, at date of his report, was \$200.

We think the testimony sustains the finding that the agreement was fair and beneficial to all concerned; but we think the court below erred in fixing the value of the interest at the date of the agreement as the amount which the plaintiff should pay. As

no one had authority to make any such agreement in behalf of the minors, and as the plaintiff allowed such a long time to elapse before he called upon the court to ratify and confirm the agreement, and as it appears that, in the meantime, lands have greatly increased in value, and the interest is now worth \$200, the court, in protecting the rights of the infants, who are its wards, will require plaintiff to pay the present value, \$200, with interest from date of the referee's report. We see nothing in the record to estop the adult Kolb heirs from contending that plaintiff should pay the present value.

The judgment of the circuit court will be modified accordingly.

GARY, C. J., and WOODS, and WATTS, JJ., concur. FRASER, J., did not sit.

(92 S. C. 211)

LONG v. WESTERN UNION TELEGRAPH CO.

(Supreme Court of South Carolina. Aug. 7, 1912.)

1. TELEGRAPHS AND TELEPHONES (§ 37*)—DELIVERY OF MESSAGES—DELIVERY OUTSIDE FREE DELIVERY LIMITS.

Plaintiff's son-in-law, who lived at a mill, but outside the telegraph company's free delivery limits, sent a death message to plaintiff, which was transmitted, and the receiving operator, after finding that plaintiff lived outside of the free delivery limits, sent a service message to the sending office, stating that the plaintiff lived beyond the free delivery limits, that the message was undelivered, and that he was trying to deliver it by phone; and the sending office tried to phone the service message to the office of the mill, but because the office had closed, or on account of some wire trouble, was unable to do so. *Held*, in the absence of any express or implied agreement, that defendant was not liable for failure to deliver the service message, so that the sender might have a chance to pay or guarantee payment of the charges for delivering the message to plaintiff.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. §§ 23, 24, 29, 30, 32; Dec. Dig. § 37.*]

2. TELEGRAPHS AND TELEPHONES (§ 65*)—ACTION FOR DAMAGES—PLEADING—ISSUES AND PROOF.

Where plaintiff alleged defendant's negligence in failing to deliver a telegram to him, but did not allege negligence in failing to deliver a service message to the sender, so that, if necessary, he might pay or guarantee charges of delivery to plaintiff, the defendant, under its denial of the negligence alleged, was entitled to show the fact that the sender lived beyond the free delivery limits, and therefore could not be reached by the service message, since such evidence tended to disprove the negligence charged.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. §§ 54-60; Dec. Dig. § 65.*]

Appeal from Common Pleas Circuit Court of Lancaster County; Ernest Moore, Special Judge.

"To be officially reported."

Action by W. J. Long against the Western Union Telegraph Company. Judgment for defendant, and plaintiff appeals. Affirmed.

J. Harry Foster, of Yorkville, for appellant. Williams & Williams, of Lancaster, Geo. H. Fearons, of New York City, and Nelson, Nelson & Gettys, for respondent.

HYDRICK, J. [1] This is an action for damages for the alleged negligent delay in delivering a telegram. On April 23, 1909, the plaintiff's son-in-law, who lived at a cotton mill near Clinton, but outside the defendant's free delivery limits at Clinton, sent a message, addressed to plaintiff at Lancaster, announcing the death of plaintiff's daughter. The message was phoned to the Clinton office from the cotton mill office, and promptly transmitted to Lancaster. Upon receiving the message, defendant's agent at Lancaster, after inquiry, ascertained that plaintiff did not live at the cotton mill in whose care it was addressed, but that he lived at Elgin, about five miles beyond defendant's free delivery limits at Lancaster. Thereupon he sent a service message to the Clinton office, stating these facts, and that the message was undelivered, and that he was trying to deliver it by phone, but that it was too stormy. The Clinton office tried to phone the service message to the office of the cotton mill from which the original message came, but the office had either closed for the day, or there was some wire trouble which prevented the communication being made. The testimony is that defendant does not deliver telegrams at this cotton mill, except by phone. The Lancaster agent succeeded in getting the message to plaintiff by phone on the morning of the 24th; and he also sent a copy of it by a person whom he found going to Elgin.

The sole question presented by the appeal is whether defendant is liable because it failed to deliver the service message, sent to the Clinton office, beyond its free delivery limits, so that the sender might have had an opportunity to pay or guarantee payment, as the defendant might require, of the charges for delivering the message to plaintiff beyond the free delivery limits at Lancaster.

The plaintiff contends that defendant knew that the sender lived beyond the free delivery limits of the initial office, and that, when it accepted the message, with knowledge of that fact, and without requiring the sender to pay or guarantee payment of the expense of delivering any service message sent in connection with the original message beyond its free delivery limits, it was bound to deliver any such message. This contention cannot be sustained. The sender also knew, or should have known, that he lived beyond the defendant's free delivery limits; and, if he had wanted any service message

delivered to him, it was his duty and business to make the necessary arrangements with defendant's agent to have it done. In the absence of any agreement, express or implied, to do so, the defendant was not bound to send the service message beyond its free delivery limits. The purpose of doing so would have been to give the sender the information contained in it, in order that he might pay or guarantee payment of the extra charge for delivering beyond the free delivery limits at the terminal office. The sender might have refused to do this, and he would have been under no obligation to pay defendant the expense of delivering the service message to him. In the absence of a contract, express or implied, defendant was not bound to take the risk that the sender would pay for delivering the service message to him.

[2] We notice next plaintiff's contention that defendant cannot avail itself of this defense, because it was not pleaded. The plaintiff charged negligence in the failure to deliver the original message to him, not in failing to deliver the service message to the sender. The defendant denied the negligence alleged, and, under that denial, was entitled to introduce any evidence tending to disprove the charge. The fact that the sender lived beyond the free delivery limits, and therefore, could not be reached by the service message, went to disprove the charge of negligence alleged.

There is no evidence of waiver of the defendant's rules as to delivery of messages beyond the free delivery limits at the sending office, and therefore no error in the charge that defendant was not bound to deliver the service message beyond those limits.

Affirmed.

GARY, C. J., and WOODS, WATTS, and FRASER, JJ., concur.

(32 S. C. 226)

MARTIN v. HOME BANK.

(Supreme Court of South Carolina. Aug. 10, 1912.)

EVIDENCE (§ 442*)—PAROL EVIDENCE—WRITTEN CONTRACT—NOTE.

Where defendant bank accepted plaintiff's note to cover an overdraft on his parol agreement to turn over to the bank the proceeds of a claim against a railroad company as soon as collected, and when such proceeds were deposited the bank credited the same as a payment on the note, though it was not yet due, parol evidence of such agreement was not objectionable in an action against the bank for injury to plaintiff's credit due to its refusal to pay checks for lack of funds, of which there would have been sufficient had the proceeds of the collection been credited to plaintiff's general account.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1874-1899; Dec. Dig. § 442.*]

Appeal from Common Pleas Circuit Court of Lexington County; Geo. W. Gage, Judge. "To be officially reported."

Action by T. L. Martin against the Home Bank. Judgment for defendant, and plaintiff appeals. Affirmed.

A. D. Martin, of Lexington, and De Pass & De Pass, for appellant. Graham & Sturkie, of Lexington, and W. H. Sharpe, of Edmund, for respondent.

HYDRICK, J. Before considering the merits of this appeal, we desire to call attention of counsel to the fact that, notwithstanding only one point is presented for decision, and that a question of law, which, as will be seen, could have been stated in less than 2 pages, the "case" contains 175 pages of printed matter. The pleadings, the stenographer's notes of evidence, the exhibits, and the judge's charge are set out in full. This is not only in violation of rule 5 of this court, but is a useless waste of appellant's money in printing unnecessary matter. But we are more concerned about the unnecessary tax upon the time and patience of the court, when there is so much useful work to do. If the bar will not heed the admonitions of the court and comply with the rules, in the preparation of their "cases" for appeal, the court will be compelled, in self-defense, to take some steps to enforce compliance with the rules.

For several years prior to 1906, plaintiff kept an account with defendant. He had frequently overdrawn his account. On May 14, 1906, he gave defendant a note, secured by chattel mortgage, to secure an overdraft of \$1,300. The note was due on August 14th. At the time it was given, plaintiff had a claim against the Seaboard Air Line Railway for something over \$500, which he was expecting to collect daily, and he agreed that if the bank would take his note for the overdraft he would apply the amount due him by the railway company to the note, as soon as it was collected. On June 28th, plaintiff received a check for the claim which he indorsed and sent to the bank to be deposited to his account, along with several other items on the same deposit slip. The bank applied the railway check as a credit on his note, notwithstanding it was not then due. Plaintiff gave several checks on the bank, payment of which was refused by the bank for lack of funds. If the \$500 check had been deposited to his credit, there would have been enough to his credit to require payment of his checks. He brought this action against the bank to recover damages to his credit as a merchant for refusing payment of his checks. The sole question is whether the court erred in admitting evidence of plaintiff's agreement to apply the railroad claim to his note, as soon as it was collected, notwithstanding the note was not due.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

It is contended that the evidence is obnoxious to the rule which forbids the admission of parol evidence which tends to vary or contradict the terms of a written instrument. We do not think so. There was no attempt to prove that the note was to become due at any other time than that expressed on its face. The evidence was of an independent and collateral agreement which in no way affected the terms of the note, so far as the time of payment therein specified was concerned. "The rule in this state is, where the writing does not contain all the terms of the transaction between the parties, parol evidence which does not contradict or vary the writing may be admissible to show a contemporaneous independent and collateral agreement." *Paint Co. v. Bennett*, 85 S. C. 493, 67 S. E. 738, and cases cited.

Affirmed.

GARY, O. J., and WOODS, WATTS, and FRASER, JJ., concur.

(92 S. C. 197)

NEAL v. SOUTHERN RY. CO.

(Supreme Court of South Carolina. Aug. 7, 1912.)

1. CARRIERS (§§ 320, 347*)—PASSENGERS CATCHING COLD AT STATION—CONTRIBUTORY NEGLIGENCE—WANTONNESS—EVIDENCE.

Evidence, in an action against a carrier by a passenger who caught cold, the waiting room for white people at a station where she was waiting for a train to connect with that from which she had alighted being washed out while she was there, held sufficient to warrant submission of the issues of negligence, contributory negligence, and wantonness.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 1118, 1126, 1149, 1153, 1160, 1167, 1179, 1190, 1217, 1233, 1244, 1248, 1315-1325, 1346, 1350-1386, 1388, 1397, 1402; Dec. Dig. §§ 320, 347.*]

2. CARRIERS (§ 337*)—PASSENGERS CATCHING COLD AT STATION—CONTRIBUTORY NEGLIGENCE.

A passenger who had to change cars, once at S. and later at B., and who, from the washing of the waiting room at B. while she was there, caught cold, was not guilty of contributory negligence because not waiting longer at S. and taking a later train from there, which would have enabled her to connect with her train at B. without waiting there so long.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. § 1387; Dec. Dig. § 337.*]

3. TRIAL (§ 296*)—INSTRUCTIONS—CONSIDERATION AS A WHOLE.

A charge distinguishing compensatory and punitive damages, though stating that punitive damages should not be awarded, unless the party acted in such a reckless and "careless" way that he ought to be punished for his recklessness and "carelessness," will be considered not to have misled the jury; the last word on the subject being: "If the party is just simply negligent, just ordinary damages should be allowed."

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 705-713, 715, 716, 718; Dec. Dig. § 296.*]

4. CARRIERS (§ 286*)—DUTY TO PASSENGERS—OPENING WAITING ROOMS.

The rule of the railroad commission that the waiting rooms at stations where tickets are sold must be opened at least 30 minutes before the schedule time for arrival of passenger trains, and kept open till their arrival, does not fix all the duty of carriers with respect to keeping open such rooms; but Civ. Code 1902, § 2168, requiring such rooms to be "kept open at such hours as to accommodate passengers traveling over such road on any of its passenger trains," establishes the rule of a reasonable time; and what, under the circumstances, is a reasonable time is for the jury.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 1142-1148, 1150-1152; Dec. Dig. § 286.*]

5. TRIAL (§ 193*)—INSTRUCTION ON FACTS.

A charge explaining preponderance of evidence, which, after saying it does not necessarily mean the greater number of witnesses, but the weight which the jury give to the evidence, adds, "You go by the witnesses' appearance and the reasonableness of their statements, look into their faces, and try to judge them," is not a charge on the facts; it containing no intimation of what the judge thought was the truth with respect to any fact in issue.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 436-438; Dec. Dig. § 193.*]

Appeal from Common Pleas Circuit Court of Union County; John S. Wilson, Judge.

"To be officially reported."

Action by Mrs. Ellen Neal against the Southern Railway Company. Judgment for plaintiff; defendant appeals. Affirmed.

Sanders & De Pass, of Spartanburg, for appellant. Wallace & Barron, of Union, for respondent.

HYDRICK, J. The plaintiff recovered judgment against defendant for \$500 damages for sickness and suffering caused her by the negligent and wanton conduct of defendant's agent at Blacksburg in having the waiting room for white people scoured, while she was waiting there as a passenger over defendant's road for a train for Yorkville, thereby driving her out into the open on a cold, bleak, and rainy day, from which exposure she incurred a serious illness.

On January 13, 1910, plaintiff became a passenger on defendant's road from Union to Yorkville. It was necessary for her to change cars at Spartanburg and Blacksburg. She left Union on the morning train, which arrived at Spartanburg about 10:30 o'clock. There were two local trains going north on defendant's main line, passing Blacksburg. One left shortly after the arrival of the train on which plaintiff came from Union; the other about 3 o'clock p. m. On other occasions, when plaintiff had made the same trip, she had taken the 3 o'clock train; but on this occasion she took the morning train, preferring to wait at Blacksburg, because, she said, it was quieter than at Spartanburg. She arrived at Blacksburg about midday. Her train did not leave for Yorkville until about 7:40 that evening. About 1 o'clock,

the station agent came to the waiting room and asked plaintiff, who was accompanied by her little son, and another woman, who had two children with her, what train they were waiting for, and, on being told, he asked them to go into the waiting room for colored people, stating that he was going to have the white waiting room scoured. At that time there were some colored boys or men in the other waiting room, laughing and talking and having fun. Plaintiff said, in the presence of the agent, that she would not go into the other waiting room where the negroes were. Asked by the other woman what they should do, plaintiff said she did not know, unless they should go out and sit on some benches on the south side of the station, where they would be protected from the damp and chilly wind which was blowing from the north. The agent allowed them to do this, without offering to make any other provision for their comfort, and proceeded, notwithstanding their objection to going into the waiting room for colored people, to scour out the waiting room for white people by flooding the floor with water by means of a hose. It was two hours or more before the room was dry enough for plaintiff to return to it. When she did, she was suffering with a severe headache; and when she reached her home that night she was seized with a chill, and was sick a week or more with pleurisy. Plaintiff said the reason she did not seek some other place of shelter was because she knew no one in Blacksburg upon whom she felt that she could intrude, and had no money to go to a hotel. There was a hotel conveniently near, where she could have waited without charge, though it does not appear that she knew it.

The defendant's station agent testified that the room was scoured at the particular time mentioned because there was no train from that time (1 o'clock p. m.) until 4 o'clock p. m., and that was the longest time during the day between trains. He denied telling plaintiff to go into the colored waiting room, and said that, in fact, he did not remember seeing her at all, and that when he went to scour the waiting room there was no one at all in it, and he had no knowledge of there being any passengers there waiting for a train; but he said he saw some ladies, accompanied by children, walking about outside, and near the station; that it was a nice, warm day—too warm to have fire in the waiting room. As to the weather, he was corroborated by several other witnesses.

[1] In view of the above statement of the testimony and the recent decision of this court in *Brckett v. Railway*, 88 S. C. 447, 70 S. E. 1026, no extended discussion is necessary to show that there was no error in submitting to the jury the issue of negligence and contributory negligence, and also that of wantonness.

[2] We fail to see any force in the point made by appellant that plaintiff was guilty

of contributory negligence in taking the morning train from Spartanburg to Blacksburg, instead of the afternoon train, which she had taken on former occasions. It does not appear that her ticket was limited to use on the later train. She had the right to take any train on defendant's road on which it was good; and defendant was bound to exercise toward her that degree of care which the law requires of carriers for the safety, comfort, and convenience of passengers from the time she became a passenger at Union until she ceased to be a passenger. The defendant knew that she would have to lie over, either at Spartanburg, or at Blacksburg, and for some time, more or less, at both places; and it was its duty, therefore, to provide for her safety, comfort, and convenience as a passenger. We do not see how the plaintiff can be said to have been negligent in taking the morning train from Spartanburg to Blacksburg, any more than she could be charged with negligence in not waiting until the next day to make her journey. If defendant had run half a dozen trains a day, and she had taken one of them, which was wrecked by the negligence of defendant, and she had been injured, could defendant contend that she was guilty of contributory negligence because she did not take one of the others? The fallacy of such an argument is apparent.

[3] On the subject of damages, the court charged as follows: "Now, damages are divided into two general heads, actual or compensatory, which means the same thing, and vindictive, or punitive or exemplary, which means the same thing. What are actual damages? Actual damages is that amount assessed by a jury which gives or compensates a person for an actual injury—a real injury that he or she has suffered. That is the rule now as to actual or compensatory damages. The other damages are something more. They are an amount given by way of punishment, not only giving the party the amount of actual damages sustained, but giving something more for the wrong done by the other party, for the injury done, as a way of punishment. These kind of damages are called punitive, exemplary, or vindictive damages. Now, in this case, the plaintiff sues for both actual and exemplary, punitive, or vindictive *all meaning the same thing*. Now, then, in any case, if the party should suffer actual damages, he or she ought not to receive punitive, vindictive, or exemplary damages, unless it is shown that the other side has consciously been guilty of some wrong, or acted in such a negligent and careless way, when the law says that, under the circumstances, they ought to have known to have done better. You see, vindictive or exemplary or punitive damages, all the same thing, meaning the same thing, are given by way of punishment, to punish the other side for a wrong; and the law says that ought not to be done, unless the

party acted in such a reckless *and careless* way that, under the circumstances, he ought to be punished for his recklessness *and carelessness*. If the party is just simply negligent, just ordinary damages should be allowed."

The defendant complains that, under this charge, the jury were allowed to award punitive damages for mere negligence. While it does appear from the words italicized that there was some confusion in the expressions of the court, still, when the whole charge upon the subject is considered, we do not think the jury were misled. The last word on the subject was: "If the party is just simply negligent, just ordinary damages should be allowed."

[4] The rule of the railroad commission that the waiting rooms at stations where tickets are sold must be opened at least 30 minutes before the schedule time for the arrival of passenger trains, and kept open until such trains arrive, does not fix *all* the duty of railroad companies with respect to keeping their waiting rooms open. The commission only fixed the minimum time at all stations where tickets are sold. The statute (section 2168, vol. 1, Code 1902) requires that the waiting rooms at such stations shall be "kept open at such hours as to accommodate passengers traveling over such road on any of its passenger trains." Under this statute, such stations must be kept open long enough before the arrival and departure of trains—not less than 30 minutes—to meet the reasonable requirements of the traveling public. It establishes the rule of a reasonable time. There was therefore no error in modifying defendant's request, to the effect that compliance with the rule of the commission satisfied the law, by saying that the circumstances might require enlargement of the time prescribed by the rule, and that the jury were the judges of what was a reasonable time, according to the circumstances of each case. Nor was there error in modifying the request that defendant had the right to close its waiting room for a necessary purpose, to wit, to cleanse it, provided it opened it 30 minutes before the arrival or departure of any train, by adding, provided 30 minutes was a reasonable time, under all the circumstances.

[5] The court charged that the plaintiff must prove her case by the preponderance of the evidence, and, in explaining what was meant by the preponderance of the evidence, he said it does not necessarily mean the greater number of witnesses, but the weight which the jury give to the evidence, and added: "You go by the witnesses' appearance and the reasonableness of their statements, look into their faces, and try to judge them." The defendant complains of this as a charge upon the facts. We fail to perceive

the force of the objection. No intimation can be gathered from the remark as to what the judge thought was the truth with respect to any fact in issue; and therefore the language is not obnoxious to the objection urged. The judge mentioned only a few of the many well-recognized rules for determining the truth of human testimony. He did not say that by those mentioned alone should the evidence of the witnesses be weighed.

The issue of plaintiff's alleged contributory negligence in refusing to go into the colored waiting room, in remaining out in the cold, when she could have found free shelter at a nearby hotel, or other place, and generally in failing to take reasonable measures to prevent injury to herself from the exposure was fairly submitted to the jury, and we do not see that their verdict is contrary to any instruction given by the court. Judgment affirmed.

GARY, C. J., and WOODS and FRASER, JJ. concur. WATTS, J., did not sit.

(23 S. C. 172)

MOON et al. v. TOOLEY et al.

(Supreme Court of South Carolina. Aug. 2, 1912.)

1. JUSTICES OF THE PEACE (§ 160*)—APPEAL—JURISDICTION.

The notice of appeal from a magistrate not being served in time, the circuit court had jurisdiction only to dismiss, and not to affirm; so that its order of affirmance is a nullity.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 579-591, 658; Dec. Dig. § 160.*]

2. JUSTICES OF THE PEACE (§ 189*)—APPEAL—AFFIRMANCE—SETTING ASIDE JUDGMENT—AUTHORITY OF SUCCEEDING JUDGE.

A judgment, with the execution issued thereon, entered on a circuit court order of affirmance, itself made without jurisdiction, and not pretending to authorize the entry of judgment and the execution, may be set aside by a succeeding judge of that court.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 727-733; Dec. Dig. § 189.*]

Gary, C. J., and Watts, J., dissenting.

Appeal from Common Pleas Circuit Court of Greenville County; J. D. Sanford, Judge.

Action by J. W. Moon and another against John Tooley and others. From an order on an attempted appeal from a Magistrate to the Circuit Court, plaintiffs appeal. Affirmed.

Adam C. Welborn, of Greenville, for appellants. J. D. Lanford, of Greer, for respondents.

FRASER, J. The following is the case and exceptions: "This case was commenced before Magistrate O. M. Allen in county and state aforesaid and tried by him, and judgment was rendered in favor of the plaintiffs and against the defendants on February 25, 1911. In due time the defendants served notice and grounds of appeal to the circuit court on the magistrate and gave bond on appeal in the sum of \$50. On March 17, 1911, a copy of said notice and grounds of appeal was mailed to and received by the plaintiff J. J. Henson, and no other notice and grounds of appeal were ever served on either of the plaintiffs. The magistrate in due time made return of all the papers in the case to the court of common pleas for the county and state aforesaid. The plaintiffs' attorney gave the defendants' attorney written notice of a motion to dismiss the appeal on the ground that no notice and grounds of appeal had been served on the plaintiffs according to law. The motion was heard by Hon. Geo. W. Gage, Presiding Judge, on April 7, 1911, who then passed an order dismissing the appeal and affirming the judgment below. On April 14, 1911, judgment was duly entered and enrolled on said order and the magistrate's papers in the office of the clerk of court of common pleas for the county and state aforesaid in favor of the plaintiffs and against the defendants and execution issued thereon."

The defendants' attorney gave plaintiffs' attorney written notice of a motion to set aside Judge Gage's order so far as it affirms the judgment below and to set aside the judgment and execution entered and issued thereon. The said motion was heard by Hon. B. M. Shuman, Special Presiding Judge, on December 12, 1911, who passed the following order: "After argument of counsel it is ordered: That the judgment of Judge Gage, so far as it affirms the judgment below is hereby declared null and void and is set aside, and the judgment and execution entered thereon is set aside."

In due time the plaintiffs served notice of intention to appeal to the Supreme Court from said order and will ask the Supreme Court to reverse said order and affirm Judge Gage's order and the judgment entered thereon upon the following exceptions:

"(1) Because the court erred in setting aside Judge Gage's order so far as it affirms the judgment of the magistrate. In a case like this, one circuit judge has no power to set aside the order of another circuit judge. It can only be set aside or reversed by the Supreme Court on appeal. When notice and grounds of appeal were served on the magistrate in time, it was his duty to make return of all the papers in the case to the court of common pleas. When Judge Gage passed his order dismissing the appeal on the ground that no notice and grounds of appeal

had been served on the plaintiffs according to law, the judgment of the magistrate was in legal effect affirmed.

"(2) Because the court erred in setting aside the judgment entered and enrolled in the clerk's office on Judge Gage's order and the magistrate's papers. Judge Gage's order being a record of the circuit court and in legal effect affirming the judgment below, and all the magistrate's papers in the case being records of the circuit court, it was perfectly proper and legal to enter and enroll judgment thereon and issue execution."

[1] It being admitted that the notice of appeal was not served within the time required by law, the circuit court had no jurisdiction in the case. This is too well settled to require the citation of authority. The appellate court, being without jurisdiction to hear, could neither reverse nor affirm the judgment and could only dismiss the appeal. That part of the order of April 7th which affirmed the judgment of the magistrate being made without jurisdiction was a nullity and could be so treated wherever it was found.

[2] The order of Judge Gage did not pretend to authorize the entry of judgment for the findings of the magistrate of the issuance of execution thereon. A succeeding judge had full authority in a motion in the cause to set aside the unauthorized judgment and execution.

The judgment of this court is that the order appealed from be affirmed.

HYDRICK and WOODS, JJ., concur. GARY, C. J., and WATTS, J., dissent on the ground that the first exception should be sustained.

(92 S. C. 151)

NELSON v. CHARLESTON & W. C.
RY. CO. *

(Supreme Court of South Carolina. Aug. 1, 1912.)

Appeal from Common Pleas Circuit Court of Spartanburg County; John S. Wilson, Judge.

Action by J. D. Nelson against the Charleston & Western Carolina Railway Company. Judgment for plaintiff, and defendant appeals. Affirmed.

The following are the exceptions:

"The defendant excepts to the rulings and charge of his honor upon the following grounds:

"(1) Error in admitting the statement of Mrs. R. M. Dubose, as contained in her deposition, over the objection of counsel, as follows: 'A few minutes before the wreck, I noticed the train was running pretty fast, faster than I thought it ought to go.' Said evidence being incompetent; it being the ex-

*Reprinted with syllabus in 121 S. E. 198.

pression of the opinion of the said witness as to how fast she thought the train ought to go, and there being no proper foundation laid for such opinion—the witness not being shown to be an expert.

“(2) Error in admitting, over objection of counsel, the testimony of Mrs. R. M. Dubose, as contained in her deposition, as follows: ‘This train very often run too fast for a mixed train.’ The said evidence being the mere expression of an opinion of a nonexpert witness, and referring not to the occasion of the wreck in question, but to other times and places, and the same being therefore incompetent. Error, further, in holding that the defendant could not take advantage of the incompetency of said statement, on account of the fact that it was made in connection with the cross-examination of said witness by Mr. Cooper, when he should have held that, under the agreement of counsel at the taking of said deposition, the right to object to any and all testimony was specifically reserved, and therefore the defendant had a perfect right to object to said testimony at the trial.

“(3) Error in refusing, upon motion of defendant's attorneys, to strike from the deposition of W. M. Hines the following: ‘It was behind time, and was trying to make up for lost time. I noticed some time before the wreck that it was running too fast. I had noticed it was running too fast for four or five miles before the wreck.’ The error being that said statements are the expression of the mere nonexpert opinion of the witness, without giving the facts upon which same were based, and were therefore incompetent.

“(4) Error in allowing the plaintiff to tell what Captain Little, the conductor, said to him on the day following the wreck; said testimony occurring as follows: ‘Q. Did you ever hear Capt. Little say where they went? Mr. Grier: We object to what Capt. Little said about where they went. It is not *res gestæ*, and does not throw any light upon this accident at all. Court: You know that it went to Gray Court? Witness: I believe Capt. Little would be truthful about it. Court: You know it went to Gray Court? Witness: Only what I was told. Court: Strike that out, Mr. Stenographer. Q. Now, who told you about the train, where the train went? A. Capt. Little. Mr. Nash: Here is the conductor of that train, your honor. Court: I think he can state, Mr. Grier. Mr. Grier: I want this put down that it is incompetent and irrelevant, not *res gestæ*, and does not throw any light on this matter. Q. Where did Capt. Little tell you they first went? A. He told me on the next day— Mr. Grier: We submit that the conversation the next day isn't competent. Court: Was he still in your employ? Mr. Grier: Yes, sir; he is now, as far as that is concerned. Court: Was he the con-

ductor on the train that night? Witness: Yes, sir. Court: I think so. Mr. Grier: We object, on the ground that it is not *res gestæ*, and, of course, that is the only way they could say that it would come in. Q. Where did Capt. Little tell you the next day that the train went that night? A. He said it went to Gray Court from Owings, and the second trip it came from there to Laurens, carrying some live stock and negroes, leaving the white folks up in the woods. Now that is the way he did. Q. Did the train come back? Mr. Grier: He said that is what Capt. Little told him, that they carried some live stock and negroes, and left the white people up in the woods. Q. It that what Capt. Little told you? A. Why, certainly. Mr. Grier: We move to strike that out; that it in no wise bears on this case, wholly incompetent, and throws no light upon this question.’ The error being that the said testimony as to what the witness was told by Capt. Little was incompetent; it was not shown to be within the scope of the authority of the conductor, was not part of the *res gestæ*, and should have been excluded.

“(5) Error in allowing the plaintiff, over the objection of the defendant, to testify as follows: ‘Q. Did you see Capt. Little the next day after this wreck? A. Yes, sir. Q. Tell how it came about? Where did you see him? A. I went to the ticket office to get a ticket to Spartanburg. Q. Did he present a paper and ask you to sign it? A. He certainly did, and I refused. Q. Did Capt. Little have any conversation with you about this wreck the next day? A. Yes, sir; he handed me a paper to sign. Q. Did you read the paper? A. I refused to read the paper, and told him that I had written to the railroad authorities.’ The error being that the said testimony was incompetent, relating, as it did, to an occurrence the next day after the wreck, was not shown to be within the scope of the authority of the conductor, was not a part of the *res gestæ*, and should have been excluded.

“(6) Error in charging, in connection with plaintiff's third request, as follows: ‘I charge you that. Now that means this, gentlemen of the jury: That where a passenger is on a railroad train and gets hurt, and it is shown that he is hurt on the railroad train, then the presumption is that it was done through the negligence of the railroad company; but when the railroad company shows that it was not through its negligence, but something that it couldn't help, not held under the law as being negligent, then that presumption of negligence gives way, done away with.’ The error being that in so charging his honor placed too great a burden upon the railway company, and stated an erroneous proposition in telling the jury that, ‘*where a passenger is on a railroad train and gets hurt, and it is shown that*

he is hurt on the railroad train, then the presumption is that it was done through the negligence of the railroad company,' when there is no presumption of negligence from the mere fact that a passenger is hurt on a railroad train. The error consisted, further, in charging the jury in that connection, in effect, that the mere fact of an injury to a passenger on a railroad train placed the burden upon the railroad company to show that it was not done through its negligence, but was done by something it could not help; the same being an erroneous statement of the law, and placing too great a burden upon the company. The error consists, further, in the fact that, in so charging in the face of the proposition laid down in the plaintiff's third request, his honor confused the jury, in that, in the first instance, he charged them that the presumption of negligence arises when a passenger has been injured *by any agency or instrumentality of the railroad*; whereas, in the second instance, he charged them that it was only necessary to show that the passenger was injured *on the railroad train*.

"(7) His honor erred in charging the jury as follows, the same being the plaintiff's fourth request: 'If an engineer willfully or intentionally fails or refuses to see a passenger at a flag station, the passenger may recover punitive damages. Also if a conductor promises to hold the train and does not.' The error being that said proposition, as applied to the facts in this case, was erroneous and misleading to the jury, in that, under plaintiff's complaint and proof, the defendant's agents were not under any obligation to stop and pick up the plaintiff, unless they took the box cars that were then in the wreck, or some of them, on to Laurens that night. If, therefore, they did not carry said box cars on to Laurens that night, as they claim they did not, the defendant would not be liable for punitive damages, even though the engineer did willfully or intentionally fail or refuse to see the plaintiff at the flag station. The error being, further, that in so charging his honor told the jury in effect that, regardless of what the facts might be as to whether said cars were carried on to Laurens that night, the defendant would be liable in punitive damages if the engineer willfully or intentionally failed or refused to see the plaintiff. The error consists, further, in the fact that it is not always, and under all circumstances, a ground for punitive damages for an engineer to willfully or intentionally fail to see a passenger at a flag station; and it was confusing and misleading to the jury for his honor to charge said proposition in connection with the facts of this case.

"(8) Error in refusing to charge the defendant's first request, as follows: 'The jury are instructed that they cannot consider the question of punitive or vindictive damages in this case. The evidence is insufficient to warrant the finding of vindictive or punitive

damages.' The error being that there was no evidence, or no sufficient evidence, upon which to base a verdict for punitive damages; and his honor should have so charged.

"(9) Error in refusing to grant a new trial upon the defendant's third ground of motion for new trial, as follows: 'That his honor erred in admitting the testimony of plaintiff detailing conversations he claims to have had with the conductor of the defendant on the day after the accident and alleged declarations made by said conductor; such declarations and conversations being hearsay, and not part of the *res gestae*.' The error being that the admission of said testimony was incompetent upon the grounds stated in said grounds for new trial; and it was error of law not to grant the same.

"(10) Error in charging the jury the third request of the plaintiff, as follows: 'A wreck is not one of the inconveniences and risks which a passenger on a mixed train assumed; and, when it is shown that a passenger was injured by that cause, it is a natural and reasonable inference that the injury was the result of the negligence of the railroad company.' The error being that in so instructing the jury the presiding judge charged on the facts of the case, in violation of article 5, § 26, of the Constitution of 1895, thereby telling the jury what facts would constitute negligence and what facts would tend to prove negligence.

"(11) Error in charging the jury plaintiff's twelfth request, as follows: 'If a railroad runs a train of cars along a road at such a rate of speed as to be wanton and reckless, and a passenger is injured thereby, the jury may infer a reckless and wanton disregard of the passenger's rights and award punitive damages. The jury must say, under the evidence, whether the train, under the circumstances, was run at a reckless and wanton speed.' And in adding thereto the following: 'I charge you that. If you run a train at one time, under certain circumstances, at such a speed you might not be negligent, might not be reckless conduct, might not be wanton conduct; if you run a train at another time, at the same place, under different circumstances, might be, in the opinion of the jury, wanton and reckless conduct. They are to be the judges of the circumstances, what kind of a train, or like that, what were the circumstances under which the train was running, what kind of a road, what time of day, what kind of weather, all these things come into consideration, and it may come into consideration.' The error being that in so charging his honor charged the jury that it might infer recklessness from the fast running of the train; it being submitted: (1) That on a straight track, free from defects, fast running is not even evidence of negligence. (2) The request must be considered with reference to the evidence, in so far as fast running, and in so far as the condition of the track, is concerned, and, so considered,

permits the jury to give punitive damages in a case, should they consider the rate of speed at which this particular train was running to be wanton or reckless. It, in effect, allows punitive damages to be awarded by the jury in this case on account of the rate of speed at which this particular train was running, and is therefore error. (3) It leaves to the jury the right to decide whether, under the evidence of this case and the circumstances, the train was running at a reckless and wanton speed; whereas it is submitted as a matter of fact that the rate of speed at which this particular train was running, in the circumstances as disclosed by the record, was free from any charge of wantonness or willfulness, and, as a matter of law, did not constitute wantonness or willfulness—in fact, did not constitute simple negligence—and it was error in the court to permit the jury to infer from this wantonness or willfulness. (4) It submitted to the jury as a matter of fact the question upon which there was absolutely no testimony whatever, to wit: There was no testimony tending to establish that the running of this train, in the circumstances as disclosed by the record, was wanton or willful. (5) It is submitted that the kind of train, the time of day, and the kind of weather cannot be considered by the jury in determining whether the defendant was guilty of wantonness or willfulness; and it was error to submit these considerations in determining this question.

"(12) Error in refusing to charge as submitted the defendant's tenth request, which was as follows: 'There is no statute law in this state regulating the speed at which a train shall be run, and the mere fast running of a train is not negligence per se, and cannot of itself be held to be willful.' And in adding thereto: 'That is for the jury to say in each case whether under the circumstances—whether the train running at a certain speed under certain circumstances was negligent running or not. You are to be judges of that particular case.' The error being: (a) That said request contained a sound proposition of law, applicable to this case, and should have been charged without modification. (b) It is submitted that the mere fast running of a train is not negligence per se, and can never be made the basis of willfulness, and his honor erred in so instructing the jury, and further erred in charging the jury that it was for them to say in each case whether, in the circumstances, a train running at a certain speed was negligent running, and in not specifically instructing the jury, as requested, that it could not be made the basis of a charge of willfulness.

"(13) Error in refusing to grant defendant's motion for a new trial upon defendant's second ground, which was as follows: 'Upon the ground that there was not sufficient evidence upon which to base a verdict for punitive damages.' The error being that the

question of punitive damages was submitted to the jury, and that there was no evidence in the record to sustain the same; and it further appearing from the verdict of the jury that the jury did include punitive damages.

"(14) Error in refusing to charge the defendant's third request, which was as follows: 'I charge you that plaintiff is not entitled to recover for loss of commissions in his business.' The error being that there is no evidence in the record showing that the plaintiff is entitled to recover commissions or profits, and the verdict of the jury shows that it is partially made up, either of commissions or profits, or vindictive or punitive damages; and in either view the question of commissions should not have been left to the jury, and the verdict was therefore erroneous.

"(15) Error in refusing to grant the defendant's motion for a new trial upon the first ground, which was as follows: 'Upon the ground that the verdict is excessive.' The error being that the evidence shows that the plaintiff, if injured at all, was injured very slightly, and the verdict is far out of proportion to any injury or actual damages caused thereby; and it appears that the verdict includes both punitive and actual damages, and for loss of commissions and profits."

F. B. Grier, of Greenwood, Nicholls & Nicholls, and Bomar & Osborne, for appellant. Johnson, Nash & Daniel, of Spartanburg, for respondent.

FRASER, J. This is an action for actual and punitive damages. The complaint alleges: That the plaintiff is a commercial traveler, selling goods by sample on commission, and in the discharge of his regular business was, on March 3, 1909, at Fountain Inn, which was a town situated along the route between Greenville and Laurens, over which the defendant operates its train. That, having paid his fare, plaintiff took passage at Fountain Inn on a mixed train to go to Laurens. That between Fountain Inn and Owing Station, a flag station, the train was wrecked because of a breakdown of a freight car which was a part of the train of cars. That, by reason of the wreck thus caused, the plaintiff was injured in his person painfully and permanently.

"(5) That because of the said acts of the defendant this plaintiff was bruised and injured about the body and made sick, so that he was unable for many days to prosecute his regular or other business, and was caused to spend money for medical and other attention, all to his serious damage.

"(6) That defendant was careless, wanton, willful, and negligent in its conduct towards this plaintiff in the particulars hereinafter mentioned:

"(a) That defendant knowingly permitted

an overloaded and defective freight car to be hauled along in said train at a high and dangerous rate of speed, the breaking of which freight car caused the wreck.

"(b) That after the wreck had occurred, and plaintiff had been dragged in a rough and dangerous manner and injured, as above described, and had gotten out of the passenger car, at the suggestion of defendant, he walked towards Owings Station, which was less than a mile ahead of the wreck, with the understanding with defendant that if the engine and certain box cars which were not thrown from the track pulled loose and came on towards Laurens the said engine and box cars would be stopped, in order to take plaintiff up and carry him to his destination. That it was promised by defendant that if the engine should overtake plaintiff before reaching said station it would stop and take him up. That when within about 100 yards of said station said engine, with two or more box cars, did overtake plaintiff, who signaled same to stop; but defendant paid no attention, and failed and refused to take plaintiff on board, and left him.

"(c) That plaintiff is informed and believes that said engine and box cars at that time went only to Gray Court, a mile or two below; but they soon came back to the place of the wreck, and upon its return from said place going towards Laurens, plaintiff again signaled the train to stop at Owings Station, in order that he might get aboard; but defendant failed and refused so to stop, and the train again left him 12 or 14 miles from his destination, though plaintiff is informed and believes that said train did go through Laurens and carried other passengers than himself. That, it then being night, plaintiff was compelled to hire a conveyance and travel 12 or 14 miles through the country to his destination on a very cold night, which might easily have been prevented if the defendant had discharged its duty towards this plaintiff.

"(7) That said conduct of defendant towards this plaintiff was willful, high-handed, and in reckless disregard of plaintiff's rights as defendant's passenger, and much to his damage."

The defendant admits that plaintiff was a passenger, and that there was a wreck, but denies that plaintiff was injured by reason of the wreck, and alleges that, if plaintiff subsequently became sick, it was due to his own conduct, and was not due to any agency or instrumentality of the defendant.

The jury found a verdict for the plaintiff for \$500.

There are 15 exceptions, which will be reported; but the appellant groups them under 9 heads:

(1) The first group complain of error in the admission of the statements of witness, Mrs. Dubose and W. H. Hinds, over ob-

jection of defendant's counsel, in which they were permitted to testify that, in their opinion, the train was running fast, and too fast, without any facts upon which they based such opinions. This testimony was more an estimate of speed than an opinion. The rate of speed was testified to by the plaintiff, the conductor, the engineer, and the fireman. To allow the witness to state whether the train was running fast, or too fast, is fully authorized by the rule laid down in *Jones v. Fuller*, 19 S. C. 70, 45 Am. Rep. 761, where the court says: "While it is necessary that the witness should first state the facts upon which he bases his opinion, where the facts are such as are capable of being reproduced in language, it is not necessary to do so, where the facts are not capable of reproduction in such a way as to bring before the minds of the jury the condition of things upon which the witness bases his opinion."

It is by no means clear from the record that the evidence objected to was not brought out by defendant's counsel. If it was, then defendant could not object to the testimony brought out by its own counsel. It is, however, stated in argument that the record must be erroneous, as an attorney of Mr. Cooper's ability would not have asked such a question. The presumption is very strong, as Mr. Cooper is a very able lawyer; but, however strong, it cannot be allowed to contradict the record. To allow it to do so would give to able and experienced counsel an advantage over their less able and experienced brethren that the law does not allow. In the courts, at least, "all men are equal." These exceptions are overruled.

(2) Exceptions 4, 5, and 9 are combined. These exceptions complain of error in allowing the testimony as to what the conductor said the next day. The testimony tended to show that the conductor, who certainly was the agent of the company, was still engaged in the business of the wreck, and went to the plaintiff for the purpose of getting a statement from him as a part of his official duties in connection with the wreck. An agent is rarely, if ever, commissioned expressly to make admissions of responsibility; but it would be monstrous to hold that an agent to get admissions could make none. These exceptions are overruled.

(3) The next exception, No. 6, complains that his honor, the presiding judge, erred in his modification of plaintiff's third request to charge, as follows: "Where a passenger is on a railroad train and gets hurt, and it is shown that he is hurt on the railroad train, then the presumption is that it was done through the negligence of the railroad company"—in that his honor omitted the important requirement that the evidence must show that the injury was caused by the agency or instrumentality of the company. The plaintiff's request contained the words "agency or instrumentality." This

was a serious omission, and would have entitled the defendant to a new trial if the defendant had not made a request to charge that embodied the same omission. The sixth request to charge was as follows: "(6) The fact, if it be a fact, that the plaintiff is in a railroad wreck, does not at all entitle him to a verdict. (By the Court: That is just simply from that fact, nothing else appearing.) *He must not only show that he was in a wrecked train, but must go further and prove to your satisfaction, by a preponderance of the evidence, that he was injured, and the extent of his injuries.* There is no presumption of law that a party has been injured because he was in a wreck; that is a matter of proof—the burden being on the plaintiff in all cases to establish his injury, and the extent of it." In a wreck, as at other times, the injury must be through the agency or instrumentality of the defendant. When a party has asked the court to charge an erroneous proposition of law, he cannot be heard to complain that the court has followed him into error. This exception is overruled.

(4) The tenth exception complains of error upon the part of the trial court in charging the jury that a wreck is not one of the inconveniences which a passenger assumes; and, where it is shown that a passenger is injured by that cause, it is a natural and reasonable inference that the injury was the result of negligence, inferred from the mere fact that the wreck occurred, in that this was a charge on the facts, in violation of the Constitution. This exception is overruled. It is true in a case of a wreck, as in all other cases, that, where a passenger is injured by an agency or instrumentality of the company, the fact raises a presumption of negligence on the part of the company. There is no intimation here that any part of the wreck was not an instrumentality of the railroad company. This exception is overruled.

(5) The seventh exception complains of error, in that his honor charged as follows: "If an engineer willfully or intentionally falls or refuses to see a passenger at a flag station, the passenger may recover punitive damages. Also if the conductor promises to hold the train and does not." The appellant admits in argument that, while this, as a general proposition, may be correct, yet, under the extraordinary condition of affairs, it was error; the extraordinary condition being the wreck. Appellant says it was the first duty of the train crew to have the obstruction removed, and this they were bound to discharge, and did discharge. This position is wholly untenable. The first duty of the train crew was to the passengers, and this first duty they neglected absolutely, although one of the passengers was a lady, traveling alone in search of medical help, and it was known to the conductor by his own testimony. This exception is overruled.

(6) The eighth and thirteenth exceptions complain that there was no evidence upon which to base a verdict for punitive damages. These exceptions are overruled. There was evidence sufficient.

(7) Exception 14 complains of error in not charging that plaintiff could not recover for loss of commissions. This was practically charged under defendant's twelfth request to charge, where his honor charged the jury "that the plaintiff cannot recover any alleged pecuniary loss, except such as he proved to you in dollars and cents; he cannot leave you to speculate, and you cannot arrive at your verdict as to such items by speculation, if he claims any such loss and has failed to give you evidence as to the items and amounts thereof, or such facts as would enable the jury to ascertain same, you cannot include same in your verdict."

(8) The twelfth exception complains of error in not charging, without explanation, the following: "There is no statute law in this state regulating the speed at which a train shall be run, and the mere fast running of a train is not negligence per se, and cannot be held to be willful." The court said: "That is for the jury to say in each case whether under the circumstances—whether a train running at a certain speed under certain circumstances was negligent running or not. You are to be the judges of that particular case." That explanation submitted to the jury only the question of negligence and eliminated willfulness from any speed, however great. This exception is overruled.

(9) The fifteenth exception complains of error in the refusal of a new trial upon the ground that the verdict was excessive. This exception is overruled, because this court cannot consider the question of excessive verdicts.

The judgment of this court is that the judgment of the circuit court be affirmed.

GARY, C. J., concurs. HYDRICK and WATTS, JJ., concur in the result.

WOODS, J. I agree that the judgment in this case should be affirmed; but I am unable to concur in all the reasoning of Mr. Justice FRASER.

The pleadings indicating the issues are set out in his opinion. The plaintiff testified that the day after the wreck the conductor of the train came to him with a paper, which he requested the plaintiff to sign, and that he refused to read or sign it. Over the objection of the defendant, this question and answer were admitted: "Q. Where did Capt. Little tell you the next day that the train went that night? A. He said it went to Gray Court from Owings, and the second trip it came from there to Laurens, carrying some live stock and negroes, leaving the white folks up in the woods. Now that is the way he did." There was no evidence that the conductor was authorized to settle

plaintiff's claim, or even that he knew there was a claim. The alleged statement was made a day after the wreck, and therefore was not a part of the *res gestæ*. Under such circumstances, the testimony was clearly incompetent, unless all the authorities on the subject are to be overruled. *Petrie v. Columbia & Greenville R. R. Co.*, 27 S. C. 63, 2 S. E. 837; *Garrick v. Florida Central & Peninsular R. R. Co.*, 53 S. C. 448, 31 S. E. 334, 69 Am. St. Rep. 874; *Mars v. Virginia Home Insurance Co.*, 17 S. C. 514; *Vicksburg & Meridian R. R. Co. v. O'Brien*, 119 U. S. 99, 7 Sup. Ct. 118, 30 L. Ed. 299. Authority of an agent to ascertain merely the existence or nature of a claim implies no authority to adjust the claim, or to make admissions binding on the principal. I think, however, that the error in admitting this testimony should not work a reversal, because the conductor in his testimony, while denying that he made the statement attributed to him by the plaintiff, practically admitted and explained the acts embraced in the alleged statement. He testified that he did attach his engine and tender to a car at Gray Court, on which there were some negroes and live stock, and did take the car into Laurens, leaving the passengers in the woods, where the wreck occurred. This testimony was given by the conductor with the explanation that he was forbidden to carry passengers on an engine; and that he merely took up the box car on his way to Laurens to get a shanty car and return for his passengers. Under these circumstances, the testimony of Nelson as to the conductor's statements to him, though incompetent, was harmless.

The sixth exception complains of error in the following instruction, given in connection with plaintiff's third request: "I charge you that. Now that means this, gentlemen of the jury: That where a passenger is on a railroad train and gets hurt, and it is shown that he is hurt on the railroad train, then the presumption is that it was done through the negligence of the railroad company; but when the railroad company shows that it was not through its negligence, but something that it couldn't help, not held under the law as being negligence, then that presumption of negligence gives way, done away with." This language must be taken in connection with the request itself, which had explicitly limited the presumption of negligence from the fact of injury on a railroad train to injury received from an "agency or instrumentality of the railroad company." In view of this language of the request, it cannot be assumed that the jury were so inattentive as not to understand that when the circuit judge, in the same connection, spoke of a passenger getting hurt on a railroad train he meant hurt by the railroad's agency or instrumentality.

The following instruction, given at request of plaintiff, taken alone, stated the law

against the defendant too broadly: "If an engineer willfully or intentionally fails or refuses to see a passenger at a flag station, the passenger may recover punitive damages. Also if a conductor promises to hold the train and does not." Many emergencies may be imagined which would make it the imperative duty of a conductor not to stop for a passenger's signals at a flag station, or to disregard his promise to hold a train for a passenger; and if the instruction stood alone it would require a reversal. But in other portions of the charge the circuit judge gave the instruction with clearness and elaboration that all the conditions and emergencies were to be considered in deciding whether it was the duty of the conductor to take plaintiff up, or to stop on his signals. Considering the entire charge on this subject, we do not think the jury could have been misled.

(92 S. C. 180)

BENBOW et al. v. HARVIN et al.

(Supreme Court of South Carolina. Aug. 7, 1912.)

1. EVIDENCE (§ 178*)—BEST AND SECONDARY EVIDENCE—DEEDS.

Where plaintiff gave defendant W. notice to produce a deed from the alleged common source of title to B., and there was proof that W., on a former trial, had testified that the original deed was lost, plaintiff was entitled to introduce a copy thereof from the records to show a common source of title.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 580-594; Dec. Dig. § 178.*]

2. EVIDENCE (§ 177*)—BEST AND SECONDARY EVIDENCE—DECLARATIONS.

Where plaintiff claimed that defendant W. held title under a common source, having been sworn as a witness for plaintiff, and testified that he claimed under a particular deed, and that it was given in settlement of a partition suit, he could have been interrogated as a witness, or his declarations as to the source of his title would have been admissible without the deed or a copy.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 557, 570-579; Dec. Dig. § 177.*]

3. QUIETING TITLE (§ 44*)—SOURCE OF TITLE—EVIDENCE.

That plaintiff sought to show title in her deviser by adverse possession did not prevent her from derailing her title through a common source; she being entitled to prove title in herself in as many ways as she could.

[Ed. Note.—For other cases, see Quieting Title, Cent. Dig. §§ 89-92; Dec. Dig. § 44.*]

4. EVIDENCE (§ 271*) — LETTERS TO THIRD PERSONS—DECLARATIONS.

On an issue as to whether defendant W. and plaintiff claimed title from a common source, a letter written by W. to a magistrate in the neighborhood of the land, stating that he claimed under a deed from such common source, was admissible.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1068-1079, 1081-1104; Dec. Dig. § 271.*]

5. EVIDENCE (§ 208*) — ADMISSION — COMPLAINT.

In a suit to quiet title, the summons and complaint, signed by defendant W. as attorney for plaintiffs against the alleged common source

of title, was admissible to show a common source of title, and also that at that time W., as such attorney, claimed, and that the common source, under whom the other defendants in the action claimed, admitted, that all the land north of a certain branch belonged to plaintiff's ancestor, and this though the summons and complaint were not of record in the court, and there was no proof that it had ever been served; W. having testified that the deed under which he claimed was made in settlement of the suit.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 713-725; Dec. Dig. § 208.*]

6. TRIAL (§ 29*) — REMARKS OF JUDGE—EFFECT.

Where a stenographer, offered to prove the testimony of defendant W. at a prior trial, failed to identify his notes, a suggestion by the court that defendant be put on the stand as plaintiff's witness, and that plaintiff would not be bound by what he said, meant only that plaintiff might prove the facts to be otherwise than as testified by the defendant, and was therefore not error.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 80-84, 508; Dec. Dig. § 29.*]

7. WITNESSES (§ 400*)—ADVERSE WITNESS—TESTIMONY—CONCLUSIVENESS.

While a party who calls his adversary as a witness may not impeach or contradict him, he is not concluded by his testimony, and may prove the facts to be otherwise than as testified by him.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1268, 1269; Dec. Dig. § 400.*]

8. QUIETING TITLE (§ 47*)—COMMON SOURCE.

When plaintiff in a suit to quiet title traced her title to the common source from which defendant W. claimed, plaintiff made a prima facie case which required submission to the jury of the issue, Who had the better title from the common source?

[Ed. Note.—For other cases, see Quieting Title, Cent. Dig. §§ 95-97; Dec. Dig. § 47.*]

9. EVIDENCE (§ 121*)—RES GESTÆ—TRUSTEES—DECLARATIONS.

Where the rights of the parties to certain land had vested under a trustees' partition, the declarations of the trustees and their instructions to the surveyor at the time of that division were admissible as res gestæ to explain their acts; but neither the acts nor declarations of the trustees in making a second division over 20 years afterwards were competent to affect the rights which vested under the first division.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 308, 307-338, 1117, 1119; Dec. Dig. § 121.*]

10. APPEAL AND ERROR (§ 1066*)—REVIEW—INSTRUCTIONS—PREJUDICE.

An instruction that, under a trust deed, the trustees, in dividing the estate, could give some parties in interest personal property and others real estate was not prejudicial to defendants, because there was no evidence that such a division was made.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4220; Dec. Dig. § 1066.*]

Appeal from Common Pleas Circuit Court of Clarendon County; Geo. E. Prince, Judge.

"To be officially reported."

Action by Joel Benbow and others against J. R. Harvin and others. Judgment for plaintiffs, and defendant H. L. B. Wells appeals. Affirmed.

Lee & Moise, of Sumter, for appellant. Charlton Du Pont, of Manning, for respondents.

HYDRICK, J. In the year 1838 Amor-intha L. Anderson, widow of Thomas Anderson, being about to contract matrimony with J. R. Thames, executed a marriage settlement, wherein she conveyed to trustees her interest in the estate of her deceased husband, in trust for her sole use during her life, and at her death, Thames surviving, to divide the same into two parts, and distribute one part among her three daughters by Anderson, or the survivor or survivors of them, the issue, if any, of any deceased daughter taking the parent's share, and to permit Thames to use the other part during his life, and at his death to divide the same among her daughters, the same as the other half. Other provisions of the deed, depending on contingencies which did not happen, need not be recited.

Mrs. Thames died about 1872. Emeline, one of her daughters, had married Bochette, and died, leaving issue. The other two survived. Ellen T. had married Harvin, and had children. The other, Sarah, never married at all. About 1873, after the death of Mrs. Thames, the trustees divided a tract containing 271 acres between her daughters and Thames, but, so far as the evidence shows, left no record of that division, and from their failure to do so this litigation and its principal difficulties arose.

There is testimony tending to prove that the trustees went upon the land, and, beginning at a point on the southern boundary, and about midway thereof, ran a line through the tract approximately north, which divided it into two halves, and assigned the eastern half to Thames, and divided the western half among the two daughters and the Bochette heirs, giving each of the daughters a third and the Bochette heirs together a third of that half, and that the northernmost tract of that half, containing 45 acres, nearly all of which lies north of Duck branch, which extends entirely across the whole tract from east to west, was assigned to Sarah Anderson. This is the division which the defendants contend was made.

On the other hand, there is evidence tending to show that they began on the eastern boundary and ran a line westward across, or at least partly across, the tract, and along and near Duck branch, and that all the land north of that branch was assigned to Sarah Anderson; and this is the contention of the plaintiff.

The plaintiff, who claims as devisee of Sarah Anderson, proved by a number of witnesses that her deviser had possession of the land north of Duck branch for from 15 to 17 years before her death. She devised her estate, without particularly describing it,

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

to her sister, Mrs. Harvin, for life, and, at her death, to the plaintiff, who is a daughter of Mrs. Harvin.

Sarah Anderson died in 1892; Thames died in 1898; and Mrs. Harvin died in 1907. After the death of Thames, the original trustees being dead, their successors undertook to make a second division. The evidence is not clear whether they undertook at that time to make a new division of the entire tract, or whether they simply divided the part which had been assigned to Thames in the first division between the Bochette heirs and Mrs. Harvin; Miss Anderson being then dead. But there is in evidence a plat, dated March 2, 1899, of the whole tract, which is divided thereon into six parcels; and the surveyor certifies on the plat that it was made according to the instructions of J. P. Brock and R. R. Dingle, who were, according to the testimony, acting as trustees, being the heirs and successors of the original trustees. This plat shows a north and south line, which, the defendants contend, was the line made by the trustees at the first division, and which divided the tract into the two halves, one of which was divided among the two daughters and the Bochette heirs, and the other assigned to Thames. On a tract of 45 acres in the northwest corner of this plat is the notation, "set off to Miss Sarah Anderson," and the tract east of it, and lying mostly north of Duck branch, is marked, "set off to Mrs. E. T. Harvin."

The defendants concede the plaintiff's right to recover the 45 acres which was so "set off" to her deviser; but the plaintiff contends that this was not the first division made, and that, under the first division, Sarah Anderson took all the tract north of Duck branch.

Another complication arises from the fact that, after the death of Sarah Anderson in 1892, and while Mrs. Harvin was in possession of her share as life tenant under her will, the Bochette heirs, by the defendant Wells, as their attorney, brought suit against Mrs. Harvin for partition of the Sarah Anderson land, presumably on the supposition that she had only a life estate therein, and that upon her death it went to Mrs. Harvin and the Bochette heirs under the deed of trust. In that complaint, which is signed by the defendant Wells, as plaintiff's attorney, the share of Sarah Anderson is described as containing 100 acres, more or less, and, according to the evidence and the boundaries given in that complaint, it comprised all of the original tract north of Duck branch. That suit resulted in a compromise, by which Mrs. Harvin conveyed to the defendant Wells and J. F. Bochette, whose interest Wells acquired afterwards, 71 acres of the tract, which, according to the plat made for Wells and Bochette, and dated January 6, 1898, lies wholly north of Duck branch, and which includes not only the 45 acres, which, the

defendants contend, was originally set off to Sarah Anderson, and which they concede the plaintiff's right to recover, but 26 acres more of the land north of Duck branch. Mr. Wells is in possession of this 71-acre tract, and the other defendants, the heirs of Mrs. Harvin, are in possession of the remainder of the tract north of Duck branch.

The plaintiff brought this action to recover all the land north of Duck branch. She bases her right to do so upon two grounds: (1) Because that was the land set off to Sarah Anderson in 1873 as her share of her mother's estate under the trust deed; but, if not, then (2) that her deviser had acquired title thereto by adverse possession for more than 10 years before her death. The jury found for plaintiff all the land north of Duck branch. The defendant Wells alone appeals.

[1, 2] For the purpose of proving a common source of title, plaintiff gave the defendant Wells notice to produce the deed to the 71 acres from Mrs. Harvin to him and Bochette. Upon his failure to produce it, and after further laying the foundation by proving that he had said, at a former trial of the case, that the original was lost, plaintiff was allowed to introduce a copy from the record. We see no possible ground for appellant's objection to the copy. The failure to produce, after notice, gave plaintiff the right to introduce secondary evidence. Besides, Mr. Wells is a party to the action, and his declaration that the deed was lost was sufficient to admit secondary evidence of its contents on that ground. Furthermore, he was afterwards sworn as a witness for plaintiff, and testified that he claimed the land under that deed, and that it was given in settlement of the partition suit above mentioned. He could have been interrogated as a witness, or his declarations as to the source of his title would have been admissible, even without the deed or the copy. Every man is presumed to know the source of his title.

[3, 4] The fact that plaintiff also sought to show title in her deviser by adverse possession cannot affect the question, because she had the right to prove title in herself in as many ways as she could. There was therefore no error in admitting in evidence a letter from defendant Wells to a magistrate in the neighborhood of the land, in which he stated that he held it under a deed from Mrs. Harvin.

[5] Nor was there error in admitting the summons and complaint, signed by Mr. Wells, as attorney for the Bochette heirs, as plaintiffs, against Mrs. Harvin. It was competent, because it tended to show common source of title; and the complaint also tended to show that at that time Mr. Wells, as attorney for the Bochette heirs, claimed, and that Mrs. Harvin, under whom the other defendants in this action claim, admitted, that all the land north of Duck branch had belonged to Sarah Anderson. As Mr. Wells

was only the attorney for the plaintiffs in that suit in making that claim, it might not operate as an estoppel against him, and it was not claimed that it did; but it was nevertheless competent evidence, because it tended to show that his contention in this action, that Sarah Anderson never owned or had possession of more than the 45 acres in the northwest corner of the plat in evidence, is inconsistent with the contention he made for the Bochette heirs, and of which he was a beneficiary. It is immaterial that the summons and complaint admitted in evidence was not a record of the court, or that there was no evidence that it had ever been served, because Mr. Wells testified that the deed on which he relied was made in settlement of that suit. The objection that the complaint in that case does not describe the property in dispute in this action is without foundation in fact. There is abundant evidence that it does; and Mr. Wells himself testified that it was the same.

[6, 7] The plaintiff's attorney attempted to prove the stenographer's typewritten notes of the testimony given by Mr. Wells at a previous trial, for the purpose of introducing it in evidence; but the stenographer failed to identify his notes. Thereupon his honor suggested that he put Mr. Wells on the stand as his witness. Plaintiff's attorney remarked that he did not like to put up an adverse party. His honor replied that he would be his witness only to a certain extent, and he would not be bound by what he said. It is objected that this remark was prejudicial as detracting from the weight of Mr. Wells' testimony, and as intimating to the jury that it was not binding on plaintiff. There was no error in the remark. While a party who calls his adversary as a witness makes him his witness to the same extent that he makes any other person whom he calls as a witness, still he is no more concluded by the testimony of his adversary than he would be by the testimony of any other witness whom he might call. But just as in the case of any other witness, having called him, he may not impeach him or contradict him; but he may prove the facts to be otherwise than as he testifies them to be. *State v. McKay*, 89 S. C. 234, 71 S. E. 858. And that is all his honor meant, and there was no ground for the jury to draw any other inference from what he said.

[8] It would be a useless consumption of time to discuss the six grounds upon which appellant contends that the court erred in refusing to grant his motion for nonsuit. When plaintiff traced her title by competent evidence to the same source from which appellant claimed, she made a prima facie case which required the submission to the jury of the issue, Who has the better title from the common source?

[9] Appellant complains that the court re-

fused to allow a witness to testify to declarations made by the trustees and the surveyor at the second division. His honor ruled that any declarations made by the trustees who made the first division, and their instructions to the surveyor, were admissible; but that, as the rights of the parties had vested under that division, the declarations of the trustees who made the second division, or their instructions to the surveyor, who made the plat in evidence, at the time of the second division, were not admissible. This ruling was correct. The declarations of the trustees and their instructions to the surveyor at the time of the first division were admissible as part of the *res gestæ*. They were explanatory of their acts. But neither the acts nor the declarations of the trustees who made the second division, over 20 years afterwards, were competent as evidence to affect rights which had vested under the first division. Therefore his honor rightly ruled that the plat made in March, 1899, at the time of the second division, was not admissible as evidence of the first division.

[10] It is not contended that the court erred in charging that under the trust deed the trustees could, in dividing the estate, give some of the parties in interest personal property and the others real estate, when there was no evidence that any such division was made. If there was error in this respect, which is not conceded, it was clearly not prejudicial.

The real, and practically the only, issue in the case was: What property was set off to Sarah Anderson at the first division? The court distinctly and repeatedly instructed the jury that plaintiff was entitled to recover that, and only that, so far as her claim under Sarah Anderson's will was concerned. And the appellant practically conceded at the trial that she was so entitled. The verdict establishes the facts according to plaintiff's contention.

Affirmed.

GARY, C. J., and WOODS, J., concur. WATTS and FRASER, JJ., did not hear this case.

(133 Ga. 432)

RAY v. HARRIS.

(Supreme Court of Georgia. July 11, 1912.)

(Syllabus by the Court.)

LIMITATION OF ACTIONS (§ 25*)—NOTE AND MORTGAGE.

A debtor executed a promissory note and a mortgage to secure the same. The note was not under seal; but the mortgage was executed under seal. The note and mortgage were separately executed, and were two separate and distinct instruments, though contained on the same sheet of paper. Suit was brought on the note more than 6 years; but within 20 years, after its maturity, and copies of the note and

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

of the mortgage were attached; and it was alleged that the note and mortgage were a part of the same transaction, and that a reference in the mortgage to the note as being secured by it constituted an acknowledgment, under seal, of the debt represented by the note. There was no prayer for the foreclosure of the mortgage. *Held* that, as the note showed on its face that the action upon it was barred by the statute of limitations, there was no error in sustaining a demurrer to the petition on that ground. *Allen v. Glenn*, 87 Ga. 414, 13 S. E. 585.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 118-131; Dec. Dig. § 25.*]

Error from Superior Court, Crawford County; W. H. Felton, Judge.

Action by B. H. Ray against E. F. Harris, Jr. Judgment for defendant, and plaintiff brings error. Affirmed.

L. D. Moore, of Macon, for plaintiff in error. R. H. Culverhouse and A. J. Danelly, both of Knoxville, for defendant in error.

EVANS, P. J. Judgment affirmed. All the Justices concur.

(138 Ga. 419)

CASTLEN v. J. W. STAFFORD & SONS.
(Supreme Court of Georgia. July 11, 1912.)

(Syllabus by the Court.)

APPEAL AND ERROR (§ 977*)—DISCRETION—NEW TRIAL—ALLOWANCE.

There was no abuse of discretion in granting a first new trial in this case. Civ. Code 1910, § 6204.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3860-3865; Dec. Dig. § 977.*]

Error from Superior Court, Upson County; Robt. T. Daniel, Judge.

Action between Mrs. A. H. Castlen and J. W. Stafford & Sons. From an order granting the latter a new trial, the former brings error. Affirmed.

Robt. L. Berner, of Macon, for plaintiff in error. C. J. Lester, of Barnesville, and Persons & Persons, of Forsyth, for defendant in error.

HILL, J. Judgment affirmed. All the Justices concur.

(138 Ga. 380)

EAST ATLANTA LAND CO. v. MOWER
et al.

HURT v. SAME.

(Supreme Court of Georgia. July 11, 1912.)

(Syllabus by the Court.)

1. APPEAL AND ERROR (§ 323*)—PARTIES—JOINT PARTIES.

Where an action is brought against two persons, and each files a separate demurrer, both of which are overruled, each party has the right to except to the overruling of the sepa-

rate demurrer filed by him, and to file a separate bill of exceptions, if he so desires.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1798-1805; Dec. Dig. § 323.*]

2. PLEADING (§ 308*)—EXHIBITS—MUNIMENTS OF TITLE—STATUTORY PROVISIONS.

Civil Code 1910, § 5541, which requires that copies of contracts, obligations to pay, or other writings which constitute the basis or cause of action, or the relief prayed for, should be incorporated in or attached to the petition, only applies where the instrument sued on constitutes the cause of action, or the basis of the relief prayed.

(a) The plaintiffs alleged themselves to be the owners of the property appurtenant to the parks dedicated and to have an easement in such parks, and the object of the suit is to protect such easement. The easement is claimed by virtue of a dedication of the parks to the public use. In such a case, copies of the plaintiffs' muniment of title are not required to be attached to the petition.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 935-941; Dec. Dig. § 308.*]

3. PARTIES (§ 14*)—PLAINTIFFS—JOINDER.

Where a number of people have a common interest in the result of a suit, they can all join in an action to assert their rights, and the parties being so joined does not make the case open to the objection that there is a misjoinder of parties plaintiff.

[Ed. Note.—For other cases, see Parties, Cent. Dig. §§ 13, 16, 17½; Dec. Dig. § 14.*]

4. DEDICATION (§ 19*)—EASEMENTS (§§ 15, 61*)—RIGHTS ACQUIRED—PROTECTION—ESTOPPEL.

Where a petition clearly shows that certain lots within an incorporated city were sold by the original owners for residence purposes with reference to a plat showing, not only the residence lots, but certain parks described thereon, which were intended to be dedicated to the public use, this would constitute a dedication of the parks to the public use, if the parks were accepted by the public.

(a) Persons who originally bought residence lots adjacent thereto with reference to such plats, and their grantees, would have an easement in such parks so dedicated.

(b) Such persons could join in an equitable petition to restrain the original owners of the lots and parks, and their grantees, from selling or otherwise disposing of or incumbering such parks, and to have a final decree declaring the parks to be public parks, subject to public use, and the petitioners and their assigns to have an easement in the same, without interference on the part of the grantors or their assigns.

(c) If the residence lots of plaintiffs were sold by the original owner to the original purchasers with reference to the plats containing a description of the parks, such original owner and his grantees are estopped from setting up a claim adverse to the right of private individuals who originally so purchased and their grantees, or to the public, to the use of the parks.

[Ed. Note.—For other cases, see Dedication, Cent. Dig. §§ 35, 37-47; Dec. Dig. § 19.* Easements, Cent. Dig. §§ 42-58, 102, 130-144, 148; Dec. Dig. §§ 15, 61.*]

Error from Superior Court, Fulton County; W. D. Ellis, Judge.

Action by W. K. Mower and others against the East Atlanta Land Company and another. Judgment for plaintiffs, and defendants East Atlanta Land Company and A. E. Hurt separately bring error. Affirmed.

Payne, Little & Jones, of Atlanta, for plaintiffs in error. Hines & Jordan, of Atlanta, for defendants in error.

HILL, J. [1] The plaintiffs in error in the two cases herein dealt with were joint defendants in the same suit in the court below. Each of them filed a separate general demurrer in the case, both of which demurrers were overruled by the court, and the defendants below filed separate bills of exception to the judgment overruling each separate demurrer. A motion was made in this court in each case to dismiss the bill of exceptions, on the grounds: (1) That it did not sufficiently appear in what case the bill of exceptions was sued out, and who were the parties to the suit; (2) that the other codefendant in the case below, who is separately excepting, was not made a party to the bill of exceptions; (3) that the case below could not be split up and two separate bills of exceptions filed. There is no merit in any of the grounds of the motion to dismiss, and the motion is accordingly overruled. Where an action is brought against two defendants, and each files a separate demurrer, both of which are overruled, each party has the right to test the ruling. If one of them files a bill of exceptions on the overruling of his demurrer, there is no method known to the law by which the other defendant can compel him to include in his bill of exceptions an assignment of error on the overruling of the demurrer of such second defendant. Therefore, where one defendant files such a bill of exceptions, and does not assign error on the overruling of the demurrer of the other defendant, either the judgment last mentioned would stand as final against such other defendant, because no exception was taken to it, or else such defendant must have the right to except and test the question. Whatever might be the ruling on the writ of error upon the overruling of the one demurrer, the judgment so rendered, even though one of reversal, would not in all cases set aside or affect the judgment rendered on the demurrer of the other defendant. See, in this connection, *Tate v. Goode et al.*, 135 Ga. 738, 70 S. E. 571, 33 L. R. A. (N. S.) 310. In order that each defendant may exercise his right to except to the overruling of a separate demurrer filed by him, he must have the right to file a separate bill of exceptions, if he so desires.

[2] 2. One ground of the demurrer is that the plaintiffs have not attached to the petition "any exhibit of any alleged deed or plat mentioned in said petition," and that this is necessary in order properly to put defendants on notice. It is insisted that copies of the plats and deeds should be attached to the petition, so as to enable the court to determine whether or not the plat would show such a designation of the places as parks as would be equivalent to a dedication. Our

Civil Code 1910, § 5541, declares: "Copies of contracts, obligations to pay, or other writing should be incorporated in or attached to the petition in all cases in which they constitute the cause of action, or the relief prayed for must be based thereon." This section, which is relied upon in support of the demurrer, has no application. It has application only where the original of the copy which is to be attached to the declaration constitutes the cause of action, or the basis of the relief prayed for. Here neither the deeds, nor the plats or maps, constitutes the cause of action, or the basis of the relief prayed for. The basis of the present cause of action is the dedication, and the relief sought under it, and not the plats or deeds. These are probably some of the evidences of the dedication, but not the dedication itself, and surely the evidence is not required to be attached. In 31 Cyc. 556, 557, it is said: "In many states it is required that, when a pleading is founded on a written instrument, the original or a copy thereof must be attached to or filed with the pleading. But no contract or other instrument need or should be filed or annexed which is not the foundation of the action or defense. Therefore instruments which are merely to be used as evidence do not generally fall within the statute. Instruments other than those contemplated by the statutes need not and cannot be set up as exhibits under the statute."

The petition alleges: "Said company represented to the original purchasers of said lots that said parts, known as the Mesa, Triangle, and the Delta, were parks, and would always be kept as such, and that no one could ever build in front of the owners of lots fronting on said parks. On this representation of said company, said original purchasers of said lots bought the same from said company, paying therefor high prices, by reason of said parks being in front of said lots; and said original purchasers and their vendees have constructed costly residences thereon, which they would not have done, but for the fact that said company had dedicated said parks to the public, and assured the original purchasers that the same would always be used for that purpose." And in an amendment it was alleged: "Said dedication consisted in said company's laying off said land into lots, streets, and parks, making maps showing said lots, streets, and parks, and thereafter, at public auction sale of said lots and at private sales, making sales of said lots with reference to said maps, and by representing to the purchasers of said lots at said sales that said plats of ground were parks for public use and enjoyment."

It will therefore be seen that the basis of the suit is the dedication. And the evidence of the dedication, as set out in paragraph 8 of the petition, was "announced in public and

in private, and in newspapers in advertising said lots for sale, and by representation on plats of said property." Even if the maps and deeds were the basis of the action, and it was necessary to attach copies, a perfect description of the parks is made, and their location with reference to the lots of land of the plaintiffs is given, in the petition, in which the boundaries of each is stated, so that the defendant is put as substantially on notice as to the property alleged to be dedicated as if the plans and maps were attached. The plaintiffs allege themselves to be the owners of the property appurtenant to the parks dedicated, and to have an easement in such public parks, and the object of the suit is to protect such easement. The easement is claimed by virtue of a dedication of the parks to the public use. In such a case, copies of the plaintiffs' muniment of title are not required to be attached to the petition.

[3] 3. As the same questions are involved in both cases, they will be considered together. In view of the amendment to the plaintiffs' petition in the court below, it will be necessary to consider only two questions presented by the record: (a) Whether there was a misjoinder of parties plaintiff in the case, as insisted by the plaintiffs in error. (b) Whether the petition shows specifically such facts as would create a dedication by the East Atlanta Land Company of the park property described therein to the plaintiff and the public for park purposes. We are clearly of the opinion that there was no misjoinder of parties. The rule seems to be well settled that, where a number of people have a common interest in the result of a suit, they can join in an action to assert their rights.

In the case of *Blaisdell v. Bohr*, 68 Ga. 56, it was held that "a bill is not multifarious because all of the defendants are not interested in all of the matters contained in the suit. It is sufficient if each party has an interest in some matter in the suit which is common to all, and that they are connected with the others," and "all persons who are directly or consequentially interested in the event of the suit are properly made parties to a bill in equity, so as to prevent a multiplicity of suits by or against parties at once or successively affected by the original case." And in discussing that case, on page 61, Justice Crawford said: "There was in this whole transaction but a single subject-matter—the 23 shares of stock. How and where the liability will fall, and what shall be the final determination as to the rights of these parties, are not the questions. All the parties are connected with it in the conveyance from the alleged true owner. They may all be heard, and their rights and liabilities settled in this one suit, and the whole matter finally adjudicated. *Burchard v. Boyce*, 21 Ga. 6; *Wynne v. Lumpkin*, 35

Ga. 208; *Mitford & Tyler*, 271-273; *Dan. Ch. Pl. and Pr.* 334; *Story's Equity Pl.* 271, 271a. * * * All persons who are directly or consequentially interested in the event of the suit should be made parties. Persons are often necessary parties defendant to a suit, 'not because their rights may be directly affected by the decree, if obtained, but because, in the event of the plaintiff succeeding in his object against the principal defendant, that defendant will thereby acquire a right to call upon him, either to reimburse him the whole or part of plaintiff's demand, or to do some act towards reinstating the defendant in the situation he would have been in but for the success of the plaintiff's claim.' This is done to avoid a multiplicity of suits, and requires the parties who may thus be consequentially liable to be brought in the first instance before the courts, that all the liabilities may be adjudicated and settled in one proceeding. 1 *Dan. Ch. Pl. and Pr.* § 283."

In the case of *Conley v. Buck*, 100 Ga. 187, 28 S. E. 97, Justice Fish (now Chief Justice) goes very exhaustively into the subject and cites a great number of authorities to sustain the ruling there made. It was there stated and ruled on page 187 of 100 Ga., and page 97 of 28 S. E., that "an equitable petition by a judgment creditor against the defendant in execution and others alleged, in substance, that they had all entered into a conspiracy to defeat the collection of the debt upon which the judgment was founded, that the common object of all the conspirators was to 'hide' and 'cover up,' in the names of the co-conspirators other than the defendant in execution, property which really belonged to him, and that in pursuance of this object various deeds had been executed purporting to convey specified parcels of realty to these co-conspirators, which in fact belonged to the judgment debtor; the particulars in each instance being set forth. The petition prayed for the cancellation of the various conveyances which were, for the reasons stated, alleged to be fraudulent, and for a judgment subjecting all the property to the petitioner's execution. Held, that this petition was not demurrable as failing to set forth an equitable cause of action, nor as being multifarious, nor for want of sufficient fullness in stating wherein the alleged fraudulent acts of the several defendants consisted." Also see 100 Ga. 199, 28 S. E. 97, et seq., where numerous authorities are cited with approval.

In 16 Cyc. 248, citing a number of authorities, including Georgia cases, it is stated that: "In order to permit a joinder of plaintiffs, it is not essential that their demands should be joint. It is sufficient if they are all interested, although distinctly, in the subject-matter and in the object to be attained. Indeed, a common interest in the object to be attained may in itself be sufficient to

sustain the joinder, as where several property owners unite to prevent the collection of an illegal tax, or the unlawful use of the street on which their property abuts. Plaintiffs having distinct interests, but whose titles are derived from a common source, may unite in a bill to protect against an attack reaching that common source. The fact that the injury to each is caused by the same act has been held to afford a sufficient connection to maintain a joint suit. It is also held that the plaintiffs may join, although their interests be separate, where the relief sought by each involves the same question, requires the same evidence, and leads to the same decree." See, also, 6 Pom. Eq. Jur. § 892; *Dart v. Orme*, 41 Ga. 377.

In *People's National Bank v. Cleveland*, 117 Ga. 908, 916, 44 S. E. 20, 24, it was said: "The rule is well established that where there is one connected interest, centering in the point in issue, or one common point of litigation, so that the joinder tends to prevent multiplicity of suits, unconnected parties may join in an action."

It is alleged in the petition of W. K. Mower and others (15 in number) that the East Atlanta Land Company was the owner of a certain tract of land in the city of Atlanta, known as "Inman Park"; that said company graded and beautified the tract of land, laid it off into streets, parks, and lots, and sold many of the lots to plaintiffs and others for residence lots; that said company dedicated certain parks in said Inman Park to the public use and enjoyment of the public, among which were Mesa Park, the Triangle, and the Delta; that said dedication consisted of said company's laying off said land into lots, streets, and parks, making maps showing said lots, streets, and parks, and thereafter sold said lots at public auction and at private sales, making said sales of lots with reference to said maps, and by representing to the purchasers of said lots at such sales that said plats of ground were parks for public use and enjoyment; that all of petitioners are residents of said Inman Park, and own and reside on lots there, and have enjoyed the use and benefit of said parks ever since they became residents of Inman Park; that the East Atlanta Land Company represented to the original purchasers of said lots that said parks were parks, and would always be kept as such, and that no one could ever build in front of the owners of lots fronting on the parks, and it was on this representation of the company that the original purchasers bought lots, paying high prices by reason of the parks being in front of said lots, and constructed costly residences thereon, which they would not have done, but for the dedication and assurance that the parks would always be used for that purpose; that on March 26, 1896, the defendant conveyed to

Alfred A. Glazier by deed the park known as the "Mesa," who afterwards on April 26, 1896, conveyed said park by deed to Mrs. Annie E. Hurt (one of the defendants); that Mrs. Annie E. Hurt has never taken possession of or improved same by erecting structures thereon, or fencing the same, but it has remained a public park, covered with grass, trees, shrubbery, etc., and has been enjoyed as such by the plaintiffs and other residents of Inman Park; that Mrs. Annie E. Hurt is the wife of Joel Hurt, who was and is the president of the East Atlanta Land Company, and its chief promotor; that Mrs. Annie E. Hurt knew of the dedication of the parks to public use and enjoyment at the time she bought said portion of Mesa Park from Glazier, etc.; that the company is offering to sell the two parks known as the Delta and the Triangle for places for the erection of stores, houses, or any other purpose, etc.; that unless enjoined defendants will create a cloud upon the title of the plaintiffs and the public to said parks; that the sale of a portion of the Mesa to Annie E. Hurt constituted a cloud upon the title of the plaintiffs and the public to the park known as the "Mesa"; and that after a title is acquired by prescription, and the evidence to establish the dedication of the land as a public park has been destroyed, the purchasers will sell or improve same and destroy the park. Plaintiffs pray: (a) That defendants be restrained and enjoined from selling, or otherwise disposing of or incumbering, the parks known as "Mesa," "Delta," and "Triangle"; (b) that the parks may be declared by final decree to be public parks, and their character as such confirmed, and the evidence thereof spread upon the records of the court; (c) that the cloud upon the title of petitioners and the public to the park known as "Mesa" may be removed by the decree of the court, and that the park may be declared as a public park, etc.

From these allegations it appears that such a community of interest exists between the plaintiffs in the court below as that they could sue jointly in order to enforce the alleged rights they have, and, this being true, the petition is not open to the objection that there is a misjoinder of parties plaintiff. Every one who bought an interest in that property, if bought as alleged in the petition, has an easement in those parks; and where an infringement of the rights of the purchaser or purchasers is shown, it affects the rights of all who are so situated, and all such may join in a bill to assert their rights. And neither the plaintiffs, nor the public, could be deprived of the right to the enjoyment of the use of the parks, if the lots were sold under the circumstances alleged in the petition and amended petition of the plaintiffs. The plaintiffs could not be deprived of the full enjoyment of the parks,

if there has been a dedication and acceptance of the parks on their part, and on the part of the public.

[4] 4. Does the petition aver specifically such facts as would create a dedication by the East Atlanta Land Company of the three parks described in the petition to the plaintiffs and to the public use? Did the petition show that the lots were sold with reference to the plats, and that the parks as described in the petition were represented on the plat at the time of the sale? Properly construed, we think the petition shows clearly that the sale of the lots was according to the plat, the substance of which was fully set forth, and if the parks were described or outlined on the plat, and the land was sold with reference thereto, then this would constitute a dedication of the parks to public or to private use, as the case may be, or both, by the owner. It appears from the petition that the East Atlanta Land Company was the owner of a certain tract of land, now constituting that certain residence district in the city of Atlanta known as "Inman Park," with the lots, streets, and parks mapped upon it. These lots, abutting upon the streets and parks, were sold by the company to the plaintiffs and others, and a valuable consideration paid therefor—a higher consideration, it is alleged, by reason of the dedication of the parks. Civil Code 1910, § 4171, declares: "If the owner of lands, either expressly or by his acts, dedicates the same to public use, and the same is so used for such a length of time that the public accommodation or private rights might be materially affected by the interruption of the enjoyment, he cannot afterwards appropriate it to private purposes."

This case has been treated as one of dedication; but, correctly speaking, there can be no dedication to a private use. "Dedication is the setting apart of land for the public use." 1 Elliott on Roads and Streets, § 122, and cases cited; Ford v. Harris, 95 Ga. 100, 22 S. E. 144. But, whether it is a case of dedication to a public or to a private use, the plaintiffs are asserting their right to an easement in the parks in controversy, and the result is the same to the plaintiffs, so far as their right to an easement in the parks is concerned. In the view we take of the case, if the lots were sold with reference to the plats, which contained a delineation of the parks, and the original purchasers bought with reference thereto, the seller is estopped from setting up a claim adverse to the right of private individuals, or their assigns, who so bought, or to the right of the public to use the parks, if there has been a dedication and acceptance. 1 Elliott on Roads and Streets, § 146; Schreck v. Blun, 131 Ga. 489, 62 S. E. 705; Mayor, etc., of Macon v. Franklin, 12 Ga. 239. And see Bouvier's Law Dict. "Estoppel in Pais," and cases cited.

In 3 Dillon on Mun. Corp. (5th Ed.) § 1107, it is said: "Consummated intent on the part of the owner to dedicate is all that is required, and such intent may be shown by parol evidence of declarations and of acts in pais which unequivocally establish it. It may, we think, truly be affirmed that the doctrines of our law on this subject, as fashioned and settled by judicial tribunals, though in many respects seemingly anomalous, are characterized by practical wisdom, and are beneficent in their operation. Rightfully applied, they work no injury to the supposed dedicator, since they draw the line with enlightened and considerate care between a just measure of his rights on the one hand and the rights of the public on the other." See, also, Savannah, etc., R. Co. v. Shiels, 33 Ga. 601 (4); Schreck v. Blun, 131 Ga. 489, 62 S. E. 705. In 1 Elliott on Roads and Streets (3d Ed.) § 128, it is said: "Dedication may be established against the owner of the soil by showing that he has platted the ground, representing streets and alleys on the plat, and has sold lots with reference to it, or by showing that he has adopted a map or plat made by public officers, or other persons, or by showing that he has sold lots describing them as bounded by a street or road. * * * Ordinarily, the sale of a single lot with reference to the plat will complete the dedication." As to express and implied dedications, see same volume of this work, section 133 et seq.

Private corporations, having the right to own and deal with land, usually have power to dedicate roads and streets, or the like, to the public use. This is usually true, so long as it does not interfere with the purposes for which the company was incorporated. 1 Elliott on Roads and Streets, § 101; 13 Cyc. 442; Macon v. Franklin, 12 Ga. 239. The doctrine of dedication of parks and public squares to the public use has been extended and applied so as to give the public an easement in parks and squares in cities and villages, and this dedication may be effected in the same way as in the case of streets and highways. 3 Dillon on Mun. Corp. (5th Ed.) §§ 1095, 1096, and cases cited. "R. Graves platted a tract of land as building lots, selling some of them by reference to such plat. On this plat was a small section marked 'Annette Park, now belonging to R. Graves.' Held, that such section thereof became a public park by dedication." Bayonne v. Ford, 43 N. J. Law, 292. In the case of Abbott v. Mills, 3 Vt. 521, 526, 23 Am. Dec. 222, Williams, J., said: "It is customary in laying out towns, particularly when it is contemplated that they will be places of business, to lay out a square or common, and to locate building lots bordering thereon. And these lots acquire an increased value in consequence of their location. If a village is built up, and individuals buy these lots, erect buildings, and commence the establish-

ing of a village, and make it a common center for the business of the town, the other lands in town rise in value, of which the proprietors have all the advantage. It would then be the height of injustice, and contrary to every principle of good faith, to permit these proprietors to derive this advantage, and then frustrate the expectations held out, by resuming the lands thus set apart, and at a value greatly enhanced in consequence of their having been thus set out."

In *Weger v. Delran*, 61 N. J. Law, 224, 226, 39 Atl. 730, it is said: "Bechtold had purchased a tract of land which included the locus in quo; that he had made a map of it, laying it off by streets into blocks; that he named it 'Plan of Bechtold's Fourth Addition to the Town of Progress'; that all the blocks except the locus in quo were divided into numbered lots; that it was distinguished from the other blocks by a different coloring, by the delineation of trees and paths, and by a rough representation of a fountain in the center; that he had lithographed copies of the map made. * * * Although the map did not designate this block in words as a 'square' or 'park,' yet it contained persuasive evidence that it was intended for a different use than that to which the other blocks were designed to be put, and from Bechtold's acts and declarations, which were admissible evidence, there was the plain inference capable of being drawn that he intended to dedicate the block to public use, as was found by the trial judge, in accordance with the cases in this state respecting the dedication of lands to public uses." See, to the same effect, *Morrow v. Highland Grove Traction Co.*, 219 Pa. 619, 623, 624, 69 Atl. 41, 42 (123 Am. St. Rep. 677), where it was said, quoting from a previous decision: "Property may be dedicated for public use by plans indicating that purpose. Such dedication becomes irrevocable when the interest of third persons is acquired by sale of lots or acceptance for the public by public use or municipal action. Acceptance by the public need not be immediate, but may be made when public necessity or convenience arises. As a corollary to this proposition, it follows that it is not necessary that the public use the entire property dedicated. Any public use of a part of the property, indicating a purpose to accept the gift, fixes the public right to the whole. When the public right has been acquired, it cannot be lost by nonuser or by municipal action not expressly authorized by law. Any occupation of the property inconsistent with the public right is a nuisance, and no length of time will legalize a public nuisance."

In *Archer v. Salinas City*, 93 Cal. 43, 50, 28 Pac. 339, 841 (16 L. R. A. 145), Harrison, J., said: "The word 'park,' written upon a block of land designated upon a map,

is as significant of a dedication, and of the use to which the land is dedicated, as is the word 'street,' written upon such map. The word carries with itself the idea of an open or inclosed tract of land for the comfort and enjoyment of the inhabitants of the city or town in which it is located, and is so defined by lexicographers. In England, the word, when applied to an inclosed tract of land in the country, has a different signification, and signifies that the lands inclosed are the private grounds of the proprietor. In this country, too, a man may inclose his own land and style it a park, or give that name to his place, without giving the public any right to its use, for in such a case there would be no semblance of dedication; but the meaning of a word is to be determined by the circumstances connected with its use. In London, as well as in any city in this country, the term 'park' signifies an open space intended for the recreation and enjoyment of the public, and this signification is the same, whether the word be used alone or with some qualifying term, as Hyde Park, or Regent's Park, or, as in the present case, 'Central Park.'"

In *Price v. Plainfield*, 40 N. J. Law, 608, it is held: "The word 'park,' written upon a block on a map of city property, indicates a public use, and conveyances made by the owners of the platted land, by reference to such map, operates conclusively as a dedication of the block."

Authorities might be multiplied to the same effect. It follows, from what has been said, and in view of the amendments filed by the plaintiffs, that the trial judge did not err in overruling the demurrers filed in each of the cases here considered.

Judgment affirmed in both cases. All the Justices concur, except LUMPKIN, J., disqualified.

(138 Ga. 359)

MOOR v. FARLINGER.

(Supreme Court of Georgia. July 10, 1912.)

(Syllabus by the Court.)

JUDGMENT (§ 572*)—RES JUDICATA—NATURE OF JUDGMENT—DEMURRER TO PETITION.

A petition was filed in the superior court, which alleged: That on a date named the plaintiff had made a deed to defendants "as trustees to sell all that tract or parcel of land [describing it]; that said parcel or tract of land was deeded to said trustees for school and church purposes [a copy of the deed being attached]. Petitioner shows that the purposes for which said deed was made have failed, and that said property has been abandoned for more than two years. Petitioner asks that said deed be annulled, and the title to said property be restored to him, according to the law governing such trustees," and that process issue. A copy of the deed was attached to the petition. It was a quitclaim deed from the petitioner to the defendants, "trustees," for the recited consideration of \$100. It set out no trust, and there was nothing to indicate the existence of a trust, except the addition of the

word "trustees" after the names of the grantees. A demurrer was filed to this petition, on the ground that it failed to state a cause of action, and because it affirmatively appeared from the petition that the plaintiff had no sort of interest in the property described, and was not entitled to a right of action for the recovery thereof. The demurrer was sustained, and the case dismissed. Later the plaintiff filed another petition, alleging, in detail, that the deed had been executed for the purpose of having the property controlled by the grantees and used for school and church purposes, and it was understood that they were to have no beneficial interest as individuals, but should hold the property in trust as long as it could be used for the purposes mentioned, and the deed was executed to put an estate in them for that length of time and no longer; that there was no consideration paid; that the property was used for the purposes stated for a time, but had been abandoned and ceased to be so used, and a resulting trust to the petitioner had arisen; that the grantees in the deed had abandoned and sold the property, and one of them had the proceeds in his hands, which he refused to pay to the plaintiff on demand, and plaintiff was informed that the others made no claim upon it. He alone was sued. The defendants pleaded that the subject-matter of the suit was res adjudicata. The case was submitted to the presiding judge, without a jury, and he sustained the plea. *Held*, that this was not error. Civ. Code 1910, §§ 4335, 5943, 5820, 4336, 4338; 24 Am. & Eng. Enc. Law, 733, 778, 780; *Fain v. Hughes*, 108 Ga. 537, 33 S. E. 1012; *Greene v. Central of Georgia R. Co.*, 112 Ga. 859, 38 S. E. 360; *Smith v. Smith*, 125 Ga. 83, 54 S. E. 73; *Gunn v. James*, 120 Ga. 482, 48 S. E. 148; *Dodson v. So. Ry. Co.*, 137 Ga. 583, 73 S. E. 834.

(a) The ruling in *Steed v. Savage*, 115 Ga. 97, 41 S. E. 272, does not conflict with that here made. There a petition was filed in the nature of a bill of interpleader. It was held that, in the absence of allegations essential to such petition, it would be dismissed on general demurrer. It was said that this would not conclude the parties thereto on any matter, except that the petition did not authorize the equitable relief prayed for, although there were some allegations which might have been appropriate to a suit to recover the property.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1047-1049; Dec. Dig. § 572.*]

Error from Superior Court, Fulton County; J. T. Pendleton, Judge.

Action by W. F. Moor against A. W. Farlinger. Judgment for defendant, and plaintiff brings error. Affirmed.

Bell & Ellis, of Atlanta, for plaintiff in error. J. L. Hopkins & Sons, of Atlanta, for defendant in error.

LUMPKIN, J. Judgment affirmed. All the Justices concur.

(138 Ga. 379)

A. J. GOLDEN & SON v. C. D. SHAW & CO. (Supreme Court of Georgia. July 11, 1912.)

(Syllabus by the Court.)

FRAUD (§ 43*)—DECEIT—SALE OF LAND.

In an action for damages, instituted August 31, 1909, on account of alleged deceit practiced on plaintiffs, inducing them to enter into a written contract with defendants, the petition was not subject to general demurrer, on

the ground that no cause of action was set out, where the petition alleged the following in substance: On September 5, 1905, by a written contract between the parties of that date, defendants sold to plaintiffs their entire turpentine outfit, located in a designated county and district, consisting of described personal property, and all their timber suitable for turpentine purposes. Of the timber included in the sale there designated numbers of "acres of timber" on several designated lots of different named persons. The contract recited the number of acres held under the different owners of land as ranging from 200 to 1,225 acres; the aggregate being 3,971 acres. As a matter of fact, there was a deficiency in the number of acres of timber in each of such tracts, on account of the land having been cleared and put in cultivation; the total deficiency amounting to 764 acres. The price paid per acre was \$2.50, and the loss to plaintiffs by reason of the deficit in acreage was \$1,910. During the negotiations which finally culminated in the sale, plaintiffs made inquiry of defendants, on different occasions, as to whether the number of acres set forth in the different leases exhibited to petitioners and afterwards incorporated in the contract "represented the number of acres of timber lands in each instance, exclusive of all clearings and cultivated fields, and petitioners were assured by the defendants that the acres so mentioned represented only timbered lands, exclusive of that cleared or in cultivation." Petitioners made an examination of the lands in the best possible manner, without an actual survey, before the transaction was actually consummated into a sale, but were unable, without an actual survey, to determine, with any accuracy, or even approximately, whether the acreage as set forth and claimed by the defendants was the true acreage of the timber lands, or otherwise; this knowledge being exclusively with the defendants, and in their own breast and keeping. At the time this sale was made, when petitioners made an inquiry as to these facts above set forth, defendants actually knew that the figures representing the acreage given and set forth did not represent the true acreage of timber lands, but represented the timber lands and the cleared lands as well. Relying upon the representations made by defendants as to the acreage of the timber lands, plaintiffs acted, and were thereby misled into making the purchase above described, believing that they had contracted only for timber lands, and not for cleared lands that contained no timber; and the failure on the part of the defendants to deliver them the total amount of timber purchased has resulted in loss and damage to them. See *Emlen v. Roper*, 133 Ga. 726, 68 S. E. 934.

(a) In regard to the case of *Martin v. Harwell*, 115 Ga. 156, 41 S. E. 696, it may be remarked that the subject-matter of the representations there involved was in part the quality or character of the timber on certain lands; and that the decision in that case was rendered by four Justices, and is not such a binding precedent as requires the decision to be reconsidered or modified formally. Therefore, without finding it necessary to formally overrule or declare a modification of that decision, it will not be extended to cases of the present character.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. § 37; Dec. Dig. § 43.*]

Error from Superior Court, Berrien County; W. E. Thomas, Judge.

Action by A. J. Golden & Son against C. D. Shaw & Co. From an order sustaining a demurrer to the petition, complainant brings error. Reversed.

W. G. Harrison and W. D. Bule, both of Nashville, for plaintiff in error. Hendricks & Christian and J. P. Knight, all of Nashville, for defendant in error.

ATKINSON, J. Judgment reversed. All the Justices concur.

(188 Ga. 232)

W. E. COLDWELL CO. v. COWART.
(Supreme Court of Georgia. May 18, 1912.)

(Syllabus by the Court.)

1. ESTOPPEL (§ 78*)—EQUITABLE ESTOPPEL—CONTRACTS.

A declaration in attachment alleged in substance as follows: An owner of timbered land sold and conveyed the cypress and hardwood timber located thereon, suitable for sawmill purposes, to another on a credit, but expressed no time which the grantee should have within which to cut and remove such timber. Two years would have been a reasonable time therefor. Some time thereafter the grantee desired to borrow money from a corporation, which was a dealer in lumber and hardwood, and which was desirous of making the loan on terms that would be advantageous to it, including the purchase of the product of the sawmill. The company was unwilling to advance the sum to the grantee, unless he could secure from the grantor and transfer to it as security the right to have ten years in which to cut and remove the timber. The grantee applied to the grantor for that purpose. The grantor agreed, provided a certain part of the purchase money should be paid, and two notes of equal amount should be given by the grantee for the balance, due at three and six months, respectively, and that the corporation would agree to assume and pay such notes. Through its officer it orally agreed to do so. The additional grant of time was made to the grantee, and he executed the notes, and transferred the grant to the corporation as security. The instrument so executed recited that, whereas, it was agreed that the purchaser should have ten years in which to exercise the rights conferred on him, and this was omitted from the "lease," "it is now agreed" that he shall have ten years within which to exercise such rights. Subsequently he became a bankrupt, and the grantor sued the corporation on its parol promise to pay the notes of the grantee. Held that, in a suit against the company, based on its promise, such recitals did not estop the grantor from alleging and proving that in fact there was no mistake in the original agreement, but the grant of ten years within which to exercise the privilege was a new agreement, and the consideration was the promise of the defendant to pay the notes of the grantee.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. §§ 204-210; Dec. Dig. § 78.*]

2. FRAUDS, STATUTE OF (§ 23*)—AGREEMENT TO ANSWER FOR DEBT OF ANOTHER.

Such promise was one to answer for the debt of another person, and was within the statute of frauds.

(a) The ground of demurrer to a suit on such parol promise, setting up the statute of frauds, should have been sustained.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. §§ 18, 19; Dec. Dig. § 23.*]

Error from Superior Court, Early County; W. C. Worrell, Judge.

Action by J. S. Cowart against the W. E.

Coldwell Company. Judgment for plaintiff, and defendant brings error. Reversed.

J. S. Cowart brought suit by attachment against the W. E. Coldwell Company. As amended, the declaration alleged in substance as follows: On July 18, 1906, the plaintiff sold to T. A. Bailey all the cypress and hardwood timber suitable for sawmill purposes, located upon certain land, for the sum of \$2,000, for which credit was extended. No time was specified in which to cut and remove the timber from the land, and therefore only a reasonable time was allowed. Two years would have been a reasonable time. About six months after the contract was made, and before any of the timber was cut, the creditors of Bailey were pressing him. The Coldwell Company was a dealer in lumber and hardwood products, and was a large and wealthy company. It desired to advance to Bailey a sufficient sum to enable him to arrange with his creditors, provided he would mortgage to it certain property and enter into a contract to sell and deliver to it the entire output of his sawmill at a price which would be very profitable to the company. After negotiation, the company was unwilling to advance the sum, unless Bailey could secure from the plaintiff and transfer to it the right to have ten years in which to cut and remove the timber. In order to carry into effect this arrangement, Bailey approached the plaintiff with a request to sign an instrument giving to him ten years in which to cut and remove the timber. The plaintiff agreed to this, provided that he should be paid \$580 of the \$2,000 purchase money, and interest then due, and that for the remaining \$1,500 of the purchase price two notes should be given by Bailey, each for \$750, with interest, due three and six months after date, respectively, and that the Coldwell Company would agree to assume and pay these notes, whether Bailey's business or arrangement with the company proved successful or not. The company orally agreed to assume and pay the notes, if the plaintiff would execute and deliver to Bailey an instrument in writing giving ten years in which to cut and remove the timber; it being in contemplation of the parties that such instrument would be at once transferred by Bailey to the company. The plaintiff executed such an instrument, and delivered it to one James, for the company, as was agreed, but, in order to more perfectly secure the payment of the notes, inserted in the paper a proviso to the effect that, if the notes were not paid at maturity, the instrument should be void. Plaintiff was informed by James, acting for the company, that the instrument was not in accordance with the agreement, and was assured that, inasmuch as the company was perfectly responsible, no security was necessary. Believing this to be true, he re-ex-

ecuted the instrument, omitting the proviso. He was under no legal or moral duty to execute such an instrument prior to the making of the promise by the company, there having been no agreement on his part prior to that time to give Bailey any fixed time in which to cut and remove the timber; and the recital in the instrument to that effect, and that the time in which the timber could be cut was left out of the original contract by mistake, was not true. Such recital "was inserted merely to comply with what plaintiff and said Bailey then believed to be a necessary legal form, and for no other reason; and this was well known to the defendant at the time when it promised to pay said notes, and when said instruments were so executed and delivered by plaintiff." It was added that, if the court should deem it necessary, the instrument last executed should be reformed by striking from it the untrue recital; and it was alleged that Bailey recognized the truth of these allegations, and stood ready to be made a party defendant and to consent to the reformation. It was prayed that, if it should be necessary to the exercise of the plaintiff's rights, this should be done. The instrument thus executed was at once transferred by Bailey to the defendant company as a part of the security given by him to it, along with other security, and a contract in regard to cutting and furnishing lumber to it. Some months later Bailey became a bankrupt.

A copy of the instrument referred to in the plaintiff's declaration is as follows: "Georgia, Calhoun County. Whereas, it was agreed between J. S. Cowart and T. A. Bailey that the said Bailey would have ten years within which to exercise the powers and rights granted to him on a certain instrument of lease from J. S. Cowart to T. A. Bailey, dated July 16, 1906, to 200 acres, more or less, of timber in the swamp of Caney creek, in Baker county, Georgia; and whereas, the length of time, to wit, ten years, was by mistake omitted from lease: It is now agreed that said Bailey shall have ten years from July 16, 1906, within which to exercise the powers granted in said instrument."

The defendant demurred to the plaintiff's declaration, on a number of grounds. Some of the grounds of special demurrer were sustained, and others were overruled. The general grounds were overruled. The defendant excepted.

J. R. Pottle, of Atlanta, and C. L. Glessner, of Blakely, for plaintiff in error. L. M. Rambo, of Arlington, and Pope & Bennet, of Albany, for defendant in error.

LUMPKIN, J. (after stating the facts as above). [1] 1. The defendant excepted to the overruling of certain grounds of demurrer to the plaintiff's declaration in attachment. A question in the case, and the one

to which the argument was largely directed, was whether the recital in the instrument executed by the plaintiff to Bailey, and which was transferred to the defendant, in regard to the omission from the former contract with Bailey of a certain time in which the timber could be cut and removed, could be shown to be untrue. The plaintiff contended that this recital was merely in regard to the consideration for the executing of the paper, and could be disproved. The defendant contended that it was not a recital of that character, but was one which worked an estoppel upon the plaintiff, who executed it, and could not be disproved.

The recital in a deed of the receipt of the purchase money does not estop the maker from denying the fact and proving the contrary. Civil Code 1910, § 4188. "Recitals in deeds, except payment of purchase money, as against the grantor" and his privies, generally work an estoppel. Section 5738. The consideration of a deed may always be inquired into when the principles of justice require it. Section 4179. Ordinarily, where the statement in a deed as to a consideration is merely by way of recital, the actual consideration of the deed is subject to explanation; but if the consideration is referred to in the deed in such a way as to make it one of the terms or conditions of the contract, it cannot be varied by parol. This statement, in connection with the rule against permitting the terms of a written contract to be changed by parol, will serve to reconcile a number of rulings where evidence has been admitted to show what was the consideration of the deed or contract with others in which it has been rejected. As illustrations of cases of the first character mentioned, see *Horn v. Ross & Leitch*, 20 Ga. 210, 65 Am. Dec. 621; *Burke v. Napier*, 106 Ga. 328, 32 S. E. 134; and citations; *Stone v. Minter*, 111 Ga. 45 (2), 53, 36 S. E. 321, 50 L. R. A. 356; *Martin v. White*, 115 Ga. 866, 42 S. E. 279; *Goette v. Sutton*, 128 Ga. 179, 57 S. E. 308; *Pavlovski v. Klasing*, 134 Ga. 704, 68 S. E. 511. For cases of the latter character, see *Wellmaker v. Wheatley*, 123 Ga. 201, 51 S. E. 436, and citations; *Atlas Tack Co. v. Exchange Bank*, 111 Ga. 703, 36 S. E. 939; *L. & N. R. Co. v. Holland*, 132 Ga. 173, 63 S. E. 898; *L. & N. R. Co. v. Willbanks*, 133 Ga. 15, 65 S. E. 86, 24 L. R. A. (N. S.) 374, 17 Ann. Cas. 860; *Southern Bell T. & T. Co. v. Smith*, 129 Ga. 558, 59 S. E. 215.

Under the guise of inquiring into the consideration of a deed, it is not competent by parol evidence to change the terms of the deed, or add new terms thereto. The point which we are now considering must not be confused with that involved in cases where a party in *pari delicto* will not be allowed to set aside his executed conveyance by asserting his own fraud, such as *Parrott v. Baker*, 82 Ga. 364, 9 S. E. 1068. In 16 Cyc. 699, it is said: "All parties to a deed are

bound by the recitals in it legitimately appertaining to the subject-matter. Recitals of matter of fact in a deed are ordinarily binding on the grantor. They are binding, also, on the grantee and his successors in estate, where he or they base their rights on the deed, but not otherwise." And on page 702 it is said: "A recital works an estoppel only in an action founded on a deed, or brought to enforce rights arising under it. While in a collateral action it may constitute evidence against the one party or the other, it is not conclusive." See, also, 2 Herman on Estoppel, § 628; Bigelow on Estoppel (5th Ed.) 352. The leading case on the subject is that of *Carpenter v. Buller*, 8 Mees. & Wels. 209, in which it is ruled: "Where a distinct statement of a particular fact is made in the recital of a bond or other instrument under seal, and a contract is made with reference to that recital, it is not, as between the parties to the instrument, and in an action upon it, competent to the party bound to deny the recital, and a recital in an instrument not under seal may be such as to be conclusive to the same extent. But a party to an instrument is not estopped, in an action by another party, not founded on the deed, and wholly collateral to it, to dispute the facts so admitted; but evidence of the circumstances under which such admission was made is receivable to show that the admission was inconsiderately made, and is not entitled to weight as a proof of the fact it is used to establish." Since this case was decided in 1841 it has been widely cited. In *re Morgan*, 2 L. R. Ch. Div. 72; *Macaulay v. Marshall*, 20 U. C. Q. B. 273; *Goodspeed v. Fuller*, 46 Me. 141, 71 Am. Dec. 572; *Harrison v. Castner*, 11 Ohio St. 339; *Champlain & St. Lawrence R. Co. v. Valentine*, 19 Barb. (N. Y.) 484; *King v. Mead*, 60 Kan. 539, 57 Pac. 113; *Reed v. McCourt*, 41 N. Y. 435.

In most, if not all, of the cases relied on by the plaintiff in error, an effort was made by a party to a deed or his privies in estate to assert title to the property conveyed, by virtue of the deed, or in conflict with its recitals or terms. Thus in *McCleskey v. Leadbetter*, 1 Ga. 551, the action was one of trover to recover certain slaves. A written instrument was introduced in evidence, which recited that the maker, under whom both parties claimed, had previously conveyed the negroes, that the conveyance was lost or mislaid, and that the maker executed the second instrument so as to relinquish all title which might remain in him. It was said that the recital of the execution of a previous deed was evidence of the fact, and binding upon the party making it and his privies. In *Thrower v. Wood*, 53 Ga. 458, an act of the Legislature was passed legitimating a child. Afterward the alleged father made a deed of gift to his three children, naming the above-mentioned child as one of them.

In a subsequent proceeding to partition the land, it was held that, "in a suit for and concerning the very land conveyed by the deed," the recital of the relationship was conclusive as against any one claiming the land under or by virtue of the deed. In *Long v. Bullard*, 59 Ga. 355, the action was commenced by suit on a promissory note. The plaintiff was allowed to amend by alleging that the money was loaned to pay a debt which was secured by a mortgage on land, that prior to the foreclosure of the mortgage the landowner and his wife had obtained a homestead, and, to secure the money advanced by the plaintiff, executed a deed to him, which described the property as having been set apart as a homestead. A sale of the property and payment of the debt from the proceeds was prayed. The court charged that the homestead was void for lack of jurisdiction in the ordinary, who granted it, to do so. It was held that the grantee, who accepted the deed with the recital that the property had been set apart as a homestead and was conveyed with the approval of the ordinary, was estopped from denying the validity of the homestead.

Applying the principles above discussed to the case in hand, it will be seen that the present suit is not an effort to recover the property conveyed; nor is the written instrument relied on to defend against such an effort. It is not a proceeding to enforce the written instrument, considered as a grant or conveyance, or to attack the conveyance or grant of a right therein specified. The suit is one to recover a consideration alleged to have been promised for the making of the instrument. It is more nearly analogous to a suit to recover the purchase price recited in a deed to have been paid. The recital in the instrument is that, "whereas," Cowart agreed with the other party, Bailey, that the latter would have ten years within which to exercise the powers and rights granted to him in what is called a "timber lease," in regard to the timber on certain land, and the time mentioned was by mistake omitted from the lease, "it is now agreed that said Bailey shall have ten years from July 16, 1906 [the date of the former instrument], within which to exercise the powers granted in said instrument." The grant of such time is a present grant. The second instrument does not in terms agree to the correction of the former lease by the insertion of another provision in it. If it had done so, such an expression in the contractual part of the instrument might not have been open to disproof by parol, unless the instrument were reformed, under proper allegations and proof. One of the meanings of the word "whereas," given by the lexicographers, is "considering that." Webster's Dictionary. See, also, *Dean v. Clark*, 80 Hun (N. Y.) 80, 83, 30 N. Y. Supp. 45. We recognize the distinction between mere motive and consideration.

But the terms of the instrument now before us would seem to indicate rather a recital of a consideration than of facts simply indicating motive, or forming an integral part of the terms of the contract. Moreover, the plaintiff alleged that he and Bailey put such recital into the written instrument to comply with what they thought was a necessary legal form, and for no other reason; that there had in fact been no previous agreement to allow ten years within which to cut and remove the timber, and such statement was untrue; and that this was well known to the defendant company, to which the contract was transferred by Bailey, when it made the promise to pay Bailey's notes.

Of course, upon the trial of such an issue, a written admission upon the part of the plaintiff as to the facts would be admissible in evidence, although it might not amount to an estoppel by deed. Whether the jury would believe such written admissions, or the parol testimony offered by the plaintiff, would be for their determination. While such recitals may not in themselves operate as estoppels by deed, statements or representations in a written instrument may sometimes furnish a basis for an estoppel in pais, or an equitable estoppel, if they induce action on the part of another detrimental to him, so that it would be a fraud to permit the person making such statements to deny them. There was no error in overruling the general demurrer based on the ground that the recital in the instrument last executed worked an estoppel.

[2] 2. Another point raised by the demurrer was that the declaration showed on its face that the alleged promise declared on was within the statute of frauds, and there was nothing to take it without the operation of that statute. Counsel for defendant in error in their brief discussed this point, and cited authorities in regard to it. In the brief of counsel for plaintiff in error there was only a passing statement as to insisting on other grounds of demurrer than that above considered. But we think that the question of the applicability of the statute of frauds is sufficiently presented to necessitate a consideration of it. Few enactments have given rise to more confusion and conflict in decision than the statute of frauds. In *Fullam v. Adams*, 37 Vt. 391, 393, *infra*, referring to the section of the statute now under consideration, Poland, C. J., said: "The question, whether the defendant's promise was valid without writing, opens the door to an examination to an almost endless extent of judicial discussions and determination, both in England and in this country, and we can hardly hope to do more than to add another decision to the long line, which may serve to perplex future explorers into the true extent and meaning of this section of this ancient statute."

On the subject of what is an original

promise, which is not within the statute, and what is a collateral promise, which falls within its purview, two general lines of authority have arisen, besides many rulings touching modifications of the general rules and special exceptions. In 1811 the leading case of *Leonard v. Vredenburg*, 8 Johns. (N. Y.) 29, 5 Am. Dec. 817, was decided. The actual questions before the court were whether a guaranty by a third person to pay the price of a bill of goods, made in writing at the time of the sale, had to express the consideration for the undertaking of the promisor, and whether certain parol evidence was admissible to show that the principal debtor had applied to purchase the goods for which the writing was given, and the credit had been refused to him without security for the payment, whereupon a third party (who was a defendant) signed the instrument as a guarantor, and the goods were delivered; also that such third person later promised to pay for the goods, and that he had been secured against loss, and the purchaser was insolvent when the goods were delivered and afterward. In discussing the case, the learned Chief Justice Kent made the following statement: "There are, then, three distinct classes of cases on this subject, which require to be discriminated: (1) Cases in which the guaranty or promise is collateral to the principal contract, but is made at the same time, and becomes an essential ground of the credit given to the principal or direct debtor. Here, as we have already seen, is not, nor need be, any other consideration than that moving between the creditor and original debtor. (2) Cases in which the collateral undertaking is subsequent to the debt, and was not the inducement of it, though the subsisting liability is the ground of the promise, without any distinct and unconnected inducement. Here must be some further consideration shown, having an immediate respect to such liability, for the consideration for the original debt will not attach to this subsequent promise. * * * (3) A third class of cases, and to which I have already alluded, is when the promise to pay the debt of another arises out of some new and original consideration of benefit or harm moving between the newly contracting parties. The two first classes of cases are within the statute of frauds, but the last is not."

In *Mallory v. Gillett*, 21 N. Y. 412, decided in 1860, a plaintiff, having repaired A.'s boat, refused to deliver it until he was paid for his work. A third person, in consideration of the relinquishment of plaintiff's lien, and of forbearance to sue the original debtor, orally promised the plaintiff to pay the debt at a certain future time. The plaintiff delivered the boat to A., and the third person so promising paid part of the debt. In an action to recover the balance, it was held by a majority of the judges that the defend-

ant's promise, not being in writing, was within the statute of frauds. A minority of the judges dissented, holding that the case fell within the ruling in *Leonard v. Vredburgh*, supra. Comstock, C. J., filed an exhaustive opinion on behalf of the majority of the court. By way of explanation or modification of Judge Kent's statement as to the third class of cases, it was said that the consideration must move to the person making the promise. A distinction was thus drawn between a consideration arising from the promisee's being induced to act to his injury by releasing a lien against the property delivered to the original debtor, and a consideration moving to the person making the parol promise—a distinction which has been questioned. These cases have been followed more or less closely by a number of others, and in some of them modifications of the original statements have been made. Some cases have declared that the question was not so much to be determined by what was the consideration for the new promise, or between whom it moved, as by whether the leading purpose of the promisor was, for a consideration, to assume a primary obligation to pay the debt, rather than a secondary or collateral one; and from this has arisen what is sometimes called "the leading purpose" test.

Another line of cases rejects the classification made by Chief Justice Kent, especially as to the third class. In *Fullam v. Adams*, 37 Vt. 391, supra, the defendant retained the plaintiff as his attorney in any litigation that might grow out of a conveyance to him by his brother, who had failed, and in consideration of such retainer promised the plaintiff verbally to pay him one-half of a debt due to the plaintiff by the defendant's brother, and also promised to pay the plaintiff for his services, if he performed any. It was held that the defendant's promise to pay the debt of his brother to the plaintiff was a promise within the statute of frauds, and that, not being in writing, it could not be enforced. It was said that "a verbal promise to pay the debt of another, where the original debt still subsists, is never legally binding, except where the promisor has received the funds or property of the debtor for the purpose of being so applied, so that an obligation or duty rests upon him, as between himself and the debtor, to make such payment, whereby his promise, though in form to pay the debt of another, is in fact a promise to perform an obligation of duty of his own." This ruling was not dependent upon any lack of consideration for the promise, for it was held that a retainer of an attorney was a sufficient consideration for a promise to pay such attorney a debt due him by another, if the promise were in writing. In *Maule v. Bucknell*, 50 Pa. 39, where a majority of the directors of a cor-

poration transferred part of their stock and resigned as directors, in order that their transferees might be elected in their stead and have control of the affairs of the company, in consideration of their parol promise to pay all the debts, and where, after such transfer and election, but a small portion of the debts was paid, in consequence of which the corporate property was sold by the sheriff and a large part of the indebtedness was left unpaid and lost, including a debt due by the company to one of the original directors, who was a promisee, in an action by him to recover against the promisors, it was held that the promise was within the statute of frauds, and the plaintiff could not recover. The court rejected the theory that, as a general rule, a promise to pay the debt of another was not within the statute of frauds, if it rested upon a new consideration passing from the promisee to the promisor. It was said: "A new consideration for a new promise is indispensable without the statute, and if a new consideration is all that is needed to give validity to the promise to pay the debt of another, the statute amounts to nothing." On the general subject, see *Sherman v. Alberta*, 153 Mich. 361, 116 N. W. 1090, 128 Am. St. Rep. 496, and note.

These cases suffice to illustrate the wide diversity of views in regard to the theory that a new promise, based on a new consideration moving to the promisor, will take the case without the statute. It would too greatly protract this opinion to discuss the various exceptional cases and modifications of these two general views. Only a few will be mentioned. One of the most common is that mentioned in the Vermont case above cited, and sometimes called "the funds rule." Another is where the promise is not made to, or sought to be enforced by, the holder of the original debt, but where, for a proper consideration, a third person agrees with the debtor to pay the debt of the latter. As an instance of this sort may be mentioned a case in which one takes an assignment of a bond for title from the holder thereof, under a contract to pay the purchase money due to the original vendor. This has been treated as another form of promise to pay the purchase money due to the assignor, the payment being agreed to be made to his creditor, instead of to him, and such a promise has been held not to be within the statute of frauds. *Ford v. Finney*, 35 Ga. 258; *Martin v. Copeland*, 77 Ga. 374, 8 S. E. 258. So, where, one purchases property on which rests a lien to secure a debt, and in order to relieve the property, or prevent a foreclosure and sale, and to secure further supplies, promises to pay the debt, this has been held to be an original promise, and not within the statute of frauds. *Wooten v. Wilcox, Stilson & Co.*, 87 Ga. 474, 13 S. E. 595. See,

also, *Bohannon v. Jones*, 80 Ga. 488; *Davis v. Banks*, 45 Ga. 138. Cases in which, by agreement, a creditor releases one debtor and substitutes another in his place, do not fall within the statute. It is plain that, if a person making a new promise becomes the sole debtor for a legal consideration, such a promise cannot be collateral; for the original promise has been extinguished, and there is nothing to which the new promise can be collateral.

There are a number of cases of this character in the Georgia Reports. As an example, see *Harris & Price v. Young*, 40 Ga. 65; *Anderson & Tucker v. Whitehead, Eggleston & Co.*, 55 Ga. 277; *Ferst's Sons & Co. v. Bank of Waycross*, 111 Ga. 229, 36 S. E. 773. In the case last mentioned *Leonard v. Vredenburg* and other similar cases are cited in the opinion, but finally the decision rested upon the substitution of one debtor for another; and this court has not gone to the length of the rulings made by the New York courts. The case of *Burruss v. Smith & Turner*, 75 Ga. 710, grew out of the peculiar relation of landlord and "cropper." The cropper had given a mortgage on cotton to a third party. The landlord was about to sell it. The mortgagee resisted the sale and threatened to stop it. In order to free the cotton, the landlord promised to pay the debt of the cropper for advances made by the mortgagee in raising the crop. Under the relation mentioned, he himself had a title to the cotton, and thus was freeing it from the lien asserted upon it. His promise was held to be original, and not collateral. In the opinion Chief Justice Jackson referred to the question of whether there was a consideration; but it will be seen to take its place with other cases which have been cited. In *Sext v. Gelse & Co.*, 80 Ga. 698, 6 S. E. 174, it was held that if, whilst a house is being built, the supply of lumber is about to stop because the contractor is not considered safe, and the owner of the building procures its continuance by promising to pay the bill, his indebtedness is not collateral, but original. No distinction seems to have been considered between lumber thereafter furnished to the owner upon his own credit and any amount which the contractor might have owed for what had already been furnished. The verdict was for less than the amount sued for. After stating the rule as above announced, Chief Justice Bleckley merely said: "We rather think the evidence makes this case, and we should be satisfied with the verdict, were it not that, according to the evidence, the time for payment was not on delivery of the lumber, but when the job was finished, and it was not shown either that the job was finished or that a reasonable time for that purpose had elapsed before the suit was brought." This was all that was said on the subject.

Omitting further discussion of the consideration theory, and of special instances where the promise is in reality to pay the promisor's own debt, though in form or name to pay the debt of another, we come to consider another general rule. In 20 Cyc. 196, it is said that "it is a general rule that an oral promise to pay the pre-existing debt of another, in consideration that the original debtor shall be discharged from liability thereon, is not within the statute. * * * But if the debtor is not discharged, and the original debt still subsists concurrently with the oral agreement to assume it, the latter is within the statute of frauds, and is void as a collateral agreement to answer for the debt of another." In *Davis v. Tift*, 70 Ga. 52, 55, Hall, J., treated the discharge of the original debtor as a test which might be used to determine whether the promise to pay a pre-existing debt of another was original or collateral, and quoted approvingly the following from Sergeant Williams: "The question is, What is the promise? Is it a promise to answer for the debt or miscarriage of another, for which that other remains liable? Not what the consideration for that promise is, for it is plain that the nature of the consideration cannot affect the terms of the promise itself, unless, as in the case of *Goodman v. Chase*, 1 B. & A. 297, it be an extinguishment of the liability of the original party." In *Strauss v. Garrett & Sons*, 101 Ga. 307, 28 S. E. 850, Strauss brought suit against Kaufman and Garrett & Sons, alleging that Kaufman was indebted to him, and that Garrett & Sons undertook and agreed to assume the payment of the debt, in consideration of the transfer by Kaufman to them of certain merchandise and the agreement by plaintiff to refrain from interfering with or preventing such transfer; that the transfer was made, plaintiff not interfering in any way to prevent it, and thereby Kaufman was rendered insolvent; that plaintiff had no lien upon the property to secure his debt, but that he could have obtained security for and final payment of his debt if the transfer had not taken place; and that he had frequently demanded payment of the defendants, but all of them had refused to pay. It was held that, the promise of Garrett & Sons to pay the plaintiff the amount due to him by Kaufman being in parol, and Kaufman being bound on the debt to plaintiff, "it was a clear case of a promise to answer for the debt of another person, and the obligation thus undertaken was not binding." *Birkmyr v. Darnell*, 2 Smith's Leading Cases, 522, was cited. A judgment sustaining a demurrer as to Garrett & Sons was affirmed. See, also, *Palmetto Mfg. Co. v. Parker & Anderson*, 123 Ga. 798, 800, 51 S. E. 714. In *Bluthenthal & Bickart v. Moore*, 111 Ga. 297, 36 S. E. 689, H. was indebted to B., and the debt was secured by a mortgage which had been

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foreclosed. W. purchased the mortgaged goods from H., assumed the debt of H., and gave his promissory notes therefor to B. M. orally agreed to see that W.'s notes were paid, and thereupon B. released H. and canceled the mortgage. It was held that the promise of M. was within the statute of frauds, and void, because not in writing, and that this was true, although the creditor had released the mortgagor and canceled the mortgage, thus losing his security.

In one or two cases mention has been made of whether there has been performance or part performance of such a character as to take the case out of the statute of frauds. But it will be found that in such cases there was a substitution of one creditor for another, and not merely the furnishing of a consideration for the promise. Otherwise every promise to answer for an antecedent debt of another would either be void for want of consideration, as would be any contract, or would be taken out of the statute of frauds if there was a consideration, as pointed out in the Pennsylvania Case above cited.

How, then, stands the present case with reference to these rules? The plaintiff, Cowart, had already granted to Bailey the right to cut the timber, and Bailey was already indebted to him therefor. Cowart had no lien or other security. The plaintiff did not release Bailey, but, on the contrary, required him to give new notes. He took no written promise from the Coldwell Company. He conveyed nothing directly to the latter company. He made a conveyance to Bailey, which would prove beneficial to the Coldwell Company through contracts contemplated to be made between that company and Bailey. This would have furnished a sufficient consideration for a written promise by that company; but, under the decisions of this court above cited, the parol promise alleged to have been made by the Coldwell Company to the plaintiff was within the statute of frauds. The allegations in regard to inserting a proviso into the instrument so executed, and then striking it out on the objection of one James, were not sufficient to change this ruling. It was alleged that the instrument was to be delivered to him for the defendant company; that, "acting for the Coldwell Company," he informed the plaintiff that the instrument was not in accordance with the agreement, and it was stricken therefrom, and James assured the plaintiff that, as the Coldwell Company was perfectly responsible, no security was necessary. This was not sufficient to show a binding oral promise on the part of defendant company.

Because of the statute of frauds the demurrer should have been sustained.

Judgment reversed. All the Justices concur.

JAMES v. CENTRAL OF GEORGIA RY. CO.

(Supreme Court of Georgia. July 11, 1912.)

(Syllabus by the Court.)

1. DEATH (§§ 46, 103*)—CHILDREN—LOSS OF SERVICE.

It cannot be said, as a matter of law, that a child 2 years, 10 months, and 20 days old, who was alleged to be "a precocious child, capable of and did run errands for petitioner, was strong and robust, with unusual physical powers for a child of his age, and did render, and was capable of rendering, services to petitioner that were at the time worth five dollars per month," etc., was so incapable of performing such valuable services that a defendant corporation would not be liable in damages for the homicide of such child, if it be shown on the trial of the case that the killing was tortious and not justified.

(a) In such case the trial judge should not take judicial cognizance of the fact that such child is incapable of performing valuable services.

(b) In cases of doubt as to whether a child of tender years is capable of performing valuable services, the court should submit the question of the ability of such child to perform valuable services to the jury for their determination under all the evidence submitted.

[Ed. Note.—For other cases, see Death, Cent. Dig. §§ 60, 141; Dec. Dig. §§ 46, 103.*]

2. DEATH (§ 52*)—ACTION—PETITION—PARTICULARS.

The court did not err in sustaining the demurrer to the petition, which seeks to recover for the funeral expenses, unless the plaintiff would file an amendment within 30 days from the date of the judgment, setting forth in detail the expenses incurred.

[Ed. Note.—For other cases, see Death, Cent. Dig. § 69; Dec. Dig. § 52.*]

Fish, C. J., and Beck, J., dissenting.

Error from Superior Court, Meriwether County; R. W. Freeman, Judge.

Action by B. F. James against the Central of Georgia Railway Company. From an order sustaining a general demurrer in striking out portions of the petition, plaintiff brings error. Reversed.

Lawton Nalley, of Atlanta, for plaintiff in error. C. E. Battle and Howell Hollis, both of Columbus, for defendant in error.

HILL, J. B. F. James, hereinafter called the plaintiff, brought suit against the Central of Georgia Railway Company, hereinafter called the defendant, for the homicide of his minor child, alleged to be 2 years, 10 months, and 20 days old, which, he alleges, was negligently killed by one of the defendant's railway trains. It was alleged that the "son was a precocious child, capable of and did run errands for petitioner, was strong and robust, with unusual physical powers for a child of his age, and did render, and was capable of rendering, services to petitioner that were at the time worth five dollars per month, and said son's services would have become more valuable to petitioner as the said child lived out the

remnant of his minority." It was further alleged that, by reason of the child being killed under the circumstances alleged in the petition, the "petitioner was put to the expense of one hundred and four dollars as funeral expenses." There were allegations of negligence, and of the circumstances of the homicide that need not here be set forth.

The defendant demurred generally and specially to so much of the petition as sought to recover for the loss of the child's services, on the ground that the child, by reason of its age, was incapable of rendering valuable services. A special demurrer attacked the general allegation that the funeral expenses were \$104, and asked that the expenses be itemized. The court rendered the following judgment on the general and special demurrers: "It is considered, ordered, and adjudged that the general and special demurrers be and the same are hereby sustained to that portion of plaintiff's petition which seeks to recover for the loss of services of the plaintiff's child, and said portions of petition are hereby ordered stricken. But the general demurrer, directed to that portion of plaintiff's petition which seeks to recover for funeral expenses, is overruled, provided that the plaintiff shall, within 30 days, file an amendment, setting forth in detail the expenses incurred, in which event the demurrer to the seventh paragraph will also be overruled, in so far as said paragraph relates to funeral expenses. Otherwise said special demurrer will be sustained. The effect of this judgment is intended to deny to the plaintiff the right to proceed for the value of the loss of services of the child, but to proceed for the funeral expenses, upon proper amendment." The plaintiff failed to amend his petition in conformity to the judgment of the court, and brings the judgment of the trial court here for review.

[1] 1. The question to be determined here is: Shall we hold, as a matter of law, that a child lacking 41 days of being 3 years old, and who was alleged to be very precocious, and capable of rendering services worth \$5 per month, was incapable of performing valuable services? or whether the question is so doubtful as that it should be remanded to the realm of facts for the jury to determine.

The determination of the question is not without difficulty. In the case of *Southern Ry. Co. v. Covenia*, 100 Ga. 46, 29 S. E. 219, 40 L. R. A. 253, 62 Am. St. Rep. 312, it was held, where a child one year, eight months, and ten days old was alleged to have been tortiously killed by the defendant company, that "the courts will take judicial cognizance of the fact that an infant of this age is incapable of rendering valuable services." It was also held in the same case that "the father of the child killed is entitled to recover the expenses necessarily and reason-

ably incurred in the burial of the child, including compensation for the loss of such time on the father's part as was needed for this purpose."

In the case of *Atlanta, etc., Ry. Co. v. Arnold*, 100 Ga. 566, 568, 28 S. E. 224, 225, this court, in an opinion delivered by Mr. Justice (now Chief Justice) Fish, said: "The reasons given by Chief Justice Simmons, in the opinion in the *Covenia* Case, for taking judicial cognizance of the fact that a child, less than two years old, is incapable of rendering 'such services as would authorize the parent to recover' for the loss of them are equally applicable in a case where the child, for whose death a recovery is sought, is alleged to have been between 2½ and 3 years of age." In the case last cited, the allegation was that "the child was between 2½ and 3 years of age." No definite age was given. The familiar rule, therefore, that the pleadings will be construed most strongly against the pleader was applicable; and it must be presumed that in that case the child was nearer 2½ years of age than otherwise. The decision from which the quotation is just made does not go to the extent of holding that a child of 3 years of age and under is incapable of rendering valuable services.

In the case of *Crawford v. Southern Ry. Co.*, 106 Ga. 870, 33 S. E. 826, where suit was brought for the alleged negligent homicide of plaintiff's daughter 4½ years old, this court held: "The question whether a particular child of such age was capable of rendering any valuable service to its father should be left to a jury to determine in the light of the evidence submitted upon this point." And see *Sugarman v. Atlanta, etc., Ry. Co.*, 94 Ga. 604, 21 S. E. 581. So it will be seen that this court has held that courts will take judicial cognizance of the fact that children 1½, and children about 2½ years old, are incapable of performing valuable services, and that their parents, on their being tortiously killed by a railroad company, cannot recover for loss of such services.

This court has also held (in the *Crawford* Case, *supra*), where a child 4½ years of age was killed by a railroad company, that the question whether a child of that age was capable of rendering any valuable services to its father should be left to a jury to determine in the light of the evidence submitted on this point.

Where, then, is the line of demarcation between the various ages of children at which a court can say, as a matter of law, that they cannot render valuable services? No fixed, arbitrary age ought to be established, except as a child's age remains near its birth. But as it gets farther and farther away, what should be the rule? No arbitrary or absolute rule ought to be laid down, and no definite age fixed. Children vary so in point of physical development, strength, energy, intelligence, and precociousness that no un-

varying age limit should be fixed at which it can be said, as a matter of law, that a child cannot perform for its parent such valuable services as would entitle him to recover damages, in case of the tortious killing of the child.

We think the safer rule to be that, where the question of the ability of the child to perform valuable services is involved, and the court is doubtful, the jury should pass upon it. It is only in cases where it is beyond question that the child is so young that it cannot perform valuable services that the trial judge should so hold. But we cannot say in the present case, where the child is alleged to have been practically three years old, precocious, and able to perform services which, if rendered, were valuable, that they were not such as a matter of law. It was alleged in the petition that "said son was a precocious child, capable of and did run errands for petitioner, was strong and robust, with unusual physical powers for a child of his age, and did render, and was capable of rendering, services to petitioner that were at the time worth five dollars per month, and said services would have become more valuable to petitioner as the said child lived out the remnant of his minority." On demurrer, for the purposes of the argument, this must be taken to be true. It is true "that which is judicially known need not be proven," and that "judicial notice takes the place of proof, and is of equal force." See 31 Cyc. 387; *Griffin v. Augusta & Knoxville Railroad*, 72 Ga. 428 (2). But, while it is true that there is a point where the court can say a child cannot render valuable services, there must also be some line of demarcation where the court must stop short of saying the child cannot perform valuable services, and permit the jury to say, under all the evidence, whether the child is capable of rendering valuable services or not. And especially is this true where it is alleged that the child was precocious, and was capable of rendering, and did render, valuable services to its parent.

It is within the common knowledge that some children are more precocious than others, and can walk, talk, and develop their mental and physical powers at a much earlier age than others. The biographies of the great musicians and musical prodigies, as well as those of artists and scientists, and others, are well known to many readers. It is said of Beethoven that he could play upon the piano at 3 years of age, and at 12 presided at the chapel organ, and at 18 was a member of the orchestra at the court theater. Mozart, another of the world's greatest musicians, was being instructed in music at the age of 3, "and shared the harpsichord lessons of his sister, Maria, 5 years his senior," and at the age of 5 had composed some simple pieces of music. *Encyclopædia Britannica* (Mozart).

Robert Alexander Schumann was a composer at 7; and Louis Spohr could sing duets with his mother at 4 years of age, and play the violin at 5. Numerous instances will call themselves to mind where precocious children of tender years, in all walks of life, have shown very early capacity for performing, not only manual services, but rare mental efforts. Where the line should be drawn, no arbitrary rule can determine rightly. In this view, we think in doubtful cases, as already said, that the jury should be left to say, under all the evidence submitted, at what age a child of tender years is capable of performing such valuable services for the parent as would entitle the latter to recover for the loss of the same, in case the killing of the child is shown to be wrong and tortious.

[2] 2. The court did not err in sustaining the demurrer to that portion of the petition which sought to recover for the funeral expenses of the child, unless the plaintiff would file an amendment within 30 days from the date of the judgment, setting forth in detail the expenses incurred.

Judgment reversed. All the Justices concur, except FISH, C. J., and BECK, J., dissenting. EVANS, P. J., concurs dubitante.

FISH, C. J., and BECK, J., dissenting from the ruling made in headnote 1, (a), cite *Southern Ry. Co. v. Covenia*, 100 Ga. 46, 29 S. E. 219, 40 L. R. A. 253, 62 Am. St. Rep. 312; *Atlanta, etc., Ry. Co. v. Arnold*, 100 Ga. 566, 28 S. E. 224.

(128 Ga. 409)

SAVANNAH GUANO CO. v. STUBBS.

(Supreme Court of Georgia. July 11, 1912.)

(Syllabus by the Court.)

1. ARREST (§ 48*)—BAIL TROVER—"IMPRISONMENT."

A defendant in a bail trover proceeding, who is in the actual custody of the sheriff, though not confined in jail, is "held in imprisonment," and may apply, under the Civil Code, § 5154, for a discharge upon his own recognizance.

[Ed. Note.—For other cases, see *Arrest*, Cent. Dig. §§ 112-114; Dec. Dig. § 48.*

For other definitions, see *Words and Phrases*, vol. 4, pp. 8445-8447.]

(Additional Syllabus by Editorial Staff.)

2. WORDS AND PHRASES—"IMPRISONMENT."

Imprisonment is not confined to the act of putting a man in prison; nor is it necessary to constitute imprisonment that the confinement should be in a place usually appropriated to that purpose. It may be in a locality used only for the specific occasion; or it may take place without actual application of any physical agencies of restraint, such as locks or bars, as by verbal compulsion and the display of available force. Any restraint of a man's personal liberty constitutes "imprisonment."

Error from Superior Court, Tattnall County; W. W. Sheppard, Judge.

Action of bail trover by the Savannah

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Guano Company against M. J. Stubbs. Application by defendant for discharge on his own recognizance. From an order granting such relief, plaintiff brings error. Affirmed.

Anderson, Cann & Cann, of Savannah, H. C. Beasley, of Reidsville, and Thos. F. Walsh, Jr., of Savannah, for plaintiff in error. P. M. Anderson, of Hagan, and H. H. Elders, of Reidsville, for defendant in error.

EVANS, P. J. The Savannah Guano Company brought an action of bail trover against M. J. Stubbs to recover certain described fertilizers and promissory notes. The sheriff made an entry that he had served personally the defendant, and demanded bond of him, which he failed to give because of his poverty, and that he had him in custody. The defendant applied to the court to be discharged on his own recognizance. The plaintiff pleaded in abatement that the defendant was not entitled to be discharged, for the reason that, neither at the time of his application, nor at any other time, had he been committed to jail, and there kept in safe and close custody, as required by law. The plaintiff also had the sheriff made a party, and traversed his entry of service that the defendant was in his custody. Upon the hearing of the issue joined on the plea and traverse, the applicant for discharge submitted evidence tending to show that he was arrested by the sheriff. He was not confined in jail, but put in the custody of a deputy sheriff, by whom he was kept under guard and surveillance from the time of his arrest until the trial of his application for a discharge from custody. The sheriff testified that the common jail of the county had two cells for male prisoners, which were occupied by seven negro prisoners, and two cells for female prisoners, one of which was occupied; and that he did not put the defendant in jail because of its condition. The jail was not ventilated; the waterworks were out of repair; and it was in no fit condition to confine a white man. The court overruled the traverse and plea in abatement, and, upon the defendant making it appear that it was not within his power to produce the property or give the statutory bond, he was discharged by the court.

[1] Upon a plaintiff in a trover suit filing an affidavit that the property is in the possession, custody, or control of the defendant, and that he has reason to apprehend that it will be eloiigned or moved away, or will not be forthcoming to answer the final judgment, it is the duty of the sheriff to seize the property; and, if the property is not to be found, "the defendant shall be committed to jail, to be kept in safe and close custody until the said personal property shall be produced, or until he shall enter into bond with good security for the eventual condemnation money." Civil Code, § 5152. When

a defendant "shall, by reason of his inability to give security, be held in imprisonment, it shall be lawful for him to make his petition" to the judge of the court where the suit is pending, stating that he is neither able to produce the property nor to give the security required by law, traversing the facts stated in the plaintiff's affidavit, and giving satisfactory reasons why he cannot produce the property, and praying for his discharge. On a hearing, after five days' notice, if the judge "shall find that the petitioner can neither give the security nor produce the property, and that the reasons for its nonproduction are satisfactory, he shall discharge the petitioner upon his own recognizance, conditioned for his appearance to answer the suit; but otherwise he shall commit him to custody." Civil Code, § 5154. The point made by the record is whether a defendant against whom bail process has issued, and who is in the custody of the sheriff, but who is not detained in jail, comes within the provisions of the statute of which mention is just made.

The statute authorizing bail in trover cases, being in derogation of common right, should be strictly construed. *Sugar v. Sackett*, 13 Ga. 462. The object of the bail process is simply to secure the forthcoming of the property to answer, in the manner authorized by law, for such recovery as may be had, or to get bond and personal security instead. *Hudson v. Goff*, 77 Ga. 281, 3 S. E. 152. Its purpose is not to punish a defendant for illegal acts in obtaining the property. *Ragan v. Chicago Packing Co.*, 93 Ga. 712, 21 S. E. 143. Indeed, the theory of punishment does not enter into the statute; for the law is not to be construed as imposing a punishment upon a defendant in a civil case upon an ex parte affidavit, without giving him a hearing. Prior to the statute (Civil Code, § 5154), the production of the property, or entering into bond with good security for the eventual condemnation money, was the only condition upon which the defendant could be discharged from custody. It was to ameliorate the harshness of the law in this respect that an imprisoned defendant, unable to produce the property or give the bond, was permitted to apply for a discharge. The remedy was given to a defendant "held in imprisonment."

[2] Imprisonment is not confined to the act of putting a man in prison; it is a restraint of a man's personal liberty. Says Mr. Black, in his *Law Dictionary*, at page 597: "It is not a necessary part of the definition that the confinement should be in a place usually appropriated to that purpose; it may be in a locality used only for the specific occasion; or it may take place without actual application of any physical agencies of restraint (such as locks or bars), but by verbal compulsion and the display of available force." It is true that when the

statute was enacted the law provided for a commitment of the defendant to jail; but the remedial statute broadly extends its provision to a defendant "held in imprisonment." A defendant in the actual custody of the sheriff comes within the provision of the statute, whether the sheriff's custody be exercised by keeping him in jail, or under special guard out of jail. The question is, not whether the sheriff ought to have imprisoned the defendant in jail, instead of keeping him under surveillance and guard, but whether the defendant is restrained of his personal liberty. If he is so restrained, then he is imprisoned, in the purview of the statute. *Everett v. Holcomb*, 1 Ga. App. 794, 58 S. E. 287.

Of course, the restraint must be something more than a feigned custody—not a collusive arrangement between the officer and the defendant. The court was authorized to find, under the facts submitted, that the defendant was actually restrained of his liberty by the sheriff by virtue of the bail trover proceeding. The defendant testified that he was unable to produce the property or to give the bond; and this was not controverted on the trial. The judgment of the court, discharging him on his own recognizance, will therefore stand.

Affirmed. All the Justices concur.

(128 Ga. 366)

MAYOR AND COUNCIL OF CITY OF MACON v. BIBB COUNTY.

(Supreme Court of Georgia. July 10, 1912.)

(Syllabus by the Court.)

1. HOSPITALS (§ 2*)—CONTRACTS—VALIDITY.

By virtue of the Civil Code 1910, §§ 1633, 1646, 1670, municipalities and counties are empowered to establish hospitals and pesthouses for persons afflicted with smallpox; the house established by the municipality being for the care and detention of those within the city limits, and the county pesthouse being for the care of those who reside in the county, but outside of the municipality. Where a municipality, instead of maintaining its own pesthouse, combines with the county for the treatment of its patients at the county's pesthouse, on the basis that the expense is to be apportioned between the municipality and the county according to the number of patients from the city and the county, the city will not be absolved from its obligation to pay its share of the expense, on the ground that the county's pesthouse is maintained by revenue derived from taxes laid upon residents of the entire county.

[Ed. Note.—For other cases, see *Hospitals*, Cent. Dig. §§ 1, 2; Dec. Dig. § 2.*]

2. MUNICIPAL CORPORATIONS (§ 232*)—INDEBTEDNESS—POWER TO CREATE.

Where a county, by written proposal, offers to receive, care for, and treat, at the county pesthouse, persons afflicted with smallpox, who are residents of the city, upon the basis that all expenses connected with the operation of the county pesthouse shall be apportioned between the city and county according to the number of inmates coming from the city and county, and the city shall pay its share

monthly, and that the arrangement is to be terminable on 80 days' notice by either party, which proposition is accepted by the city, and where the city in subsequent years, during the pendency of the arrangement, sends smallpox patients to the county pesthouse, which patients are cared for according to the terms named in the county's proposal, the city will not be relieved from the payment of its proportionate expense, on the ground that the arrangement of the city and county to combine the pesthouses is void, because, as it is contended, its effect is to create a debt extending beyond the current year, and to bind the successors in office of the city.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 665; Dec. Dig. § 232.*]

Error from Superior Court, Bibb County; W. H. Felton, Judge.

Action by Bibb County against the Mayor and Council of City of Macon. Judgment for plaintiff, and defendants bring error. Affirmed.

Lane & Park, of Macon, for plaintiffs in error. W. G. Smith and Harris & Harris, all of Macon, for defendant in error.

EVANS, P. J. The action is by Bibb county against the mayor and council of the city of Macon to recover of the city its pro rata expense of the county smallpox hospital, while jointly used by the city while under a contract with the county. The exception is to the overruling of the city's demurrer.

It appeared from the petition that on December 21, 1903, the mayor of the city of Macon addressed a communication to the board of county commissioners, suggesting a plan for a common pesthouse for the treatment of smallpox. A committee was also appointed by the mayor and council of the city of Macon, for the purpose of effecting some arrangement with the county authorities for the admission of white persons afflicted with smallpox from the city to the county pesthouse. A conference followed, and as a result the following proposition was submitted by the county authorities to the city: "Whereas the mayor and a committee of the city council of the city of Macon, in company with a committee of the board of health of the city of Macon, this day came before the board and suggested, in the interest of economy, that some arrangement be entered into between the city of Macon and the county of Bibb, whereby the city could secure the use and benefit of the county smallpox hospital for the white patients and suspects of the city, and thereby avoid subjecting the city to the expense of establishing a separate smallpox hospital for the exclusive use of the white patients of the city: Ordered, that such suggestion be approved; and this board agrees and hereby offers to admit to the county smallpox hospital all white patients and suspects of the city sent there by proper city authorities, upon the understanding and contract that all the ex-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

penses connected with the operation of the county smallpox hospital, including expenses for enlargement or addition thereto, as long as the same used thus jointly by the city and county authorities, shall be prorated between the city and county in proportion to the relative number of inmates sent there by the city and county authorities respectively, the city to pay the county each month, or on demand, its proportion of said expenses thus prorated; provided, that this arrangement shall not go into effect until this offer is formally accepted by the city authorities, and it may at any time be terminated by either party on thirty days' written notice to the other party; provided further, that the acceptance of this offer shall not in any manner affect any other obligations and liabilities now existing between said parties; provided further, that so long as Dr. Gibson, the county physician, is paid, as at present, by the city for looking after smallpox cases, his salary shall not be included in the expense to be prorated between the city and the county as above specified."

The mayor and council of the city of Macon accepted the proposition on February 3, 1904. The county's proposition and the city's acceptance were duly entered upon the minutes of the city and of the county board. Pursuant to this arrangement, the city proceeded to send all of its smallpox cases to the county hospital, and the county received, treated, and provided for them. The city destroyed its own smallpox hospital, and sent all of its smallpox patients to the county hospital. Upon the faith of and pursuant to the contract or agreement between the city and county authorities, the county admitted to the smallpox hospital 169 smallpox patients in the year 1909, and 252 smallpox patients in the year 1910, sent there by the city, and treated and provided for them according to the agreement, whereby the city became indebted to the county in the sum of \$1,050.36 for the year 1909 and \$2,088.84 for the year 1910, as set out in detail in the attached exhibits to the petition. The city paid for patients previously sent to the county hospital; and the county, until the city's refusal to pay the amount sued for, had no notice that the city desired to terminate the agreement, or that the city did not recognize the agreement as a subsisting contract, or that the city would refuse to pay the bill which is the basis of the suit.

[1] 1. It is urged by demurrer that, inasmuch as the county revenue is derived from taxation of property within the county of Bibb, which includes the city of Macon, it is as much a part of the duty of the board of county commissioners to treat and care for patients afflicted with smallpox, and who live within the corporate limits of the city of Macon, as it was and is their duty to care for similar cases within the county, but outside the limits of the city of Macon. It is

well settled that the state, in the exercise of the police power for the preservation of the public health, has the right to select such agency or agencies as it may deem best for that purpose. 1 Abbott on Municipal Corporations, § 119. The duty of supervision may be delegated to boards of health or other agencies. It can hardly be disputed that the state may give plenary jurisdiction in matters of health and quarantine to a city within its jurisdictional limits, and to the county within its limits, exclusive of the municipal territory. A sanitary district may territorially coincide with a taxing district, or a taxing district may include more than one sanitary district. It is a well-known fact that because of the denseness of urban population the susceptibility to, as well as the fatality of, contagious disease is greater in a city than in sparsely settled rural communities. The city is to be protected from contagion, both from within and without its own limits. The benefits accruing from this protection largely preponderate with the city. The Legislature, in appreciation of this fact, for the common good of all, may empower the county to maintain a hospital for smallpox patients out of the general revenues of the county, and that the city maintain a hospital for the treatment of its own afflicted inhabitants, and at its own expense. As residents of a city receive benefits from, and exercise privileges under, both municipal and county governments, they can be required to contribute by taxation to the support of both. Upon this principle it has been held that, though the residents of a city are taxed to keep the streets of the city in repair, they may also be made liable for a tax to keep in repair the county roads outside of the city. *Wolfe v. McHargue*, 88 Ky. 251, 10 S. W. 809; *Byram v. Board of Commissioners*, 145 Ind. 240, 44 N. E. 357, 33 L. R. A. 476.

It is clear that the Legislature contemplated that outside of any municipality the county authorities were to be in control of the smallpox situation, and that the city should look after its own problem. The city authorities thought it would be less expensive to co-operate with the county than to maintain its own separate hospital, and entered into an agreement to that effect. Having the power to erect and maintain its own hospital, the city possessed the power to contract with the county for the joint use of its hospital. Under similar statutory conditions, the Court of Appeals of Kentucky held that, where a city and county combined for the treatment of persons within the county afflicted with smallpox, they were both responsible for the expense, the city for that incurred in treating those so afflicted within the city limits, and the county for that incurred in treating those so afflicted without the city. *Pulaski County v. City of Somerset* (Ky.) 98 S. W. 1022.

[2] 2. It is further urged that the arrangement between the city and county authorities was invalid as a contract, because it amounted to the creation of a debt. While the resolution of the board of county commissioners and the acceptance of the proposal therein contained by the municipal authorities is called a contract in the petition, it is not strictly such, because the city does not undertake to send any or all of its patients to the county hospital.

It is more of an arrangement in the nature of a working basis between the authorities of the two sanitary districts—a sort of *modus vivendi* until the authorities decide to establish separate pesthouses. It does not undertake to bind the city from establishing its own pesthouse; nor does it require the city to send its patients to the county pesthouse. It amounts to a continuing offer by the county, until terminated by notice, that it will accept, treat, and provide for the city's smallpox patients on a co-operative plan, with a division of the expenses, proportioned according to the number of patients received from the city and from the county. When the city sent its patients to the county hospital, pending this continuing offer, the county, in the absence of notice to the contrary, might well assume that the patients were sent by virtue of this arrangement; and it should receive compensation for their treatment, as provided in the resolution.

Judgment affirmed. All the Justices concur.

(11 Ga. App. 261)

PARKER v. STATE. (No. 4,131.)

(Court of Appeals of Georgia. June 5, 1912.)

(Syllabus by the Court.)

1. SEDUCTION (§ 43*)—CRIMINAL PROSECUTION—SUFFICIENCY OF EVIDENCE.

On the trial of one accused of the offense of seduction, it is competent for the state to show (as a circumstance evidencing the existence of an engagement to marry) that the female alleged to have been seduced made preparations for her marriage, and sent out invitations to the wedding.

[Ed. Note.—For other cases, see Seduction, Cent. Dig. § 77; Dec. Dig. § 48.*]

2. SEDUCTION (§ 40*)—CRIMINAL PROSECUTION—SUFFICIENCY OF EVIDENCE.

The fact that the female alleged to have been seduced has a living child, as well as the fact that the accused endeavored to induce her to take medicine for the purpose of causing an abortion, while in themselves not sufficient to prove seduction, are both circumstances competent for the purpose of proving that the accused had carnal intercourse with her, which is an essential ingredient of the offense of seduction.

[Ed. Note.—For other cases, see Seduction, Cent. Dig. §§ 72, 79; Dec. Dig. § 40.*]

3. WITNESSES (§ 846*)—CRIMINAL LAW (§ 1153*)—IMPEACHMENT OF WITNESS—WRIT OF ERROR—DISCRETION OF TRIAL COURT.

As illustrating the interest and credibility of a witness, and for the purpose of impeach-

ment, it is competent to show that the witness made an effort to improperly influence and suborn another witness in the case. It is not error for a trial judge to permit a witness to be interrogated as to any matter pertinent to the issue, although the question sought to be asked, or the answer thereto, either or both, may be prejudicial, when counsel who seeks to ask the question states in his place that he expects to prove the fact which his question seeks to elicit. The issue as to whether a question is asked without a bona fide expectation of receiving the answer apparently expected, and merely for the purpose of prejudicing the opposite party before the jury, or whether the question is asked in good faith, must in every case be left to the discretion of the trial judge, and this discretion will not be controlled, unless it is manifestly abused.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 1133; Dec. Dig. § 846.* Criminal Law, Cent. Dig. §§ 3061-3066; Dec. Dig. § 1153.*]

4. CRIMINAL LAW (§ 757*)—TRIAL—INSTRUCTIONS—CONSIDERATION OF EVIDENCE.

Where the presence of a witness in a criminal case is waived, and it is agreed, with the approval of the court, that the contents of an affidavit, previously given by the witness, be used, instead of his oral testimony, the statements in the affidavit must be considered by the jury just as if they had been delivered by the witness from the stand, and cannot be capriciously rejected, either in whole or in part. Where the presence of a witness is waived, and it is agreed that his testimony shall be taken by affidavit, the jury should consider the testimony just as if the witness had orally testified in their presence, and believe him, unless he was impeached or discredited by other testimony. Consequently it was error for the court to charge, as to the contents of such an affidavit: "You may believe as much of it as you please, or as little of it as you please."

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1772-1785; Dec. Dig. § 757.*]

5. CRIMINAL LAW (§ 723*)—TRIAL—ARGUMENT OF COUNSEL.

In a trial for seduction, the maintenance and education of a child which may have been the result of the illicit connection is not involved, nor is its legitimacy affected by the verdict in the case. The prosecution for seduction is for the punishment of a public wrong, and not for redress of a private injury. It was error, therefore, for the court to allow the Solicitor General, over the objections of the accused, to urge that the defendant should be convicted of seduction, in order that the child might have a legitimate father, and because the female alleged to have been seduced, and who would have to raise and maintain the child, should be protected.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1676; Dec. Dig. § 723.*]

Error from Superior Court, Dekalb County; L. S. Roan, Judge.

C. B. Parker was convicted of seduction, and brings error. Reversed.

John W. Moore and J. E. & L. F. McOlelland, all of Atlanta, for plaintiff in error. C. S. Reid, Sol. Gen., of Palmetto, Wm. Schley Howard, of Atlanta, and L. J. Steele, of Decatur, for the State.

RUSSELL, J. The defendant was convicted of the offense of seduction, and excepts to the judgment overruling his motion

for new trial. As the case turns upon some of the special assignments of error, we shall express no opinion upon the testimony. It suffices to say that the evidence warranted the conviction of the accused and the sentence imposed upon him. But, though the defendant be accused of a most horrible crime (and than one guilty of seduction we can imagine no fouler criminal), he is entitled to a fair and impartial trial, according to the rules of the law, and the just resentment and passion which is necessarily aroused by the very character of the charge should not be permitted to be inflamed so as to prejudice the rights of the accused, or place upon him a burden which the law does not impose.

We are clear that as to most of the exceptions there was no error. There was none in the admission of the testimony of which complaint was made, nor in the ruling upon the question which the Solicitor General was permitted to ask. But we think that in charging the jury the learned trial judge, inadvertently perhaps, deprecated the most vitally important testimony which was at the defendant's command, and that he perhaps underestimated the effect of the language used in the concluding argument of the state's counsel, which submitted to the jury issues foreign to the charge at bar, but the suggestion of which was manifestly calculated to weigh heavily against the accused.

[1, 2] 1, 2. The first and second headnotes are self-explanatory.

[3] 3. It is alleged in the fourth ground of the motion for a new trial that the Solicitor General asked G. E. Lanier: "Didn't you go to Mr. Lee Cheek's with your brother on Sunday before this case was tried the last time, and didn't you or your brother pull out money in the presence of Mr. Cheek and offer it to him, and say to him that you would pay him money if he would go to Decatur on Tuesday and swear that Miss Tedder's character was bad? Didn't Mr. Cheek tell you that he was not the man that could be bought to swear a lie? Did you not try to get Mr. Hand to go to Decatur and swear against this young lady?" The movant objected to all of these questions at the time, and assigns same as error. He contended then as follows:

"By Mr. McClelland, Counsel for the Defendant: My objection is this. He proposes to ask this witness, in the presence of the jury, if he did not go to Mr. Lee Cheek's house before the last trial and offer him some money. He is not going to try and make any proof of that, but he is merely going to ask that question so as to discredit the witness before the jury. I object to his asking that question unless he is going to prove that.

"By the Court: Do you expect to prove that by Mr. Cheek?

"By Mr. Howard: Yes; I expect to show that they came up there on Sunday evening and made this offer."

The court then allowed the solicitor, in the presence of the jury, to ask the questions above set out, to all of which the witness answered "No."

Of course, if the Solicitor General was asking these questions merely for the purpose of discrediting the witness, without any bona fide intention of proving the facts to which he referred, simply hoping to leave a trail of indefinable prejudice in the minds of the jury after they had retired to their room, his conduct would have been most reprehensible. But neither the trial court nor this court can lightly assume that a member of the bar of undoubted standing in his profession would be guilty of such practice. The trial judge relied upon the statement that the facts which were the subject-matter of the discussion would be established during the course of the trial, or at least that the counsel expected to prove the facts to which he referred by his question, and his ruling, permitting the question to be asked, was based upon this assumption. We have no doubt that the fact that witnesses were not introduced to testify upon the point was due to oversight. But, in any event, when the issue of good faith is raised under such circumstances as those presented by this record, it must be determined by the trial judge in the exercise of his discretion, and that discretion will not be interfered with, unless it is perfectly plain that there was an abuse of discretion.

[4] 4. In the fifth ground of the amended motion for new trial error is assigned upon the instruction of the judge as to the affidavit of one Tuggle, who was not present at the trial, but whose testimony was submitted, by agreement, in the form of an affidavit which he had previously made. In view of the legal requirement that witnesses in criminal cases shall testify orally and in the presence of the defendant, and the fact that exceptions to the enforcement of this rule are extremely rare, it can readily be seen that the reference of the judge to the affiant Tuggle by name would naturally arrest and fix the attention of the jury upon him, and made it even more than usually important that any instruction with reference to his testimony should be free from error. We have often wondered if too much importance were not sometimes attached to the precise verbiage employed by the trial judges in instructions to juries, and if expressions were not considered harmful which perhaps the jury did not even remember after they had retired to consider their verdict. There can be no doubt that, when the judge puts his instructions in abstract terms, the effect of nice verbal criticism is greatly minimized. But when the judge calls a witness by name, and especially when, as in this case, he is the only one whose testimony was submitted in his absence and by affidavit, it can, we think, be safely assumed that the jury not only heard, but remembered,

what was said about this particular witness, and therefore, if the instructions were erroneous, the result would be necessarily and unquestionably harmful to the accused. In the present case the judge charged as follows: "In criminal cases, each and every witness has to testify before the jury in person. They cannot be examined by interrogatories as in civil cases, unless it is by agreement, but in criminal cases every witness must testify in the presence of the jury, so that the jury may look at them when they testify, unless it is agreed to the contrary, and see their manner of testifying, their manner when being examined or cross-examined, their deportment upon the stand, and all about it. You have seen all of the witnesses and looked at each witness, let it be man or woman, male or female, as the case may be. They have all been before you except one witness, whose affidavit has been read to you, and it was agreed between the counsel for the state and defendant that this witness, Tuggle, would have testified that way if he had been here and had been sworn and put on the stand, and you would consider it just as if he had testified it on the stand, because that is agreed upon. You may believe as much of it as you please, or as little of it as you please, and deal with it as if he had come here in person and testified. It is for you, gentlemen, to say how much of each witness' testimony you will believe. You are to weigh all the testimony, examine it, and from it glean what you believe to be the truth." A portion of this instruction, if considered apart from its context, is unobjectionable, but, when the instruction is considered as a whole, the jury were told in terms they could not misunderstand that they might believe as much of Tuggle's testimony as they pleased, or as little of it as they pleased. Of course, the jury could not thus captiously dispose of the testimony of any witness. And as the judge had referred in the same connection to the fact that witnesses usually appeared upon the stand, and that the jury could test their credibility by their manner of testimony, their manner upon examination and cross-examination, and their deportment upon the stand, and then to the fact that Tuggle was absent and his testimony by affidavit had only been admitted by agreement, the jury may have thought that this depreciation of Tuggle's testimony was due to the fact that he was not present, and they had not had the opportunity of seeing and judging him by his appearance and manner. It cannot be denied that the effect of the charge greatly depreciated the testimony of the witness, and in any case this error requires the grant of a new trial. In the present case the error was particularly harmful, for, if the testimony of Tuggle was to be believed, the defendant did not commit the offense of se-

duction, because the prosecutrix had fallen from virtue before Parker had sexual intercourse with her. We have no doubt that the error of the learned judge was due to mere inadvertence, but it was not corrected in any portion of his instructions, and the effect of the words used is so unmistakable that it could not fail to influence the jury, and demands the grant of a new trial.

[5] 5. The sixth ground of the motion for new trial assigns error upon the argument of the Solicitor General, which was permitted by the court over objection of defendant's counsel. The defendant moved for a mistrial, but this motion was overruled by the court, without even any instruction to the jury that they should not consider the objectionable argument. The Solicitor General argued as follows: "Miss Tedder is the mother of a three year old child. Parker is its daddy. By turning him loose he goes 'Scot free,' and she will have the care of raising and maintaining this outcast. It is your duty to protect this woman, and as well see that this child has a legitimate father." We do not think that the court was required to order a mistrial, but the argument was improper, and the court should have so told the jury, and have withdrawn it from their consideration. In a trial for seduction the maintenance and education of a child, which may have been the result of illicit connection, is not involved, nor is its legitimacy affected by the verdict in the case. The prosecution for seduction is for the punishment of a public wrong, and not for redress of a private injury. It was error, therefore, for the court to allow the Solicitor General, over the objection of the accused, to urge that the defendant should be convicted of seduction, in order that the child might have a legitimate father, and because the female alleged to have been seduced, and who would have to raise and maintain the child, should be protected.

Judgment reversed.

(11 Ga. App. 401)

SOUTHERN FLOUR & GRAIN CO. v. ST. LOUIS GRAIN CO. (No. 4,232.)

(Court of Appeals of Georgia. Aug. 6, 1912.)

(Syllabus by the Court.)

SALES (§ 360*)—REMEDIES OF SELLER—ACTION FOR BREACH OF CONTRACT—RE-SALE.

Where one who has entered into a binding agreement to take and pay for goods to be delivered in the future notifies the seller, before the time fixed for delivery, that he will not receive and pay for the goods, if tendered at that time, the seller may treat the contract as rescinded and sue for whatever damages he has sustained at the time the purchaser repudiated the contract. But this is not the exclusive remedy of the seller. He may refuse to agree to a rescission of the contract, and may treat it as continuing until the time arrives for performance; and if, at that time, the purchaser refuses to take and pay for the goods, after

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

they are tendered to him in accordance with the terms of the contract, the seller may, under the provisions of Civil Code 1910, § 4131, after notice to the purchaser, resell the goods at the place of delivery, acting for this purpose as the agent of the vendee, and recover the difference between the contract price and the price on resale.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1083, 1084; Dec. Dig. § 369.*]

Error from City Court of Atlanta; H. M. Reid, Judge.

Action by the St. Louis Grain Company against the Southern Flour & Grain Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Walter McElreath, of Atlanta, for plaintiff in error. Dorsey & Shelton, of Atlanta, for defendant in error.

POTTLE, J. This was an action brought by a seller of goods to recover from the purchaser damages for refusing to take and pay for the goods. The seller claimed that the measure of damages was the difference between the contract price and the price realized from the resale of the goods at the place of delivery, under the provisions of the Civil Code of 1910, § 4131. The seller recovered a verdict and the purchaser is complaining in this court of a judgment overruling his motion for new trial.

It appears that, before the time arrived for the delivery of the goods, the purchaser countermanded the order, thus making an anticipatory breach of the contract. It is contended by counsel for plaintiff in error that the exclusive remedy of the seller was to bring an action for the damages which he had sustained up to the date notice was given to the seller that the purchaser would refuse to take and pay for the goods. In other words, his position is that, where one party breaks a contract, it is the duty of the other party to lessen the damages; and that under this principle the seller, upon receiving the notice, was bound to treat the contract as ended and sue for whatever damages he had sustained. Counsel for plaintiff in error insists that the special remedy provided by section 4131, *supra*, where the seller is given the right to resell the property and recover the difference between the contract price and the price on resale, if the latter be less than the contract price, is not applicable where there has been an anticipatory breach of the contract of sale.

The rule is well settled that in such a case the exclusive remedy of the seller is an action for damages and that he cannot sue for the full amount of the purchase price. *Linder v. Cole Bros. Co.*, 10 Ga. App. 102, 72 S. E. 719, and cases cited. In this case the seller did not sue for the purchase price, but his action was for damages for breach of the contract. The general rule is that the seller is entitled to recover the difference be-

tween the contract price and the market value at the time and place of delivery; and, under the terms of the Code section, he may conclude the purchaser on the question of market value by reselling the property after notice to the purchaser. Where there has been an anticipatory breach of an executory contract of sale, the seller has a right to treat the contract as ended, and immediately sue for damages; but he is not bound to do this. The purchaser alone cannot rescind. Rescission can only be brought about by mutual agreement of the parties. If notice is given to the seller that the purchaser will not take and pay for the goods at the time and place of delivery, and the seller assents to this breach, then the contract is rescinded, and the seller will be remitted to whatever rights and remedies he had as of the date on which the breach by the purchaser is made. But if the seller refuses to assent to the attempted rescission of the contract by the purchaser, he has the right to wait until the time for performance, and then tender the goods to the purchaser. A mere statement by a purchaser that when time for performance arrives he will not perform is not binding even upon him, unless the statement is immediately acted upon by the seller. The purchaser may reconsider. Such a notice is nothing more than an invitation to the seller to agree to a rescission. If the seller refuses to agree, the purchaser may still take the goods and comply with his part of the contract. The seller is not bound to assume that when the time for performance arrives the purchaser will refuse to comply, notwithstanding the latter may have notified the seller that he would refuse. The *locus poenitentiae*, so to speak, remains with the purchaser until after the time has arrived for performance on his part.

These considerations clearly result from decisions of the Supreme Court in the following cases: *Smith v. Georgia Loan Co.*, 113 Ga. 975, 39 S. E. 416; *Ford v. Lawson*, 133 Ga. 237 (5), 65 S. E. 444; *Byrd Printing Co. v. Whitaker Co.*, 135 Ga. 865, 70 S. E. 798, Ann. Cas. 1912A, 182. There is nothing to the contrary in *Oklahoma Vinegar Co. v. Carter*, 116 Ga. 140, 42 S. E. 378, 59 L. R. A. 122, 94 Am. St. Rep. 112. Indeed, the reasoning of Mr. Justice Little, in the opinion in that case, clearly supports the view above announced. An anticipatory breach was committed in that case. The plaintiff sought to pursue the special remedy provided by the Civil Code of 1910, § 4131, whereby the seller is given the right to store and retain the goods for the benefit of the buyer and recover the full amount of the purchase price. The court held that that remedy was not available in that case, simply because it appeared that the plaintiff had not stored and retained the goods. As was said in the opinion: "Had it done so, it might have brought

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

an action against the buyers for the entire price of the goods." Here the seller adopted the other remedy provided by this section of the Code, and resold the goods after notice to the purchaser. This fixed the measure of the plaintiff's damages, and was conclusive upon the purchaser that the price realized at the resale was the market value of the goods at the time and place of delivery. See, also, *Rounsaville v. Leonard Mfg. Co.*, 127 Ga. 735, 56 S. E. 1030; *Black Co. v. Kaplan*, 9 Ga. App. 811, 72 S. E. 803; *Georgia Agricultural Works v. Price*, 11 Ga. App. 80, 74 S. E. 718.

Judgment affirmed.

RUSSELL, J., absent because of sickness.

(11 Ga. App. 404)

GLAUSIER, WATSON & CO. v. WHALEY
et al. (No. 4,241.)

(Court of Appeals of Georgia. Aug. 6, 1912.)

(Syllabus by the Court.)

JUDGMENT (§ 590*)—MERGER AND BAR—
JUDGMENTS OPERATING AS BAR.

The subject-matter of the cause of action upon which this suit was brought in the city court was involved in and concluded by the judgment rendered in the suit previously brought in the superior court.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1084, 1085, 1102-1106; Dec. Dig. § 590.*]

Error from City Court of Thomasville; W. H. Hammond, Judge.

Action by Glausier, Watson & Co. against E. R. Whaley and others. Judgment for defendants, and plaintiffs bring error. Affirmed.

J. H. Merrill, of Thomasville, and R. J. Bacon, of Albany, for plaintiffs in error. Snodgrass & MacIntyre, of Thomasville, for defendants in error.

POTTLE, J. Suit was brought against Whaley and Myrick, as surviving partners of a partnership known as the Boston Naval Stores Company, alleged to have been composed of Whaley, Myrick, and Mallette, the last of whom was not in life at the time the suit was brought, and his legal representatives were made parties to the action. The petition alleges that the defendants were indebted to the plaintiffs upon a check which had been executed by the Boston Naval Stores Company and delivered to the plaintiffs upon a valuable consideration. The defendants pleaded that in a former suit in the superior court between the same parties, and involving the same subject-matter, a judgment had been rendered in favor of the plaintiffs, and that such judgment was a full and final adjudication of the claim and cause of action now sued on. The suit referred to as having been brought in the superior court was in behalf of these plaintiffs and

against the Boston Naval Stores Company and L. F. Driver. The petition alleged that the plaintiffs had sold to the Boston Naval Stores Company a turpentine plantation for the sum of \$17,000, and that \$100 of the purchase price had been paid in cash, and that a "check for one hundred (\$100) dollars was given as a part payment, then and there, on said business, which was signed by Boston Naval Stores Company, per E. R. Whaley, was accepted as one hundred (\$100) dollars cash, and was received in part payment." It is further alleged that the Boston Naval Stores Company operated the business for five days, shipped the products in the name of the company, and never paid the remainder of the purchase price, to wit, \$16,900; that it refused to pay the check, and that the same came back with "payment stopped" written thereon, this being the reason for nonpayment; that the said company abandoned said business and said assets, broke said contract of sale, and left the assets in a demoralized condition as to value, in that they were not worth more than \$11,000.

The petition further alleged that L. F. Driver was not a partner in the Naval Stores Company at the time of the bringing of the suit, but was to have an interest in the firm, in consideration of his services in looking up the location; that he had his name placed in the contract of sale to protect him; and that the contract was closed and the sale made with the Boston Naval Stores Company and Driver. The petition alleged that the plaintiffs were entitled to recover the sum of \$6,000 for breach of contract, by reason of the acts of the Boston Naval Stores Company and the members composing that firm and L. F. Driver. It was further alleged that the name of L. F. Driver in the contract was a mistake of the scrivener and a mutual mistake of the parties; the intent being that the contract should be with the Boston Naval Stores Company alone. The petition prayed for reformation of the contract. By an amendment to the petition, the plaintiffs alleged that Driver was a party to the case, and that defendants contend now in open court that he was a party to the contract of sale, and is equally bound with the Boston Naval Stores Company, and ask for a nonsuit on that ground; that the contract shows that Driver is so bound, and plaintiffs show that under the evidence adduced on the trial he is bound, and this amendment is offered that the petition may correspond with the proof and show liability on the part of Driver. The plaintiffs prayed for a judgment against Driver and the Boston Naval Stores Company. The suit resulted in a judgment in favor of the plaintiffs for \$1,250 against the Boston Naval Stores Company, E. M. Myrick, E. R. Whaley, and L. F. Driver, the amount of which was subsequently paid by

the defendants. At the conclusion of this evidence, the trial judge rendered judgment against the plaintiffs and in favor of the defendants, and to this judgment exception has been duly taken by the plaintiffs.

If the former suit brought in the superior court involved the \$100 now being sued for, and if, under a proper construction of the petition in that case, a recovery was or might have been had in favor of the plaintiffs for the \$100 being sued for, the judgment in the superior court is conclusive, and operates as a bar to any further suit on the check. The suit was against the Boston Naval Stores Company and L. F. Driver. The check was given by the Boston Naval Stores Company alone; but by the amendment in the suit for breach of contract it was alleged that Driver was a party to the contract of sale and "equally bound with the Boston Naval Stores Company." If this was true, Driver was liable to that company for his pro rata of \$100. The check was received as cash, and is therefore to be treated for all purposes as so much cash paid. While paid by the Naval Stores Company alone, it was paid for the benefit of that company and Driver. This being so, the cash payment of \$100 either was or could have been taken account of in the verdict in that suit. It cannot be ascertained with certainty whether the verdict of \$1,250 included the \$100 which had been paid on the purchase price; but it probably did, because the plaintiffs prayed to recover the full difference between the agreed price and the market value, making no deduction for the \$100. Taking the allegations and the prayer altogether, it was the evident purpose of the parties in the first suit to fix their liability on account of the alleged breach of the contract of sale, and the plaintiffs were manifestly seeking to recover a verdict which should represent the full measure of the defendants' liability by reason of the breach. This was the difference between the agreed price and the market value, and the presumption is that the jury made due allowance for the \$100 which had been paid. But whether they did or not, under the pleadings and the evidence, they might have done so. This being so, the verdict and judgment in the first suit fixed the measure of the plaintiffs' right of recovery, and they were not entitled to recover upon the check.

Judgment affirmed.

RUSSELL, J., absent because of sickness.

(11 Ga. App. 416)

WILLIAMS et al. v. STATE. (No. 4,264.)
(Court of Appeals of Georgia. Aug. 6, 1912.)

(Syllabus by the Court.)

1. SUFFICIENCY OF EVIDENCE.

The evidence in this case was sufficient to rebut the presumption that the fire was ac-

cidental, and to raise a reasonable inference that it was due to criminal agency.

2. ARSON (§ 37*)—SUFFICIENCY OF EVIDENCE.

The evidence was sufficient to show that the accused burned the house described in the indictment. It showed motive or ill will towards the owner of the house, flight from the house in the middle of the night, taking goods contained in the house, incriminatory statements made during their flight, indicating guilty knowledge and expectation of the appearance of a fire, which had been kindled just before leaving the house, and other circumstances, sufficient to exclude every other reasonable hypothesis than that of guilt.

[Ed. Note.—For other cases, see Arson, Cent. Dig. §§ 71-73; Dec. Dig. § 37.*]

3. ARSON (§ 37*)—EVIDENCE—SUFFICIENCY.

The allegation in the indictment, descriptive of the house that was maliciously set fire to and burned, that it was "an occupied dwelling house," is sufficiently proved by evidence that the accused (four persons) lived in the house prior to and up to the night in which it was burned; and that immediately upon setting fire to the house they fled therefrom.

[Ed. Note.—For other cases, see Arson, Cent. Dig. §§ 71-73; Dec. Dig. § 37.*]

Error from Superior Court, Irwin County; W. F. George, Judge.

Pillie Williams and others were convicted of maliciously setting fire to a house, and bring error. Affirmed.

Newbern & Meeks, of Ocilla, for plaintiffs in error. Max E. Land, Sol. Gen., of Cordele, for the State.

HILL, C. J. Judgment affirmed.

RUSSELL, J., absent because of sickness.

(11 Ga. App. 418)

HOLLINGSWORTH v. MAYOR, ETC., OF
CARROLLTON. (No. 4,281.)

(Court of Appeals of Georgia. Aug. 6, 1912.)

(Syllabus by the Court.)

CRIMINAL LAW (§ 1179*)—WRIT OF ERROR—QUESTIONS OF FACT.

The petition for certiorari complains of no error of law, but only that the finding of the municipal court was without any evidence to support it. There being direct evidence that the accused was guilty as charged, this court will not interfere with the refusal of the judge of the superior court to sanction the writ of certiorari.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3001; Dec. Dig. § 1179.*]

Error from Superior Court, Carroll County; R. W. Freeman, Judge.

Essie May Hollingsworth was convicted of violating an ordinance of the Mayor, etc., of the City of Carrollton. From a judgment refusing to sanction a writ of certiorari, she brings error. Affirmed.

Buford Boykin, of Carrollton, for plaintiff in error. Emmett Smith, of Carrollton, for defendant in error

HILL, C. J. Judgment affirmed.

RUSSELL, J., absent on account of sickness.

(11 Ga. App. 384)

WILKES v. STATE. (No. 4,245.)

(Court of Appeals of Georgia. July 23, 1912.)

*(Syllabus by the Court.)***1. LARCENY (§ 77*)—INSTRUCTIONS—RECENT POSSESSION OF PROPERTY.**

In a prosecution for simple larceny, the evidence tended to show that recently after the offense was committed the stolen property was found in the house where the accused lived with others. It was not shown that the accused had exclusive possession, either of the stolen property or of the house where the property was found. It was error, therefore, for the trial judge to charge as follows: "If you find the offense alleged in the indictment was committed by some one, and that after the commission of the offense, or at the time of the commission of the offense, the goods, or some portion of them, were found in the recent possession of any one, such possession, unless explained to the satisfaction of the jury, is a circumstance which the jury may consider in determining the guilt or innocence of the accused." The fact that the eggs (the property stolen) were found in the possession of some one, and that this possession was not explained to the satisfaction of the jury, does not raise any inference that the accused was the thief. This inference arises only when the evidence shows recent possession in the accused, not explained to the satisfaction of the jury.

[Ed. Note.—For other cases, see Larceny, Cent. Dig. §§ 199, 202, 204; Dec. Dig. § 77.*]

2. CRIMINAL LAW (§ 785*)—TRIAL—INSTRUCTIONS—CREDIBILITY OF WITNESSES.

It is erroneous to charge the jury, in effect, that, if they cannot reconcile the testimony of the witnesses so as not to impute perjury to any one, they would have the right to believe the witness who had the best opportunity to know the facts testified to by him, without adding the qualification that the witnesses should be of equal credibility. *Lawrence v. State*, 10 Ga. App. 786, 74 S. E. 300.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1774, 1776-1781, 1889-1894; Dec. Dig. § 785.*]

3. PREJUDICIAL NATURE OF ERROR—SUFFICIENCY OF EVIDENCE.

The evidence tending to prove the guilt of the accused was not clear, strong, or conclusive; and for this reason the errors noted above demand another trial.

Error from City Court of Carrollton; James Beall, Judge.

Bob Wilkes was convicted of simple larceny, and brings error. Reversed.

Leon Hood and R. W. Adamson, both of Carrollton, for plaintiff in error. C. E. Roop, Sol., of Carrollton, for the State.

HILL, C. J. Judgment reversed.

(11 Ga. App. 410)

CUMBY v. STATE. (No. 4,256.)

(Court of Appeals of Georgia. Aug. 6, 1912.)

*(Syllabus by the Court.)***1. CRIMINAL LAW (§ 918*)—NEW TRIAL—HARMLESS ERROR.**

The conduct of the trial judge complained of in the motion for a new trial will not, un-

der the facts of this case, be held to be cause for a new trial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2163-2196, 2219-2224; Dec. Dig. § 918.*]

2. INTOXICATING LIQUORS (§ 236*)—CRIMINAL PROSECUTIONS—EVIDENCE—SUFFICIENCY.

The evidence fully warranted the verdict.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. §§ 300-322; Dec. Dig. § 236.*]

Error from City Court of Carrollton; James Beall, Judge.

Esmer Cumby was convicted of selling intoxicating liquors, and brings error. Affirmed.

Buford Boykin, W. Smith, and S. C. Boykin, all of Carrollton, for plaintiff in error. C. E. Roop, Sol., of Carrollton, for the State.

POTTLE, J. [1] Cumby was convicted of selling intoxicating liquors. During the trial, while a witness for the defendant was on the stand, he was asked by the solicitor whether a mule which had been referred to in the testimony was in a stable. The witness answered, "In the lot." The solicitor then repeated the question, and received the same answer. The solicitor again twice repeated the same question, and each time received the same answer. Counsel for the defendant objected to further questions of the same nature, upon the ground that the witness had already intelligently answered the question. The court overruled the objection, and permitted the same question to be again put, and the same answer was again given by the witness. Thereupon the court "became a little angry with the witness and said: 'Look here, you have got to answer that question. You can understand. You have sense.'" The witness again answered that the mule was in the lot, whereupon the court said: "Look here, I will have to send you to jail. Mr. Sheriff, you will have to take this boy to jail. Now, was the mule in the lot or in the stable?" The witness again answered that the mule was in the lot, and explained that the stable was not inclosed in the lot fence. In the bill of exceptions, which is certified to be true by the trial judge, it is recited that the last remark was made to the witness by the court in a very angry manner, and that the court was requested to withdraw the case from the jury and declare a mistrial. It is not quite clear from the record what information the court was seeking to elicit from the witness. He seems to have answered the question fairly and intelligently each time it was put to him, and upon the record as presented to this court the conduct of the trial judge was improper. It is improper, and often prejudicial to the rights of a party litigant, for the trial judge, by his manner and statements, to discredit a party's witness or minimize the importance

of his testimony. In a close case such prejudicial conduct on the part of the trial judge would necessitate a new trial. It will not have this result in the present case, because the defendant is clearly guilty under the evidence, and the testimony about which the exception arose seems to be entirely immaterial to any issue involved in the case. The defendant was charged with having sold a pint of whisky, and it is not apparent how the question as to whether the mule was in the lot or in the stable could elucidate this issue.

[2] A technical case of guilt was made out by the defendant, even by his own witness whom it is claimed the court discredited. The state's witness testified that he bought a half pint of whisky from the accused. It is inferable from the testimony of the defendant's witness that the state's witness sold the whisky to the accused, and afterwards bought it back from him. If that be the truth, the defendant is just as guilty as if he had sold the whisky to the state's witness in the first instance. The statement of the accused accorded with the testimony of his witness, and it is thus apparent that both the evidence and the statement demanded his conviction.

Judgment affirmed.

RUSSELL, J., absent because of sickness.

(11 Ga. App. 364)

CAIN v. KNIGHTS OF PYTHIAS OF NORTH AND SOUTH AMERICA, EUROPE, ASIA, AFRICA, AND AUSTRALIA.
(No. 4,220.)

(Court of Appeals of Georgia. July 23, 1912.)

(Syllabus by the Court.)

1. INSURANCE (§ 767*)—INSURABLE INTEREST—NECESSITY.

"While a valid contract of insurance cannot lawfully be taken on the life of another by one who has no insurable interest therein, because it contravenes public policy, yet, as one has an insurable interest in his own life, he may lawfully procure insurance thereon for the benefit of any other person whose interest he desires to promote. Such a contract cannot be defeated because of the want of insurable interest in the beneficiary, when it appears that the person whose life was insured acted for himself, at his own expense and in good faith, to promote the interest of the beneficiary, in taking out the policy. A contract so entered into is in no sense a wagering or speculative one."

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1929-1931; Dec. Dig. § 767.*]

2. INSURANCE (§ 818*)—ACTIONS ON POLICIES—PARTIES.

It appearing from the allegations of the petition that the right of action upon the policy sued on was in one other than the legal representative of the insured, the court did not err in sustaining a general demurrer to the petition, without reference to whether a temporary administrator is a legal representative,

within the meaning of that term as used in the policy.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1994; Dec. Dig. § 813.*]

Error from City Court of Savannah; Davis Freeman, Judge.

Action by Frank Cain, administrator, against the Knights of Pythias of North and South America, etc. Judgment for defendant, and plaintiff brings error. Affirmed.

Oliver & Oliver, of Savannah, for plaintiff in error. F. B. Pettie, of Savannah, for defendant in error.

POTTLE, J. Cain, as temporary administrator upon the estate of Johnson, brought suit against the Knights of Pythias of North and South America, Europe, Asia, Africa, and Australia to recover a certain amount alleged to be due the estate of the deceased on an insurance policy which had been issued to the deceased.

The petition alleged that the proceeds of the policy were made payable to one Eliza Cunningham, who was named in the policy as Eliza Johnson, alleged to be the wife of the insured; but she was not in fact his wife, and this was known to the insurer, and it is acquainted with the fact that she is not the wife of the insured, and not entitled to the proceeds of the policy. For this reason, petitioner alleges that the proceeds of the policy are due to him as administrator on the estate of the deceased. Attached to the petition and made a part thereof was a copy of the benefit certificate issued to the deceased. Its provisions, so far as material, are as follows: "Under the following expressed conditions, stipulations, and agreements now existing or that may hereafter be enacted by the grand lodge, [it] will pay to Eliza Cunningham, wife, heirs or legal representative of such heir or heirs, at the death of [the insured], an endowment of not less than fifty dollars, nor more than three hundred and fifty dollars, being the total amount under this policy; provided that [the insured] shall have complied with all the laws and regulations of the grand and subordinate lodges" which follow. The conditions were that the insured be, at the time of his death, a member in good standing; that the policy shall not have been assigned, transferred, or hypothecated to any person before the death of the insured; that the policy shall not be assigned, transferred, or hypothecated after the death of the insured, by his widow or legal representatives, or such heir or heirs, without the consent of the grand lodge; that if the policy shall have been assigned, transferred, or hypothecated by the insured prior to his death, or by his widow, heirs, or legal representatives of such heir or heirs after the death of the insured, without the consent of the grand lodge, then the policy shall become void, and

all rights and benefits arising from the same shall cease and terminate forever; that upon a faithful compliance with the foregoing stipulations and laws of the endowment bureau and subordinate lodge, and upon satisfactory proof of the death of the insured, the endowment bureau will pay, "as above expressed," according to a certain tabulated statement set forth in the certificate. The trial judge sustained a general demurrer to the petition, holding that the plaintiff was not a legal representative, within the meaning of that term as used in the benefit certificate, and was therefore not entitled to bring the action.

[2] Counsel for the plaintiff in error state in their brief that the sole question before the court is: "Has the temporary administrator authority, under the law, to collect the proceeds of this policy, and is he within the contemplation of the term 'legal representative'?" They present cogent reasons in their brief why a temporary administrator is permitted, under the laws of this state, to bring suit to recover upon a policy of insurance, payable to the estate of his intestate. The rule of practice is well settled that a judgment will be sustained, if right for any reason, even though the reason given by the trial judge for entering the judgment may have been, in the opinion of the reviewing court, wrong. Taking into consideration the business and principles of the order in which the plaintiff's intestate was insured, it would seem not to have been in contemplation of the parties that recovery on the policy could be had by an administrator or executor of the deceased. The term "legal representative" does not always include executor or administrator. Under a very similar contract to the one involved in the present case, the Supreme Court held that a permanent administrator on the estate of the insured could not recover. See *Tucker v. Knights of Pythias*, 135 Ga. 56, 68 S. E. 796. It is significant, as determining the meaning intended to be placed by the parties upon "legal representative," that one of the conditions was that the policy should not be assigned after the death of the member, either by his widow, or his heir, or legal representatives of such heir. It would seem, therefore, that in contemplation of the parties the benefit fund was to be paid over, either to the beneficiary named, or legal representatives of the heirs of the insured.

But, be this as it may, we are quite clear that the judgment dismissing the petition on general demurrer was right for another reason. The policy was made payable to Eliza Cunningham, and a fair construction of the allegations of the petition is that Eliza Cunningham is still in life. There is some doubt as to whether it was intended to be stated in the certificate that Eliza Cunningham was the wife of the insured. Her name is

set forth as Eliza Cunningham, and a proper construction of the certificate would seem to be that the proceeds of the policy were to be paid to Eliza Cunningham, if in life, or to the wife, heirs, or legal representatives of such heirs, if neither Eliza Cunningham nor the wife of the insured were in life.

[1] But it is entirely immaterial whether Eliza Cunningham is stated to be the wife of the insured or not; and it is also immaterial whether she is in fact his wife or not. The petition alleges that the insured himself took out the policy of insurance and carried on the insurance during his lifetime; and by this it was necessarily intended to be alleged that the insured paid the premiums and himself controlled the policy. Insurance cannot be taken out by another on the life of one in whom the person taking out the policy has no insurable interest. Such insurance would be void and contrary to public policy. It would be nothing more than a wagering or speculative contract, "yet, as one has insurable interest in his own life, he may lawfully procure insurance thereon for the benefit of any other person whose interest he desires to promote. Such a contract cannot be defeated because of the want of insurable interest in the beneficiary, when it appears that the person whose life was insured acted for himself, at his own expense and in good faith, to promote the interest of the beneficiary, in taking out the policy. A contract so entered into is in no sense a wagering or speculative one." *Union Fraternal League v. Walton*, 109 Ga. 1, 34 S. E. 317, 46 L. R. A. 424, 77 Am. St. Rep. 350; *Grand Lodge Knights of Pythias v. Barnard*, 9 Ga. App. 71, 70 S. E. 678. These decisions are decisive of the present case. The fact that Eliza Cunningham was not the wife of the insured, and that the insurer knew this fact, constituted no reason why she was not entitled to the proceeds of the policy. It not being alleged that Eliza Cunningham is not in life, and it being inferable from the allegations of the petition that she is in life, this constitutes a sufficient reason for dismissing the petition on general demurrer, without reference to the right of the temporary administrator to recover if Eliza Cunningham is not in life.

Judgment affirmed.

(11 Ga. App. 415)

COUEY v. STATE. (No. 4,263.)

(Court of Appeals of Georgia. Aug. 6, 1912.)

(Syllabus by the Court.)

1. CRIMINAL LAW (§ 828*)—TRIAL—INSTRUCTIONS—NECESSITY FOR REQUEST.

The testimony relied on by the accused to prove an alibi not being such as to show the impossibility of the defendant's presence at the time when and the place where the crime was alleged to have been committed, it was not error, in the absence of a written request so to

do, to omit to instruct the jury on the law of alibi. *Shaw v. State*, 10 Ga. App. 776, 74 S. E. 89.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2007; Dec. Dig. § 828.*]

2. CRIMINAL LAW (§ 922*)—NEW TRIAL—INSTRUCTIONS.

While not strictly accurate, under the facts of the present case, the following charge was not so erroneous as to require a new trial: "I charge you that it would not be necessary for the state to show that the defendant actually played cards and bet. It would be sufficient if it appears to you that he bet on any game played with cards. It would not be necessary for him to actually participate in the game. If he stood by, saw the game played, and bet money on it, he would be guilty under the charge made against him in the accusation."

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2210-2218; Dec. Dig. § 922.*]

3. SUFFICIENCY OF EVIDENCE.

The evidence warranted the verdict.

Error from City Court of Polk County; F. A. Irwin, Judge.

Ross Couey was convicted of gaming, and brings error. Affirmed.

W. W. Mundy, of Cedartown, for plaintiff in error. J. A. Wright, Sol., and E. S. Ault, both of Cedartown, for the State.

POTTLE, J. The proposition stated in the first headnote is well settled, and needs no elaboration.

[2] The language of the statute is that, before one can be convicted, it must appear that he played and bet for money at any game played with cards, dice, or balls. Strictly speaking, therefore, it must appear that one charged with a violation of this statute participated in a game. It is apparent, however, from the testimony that the court did not mean to charge that the accused need not take part in a game. The state's witness testified as follows: "Ross Couey, the defendant, played cards and bet with us. We were all playing cards at Standpipe Hill, playing 'skin.' Some would play sitting on the ground. The ones handling the cards were the principals, and the ones standing behind were the 'pikers.' The principals would handle the cards and the 'pikers' would reach over and pick up one of the cards thrown aside by the dealer, and then throw his money in the ring and bet on his card. Ross was standing behind Dave Cason, 'piking.' I saw Ross reach down several times and pick up the cards and put his money down." It is apparent, therefore, that what the court meant to say was that if the jury believed that the accused was a "piker," as described by the state's witness, he would be equally guilty as if he were a "principal." Manifestly this was correct. The law does not permit this form of gaming, either by "principals" or by "pikers."

Judgment affirmed.

RUSSELL, J., absent because of sickness.

(11 Ga. App. 427)

STRICKLAND v. STATE. (No. 4,290.)

(Court of Appeals of Georgia. Aug. 6, 1912.)

(Syllabus by the Court.)

1. CRIMINAL LAW (§ 828*)—TRIAL—INSTRUCTIONS—NECESSITY FOR REQUEST.

In the absence of a timely written request, the failure to instruct the jury on a theory of the defense dependent alone on the statement of the accused to the jury is not error. *Jordan v. State*, 9 Ga. App. 578, 71 S. E. 875.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2007; Dec. Dig. § 828.*]

2. ASSIGNMENTS OF ERROR WITHOUT MERIT—EVIDENCE SUFFICIENT.

The assignments of error of law are without merit, and the evidence fully supports the verdict.

Error from City Court of Statesboro; H. B. Strange, Judge.

J. D. Strickland was convicted of crime, and brings error. Affirmed.

J. F. Brannen and J. J. E. Anderson, both of Statesboro, for plaintiff in error. Fred T. Lanier, Sol., of Statesboro, for the State.

HILL, C. J. Judgment affirmed.

RUSSELL, J., absent because of sickness.

(11 Ga. App. 418)

AVERY v. STATE. (No. 4,280.)

(Court of Appeals of Georgia. Aug. 6, 1912.)

(Syllabus by the Court.)

1. CRIMINAL LAW (§ 1144*)—WRIT OF ERROR—REVIEW—PRESUMPTIONS.

A ground of a motion for new trial, based upon alleged newly discovered evidence, need not be formally approved by the trial judge in the sense that the recitals of fact contained in the affidavits offered in support of the ground are verified as true. The reviewing court will pass upon a ground of the motion for new trial, based upon alleged newly discovered evidence, if it appears that this ground was presented to and considered by the trial judge, and that the affidavits offered in support thereof were likewise considered by the judge. Where, however, the record discloses that the trial judge refused to approve such a ground of a motion for a new trial, and nothing more appears, it will be presumed that for some good and sufficient reason the trial judge refused to consider the ground of the motion, and the evidence offered in support thereof.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2736-2781, 2901, 3016-3037; Dec. Dig. § 1144.*]

2. CRIMINAL LAW (§ 942*)—NEW TRIAL—GROUNDS—NEWLY DISCOVERED EVIDENCE.

A ground of a motion for new trial, based upon alleged newly discovered evidence which is impeaching in its nature, presents no sufficient reason for granting a new trial, and especially is this true where the impeaching evidence relates to proof of a specific act tending to show the bad character of a witness, evidence of which would not be admissible even if a new trial should be granted.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2331-2332; Dec. Dig. § 942.*]

3. SUFFICIENCY OF EVIDENCE.

The evidence supports the verdict.

Error from Superior Court, Cobb County; N. A. Morris, Judge.

L. C. Avery was convicted of crime, and brings error. Affirmed.

Mozley & Moss, of Marietta, for plaintiff in error. J. P. Brooke, Sol. Gen., of Alpharetta, for the State.

POTTLE, J. Judgment affirmed.

RUSSELL, J., absent because of sickness.

(11 Ga. App. 404)

MUSCOGEE COUNTY v. RODGERS.

(No. 4,236.)

(Court of Appeals of Georgia. Aug. 6, 1912.)

(Syllabus by the Court.)

ACTION FOR PERSONAL INJURIES—SUFFICIENCY OF EVIDENCE—AMOUNT OF DAMAGES—CHARGE OF COURT.

This was an action for personal injuries alleged to have been received by the plaintiff, in consequence of being thrown from a buggy as a result of the horse hitched thereto having stepped upon a rotten plank in a bridge along a public road of a county. The evidence fully warranted, if it did not demand, the verdict in the plaintiff's favor. The amount thereof (\$750) was not only not excessive, but was less than that to which the plaintiff was fairly entitled, under the testimony introduced in her behalf. The charge of the court fairly submitted the issues. The requests to charge, so far as legal and pertinent, were covered by the general charge; and the instruction excepted to was not subject to the criticism that it contained an expression of opinion as to the weight of the evidence.

Error from City Court of Columbus; G. Y. Tigner, Judge.

Action by Inez Rodgers against Muscogee County. Judgment for plaintiff, and defendant brings error. Affirmed.

Hatcher & Hatcher, of Columbus, for plaintiff in error. A. W. Cozart, of Columbus, and S. M. Davis, for defendant in error.

POTTLE, J. Judgment affirmed

RUSSELL, J., absent because of sickness.

(11 Ga. App. 385)

SMITH v. STATE. (No. 4,250.)

(Court of Appeals of Georgia. July 23, 1912.)

(Syllabus by the Court.)

LARCENY (§ 23*)—ELEMENTS OF OFFENSE—HOG STEALING.

The accused was tried for hog stealing. The evidence strongly tended to show that he acquired and held possession of the hog under an honest claim of right. Under no view of the evidence was a conviction for the statutory offense of hog stealing authorized, even if the accused could properly have been found guilty of taking and carrying away the carcass of a hog belonging to the prosecutor, with intent to steal the same. The case is similar upon its facts to that of Moses v.

State, 8 Ga. App. 446, 69 S. E. 575, and is in principle controlled by that decision.

[Ed. Note.—For other cases, see Larceny, Cent. Dig. §§ 50-52; Dec. Dig. § 23.*]

Error from Superior Court, Laurens County; K. J. Hawkins, Judge.

George Smith was convicted of hog stealing, and brings error. Reversed.

R. Earl Camp, of Dublin, for plaintiff in error. E. D. Graham, Sol. Gen., of McRae, for the State.

POTTLE, J. Judgment reversed.

(11 Ga. App. 355)

WEAVER v. SOUTHERN RY. CO.

(No. 4,196.)

(Court of Appeals of Georgia. July 23, 1912.)

(Syllabus by the Court.)

CARRIERS (§ 218*)—TRANSPORTATION OF LIVE STOCK—LIABILITY FOR INJURY.

Where, in a contract of affreightment for the transportation of live stock, the shipper obligates himself to accompany the stock and feed and water them, he cannot recover of the carrier damages for injuries to the stock, caused from failure to supply them with food and water, if he abandons the stock en route without making arrangements to have them fed and watered, and without making any demand upon the carrier to furnish facilities for the feeding and watering of the stock. Especially is this true where it appears that at the point where it is claimed the carrier committed the breach of duty in failing to feed and water the stock there was a stock pen in which the stock might have been unloaded, and no demand was made upon the carrier to supply the owner with necessary vessels from which to feed and water the stock. In the absence of such a demand and of a refusal to comply therewith, the carrier cannot be held liable as for breach of its obligation to furnish facilities for feeding and watering the stock.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 674-696, 927, 928, 933-949; Dec. Dig. § 218.*]

Error from City Court of Atlanta; H. M. Reid, Judge.

Action by G. A. Weaver, Jr., against the Southern Railway Company. Judgment for defendant, and plaintiff brings error. Affirmed.

See, also, 9 Ga. App. 34, 70 S. E. 222.

Burton Smith and R. W. Crenshaw, both of Atlanta, for plaintiff in error. McDaniel & Black, of Atlanta, for defendant in error.

POTTLE, J. This is the second appearance of this case. The facts are fully reported in the former decision in 9 Ga. App. 34, 70 S. E. 222. The suit was brought to recover damages for alleged injuries to live stock shipped from Thomaston Ga., to Atlanta, Ga., over the lines of the Macon & Birmingham Railway Company and the Southern Railway Company. At the first trial a verdict was directed in favor of the plaintiff. That judgment was reversed by the

Court of Appeals, upon the ground that there was some evidence upon which the jury might find in favor of the plaintiff. In the decision rendered upon the record as then presented, it was held that the plaintiff could not recover for any injury caused by failure to supply the stock with food and water, since, under the contract of affreightment, he was bound to accompany the stock and feed and water them himself, and the evidence showed that he abandoned them at Woodbury, and that the failure to supply them with food and water was not a breach of duty on the part of the defendant. It was further held that, as there was some evidence that might authorize a finding that there was injury to some of the stock from causes other than failure to feed and water and for which the company would be responsible, the case should be submitted to a jury upon that issue. At the second trial the jury found for the defendant, and the plaintiff's motion for new trial was overruled.

The evidence is substantially the same as it was at the first trial. It is insisted that the court erred in charging the jury that the plaintiff could not recover for injury caused from failure to feed and water the stock, for the reason that the defendant had failed to supply the plaintiff with proper facilities for feeding and watering the stock at Woodbury. It appears now, as it did in the former trial, that there was a stock pen at Woodbury, where stock might have been safely confined after being unloaded from the car, but it does not appear that there were any troughs where food could be placed in the stock pen, or any receptacles for holding water for the stock to drink. If the injuries to the stock resulted from the carrier's failure to furnish proper facilities for feeding and watering, then the company would be liable. *Comer v. Stewart*, 97 Ga. 408, 24 S. E. 845. On the other hand, if the proximate cause of the injury was the plaintiff's abandonment of the stock and his own failure to comply with his contractual obli-

gation to feed and water, he cannot recover. *Georgia Railroad Co. v. Reid*, 91 Ga. 377, 17 S. E. 934; *Cooper v. Raleigh & Gaston Railroad Co.*, 110 Ga. 659, 36 S. E. 240. The court's instruction practically amounted to a statement to the jury that the plaintiff was not entitled to recover, under the evidence, for any damage caused from failure to feed and water the stock; and this instruction, we think, was proper under the facts of the case. It was undisputed that when the stock arrived at Woodbury, and the plaintiff ascertained that there would be no freight train from Woodbury to Atlanta until the next day, he abandoned his stock, without leaving them in the care of any person, and came to Atlanta. He made no demand upon the carrier to furnish any facilities for feeding and watering the stock; he made no effort to feed and water them himself; he employed no other person to do this for him in his absence. There was a stock pen near the track, where the stock might have been unloaded. If he had made demand upon the carrier to furnish troughs wherein the stock might be fed, and buckets out of which they might be watered, and the carrier had refused to comply with his demand, and injury had resulted to the stock from the plaintiff's failure to procure the necessary facilities for feeding and watering, then the carrier would have been liable. But where no such demand was made, and no effort of any sort made to feed and water the stock which were abandoned by the plaintiff, we do not think that he can properly hold the carrier liable for the consequences of his own neglect. Having taken the risk himself and the carrier having committed no breach of its contractual obligation, and no breach of any duty which it owed the plaintiff as a common carrier of live stock, the plaintiff must abide the consequences and suffer his loss. There was no error in any of the court's instructions, nor in refusing to give in charge the requests presented by the counsel for the plaintiff.

Judgment affirmed.

(92 S. C. 290)

STALLINGS v. SOUTHERN RY. CO.

(Supreme Court of South Carolina. Aug. 15, 1912.)

CARRIERS (§ 20*)—CARRIAGE OF GOODS—PENALTY FOR EXCESSIVE CHARGES.

Where a consignee of goods paid excessive freight charges without objection, he cannot recover from the railroad company the penalty for overcharge.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 33-49, 133, 927; Dec. Dig. § 20.*]

Appeal from Common Pleas Circuit Court of Spartanburg County; R. C. Watts, Judge.

Action by E. L. Stallings against the Southern Railway Company. From a judgment of the circuit court, affirming a judgment of the justice court in favor of plaintiff, defendant appeals. Reversed.

J. B. Atkinson, of Spartanburg, for appellant. C. C. Wyche, of Spartanburg, for respondent.

WOODS, J. The plaintiff recovered a judgment in a magistrate's court for 75 cents overcharge of freight on washstands shipped from Savannah, Ga., to Spartanburg, S. C., and \$50, the penalty for such overcharge. On appeal the judgment was affirmed by the circuit court.

The plaintiff admitted in his testimony that he paid the freight without objection. This admission was fatal; for, since the case was heard, the circuit court decided, in *Hardaway v. Southern Ry. Co.*, 90 S. C. 475, 73 S. E. 1020, that there can be no recovery for such overcharge voluntarily paid. This conclusion renders unnecessary the other questions made by the appeal.

Reversed.

GARY, C. J., and HYDRICK and FRASER, JJ., concur.

STATE v. JONES.

(Supreme Court of South Carolina. Aug. 10, 1912.)

1. JURY (§ 117*)—OBJECTIONS TO PANEL.

While Act Feb. 7, 1902 (23 St. at Large, p. 1066), providing for the selection of the jury list, no doubt contemplates that the names selected should be considered by the jury commissioners as a body, a failure to give such consideration is a mere irregularity, objection to which must be made before trial.

[Ed. Note.—For other cases, see Jury, Cent. Dig. § 544; Dec. Dig. § 117.*]

2. JURY (§ 117*)—OBJECTIONS TO PANEL EXCUSE FOR DELAY.

As the statute provides each step in the selection for a jury, an accused cannot excuse his failure to make objections to the panel before trial, because of lack of means of discovering irregularities; it being his duty to make inquiries of those participating in the proceeding.

[Ed. Note.—For other cases, see Jury, Cent. Dig. § 544; Dec. Dig. § 117.*]

Appeal from Common Pleas Circuit Court of Orangeburg County; R. W. Memminger, Judge.

John J. Jones was convicted of manslaughter, and from an order denying his motion for new trial he appeals. Affirmed.

See, also, 90 S. C. 290, 73 S. E. 177.

Wolfe & Berry, Glaze & Herbert, and C. P. Brunson, all of Orangeburg, for appellant. **P. T. Hildebrand**, for the State.

WOODS, A. J. [1] The defendant was convicted of manslaughter, and sentenced at the January, 1911, term of the court of general sessions for Orangeburg county. On appeal the judgment was affirmed. 90 S. C. 290, 73 S. E. 177. While the appeal was pending, the defendant's counsel gave notice of a motion, in the circuit court, for a new trial on the ground of after-discovered evidence, and on this further ground presented in the agreed statement: "In order to facilitate the work of preparing the jury list for the year 1911, the jury commissioners agreed among themselves that each commissioner would select the names from certain townships for the jury lists, and in accordance with that agreement each jury commissioner selected the names for the jury lists from his allotted portion of the county, and after they had prepared the lists in the manner above provided they met together, and put the names so chosen in the jury box, each agreeing to accept the name selected by the other, and without conjointly passing on each separate name, and declared that to be the jury list for the year 1911." Defendant's counsel did not discover that the jury box was made up in this manner until after the trial, when the fact was accidentally brought out in the hearing of a motion to quash the jury, made in another case and on a different ground. The circuit judge refused the motion, and the defendant appeals on the ground that the failure of the jury commissioners to pass conjointly on each name placed in the box was a violation of the law fatal to the validity of the presentment of a grand jury and the conviction of a petit jury so drawn.

Section 2 of the act of 1902 (23 Stat. 1066) provides: "That the said county auditor, county treasurer, and the clerk of the court of common pleas of each county shall immediately after the passage of this act, and hereafter in the month of December, of this and each succeeding year, prepare a list of such qualified electors, under the provisions of the Constitution, between the ages of twenty-one and sixty-five years and of good moral character, of their respective counties, as they may deem otherwise well qualified to serve as jurors, being persons of sound judgment and free from all legal exceptions, which list shall include not less than one

from every three of such qualified electors under the provisions of the Constitution, between the ages of twenty-one and sixty-five years, and of good moral character, to be selected without regard to whether such persons live within five miles, or more than five miles from the courthouse." The statute, no doubt, contemplates that the names placed in the box should be considered by the jury commissioners as a body; but the failure to give such joint consideration is nothing more than an irregularity, objection to which comes too late, if not made before trial. Similar questions have been so often before the court that no extended discussion is necessary. In *State v. Smalls*, 73 S. C. 516, 53 S. E. 976, it was held to be an irregularity merely that the jury commissioners selected for grand jurors the persons whom they regarded best qualified, instead of following the statute, which required that those whose names were first put down should be assigned to the grand jury. The authorities are cited in that case, and in *Rhodes v. So. Ry. Co.*, 68 S. C. 494, 47 S. E. 639, and *State v. Lazarus*, 83 S. C. 215, 65 S. E. 270.

[2] The position that the defendant had no means of discovering the irregularity before going to trial is not tenable. The statute law lays down every step to be taken in obtaining juries. When a party wishes to avail himself of any failure to comply with the law, due diligence requires that he make inquiry of those who participated in the proceedings prescribed by the statute. The cases will be very rare where every step taken will not be made known by such inquiry.

Affirmed.

GARY, C. J., and HYDRICK, WATTS, and FRASER, JJ., concur.

(92 S. C. 229)

WEST END DEVELOPMENT CO. v. THOMAS et al.

SAME v. O'HAGAN et al.

(Supreme Court of South Carolina. Aug. 10, 1912.)

1. PUBLIC LANDS (§ 192*) — COLONIAL GRANTS.

Act April 12, 1768 (7 St. at Large, p. 88) § 5, which reserved certain tide and marsh lands as a common for the city of Charleston, being a mere reservation and not a grant, was not binding on subsequent Legislatures, and hence did not invalidate the act of August 13, 1783 (7 St. at Large, p. 99) § 5, giving the marsh land to the city council to improve or sell for the benefit of the city or its inhabitants, or the act of March 4, 1909 (26 St. at Large, p. 361), granting tidelands not theretofore granted.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 615, 617, 618; Dec. Dig. § 192.*]

2. JUDGMENT (§ 691*) — CONCLUSIVENESS — PERSONS CONCLUDED.

Act Aug. 13, 1783 (7 St. at Large, p. 99) § 5, which granted marsh land to the city council of the city of Charleston, to be leased,

sold, or improved as shall appear to the council most conducive to the welfare of the city and its inhabitants, made the council a mere trustee, so that a judgment against it would not be conclusive on the city and its inhabitants.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1214; Dec. Dig. § 691.*]

3. EASEMENTS (§ 2*) — OVER PUBLIC PROPERTY.

Abutting owners cannot acquire an easement over land held for the public.

[Ed. Note.—For other cases, see Easements, Cent. Dig. § 3; Dec. Dig. § 2.*]

4. EASEMENTS (§ 26*) — OVER PUBLIC PROPERTY—ESTOPPEL.

If abutting owners acquired an easement over public land, they lost the same by silent acquiescence in the expenditure of large sums of money in the improvement and a consequent change in the use of the property.

[Ed. Note.—For other cases, see Easements, Cent. Dig. §§ 72½-74, 80-82; Dec. Dig. § 26.*]

Appeal from Common Pleas Circuit Court of Charleston County; Frank B. Gary, Judge.

Actions by the West End Development Company, a corporation, against John P. Thomas and others, and by the same plaintiff against W. J. O'Hagan and others. From a judgment for plaintiff in each case, the defendants appeal. Affirmed.

Mitchell & Smith and Wm. Henry Parker, all of Charleston, for appellants. James Simons and Geo. H. Moffett, both of Charleston, for respondent.

FRASER, J. In 1909 the Legislature of this state (Acts 1909, p. 361) enacted:

"Whereas, the city council of Charleston contemplates the extension and improvement of the water front of the said city by extending its seawall from the southwest extremity of White Point Garden to a point known as 'Chisolm's Mill,' on the Ashley river, as defined upon a plat hereinafter mentioned, and the filling in of the lowlands lying between the said seawall and the highlands of the said city, and the extension and construction of highways upon the lands so reclaimed:

"Section 1. Be it enacted by the General Assembly of the state of South Carolina, in consideration of the public improvements involved in the work aforesaid, the state of South Carolina has given and granted, and by this act does give and grant, unto the city council of Charleston, its successors and assigns, all the right, title, interest and estate of the state of South Carolina as the same may now be, of, in and to the land not heretofore granted under any of the grants hereinafter mentioned, lying between high-water mark and the outer line of the seawall so to be constructed as indicated upon the plat of Simons and Mayrant Company, dated the 19th day of January, 1909, and filed in the office of the Secretary of State and also recorded in the office of the register of mesne conveyances for the county of Charleston; and also the right to dig, excavate and re-

move from the bed of the Ashley river such soil as may be necessary to fill up the land lying between the said seawall and the highland of the present water front of the said city."

In 1783 (7 Statutes, p. 99) the provincial Legislature passed an act in which it provided as follows: "The marsh lands appropriated by law for a common * * * shall be vested in the said city council and their successors for the use and advantage of said city, to be *leased, sold improved* on or otherwise disposed of as to the *said city council shall appear most conducive to the welfare and advantage of said city and the inhabitants thereof.*"

In 1768 (7 Statutes, pp. 88, 89) the provincial Legislature passed an act, the fifth section of which is as follows: "V. And be it further enacted by the authority aforesaid, that all the vacant marsh land lying on each side of the said canal, hereby directed to be made, situate on the east side of Ashley river, within the limits of Charleston, shall forever hereafter be reserved and kept for the use of a common for Charleston; and any grant that may be made or obtained for the same, or any part thereof, is hereby declared to be absolutely null and void."

Under the act of 1909, the city council of Charleston conveyed to the respondent (an auxiliary corporation), and went to considerable expense in filling up, lands referred to in that act, and preparing the same for sale as building lots. The defendant appellants herein agreed to purchase two of the lots, but declined to comply with their contract, on the ground that under the act of 1768 this land had been granted to the use of the people of Charleston as a common, and the acts of 1783 and 1909 are invalid. The appellants also claim that the city is estopped from selling the lots by virtue of two judgments in which the city council was a party. The judgments, it is claimed, fix the right of common, and by these judgments the city is bound.

The case was referred to the master, who held that the land described in the acts of 1768 and 1783 were not the lands covered by the act of 1909, and no part of the land lately improved by the city council; and that, even if they are the same, the act of 1783 is valid, and the judgments set up as estoppels are not estoppels. The circuit judge confirmed the report of the master, and ordered the appellants to comply with their contracts. From this decree, this appeal is taken on the following grounds:

Exception 1:

"(1) In holding that the said grant of land for a common under the act of 1768 did not include the lands, now known as the 'Boulevard Lots,' or any part thereof; whereas he should have found that such lands, as the 'Boulevard Lots' generally, and the two lots thereof here in question specifically, formed

a part of the land so granted and dedicated under said act for a common."

The concurrent findings of fact by the master and the circuit judge are abundantly supported by the evidence, and this exception is overruled.

[1] Exception 2:

"(2) In holding that the plaintiff is not estopped from making the question of location on account of the litigation in the cases of *Campbell v. Charleston* and *O'Brien v. Charleston*; whereas (a) he should have held that the decrees in these cases were a judicial recognition of the existing validity of the act of 1783, and of the grant of lands thereunder for a common, embracing the lands here in question, and that the said city council is now estopped from questioning the validity thereof; and it is submitted his honor should have held that the inference to be drawn from said cases is that the marsh lands south of Broad street, including the boulevard lots generally, and the two lots here in question specifically, were in fact included in the grant of 1768 for a common; it being admitted by the agreed statement that the lots here in question and the greater part of the boulevard lots generally whether so included or not, were never sold or disposed of by the city council of Charleston prior to the year 1853. (b) And he should have held that, whatever the force and effect of the acts of 1768 and 1783, apart from these cases, and whatever the original limits of the land granted by the act of 1768 for a common, the legal effect of the decree of Judge Kershaw in 1883, in the case of *O'Brien v. City Council of Charleston*, was a judicial recognition and determination that the said act of 1768 was of force, not superseded by the act of 1783, embracing in its terms the boulevard lots generally, and the two lots here in question specifically, dedicating the same for a common in perpetuity; and that the city council of Charleston is, by the terms of said decree and the consent of said city council thereto, estopped from denying the same."

The Master finds "there is absolutely nothing before me to show that any portion of the lands sold to the West End Development Company by the city was within this grant."

[2] This finding being affirmed, of course, there is no ground for estoppel. Even if it were the same land, there would be no estoppel. The act of 1768 granted nothing. That act contained a reservation, and not a grant. The act merely declared the intention of the Legislature to keep the marsh land as a common, and could not bind any other Legislature, even if it had not been passed before the adoption of the Constitution. The act of 1783 then gave the marsh land to the city council, to be sold, etc., as to the *city council shall appear most conducive to the welfare and advantage of said city and the inhabitants thereof.* The city

council were mere trustees with power to improve, sell, etc. The city and its "inhabitants" were not parties to the suit, and not bound by it. This exception is overruled.

Exceptions 3 and 4:

"(3) In holding that, even if the lots in dispute were embraced in the legislation of 1788, such legislation has been superseded by subsequent legislation, especially by the act of 1783, incorporating the city of Charleston; and that since the enactment of 1783 it has been competent for the city council of Charleston to make such disposition of vacant marsh land appropriated for a common as to the said city council might appear most conducive to the welfare and advantage of said city and the inhabitants thereof; and more particularly: (a) Whereas he should have held that said act of 1768 was not superseded, but is now of force, and the dedication thereunder of lands for 'a common for Charleston' is valid and subsisting, not only because the act of 1783 and the subsequent acts have not that effect, and, even if the same had been intended to have such effect, this would have been beyond the power of the Legislature to enact such legislation as would divest vested rights. (b) And whereas his honor should have held that said act of 1783 did operate against a subsequent grant by the Assembly of 1783 (sic), and that there were then, and are now, restrictions of the right of a state Legislature to sanction the change of use of a public grant, and more particularly a restriction in favor of abutting landowners, who have vested rights in the use for a common of the land upon which their lands abut. (c) And whereas his honor should have held that such grant, being for a restricted portion of the public, was not a grant to the public in the sense of the principle contended for.

"(4) That in this his honor should have held that a conveyance, subject to said consent decree, and not subsequent to the consent decree in O'Brien, could not and should not be approved by the court, and that the city council, thereto consenting, could so far give to such an act legislative effect as to estop said city council forever thereafter, especially when, as in the case at bar, the consent of city council in said two cases, and the resulting dedication effected by the decree of court in said cases under said consent, was given for a valuable consideration to the city council of Charleston in the release of certain claims and demands expressly waived and disposed of by said consent decree; and whereas in this case the rights of abutting landowners are shown to be in question; and whereas his honor should have held that the defendants have shown that the grantors have no title; that at all events there is a cloud on the said title, and that there is nothing shown in the proceed-

ings, in the way of law or evidence, to remove the cloud; and therefore the defendants should not be compelled to comply."

[3, 4] Abutting owners could acquire no easements over land held for the public. Even if they could, they would themselves be estopped. They could not stand silent while large sums were being expended in valuable improvements and the use of the property changed, and then assert the rights they had lost by their silence.

What has already been said disposes of these exceptions; and they are overruled.

Exception 5:

"(5) That his honor erred in finding that the defendants have failed to establish the special defenses alleged, and in finding, as matter of law, that plaintiffs are entitled to the relief prayed for; whereas he should have found that the defendants have shown that plaintiffs have no title, and that the defendants should not be compelled to perform specifically."

What has already been said disposes of this exception; and it is overruled.

The judgment of this court is that the judgment appealed from is affirmed.

WOODS, HYDRICK, and WATTS, JJ., concur.

(32 S. C. 263)

JONES v. ENOREE POWER CO.

(Supreme Court of South Carolina. Aug. 12, 1912.)

1. ARBITRATION AND AWARD (§ 9*)—AGREEMENTS TO ARBITRATE — CONDITION PRECEDENT TO ACTION.

Under a contract providing expressly or impliedly that the determination of some specific question of fact by arbitration shall be a condition precedent to a right of action thereon, the failure of a party without good excuse to so arbitrate *held* to be a good defense to a suit on the contract by such party.

[Ed. Note.—For other cases, see Arbitration and Award, Cent. Dig. § 30; Dec. Dig. § 9.*]

2. ARBITRATION AND AWARD (§ 16*)—AGREEMENTS TO ARBITRATE—REVOCABILITY.

A valid agreement by the parties to a contract, made before any dispute has arisen, to submit to arbitration some specific question of fact, with a further provision that such arbitration shall be a condition precedent to a right of action on the contract, *held* to be irrevocable.

[Ed. Note.—For other cases, see Arbitration and Award, Cent. Dig. §§ 64-76; Dec. Dig. § 16.*]

Gary, C. J., dissenting.

Appeal from Common Pleas Circuit Court of Spartanburg County; Robt. Aldrich, Judge. "To be officially reported."

Action by W. H. Jones against the Enoree Power Company. Judgment for defendant, and plaintiff appeals. Affirmed.

Johnson, Nash & Daniel, of Spartanburg, for appellant. Bomar & Osborne, of Spartanburg, for respondent.

WOODS, J. By a contract executed February 27, 1900, W. H. Jones, the plaintiff, and others, conveyed to A. B. Groce, his heirs and assigns, "the right and privilege to raise a dam on the Van Patton Shoals, now owned by the Westmoreland estate and S. H. Calvert, to such height as he may desire." The questions made by this appeal arise under the following stipulation of the contract: "It is further agreed that if the land of the parties above named become in any way injured or damaged by water from said raising of the dam on said Van Patton Shoals on Enoree river, the said A. B. Groce hereby binds himself, his heirs, executors, administrators, and assigns, to pay the amount of such damages to the said parties above named, their heirs, executors, administrators, and assigns. The amount of such damages shall be derived and determined in the following manner, to wit: The said Abraham Cook, W. L. Hudson, P. B. Cooper, T. L. Bragg, R. T. Newman, Mrs. M. T. Newman, R. B. Newman, B. F. Newman, W. H. Jones, J. F. King, O. E. Godfrey, M. E. Jones, W. F. Fowler, the heirs, executors, administrators, or assigns, are to select one arbitrator, and the said A. B. Groce, his heirs, executors, administrators, or assigns, the other, and these two a third; and if these two cannot agree on a third, then such third arbitrator is to be selected by the clerk of the court, and if he will not then the probate judge, and if he will not select then the third arbitrator shall be selected by the sheriff, and if for any reason the arbitrators cannot be chosen or a majority of them cannot agree, then the amount of such damage is to be determined by action at law. The award of said arbitrators shall be final and conclusive."

The defendant, Enoree Power Company, acquired by assignment of the contract the rights of Groce. On July 19, 1907, the plaintiff served on the defendant a notice that he would contest the validity of the contract, and that, even if the contract should be declared valid, the plaintiff revoked the agreement to arbitrate. Afterwards the plaintiff, disregarding the agreement, brought this action for damages and injunction, alleging in his complaint: "That about the first of the year 1908, the defendant, Enoree Power Company, erected a dam across Enoree river, at what is known as Van Patton Shoals, of considerable height just below plaintiff's land, thereby impeding the water in said stream and backing it up into the small stream running through plaintiff's land referred to in such manner as to impede its progress and flow and caused said land to be saturated and slobbered with water and become unfit for cultivation, to the plaintiff's great damage. That plaintiff is a farmer and is dependent on the products of his farm for a living; and the defendant, by its said unlawful act, has so impeded the water, as it

was wont to flow above, over, and along his said lands, as to cause mud, sand, and debris, in case of even ordinary freshet, to be deposited in the bed of said stream and out upon the cultivated land, to his damage in the sum of \$500." The defendant set up as a defense that the action could not be maintained until the plaintiff had submitted the amount of damage, if any, to arbitration. In reply, the plaintiff alleged that the contract was without consideration, that it had been obtained by fraud, and that the agreement to arbitrate had been annulled by revocation.

[1, 2] The verdict of the jury was in favor of the defendant. The circuit judge instructed the jury: (1) That if the contract was obtained by fraud, it was of no effect; the plaintiff should have a verdict for whatever damage he had proved. (2) That if the contract was not obtained by fraud, then the plaintiff was bound by its terms; that he could not revoke the agreement to arbitrate, and could not maintain his action until he had offered to submit to arbitration the amount of the damage. The issue of fraud is out of the case, having been settled by the jury against the plaintiff.

Before considering the real question involved, it may be well to remark that no question under our Constitution or statute law is involved, for the arbitration provided for in this contract is a common-law arbitration falling entirely without the statute enacted by the General Assembly under the mandate of the Constitution. The Constitution provides: "The General Assembly shall pass laws allowing differences to be decided by arbitrators, to be appointed by the parties who may choose that mode of adjustment." Article 8, § 1.

Section 2849 of the Civil Code provides for arbitration agreements as required by the Constitution; but the statute contemplates arbitration of differences which have already arisen, and requires as a part of the contract "each party to enter into bond in double the amount involved to faithfully abide the result of the arbitration." Thus on its face the statute shows, without analysis, that it does not cover agreements contained in written contracts made before any difference has arisen to have any specific question of damage, loss, measurement, or the like arising under the contract settled by arbitration; and certainly it could not be contended for a moment that the statute or the Constitution expresses or implies any intention to take away the common-law right to make such an agreement. The indisputable right to make such a common-law agreement, not falling under the statute, was expressly recognized in *Bishop v. Valley Falls Mfg. Co.*, 78 S. C. 312, 58 S. E. 939.

The exceptions raise two questions: First, was the agreement for arbitration binding on the plaintiff in the absence of fraud? Sec-

ond, did the plaintiff have the right to revoke the agreement that the amount of damage should be ascertained by arbitration?

We shall not discuss in detail the numerous cases in which the validity of arbitration agreements under the common law and the right to revoke them have been considered. As to the validity of such contracts, the authorities with entire unanimity now lay down this rule. An agreement to submit to arbitration all questions of law and fact that may arise under a contract is contrary to the public policy and void, as an attempt to oust the courts of their jurisdiction and establish in their place a contract tribunal. But an agreement that any particular issues of fact that may arise, such as quality of goods or amount of loss or damage, or the like, shall be submitted to arbitration, leaves the question of ultimate liability open for the decision of the courts and is valid; and if the contract expressly or by necessary implication makes the ascertainment of such fact by arbitration a condition precedent to a right of action, it is a good defense to a suit on the contract that the plaintiff has, without such good excuse, failed to arbitrate. Freedom to contract for arbitration to this extent imports no invasion of the province of the courts, and there is no ground upon which a right so essential to the convenient transaction of modern business affairs can be denied.

It is true that the case of *Herbemont v. Percival*, 1 McMul. 69, decided in 1840, does lay down in very broad language the general rule that a suit may be brought in disregard of any sort of agreement to arbitrate, though it is important to observe that the court also held in that case that the terms of the contract were too indefinite for enforcement. The case, however, is no longer authority in this state against the rule we have stated as to the validity of arbitration agreements, for in the case of *Maxwell v. Thompson*, 15 S. C. 612, decided in 1881, it was held that agreements to arbitrate are not against public policy. In the still later case of *Brooke v. Laurens Milling Co.*, 78 S. C. 200, 58 S. E. 806, 125 Am. St. Rep. 780, and *Id.*, 84 S. C. 299, 66 S. E. 294, the court held an agreement like that in this case binding on the parties. Since the decisions in *Hamilton v. Liverpool*, etc., Ins. Co., 136 U. S. 242, 10 Sup. Ct. 945, 34 L. Ed. 419, and *Hamilton v. Home Ins. Co.*, 137 U. S. 370, 11 Sup. Ct. 133, 34 L. Ed. 708, we think no authority can be found which questions the following summary of the law made in the latter case: "A provision, in a contract for the payment of money upon a contingency, that the amount to be paid shall be submitted to arbitrators, whose award shall be final as to that amount, but shall not determine the general question of liability, is undoubtedly valid. If the contract further provides that no action on

it shall be maintained until after such an award, then, as was adjudged in *Hamilton v. Liverpool & L. & G. Ins. Co.*, above cited, and in many other cases therein referred to, the award is a condition precedent to the right of action. But where no such condition is expressed in the contract, or necessarily to be implied from its terms, it is equally well settled that the agreement for submitting the amount to arbitration is collateral and independent; and that a breach of this agreement, while it will support a separate action, cannot be pleaded in bar to an action on the principal contract." Numerous authorities following this rule are cited in 19 Cyc. 873; 2 Am. & Eng. Enc. 573; *Kinney v. Baltimore & O. Employees Relief Ass'n*, 35 W. Va. 385, 14 S. E. 8, 15 L. R. A. 142; *Chadwick v. Phoenix Accident & Sick Benefit*, 143 Mich. 481, 106 N. W. 1122, 8 Ann. Cas. 170.

As to the question of revocation, the language just quoted clearly imports that a valid agreement to arbitrate, made by the parties a condition precedent to the right of action, is not revocable. The general rule undoubtedly is that a contract of arbitration entered into *after the controversy has arisen* is revocable at will at any time before the award has been made, and many cases will be found holding that in general arbitration agreements are revocable even when entered into before any controversy has arisen; but we have found no authority holding an agreement to be revocable when made by the parties before any issue has come between them, that any issue of fact, that may in the future arise, as to a specific point, such as valuation, quality, damage, and the like, shall be determined by arbitration before suit shall be brought. If on any such matters the parties have agreed that arbitration shall be a condition precedent to the right of action, there is no principle of law which warrants the courts in dispensing with the condition.

The rules we have set out and the principles on which they rest were stated with such convincing clearness and force by Mr. Justice Lamar, now Associate Justice of the Supreme Court of the United States, in *Parsons v. Ambos*, 121 Ga. 98, 48 S. E. 696, that we quote at length: "Courts favor the submission of controversies to speedy and inexpensive tribunals of the parties' own selection, and generally, in the absence of fraud or palpable mistake, will not interfere with their findings, even though a verdict of a jury, to the same effect, might be set aside as contrary to law. But the underlying reason for the recognition of the award is found in the fact that the parties not only agreed to submit their differences, but voluntarily permitted the agreement to be executed, and consented for the award to be actually made by judges of their own selection. The mere executory agreement to submit is generally revocable, otherwise nothing

would be easier than for the more astute party to oust the courts of their jurisdiction. By first making the contract, and then declaring who should construe it, the strong could oppress the weak, and in effect so nullify the law as to secure the enforcement of contracts usurious, illegal, immoral, or contrary to public policy. Civ. Code 1895, § 3668. A common-law agreement, therefore, to submit the validity and effect of a contract, or to submit all matters in dispute, to arbitration, may be revoked by either party at any time before the award. For statutory awards, see Civ. Code 1895, § 448. Some of the early cases put this rule upon the ground that a provision whereby the courts may be ousted of their jurisdiction is repugnant to that other provision, implied in every contract, that its validity and effect shall be determined by the courts and the law of the land. But whether predicated on the idea that the agreement is repugnant to the contract or to public policy, the principle is universally recognized that such general submissions are revocable. But this does not mean that nothing can be submitted, nor that the parties may not stipulate that certain facts must be determined by those of their own choosing. For example, in building contracts it is manifest that there must be some one other than a court or jury to pass on the question as to whether there has been a compliance with the specifications as the building proceeds, or to determine whether the work shall be accepted or rejected as completed. Hence there may be a lawful and irrevocable stipulation for the certificate of the architect or engineer. In contracts of insurance the assessment of the amount of damages may be made a condition precedent to a suit by the insured on the policy. So, too, in contracts of sale, the parties may stipulate for the opinion of an attorney as to the validity of the title, or that the value of the property shall be ascertained by appraisers before either has the right to sue. This fixing of value, however, is a mere incident, and not of the substance of the contract. It rather serves the office of evidence, than of finding which construes the contract or determines rights. The jurisdiction of the courts over these substantial matters may be retained by revocation, though the incidental stipulation for valuation is not revocable by the act of the parties, each of whom is bound to do all that is reasonably in his power to procure the appraisal, and must continue to act until he puts the opposite party in the wrong, or makes it manifest that no suitable person can be obtained to do the service within a reasonable time. *Hood v. Hartshorn*, 100 Mass. 121, 1 Am. Rep. 89."

Applying these rules of law, the question here is whether it appears from the contract, either expressly or by necessary implication, that as a condition precedent to

an action on the contract the amount of damages first should be ascertained by arbitrators. The contract, after providing in detail for the arbitration on the amount of damages from backwater, stipulates: "And if for any reasons the arbitrators cannot be chosen, then the amount of such damages is to be determined by action at law." This clearly means that the amount shall be determined by action *only* in the event the arbitrators cannot be chosen or cannot agree, thus necessarily implying that in the ascertainment of damages suit could be resorted to only after arbitration had become impossible. For these reasons it seems to me that the contract to arbitrate the amount of damages was valid, that it made arbitration as to such damages a condition precedent to an action, and that it was not revocable. Hence I think the judgment should be affirmed.

HYDRICK, J., concurs. FRASER, J., concurs in result. WATTS, J., absent.

GARY, C. J. (dissenting). This is an action for damages, alleged to have been sustained by the plaintiff, through the wrongful acts of the defendant, in erecting a dam across Enoree river, thereby causing the overflow of his lands. The plaintiff also asks equitable relief by way of injunction. The defendant, to whom A. B. Groce subsequently assigned his rights under said contract, denied all the allegations of the complaint, except the corporate existence of the defendant, and plaintiff's ownership of the lands that were overflowed, and set up as a defense the following contract: "State of South Carolina, Spartanburg County. This contract made and entered into, this 27th day of February, 1900, between W. H. Jones (and other parties therein named) and A. B. Groce, witnesseth: The said W. H. Jones (and others), for valuable consideration, hereby made unto the said A. B. Groce, his heirs and assigns, the right and privilege to raise a dam on the Van Patton Shoals * * * to such height as he may desire. It is further agreed that if the lands of the said parties above named become in any way injured or damaged, by water from said raising of the dam, * * * the said A. B. Groce binds himself * * * to pay the amount of such damage, to the said parties above named. * * * The amount of such damage shall be arrived at and determined, in the following manner, to wit: The said W. H. Jones (and others) * * * are to select one arbitrator, * * * and the said A. B. Groce * * * the other, and these two, a third; and if these two cannot agree on a third, then such third arbitrator is to be selected, by the clerk of court, and if he will not, then the probate judge, and if he will not select, then the third arbitrator shall be selected by the sheriff, and if, for any reason, the arbitrators cannot be chosen, or a

majority of them cannot agree, then the amount of such damage, is to be determined by action at law. The award of said arbitrators shall be final and conclusive." After setting forth the terms of the contract, the defendant alleged "that the plaintiff has no right to make or have fixed any claim to damages, save and except as is provided by the terms of the contract aforesaid." The plaintiff, in reply, alleged failure of consideration, fraud, and that he revoked the agreement to arbitrate, before the commencement of the action.

The notice served on the defendant, by the plaintiff, dated July 18, 1907, uses this language: "You will, also, take notice, that even if said paper (the contract) be declared valid, the undersigned, W. H. Jones, does hereby revoke, any and all agreement or agreements to arbitrate, mentioned in said paper."

The question raised by the exceptions is thus stated, in the argument of the appellant's attorneys: "There is only one question made, as we understand it, by the several exceptions of the plaintiff, which is succinctly embraced in the plaintiff's first request to charge, which was refused by his honor, and which was as follows: 'The notice of revocation served on July 19, 1910, revoked the agreement to arbitrate, and it was no longer in force, the jury, therefore, having nothing to do with anything about the arbitration.' His honor refused this, and charged, in effect, that the plaintiff was bound by the provisions of the paper referred to, unless it was obtained by fraud; and quoted at length from the case of *Hamilton v. Insurance Co.*, 136 U. S. 254, 10 Sup. Ct. 945, 34 L. Ed. 419, telling the jury that the principles announced in that case were applicable to this case, provided the paper was not fraudulent. The court further charged: 'If you find that this paper was not obtained by fraud, then the plaintiff has no cause of action, because, before he can bring his suit, he must have his damage ascertained by arbitration. If you find that this paper was not obtained by fraud, you will find for the defendant; if you find that this paper was obtained by fraud, as I have endeavored to explain the law to you on that subject, then you will find for the plaintiff such a sum as represents his injury, if any has been proven.'"

"Where the parties to a contract enter into an absolute agreement, or covenant, that, in case a dispute should arise under such contract, all matters in difference between them relating thereto shall be submitted to arbitration, it is void on grounds of public policy, because to give effect to it would be to oust the courts of their jurisdiction." 2 Encyc. of Law, 571.

The appellant's attorneys do not dispute this principle, but contend for the doctrine, which is thus stated in 3 Cyc. 595: "Though the parties cannot, by any agreement to sub-

mit, oust the jurisdiction of the courts, they may agree to impose, as a condition precedent to any right of action, that, with respect of the liability to pay, the mode of settling the amount to be paid, or the time for paying the same, an arbitration shall first be held."

In the first place, the provision in said contract for submitting the amount of damages to arbitration is not a condition precedent, and his honor erred in applying to this case the principle announced in *Hamilton v. Insurance Co.*, 136 U. S. 254, 10 Sup. Ct. 945, 34 L. Ed. 419. In the said case (upon which his honor principally relied), the facts were very materially different from those in the present case. The policy therein provided that any difference arising between the insured and insurer, as to the amount of loss or damage thereunder, should be submitted, at the request of either party, to certain persons as arbitrators, to be chosen in the manner therein provided, whose award should be conclusive as to the amount of loss or damage only, and should not determine the question as to the liability of the company, and that, until such an appraisal should have been permitted, and such an award obtained, *the loss would not be payable and no action would lie against the company.*

"In order to make such award (under arbitration provided for in policy) a condition precedent to the right of maintaining suit, it must be so expressed in the policy, or necessarily implied from its terms. A mere provision in the policy that the amount to be paid, in case of disagreement, shall be submitted to arbitration, does not prevent the insured from maintaining an action, unless the policy further provides that no action shall be maintained until after award; but such agreement to submit to arbitration is regarded as a collateral and independent agreement, the breach of which, while it will support a separate action, cannot be pleaded in bar to an action on the principal contract." *Mutual F. Ins. Co. v. Alford*, 61 Fed. 752, 9 C. C. A. 623.

We do not deem it necessary to cite other authorities to show that the provisions of the contract herein do not constitute a condition precedent. But even if there was a condition precedent, it would not bar the plaintiff's right to bring his action, until there was a compliance with the requirements thereof.

In an exhaustive note to the case of *Chadwick v. Phoenix, etc., Association*, 143 Mich. 481, 106 N. W. 1122, 8 Ann. Cas. 170, it appears that the authorities are in irreconcilable conflict.

There are cogent reasons why the doctrine for which the respondent contends should not prevail. It would enable parties, practically, to abrogate the principle that they cannot oust the court of jurisdiction in the manner

hereinbefore mentioned, for they could accomplish this purpose, by simply designating specifically every question that could arise under the contract. The authorities sustaining this view do not place any limitation upon the power of the contracting parties to specify what issues shall be referred, and may thus leave the court powerless to do more than pass a formal order, affirming the award of the arbitrators.

In the note to the case of *Chadwick v. Phoenix, etc., Ass'n*, 143 Mich. 481, 106 N. W. 1122, 8 Ann. Cas. 170, the annotator cites numerous authorities to sustain the proposition that a denial of all liability by the insurer leaves nothing for arbitration, and that the insured may maintain an action on his policy before arbitration.

We come now to the main question in the case, to wit, whether the provision in the agreement for arbitration was revocable.

An agreement to arbitrate does not stand upon a higher plane than an actual submission to arbitration, which, as will be seen from the authorities, may be revoked by either party at any time, before the award is made.

"Though there are cases which hold that a submission under a contract or agreement, founded upon a valuable consideration, or a submission which is part of an agreement containing other terms to be performed by the parties, is irrevocable, by one party without the consent of the other, the general rule is that a submission may be revoked by either party thereto before award, if the submission is not made a rule of court, or is not otherwise regulated by statute. The remedy of the adverse party in case of a revocation is by an action on the agreement to submit, or on the submission bond. But where an award is made and published, neither party can revoke the submission, without the consent of the other." 3 Cyc. 610, 1. "A distinction has been drawn in some cases, the courts holding that an arbitration clause in a contract is merely collateral to the agreement to pay, and is therefore no bar to an action upon the contract." 2 Encyc. of Law, 582:

"At the common law, a submission might be revoked by any of the parties thereto, at any time before the award was made, nor was this right taken away by an express stipulation in the submission that it should be irrevocable. And where one of several persons, who jointly made but one party, revokes the submission, even against the will of the others, it makes the submission void as to all." *Id.*, 594-596.

"Outside of the liability for breach of the agreement to submit, the effect of revoking the submission is to restore the parties to their original rights against each other, as they existed before the submission was made." *Id.*, 603, 604.

"The authority of an arbitrator is at common law, in its nature, revocable, and no

act of the party submitting can render it irrevocable; but, if the party is bound under a penalty to abide the arbitration, the bond is forfeited by his countermanding the authority." *Vynier's Case*, 3 Eng. Ruling Cases, 357. "It is an ancient and well-established rule that either party may revoke his submission, at any time before the award is made, and by this revocation render the submission wholly ineffectual, and, of course, take from the arbitrators all power of making a binding award. * * * As an agreement to submit is a valid contract, the promise of each party being the consideration for the other, a revocation of the agreement or of the submission is a breach of the contract, and the other party has his damages. The measure of damages would generally include all the expenses the plaintiff has incurred about the submission, and all that he has lost by the revocation in any way. * * * It may be implied as well as express; and would be implied by any act, which made it impossible for the arbitrators to proceed." 2 Par. on Com. pp. 710, 711.

These authorities show that his honor the presiding judge erred in his ruling upon the question of revocation.

Thus far we have discussed this question without reference to the constitutional and statutory provisions in our state. Section 1, article 6, of the Constitution is as follows: "The General Assembly shall pass laws, allowing differences to be decided by arbitrators, to be appointed by the parties, who may choose that mode of adjustment."

Section 2849 of the Code of Laws provides that "it shall be lawful for any and all persons, in cases of disagreement or differences of opinion, as to the proper settlement of any contention that may hereafter arise and either party to the contention may, propose to leave their differences to arbitrators, each party to enter into bond, in double the amount involved, to faithfully abide the result of arbitration. The arbitrators shall be selected in the following manner: * * * The finding of said board of arbitration shall be final."

In construing this statute, the court used this language in the case of *Bishop v. Manufacturing Co.*, 78 S. C. 312, 58 S. E. 939: "The agreement for arbitration is complete, when one party to a dispute proposes arbitration, and the other assents to it, and each party enters into bond, in double the amount involved, to faithfully abide the result. The selection of arbitrators is no part of the agreement required by the statute. After the agreement has been made, the statute provides a method of selection, so that there may be no reason for difference between the parties on the point. But this is nothing more than conferring on each party the right to demand that the arbitrators be selected in the manner indicated in the statute. This right, like all others, may be waived by agreement of the parties to select

the arbitrators in some other way. Hence it is illogical to say an arbitration cannot be referred to the statute, merely because the parties agree on the arbitrators, instead of exercising the right to require them to be selected, in the manner indicated in the statute."

The words of the statute and the language of the court indicate that the remedy of either party, for a failure of the other, to abide by the terms of the contract, is by an action on the bond; thus showing that an agreement to arbitrate is collateral in its nature, and that damages for a breach thereof are recoverable in an independent action.

The question now under consideration was determined in the case of *Herbemont v. Percival*, 1 McMul. 59, cited with approval in *Smith v. Thomson*, 1 Strob. 344. For the purpose of an amicable settlement of the controversy in that case, a written agreement was entered into, by which it was agreed that certain negroes should be delivered to Dr. Percival; he agreeing to pay hire for such of them as counsel of the parties should decide the plaintiff was entitled to. And, on default of such decision, the plaintiff was to file a bill in equity, which was to include all the matters in controversy between them. In that case the court said: "The first thing in this case is to ascertain the character and decide on the effect of the special plea in bar, filed by the defendant. The plea sets out a special agreement, by which it appears that the plaintiff had delivered up to the defendant certain slaves which came into his possession at the death of his intestate, and had retained for a specific purpose two others; and that defendant was to pay such a sum, for the hire of those he took, as should be determined on by the counsel of the parties, or by the court of equity; and the plea alleged that no sum had been agreed on by the counsel, nor had the plaintiff filed his bill in the court of equity. But it does not aver that the defendant had applied to counsel to have the matter adjusted himself. * * * It seems to have been the object of the parties to submit the matters in controversy to arbitration, and this is the true character of their agreement. An agreement to arbitrate, or a bond to submit to arbitration, may be the subject of a suit, where the damages stipulated or the penalty will authorize a recovery. But such an agreement, or bond, would not deprive either party of his remedy in the courts, or oust them of their jurisdiction, in regard to the matter in dispute."

This language was used with reference to a *special* issue just such as is now under consideration. Mr. Justice WOODS practically concedes that the question now under consideration was decided in that case, for he says: "It is true that the case of *Herbemont v. Percival*, 1 McMul. 59, decided in 1840, does lay down in very broad language

the general rule that a suit may be brought, in disregard of *any* sort of agreement to arbitrate," etc. He, however, contends that the case just mentioned is no longer authority in this state, against the rule for which he contends as to the validity of arbitration agreements, for the reason that the cases of *Maxwell v. Thompson*, 15 S. C. 612, and *Brooke v. Laurens Milling Co.*, 78 S. C. 200, 58 S. E. 806, 125 Am. St. Rep. 780, and *Id.*, 84 S. C. 299, 66 S. E. 294, held that agreements to arbitrate are not against public policy. Conceding that agreements to arbitrate are not against public policy, it by no means follows that such an agreement *can* have the effect of ousting the court of its jurisdiction. It seems to us that the failure of Mr. Justice WOODS to observe this distinction has caused him to reach an erroneous conclusion.

Let us, however, see if the causes upon which he relies sustain the proposition that the case of *Herbemont v. Percival*, 1 McMul. 59, has been overruled. The case of *Maxwell v. Thompson*, 15 S. C. 612, was regarded as so unimportant that it is published among the unreported cases, and all that it says in regard to this question is as follows: "A building contract provided that, in case of any disagreement, the matter of difference should be referred to three disinterested persons as arbitrators; such agreement is not against public policy, but may be waived by the parties." No mention is made of the case of *Herbemont v. Percival*, 1 McMul. 59, nor is there any reference as to the power of parties to oust the court of jurisdiction, by agreements to arbitrate special issues.

The case of *Brooke v. Laurens Milling Co.*, 78 S. C. 200, 58 S. E. 806, 125 Am. St. Rep. 780, and *Id.*, 84 S. C. 299, 66 S. E. 294, has no application whatever to the question under consideration, as there was an award in that case, and the right of the parties to oust the court of jurisdiction was not involved. There is no doubt that the agreement in the present case was to *arbitrate*, which, of course, meant that the parties should have all the rights incident to arbitration, one of which is the right of revocation.

It will thus be seen that the court cannot be ousted of its jurisdiction, until the right of revocation is destroyed, for which we fail to find any authority in this state. Mr. Justice WOODS quotes the following language from the case of *Parsons v. Ambos*, 121 Ga. 98, 48 S. E. 696: "This fixing of value is a mere incident, and not of the substance of the contract. It rather serves the office of evidence." In the first place, this decision is against the rule stated in *Herbemont v. Percival*, which shows that it is not a rule of evidence, but an agreement to *arbitrate*, with all the incidents of arbitration. And, in the second place, we do not understand how, as a mere rule of evidence, such an

agreement could have the effect of ousting the court of jurisdiction.

But whatever might have been done under the Constitution of 1868 towards ousting the court of its jurisdiction, no agreement of any kind whatsoever can have such effect since the adoption of the Constitution of 1895, section 15, art. 5, of which provides that "the courts of common pleas shall have jurisdiction in all civil cases." This provision was inserted for the prevention of just such questions as have arisen in this case. This section was construed in the case of *Epperson v. Jackson*, 83 S. C. 157, 85 S. E. 217, in which the court said: "Section 15, art. 5, of the Constitution provides that the court of common pleas shall have jurisdiction in all cases, thus showing that its jurisdiction, with that of the probate court in matters such as are now under consideration, is concurrent. The words, 'they shall have jurisdiction in all civil cases,' in section 15, art. 5, of the Constitution of 1895, are not to be found in section 15, art. 4, of the Constitution of 1868, which was construed in *Ex parte White*, 33 S. C. 442 [12 S. E. 5]." In the last-mentioned case, it was held that the jurisdiction of the probate court as to the matter then before it was exclusive.

The court of common pleas is the tribunal constituted by law for the trial of civil cases. A board of arbitrators is, also, a tribunal for the trial of such issues, as may be submitted to it. Such board may be created by law, or by agreement of the parties. The final determination of the rights of the parties by the court is denominated a judgment, while that of a board of arbitrators is defined as an award. But whether there is a judgment rendered by the court, or an award made by a board of arbitrators, it is conclusive of the question thus decided. If there is an award by arbitrators, it is so far res adjudicata in its nature, as to the question submitted, that it cannot again be made an issue in the court of common pleas, unless there was fraud or undue influence. But until there is an award, section 15, art. 5, of the Constitution shows that the parties cannot by agreement oust the court of its jurisdiction.

I cannot conceive how the framers of the Constitution could have expressed in stronger language their intention that the court of common pleas should not be deprived of its jurisdiction, by agreement or otherwise.

For these reasons I dissent.

(92 S. C. 219)

SOUTHERN POWER CO. v. WHITE et al.
(Supreme Court of South Carolina. Aug. 7, 1912.)

1. JURY (§ 31*)—RIGHT TO JURY TRIAL—INFRINGEMENT—SETTING ASIDE VERDICT.

The constitutional guaranty of trial by jury does not deprive the circuit court of power to set aside a verdict fixing the com-

pensation in condemnation proceedings and to grant a new trial.

[Ed. Note.—For other cases, see *Jury*, Cent. Dig. §§ 204-219; Dec. Dig. § 31.*]

2. EMINENT DOMAIN (§ 239*)—NEW TRIAL—POWER TO GRANT.

Civ. Code 1902, § 2191, providing that the verdict in condemnation proceedings in the circuit court shall be conclusive unless a new trial is ordered by the Supreme Court, does not deprive the circuit court of power to set aside the verdict and grant a new trial; such provision appearing to have been inserted merely to provide a right of review by the Supreme Court, when viewed in the light of legislation contemporary with the condemnation act, particularly of Civ. Code 1902, § 2734, giving circuit courts power to grant new trials after verdict, of Code Civ. Proc. § 288 (adopted March 1, 1870, 14 St. at Large, p. 485), authorizing a trial judge to set aside a verdict and grant a new trial, and also in the light of the fact that the Supreme Court has no appellate jurisdiction in such proceeding, but can correct only errors of law.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. §§ 615-620; Dec. Dig. § 239.*]

3. EMINENT DOMAIN (§ 239*)—CONDEMNATION PROCEEDINGS—TRIAL—RIGHT TO OPEN.

Where both sides appealed from the verdict of the clerk's jury in condemnation proceedings, the landowners were entitled to open and reply on trial in the circuit court.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. §§ 615-620; Dec. Dig. § 239.*]

Fraser, J., dissenting.

Appeal from Common Pleas Circuit Court of Spartanburg County; Ernest Gary, Judge.
"To be officially reported."

Action by the Southern Power Company against A. L. and T. J. White. From a judgment for defendants, plaintiff appeals. Reversed.

The order appealed from is as follows: "This was an appeal by both parties from the verdict of a jury impaneled by the clerk in condemnation, and came on for hearing at the November term of said court. An issue was framed submitting to the jury the question of the amount of compensation defendants were entitled to on account of the erection by the plaintiff of a line of steel towers and wires over and across defendants' lands in the suburbs of Spartanburg. The jury fixed the compensation at \$3,500. Plaintiffs gave notice of a motion for a new trial, nisi, upon the minutes, and the same has just been argued before me; the plaintiff's attorneys contending that the verdict is excessive, and that I should set aside the verdict and grant a new trial, unless the defendants would remit from the verdict such amount as I might conclude was excessive. After hearing argument, I am of the opinion that, under the terms of the provisions of the Code, I am without jurisdiction or power to interfere with the verdict or grant a new trial, and that defendants' attorneys contention as to that is correct. The Code provides that the verdict of the

jury, on appeal, shall be final and conclusive, unless set aside by the Supreme Court; and I so hold. The motion is refused for the foregoing reasons."

Osborne, Lucas & Cocks, of Charlotte, North Carolina, and Nicholls & Nicholls and John Gary Evans, all of Spartanburg, for appellant. Bomar & Osborne, of Spartanburg for respondents.

HYDRICK, J. [1] The circuit court erred in holding that it had no power to set aside the verdict and grant a new trial, absolute or nisi. The argument that the court must be denied that power because the Constitution provides that the compensation for the use of land shall be ascertained by a jury is untenable on principle and authority. The Constitution also guarantees the right of trial by jury in many other cases in which the power of the court to set aside the verdicts of juries and grant new trials, absolute or nisi, has been sustained so frequently by this court that it is now unquestioned, and, in the face of these decisions, it cannot logically be maintained that the exercise of the power deprives the parties of their constitutional right of trial by jury. *Warren v. Lagrone*, 12 S. C. 45; *Stuckey v. Railroad Co.*, 57 S. C. 395, 35 S. E. 550; *Hall v. Railroad Co.*, 81 S. C. 533, 62 S. E. 848.

[2] If the power is denied, it is only by implication from the use of the following words in section 2191, vol. 1, Code 1902, where it is said with regard to the verdict of the jury in the circuit court: "Whose verdict shall be final and conclusive, unless a new trial shall be ordered by the Supreme Court." The language quoted certainly does not expressly deny the power of the circuit court to set aside the verdict and grant a new trial. On the other hand, the power to do so is expressly conferred in section 2734, vol. 1, Code 1902, which reads: "Circuit courts shall have power to grant new trials in cases where there has been a trial by jury for reasons for which new trials have usually been granted in the courts of law of this state."

Prior to the adoption of the Constitution of 1868 and the act from which section 2734 was taken, the circuit courts in this state had no power to grant new trials. That could be done only by the Supreme Court. But under the Constitution of 1868 and the present Constitution, the provisions of which, as to the matter under consideration, are substantially, if not identically, the same as those of the Constitution of 1868, the power to grant new trials, which is an appellate power, is denied to the Supreme Court, which has appellate jurisdiction only in equity cases, and its power in law cases is limited to the correction of errors of law. *State v. Bailey*, 1 S. C. 1; *Byrd v. Small*, 2 S. C. 388; *State v. David*, 14 S. C. 430.

A consideration of the provisions of the condemnation act, as it now appears in section 2191, above quoted, in the light of contemporaneous and subsequent legislation, reorganizing the courts and prescribing new methods of procedure therein, under the Constitution of 1868, will show conclusively that those words were never intended to have the effect which is now claimed for them; and, furthermore, that the necessary result of subsequent legislation has been to repeal that provision, if it can be construed to have that effect.

On August 28, 1868, it was enacted, pursuant to the limitations of the power of the Supreme Court by the Constitution, which had been ratified in April before, that "final judgments and decrees in civil and criminal actions in the circuit courts, brought there by original process, or removed there by appeal from any inferior court or jurisdiction, may be re-examined and reversed or affirmed in the Supreme Court, upon writ of error," etc., 14 Stat. p. 12. The same statute provided for an appeal to the Supreme Court in equity cases. Naturally, therefore, we find in the original condemnation statute, which was enacted later, on September 22, 1868 (14 Stat. p. 89), these words: "Whose verdict shall be final and conclusive, unless, on writ of error, a new trial shall be ordered by the Supreme Court." It will be observed that these words are slightly different from those now found in section 2191. The reason for this difference becomes apparent when we remember that the writ of error was abolished on the adoption of the Code of Procedure on March 1, 1870, and an appeal substituted for it in all cases. 14 Stat. pp. 500, 527. Hence in the next codification (Rev. Stat. 1873, p. 354) we find the words "on writ of error" omitted.

In view of the practice which had obtained in this state for a long time, and the prevailing opinion that new trials could be granted only by the Supreme Court, it may, indeed, have been supposed that the circuit court would have no power to grant new trials in such proceedings; but such supposition, if it existed, was erroneous, because this court held distinctly, in *State v. Bailey* and in *State v. David*, supra, that the power to grant new trials in cases tried by the circuit courts was one of their inherent powers. At any rate, the statute from which section 2734 was taken was enacted just four days after the condemnation act, to wit, September 26, 1868 (14 Stat. p. 136). We think the history of the legislation of the time shows that the purpose of inserting those words was merely to provide the right to have the proceedings reviewed by the Supreme Court, at first on writ of error, and afterwards, when that writ was abolished, by appeal; because, at that time, there had not been enacted any general law as

to what proceedings of the circuit courts could be reviewed by the Supreme Court, and hence, no doubt, it was thought necessary to provide in the condemnation act for such review; otherwise, there would have been no appeal from the judgment of the circuit court. Therefore we do not think those words should be construed to deny a power to the circuit courts which was expressly conferred upon them by a statute of a subsequent date, enacted by the same Legislature, for even if their proper construction would, without considering any other legislation, result in a denial of the power by implication, the subsequent statute, granting the power in express, though general, terms, overrides and repeals the former.

Again, we find in section 288 of the Code of Procedure (adopted March 1, 1870, 14 Stat. p. 485), under the chapter headed "Trial by Jury," this provision: "The judge who tries the cause may, in his discretion, entertain a motion, to be made on his minutes, to set aside a verdict and grant a new trial upon exceptions, or for insufficient evidence, or for excessive damages."

There is another consideration which should have some weight in leading the court to this conclusion. In proceedings of this kind, this court has no appellate jurisdiction, but can correct only errors of law. Therefore, no matter how excessive a verdict might be, and even though it should be apparent that it was influenced by prejudice or caprice, if it be true that the circuit court cannot reduce it or set it aside, there is no power lodged anywhere to correct it. Because, if the circuit court has no power to grant a new trial, it has no power even to consider the grounds upon which a new trial would be ordered. Hence, as there could be no ruling, there could be no error of law in respect to all such matters of fact, and therefore nothing with respect thereto which this court could review. Again, under such holding, no matter how plainly it should be made to appear to the circuit judge that he had erred in matters of law, during the trial—in the admission or exclusion of evidence, or in his charge—and no matter how plainly it might appear that such errors had affected the verdict, he would be powerless to correct them, and the litigants would be compelled to undergo the unnecessary delay and expense of an appeal to this court.

Unless the language used by the lawmakers plainly required it, we would be inclined against a construction of the statute which might result in such unnecessary expense, inconvenience, and delay, and possibly a great and irremediable wrong. We see no reason for denying the power to the court in the trial of an issue to determine the value of land, and in granting it in the trial of an issue involving the title to the land, and we are satisfied the lawmakers did not intend to make any such difference.

[3] As both sides appealed from the verdict of the clerk's jury, the court correctly ruled that the landowners were entitled to open and reply on the trial in the circuit court. *Railroad Co. v. Blake*, 6 Rich. 634. Reversed.

GARY, C. J., and WOODS and WATTS, JJ., concur.

FRASER, J. (dissenting). This is a special proceeding in condemnation of land of the respondents for the use of the appellant company. The appeal is from the decision of Judge Ernest Gary in which he held: (1) That the appellants (respondents here) were entitled to the opening and reply; (2) that he had no right to grant a new trial nisi.

I. The statute gives the right to open and reply to the "appellant." Both parties appealed from the verdict of the jury before the clerk. The case of *Railroad Co. v. Blake*, 12 Rich. 650, after stating that in condemnation proceedings the right to open and reply is largely in the discretion of the judge, says: "We are of opinion, however, that in general, in the absence of contrary direction by the judge ordering the issue, the owner claiming damages has the right to open and conclude." This exception is overruled.

II. The second exception is as follows: "Second. His honor erred, it is submitted, also, in holding that he had no power or jurisdiction to grant a motion for a new trial nisi in a condemnation suit, and in refusing to entertain and grant said motion, it being respectfully submitted that the circuit judge has power to grant a new trial in a condemnation case as well as other cases, and his honor should have considered the merits of the motion and should have granted a new trial nisi."

The Constitution, art. 9, § 20, says: "No right of way shall be appropriated to the use of any corporation until full compensation therefor shall be first made to the owner or secured by a deposit of money, irrespective of any benefit from any improvement proposed by such corporation, which compensation shall be ascertained by a jury of twelve men, in a court of record, as shall be prescribed by law."

"Which compensation shall be ascertained by a jury of twelve men": If the judge grants a new trial nisi and thereby alters the amount in any way, the compensation is fixed by the judge and not by the jury. To allow the compensation to be fixed by the judge, and not by the jury of 12 men, would be to repeal this constitutional protection to the landowner. The Judicial Department is as much bound by the Constitution as the Executive and Legislative Departments. There is no such thing as an "inherent power" that overrides the Constitution. It is hardly necessary to quote the statute because it cannot change the Constitution. The act can-

not empower any other than a jury of 12 men to ascertain the compensation. When the statute says "the question of compensation shall be thereupon submitted to a jury in open court, whose verdict shall be final and conclusive," it declares the law in full accord with the Constitution and is a legitimate exercise of legislative power and binding. When the statute goes on to say "unless a new trial shall be ordered by the Supreme Court," it must be held to mean that the new trial shall be ordered for a cause for which the Supreme Court is empowered by the Constitution to order a new trial, to wit, for errors of law committed in the trial.

In my opinion the second exception ought to be overruled.

(133 Ga. 371)

SOUTHERN RY. CO. et al. v. DICKSON.

(Supreme Court of Georgia. July 11, 1912.)

(Syllabus by the Court.)

1. DEATH (§ 55*)—ACTIONS FOR CAUSING DEATH—PLEADING—AMENDMENT.

In an action brought by a mother for the homicide of her son, where the original petition alleged in substance that the son contributed to her support, it was amendable by alleging that she was also dependent upon him for support. *Ellison v. Georgia Railroad Co.*, 87 Ga. 691, 13 S. E. 809.

[Ed. Note.—For other cases, see Death, Cent. Dig. § 72; Dec. Dig. § 55.*]

2. DEPOSITIONS (§ 90*)—USE IN EVIDENCE—PRESENCE OF WITNESS.

Where, under the provisions of the Civil Code 1910, § 5910 et seq., depositions of a witness are taken for use in a case pending, at the trial of such case the depositions so taken may, in the discretion of the court, be read in evidence, notwithstanding the presence of the witness at the trial. *W. & A. R. Co. v. Bussey*, 95 Ga. 584 (1), 23 S. E. 207.

[Ed. Note.—For other cases, see Depositions, Cent. Dig. §§ 258-260; Dec. Dig. § 90.*]

3. NEW TRIAL (§ 125*)—PRESENTING QUESTION IN TRIAL COURT—ADMISSIBILITY OF EVIDENCE.

One ground of the motion for new trial was that, after the engineer of the train which killed the plaintiff's son had testified as to his experience as a locomotive engineer, and as to his observation as to the "way a moving train will pull a person," the court refused to permit the witness to testify as to "the manner in which a train in forward motion will pull or jerk such person catching hold of the same." As it does not appear from the ground of the motion what would have been the testimony of the witness on the point, had he been permitted to testify, no point is presented for decision.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 254, 255; Dec. Dig. § 125.*]

4. APPEAL AND ERROR (§ 1056*)—REVIEW—QUESTIONS NOT NECESSARY TO DECISION.

Inasmuch as this court holds that the plaintiff made out no case authorizing a recovery, considering the depositions to which objections were made along with other evidence in the case, it is unnecessary to discuss

points raised in regard to their admissibility, especially in view of the peculiar facts and circumstances under which the objection and motion to exclude were made and the time of the making thereof—a situation which is not likely to arise again. If the depositions should be offered in evidence upon another trial, such proper objections as may be raised to them can then be passed upon, not complicated by the peculiar circumstances under which the ruling was made at the last trial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4187-4193; Dec. Dig. § 1056.*]

5. NEGLIGENCE (§ 80*)—CONTRIBUTORY NEGLIGENCE—EFFECT.

Where one knowingly and voluntarily takes a risk of physical injury, the danger of which is so obvious that the act of taking such a risk, in and of itself, amounts to a failure to exercise ordinary care and diligence for his own safety, damages resulting from a hurt thus occasioned are not recoverable, although the same may be in part attributable to the negligence of the defendant.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 84, 85; Dec. Dig. § 80.*]

Error from Superior Court, Fayette County; R. T. Daniel, Judge.

Action by H. T. Dickson against the Southern Railway Company and others. Judgment for plaintiff, and defendants bring error. Reversed.

C. E. Battle and Howell Hollis, both of Columbus, and Blalock & Culpepper, of Fayetteville, for plaintiffs in error. J. W. Wise, of Fayetteville, and R. R. Arnold, of Atlanta, for defendant in error.

FISH, C. J. Mrs. H. T. Dickson brought an action against J. A. Kenney and the Southern Railway Company for the alleged wrongful homicide of the plaintiff's minor son, Will A. Dickson. So much of the petition as is now material was as follows: "(3) Petitioner further shows that Will A. Dickson was a son of your petitioner, being 20 years old and unmarried, and living with your petitioner and waiting on her, and contributing to her support and comfort and looking after her welfare. (4) Petitioner further shows that she was entitled to the services and labor and association of the said Will A. Dickson, her minor son; your petitioner's husband, and the father of the said Will A. Dickson, being dead. (5) Your petitioner further shows that she is a widow, and the said Will A. Dickson being the only minor son of petitioner, and the only one whom petitioner had to live with her and protect her and labor and work for her."

The original petition was demurred to. One of the grounds of demurrer was that it did not appear from the allegations of the petition "that the plaintiff was dependent upon her son, wholly or in part, for her support." To meet this ground, the third paragraph of the petition, quoted above, was amended, over the objection of defendants, by adding to such paragraph the following allegation: "And upon whom your petitioner

was dependent for support; your petitioner being a widow with two girls living with her, and no other man to work for and support her." The ground of demurrer above stated, was then urged to the petition as amended, and was overruled, to which judgment the defendants excepted pendente lite. On the trial at a subsequent term, a verdict was rendered in behalf of the plaintiff, and the defendants' motion for a new trial being overruled, they excepted, assigning error, also, upon the exceptions pendente lite. The petition alleged that the plaintiff's son was killed about 5:20 o'clock p. m. on November 27, 1909, by being run over by a freight train, on which the defendant Kenney was engineer, at a public crossing over the track of the Southern Railway Company in the city of Fayetteville, this state. According to the petition, it was dark at the time of the homicide. The engine was running backwards, pulling a regular freight train having a tender and cars in front of the engine, with no lights on them, and no headlight on the engine. Other negligence alleged in the petition was as follows: "Said engineer and said Southern Railway Company did not slow up and slacken the speed of said train, so as to have the same under control as it approached the said crossing, where the said Will A. Dickson was killed, as alleged, said train being run at said time at a rapid rate of speed, to wit, at a speed of 30 miles per hour, and did not slacken and slow up and continue to slacken the speed of said train as it approached said crossing, so as to have the same under control, as the law requires in such cases." The answer of the defendants denied the material allegations of the petition.

There was evidence in behalf of the plaintiff to the effect that there were two tracks of the Southern Railway, one the main line, the other a side track crossing the public crossing on which the plaintiff contended that her son was struck and killed, at the time alleged, by a freight train running north on the main line, which was to the right, or east, of the side track, and that the engine pulling the train was running backwards, with the tender and a freight car in front or ahead of it, with no lights, either on the engine, the tender, or the freight car in front; that the body of the deceased was found to the left or west of the main line, and near the rail on that side, about 20 or 30 yards north of the crossing; and there were signs as if something had been dragged along near the left rail of the main track from a point from 5 to 10 feet north of the crossing towards where the body was found, with a little blood on some leaves 4 or 5 feet further north from where it appeared something had been dragged. A piece of skull was found by the side of the track, about 10 feet north of the place where the body was found. A witness for

the plaintiff, who said he was a passenger on the train that killed plaintiff's son, testified: "It was kind of dark, and I recollect when it [the train] passed Hampton's crossing [whereon plaintiff claimed her son was killed]. It didn't blow for the crossing, and was running 30 or 35 miles an hour, as well as I can come at it." While there was some diversity in the testimony of the witnesses for the plaintiff as to whether it was dark at the time of the homicide, all of them who testified with reference to the train said that they saw the train as it approached the crossing. The plaintiff herself testified on this subject that "it was getting dark on the evening Will was killed," and that she saw the train before it reached the crossing, but could not see well enough to tell how the engine was running, whether backwards or forwards, because of the darkness.

It does not appear from the record that any one saw the plaintiff's son at the time he was killed. Lindsay Pyrom, a witness for the plaintiff, testified that on the day of the homicide the witness and a boy named Sam Ross left Fayetteville about sundown, and drove a wagon across the railroad at the public crossing south of the depot, whereon the plaintiff contended her son was killed. As Pyrom was the only witness for the plaintiff who saw the deceased immediately before he was killed, we quote all of his testimony that we deem material. He testified: "When we approached the crossing, Mr. Will Dickson hollered to me to hurry up and cross, that the train was coming, and I did hurry up and crossed. At the time that Mr. Dickson spoke he was standing. He had come down a little slant from his house, coming towards town. He was just coming up to the railroad. He was off of the crossing and coming to the crossing. He was coming from the house, going towards the crossing. He was in the big road when he hollered to me. When he called that the train was coming, I jerked up the lines and hit the mules and hurried across the track. Mr. Dickson went upon the track. He passed close to the wagon, and we went over the railroad. He was going straight across the track. When I looked up the last time and saw Mr. Dickson, I did not see the train. The train was right at me before I saw it, as close as that window, about 12 or 15 feet. I could not see it before. It didn't have any light on the train. The engine did not blow for that crossing. The train missed me about this far [indicating with his hands]. The wagon got fastened against the post at the crossing. I should say that it missed us 2½ feet. The last time I saw Mr. Dickson, he was going over the right-hand rail. I don't know, don't remember, how far the train run before it stopped. In order to get away from the post, I had to back onto the track. * * * As I have stated, when I

last saw Mr. Dickson, he was going upon the railroad. If he went up between the track and the embankment, I did not see him. I was whipping my mules when I saw him last, and the train was right on him."

On cross-examination he testified: "When I first saw Mr. Dickson, he was standing in the road pretty close to the crossing; and this was when he called to me. At that time I was mighty nigh on the track. He said to me: 'Hurry up and cross; the train is coming.' I hurried and barely got across. He did not stand there. We crossed about the same time. I started to whip the mules, and they run and got across. The post to which the wagon was caught was the sign-board standing by the side of the railroad and of the dirt road. I was sitting on the right of the wagon, driving. Sam Ross was sitting by me. He was on the side of the seat next to Mr. Dickson. * * * I was doing all I could to keep the mules from running away, and trying to keep the train from hitting me. I looked at Mr. Dickson, because he was watching me to see that I got across. I hurried up. Yes, sir; he was afraid that I would be hit by the train; I guess that he was. He was hurrying me up to keep me from being hit by the train. He was standing there urging me to go across as fast as I could, and me and him started across at the same time. The mules started to run from the side track. At that time Mr. Dickson was right on the other side of the railroad, and was hurrying me to cross. He only spoke once, and told me to hurry. He feared that I would get hit. After he told me, I got in view of the train. I could not see it at the time that he told me. I started from town that afternoon. I don't know how far it is from the square out to the crossing. I could not tell whether it was 300 or 400 or 500 yards. I have no idea. I left the square about sundown. It was dark right after sundown. It was night when the sun went down. I testified in this matter before, when my depositions were taken. In that examination I testified that Mr. Will Dickson was coming down a little slant from his house. I did not afterwards say that nobody was in the wagon with me. I never said that, because I knew somebody was in the wagon with me. I testified before that Mr. Dickson hollered to me and told me to look out the train was coming, and that is correct. I stated in my former examination that at the time I was on the railroad, I was on the side track. In answer to the question in my former examination, how come him to tell me to hurry across, I answered, 'He said that I didn't hear it.' That is a fact. He hollered and told me that the train was coming. That is correct; at that time the train was no piece from me. That was correct. Q. 'Did you look and see the train?' A. 'Yes, sir; time I looked I saw it.' That answer

I gave in my former examination, and it is correct. I did not look on the side track; I looked when I was on the main line. It was not far when we got on the railroad. In my former examination I testified: 'He had not got on the track when he told me to hurry up. The mules were near to it; the wagon was not. I was going at a slow walk when he hollered to me.' That is the way it was. I then went across in a hurry. I was not frightened much. If I had been frightened, I would have jumped out of the wagon. * * * When Mr. Will Dickson hollered to me to hurry up, I might have been six feet from the main line. I was on the west side of the side track. He was standing pretty close to the crossing, and we started across the crossing at the same time. I saw the train when I was on the main line. I was driving to get out of the way. I was hurrying to get away from it, and he passed me and went onto the track. When he passed me, I had got over the crossing; but the hind part of the wagon was not. He passed right by the wagon as I passed over the crossing. I do not know in what direction Mr. Dickson turned after he passed me. I do not know whether he passed between the track of the main line and the embankment. If he did, I did not see him. I do not know what direction he took. The mules were trying to back into the track, and I was whipping them to keep the track from striking the wagon; and while I was doing so I was not noticing Mr. Dickson. I was not looking back. He had passed me before I got hung to the post. As I have stated, I was on the west side of the track when Mr. Dickson called me to go across; that the train was coming. In my former examination, I stated that I was on the west side of the side track when he called to me that the train was coming; and that is correct. Mr. Dickson had hurried me across, and after he had hurried me across he stepped on the track himself. * * * I whipped the mules to keep from being killed. * * * I didn't hear it rolling. The train was sneaking upon me."

The theory of the defendant was that Will Dickson was not killed on the crossing, but that he ran towards the north across the track in front of the train, and endeavored to mount a box car while in motion, and was thrown or fell from it and was killed. There was evidence tending to support this theory.

[1-4] 1-4. The matters dealt with in the headnotes 1 to 4, inclusive, do not, when considered in connection with statement of facts, need any elaboration. The grounds of the demurrer, other than the one ruled on, are clearly without merit, and call for no further discussion.

[5] 5. After a most careful examination of the evidence submitted in behalf of the plaintiff below, and viewing it in the most

favorable light for the plaintiff, we are clearly of the opinion that it was wholly insufficient to support the verdict; and that the trial judge, for this reason, erred in refusing a new trial. Granting that the decedent was killed upon the public crossing, and that the defendants were negligent in not observing the law in reference to approaching it, the evidence of the plaintiff's witness Pyrom, which is fully set forth in the statement of facts, and which tends more strongly than the testimony of any other witness for the plaintiff to show that the homicide occurred on such crossing, clearly indicates, to our minds, that the plaintiff was not entitled to recover. From Pyrom's testimony, it is manifest that the decedent knew of the near approach of the train to the crossing. He was standing near the crossing in a position from which he could see the approaching train, so far as the evidence showed to the contrary. He was urging Pyrom "to hurry up and cross; that the train was coming"—and "to go across as fast as [he] could." Pyrom whipped his mules and hurried across the track, barely getting over; the train missing the rear of his wagon only some 2½ feet. Decedent, though urging Pyrom to hurry across, started to cross the main line himself from the opposite direction at the same time Pyrom was crossing it, and passed close to the wagon as he went onto the track. The last Pyrom saw of decedent the latter "was going over the right-hand rail," which was the first rail he came to in crossing the main line. The body of the wagon had not then passed over the main line. Pyrom had then seen the train. Decedent must have then seen it also. At all events, he was fully aware of its near approach before Pyrom knew of it, as he warned Pyrom of it, and urged him to hurry up and get across as fast as he could, in order to avoid the train. Decedent was bound to exercise ordinary care to avoid the consequences of the negligence of the defendants. This he evidently failed to do. He knowingly and voluntarily took the risk of injury to himself by attempting to pass immediately in front of the approaching train; the danger of the act being so obvious to him as to amount, in and of itself, to a manifest failure to exercise ordinary care for his own safety. If the defendants were negligent in approaching the public crossing, such negligence was existing, and must necessarily, from the testimony of Pyrom, have been apparent to the decedent when he attempted to cross the track. The rule is so well settled, by numerous decisions of this court, as not to need their citation that, if, after the negligence of the defendant commenced, the decedent became aware thereof, or by the exercise of ordinary care should have become aware thereof, and thereafter failed to exercise ordinary and reasonable care and diligence for his own safe-

ty, there could be no recovery. While the question of ordinary care is generally to be determined by the jury, yet where, as in the case at bar, it is manifest from the evidence submitted in behalf of the plaintiff that the decedent knew of the defendants' negligence, and thereafter not only failed to exercise ordinary and reasonable care and diligence for his own safety, but voluntarily and recklessly took the risk of a danger that must necessarily have been obvious to him, then, in such circumstances, the court may say that there can be no recovery.

Judgment reversed. All the Justices concur.

(138 Ga. 392)

TALLEY v. MITCHELL et al.

(Supreme Court of Georgia. July 11, 1912.)

(Syllabus by the Court.)

1. LANDLORD AND TENANT (§ 216*)—RENT—LIABILITY FOR DOUBLE RENT.

Where, under a contract for the rental of certain premises for a term of three years, the landlord was not required to rebuild in case of destruction of or damage to the building upon the property by reason of fire, but there was a stipulation that, "should the premises be destroyed or damaged by fire so as to be untenable, the conditions of this lease shall cease from the date of the fire until the premises shall be restored to as good condition as they were in previous to the fire;" and where during the term a fire occurred, causing a large portion of the premises to be untenable, but the tenant refused either to deliver possession or pay rent, though continuing to use a portion of the property, under a statutory proceeding to dispossess him, to which he interposed a counter affidavit, he was liable for double rent.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 861-865; Dec. Dig. § 216.*]

2. LANDLORD AND TENANT (§ 216*)—RENT—LIABILITY FOR DOUBLE RENT.

Under such facts, the tenant was liable for double the contractual rate of rental, and could not reduce such amount by showing that after the fire the value of the premises for rent was much less than before.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 861-865; Dec. Dig. § 216.*]

3. REJECTION OF EVIDENCE.

None of the rulings in regard to rejecting evidence require a new trial.

4. APPEAL AND ERROR (§ 1140*)—LANDLORD AND TENANT (§ 216*)—RECOVERY OF DOUBLE RENT—DISPOSITION OF COSTS—AFFIRMANCE ON CONDITION.

Under the proceeding authorized by the Civil Code 1910, § 5385 et seq., double rent cannot be recovered from a tenant prior to demand for possession; nor is such action an appropriate one for the recovery of rent due under the contract prior to such demand.

(a) It not clearly appearing how long before the commencement of the proceeding demand for possession was made, it is directed that if, within 20 days from the filing of the remittitur in the office of the clerk of the superior court, the plaintiffs will write off from verdict and judgment \$400, to cover the double rent included therein prior to the beginning of

the action, the judgment will stand affirmed; otherwise it will be reversed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4462-4478; Dec. Dig. § 1140.* Landlord and Tenant, Cent. Dig. §§ 861-865; Dec. Dig. § 216.*]

(Additional Syllabus by Editorial Staff.)

5. LANDLORD AND TENANT (§ 231*)—LIABILITY FOR DOUBLE RENT—ADMISSIBILITY OF EVIDENCE.

In an action to recover double rent, where a tenant retained possession and refused to pay rent after a fire, the exclusion of a letter from an agent of the landlord, expressing the opinion that the fire canceled the lease, and offering a new lease on the rear end of the lot, and one stating unwillingness that the tenant should build till a satisfactory arrangement had been made, were properly excluded.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 926-934; Dec. Dig. § 231.*]

Error from Superior Court, Fulton County; Geo. L. Bell, Judge.

Action by Mrs. E. J. Mitchell and others against W. M. Talley. Judgment for plaintiffs, and defendant brings error. Affirmed on condition.

R. B. Blackburn and L. Z. Rosser, both of Atlanta, for plaintiff in error. C. W. Smith and M. A. Hale, both of Atlanta, for defendants in error.

LUMPKIN, J. John J. Woodside, as agent for Mrs. E. J. Mitchell and Mrs. G. M. Bridges, made affidavit and obtained a warrant for the eviction of W. M. Talley from certain premises. The affidavit alleged "that said tenant fails to pay the rent now due on said house and premises; and that the said tenant is holding said house and premises over and beyond the term for which the same were rented to him;" also that demand had been made upon him for delivery of possession, which had been refused. The defendant filed a counter affidavit, in which he denied that the rent claimed to be due was so, and also denied that he was holding over and beyond his term. He further pleaded that, under the terms of the contract of rental, it was agreed that, if the premises should be destroyed or damaged by fire so as to be untenable, the conditions of the lease should cease until the premises should be restored to as good condition as they were in previous to the fire; that a fire occurred, "destroying the front end of said building in such a way as to make a large portion of said premises untenable"; that he immediately gave notice to the renting agent, and requested that the premises be restored to a tenantable condition; that the plaintiffs "have refused and still refuse to restore the premises partially destroyed by fire to the condition in which they were prior to said fire"; and that they are not entitled to recover against him. He also denied that any demand was made upon him for

possession, or that any rent was due to the plaintiffs at the time of the commencement of the proceeding.

The contract of rental contained the following, among other, clauses: The tenant, "further agrees that he will deliver the premises at the expiration of this lease in as good order and repair as when first received (natural wear and tear excepted). Said John J. Woodside, agent, agrees that, should the premises be destroyed or damaged by fire so as to be untenable, the conditions of this lease shall cease from the date of the fire until the premises shall be restored to as good condition as they were in previous to the fire. * * * It is further agreed by both parties to this contract that the said second party shall take the above described premises in their present condition, knowing the premises are in bad repair and agreeing to make such repairs and improvements as are necessary at his own, the said second party's, expense, and further to require no repairs or improvements from said owner or agent."

The jury found for the plaintiffs \$2,500. The defendant moved for a new trial, which was refused, and he excepted.

[1] 1. The contract of rental involved in the present case has been before this court on a former occasion. It was then held that the contract imposed on the lessor no obligation to effect a restoration of the premises after the building was destroyed or damaged by fire. *Woodside v. Talley*, 135 Ga. 337, 69 S. E. 492. The tenant, therefore, had no right to contend that he was relieved from the payment of the rental provided in the contract, on the ground that the lessor was guilty of a breach of duty in not restoring the premises to their previous condition. If the landlord was not required to repair or rebuild, either there was no duty to do so, or it rested on the tenant. If there was a duty on his part to make such restoration, he could take no advantage of his failure to do so. If there was no duty of restoration, but a mere privilege, did the occurrence of the fire and the damage resulting therefrom operate, by virtue of the terms of the contract, to relieve the tenant, either permanently or until a restoration could be made, from the payment of rent, he retaining possession and using the premises?

In *Snook & Austin Furniture Co. v. Steiner & Emery*, 117 Ga. 363, 43 S. E. 775, the lease contract provided that, "should the leased premises be destroyed by fire," the lessors "are to rebuild the same with all reasonable dispatch, at their option, and that from the time of such fire until the rebuilding has been completed the rent shall abate for such time." It was held that, if, after the buildings were totally destroyed by fire, the lessors promptly notified the lessee that they elected to rebuild, and thereupon proceeded with all ordinary diligence to erect a

structure substantially like that destroyed, the relation of lessor and lessee was suspended until the new building was ready for occupancy, when the rights and obligations of both under the lease were renewed; but that it was optional with the lessors whether they would rebuild; and that if they notified the lessee that they elected not to rebuild, or that they would rebuild a different kind of structure, the tenant was relieved from the obligation to pay rent, and was no longer entitled to possession of the vacant premises. In the opinion the following was quoted approvingly from *Buschman v. Wilson*, 29 Md. 553: "The clause with reference to the cessation of rent implies an obligation on the part of the tenants to surrender the premises upon the occurrence of the event that released them from the further payment of rent. Any other construction would work gross injustice, and contravene the plain purpose and design of the parties." It was also added: "Complete surrender of the premises is a condition precedent to the tenant's release from liability for rent under statutes containing provisions substantially similar to the contract here." 24 Cyc. 1160.

In the case now under consideration, the contract provided that, should the premises be destroyed or damaged by fire so as to be untenable, "the conditions of this lease shall cease from the date of the fire until the premises shall be restored to as good condition as they were in previous to the fire." It will be noticed that this provided, not merely for an abatement of the rent, but for a cessation of "the conditions" of the lease. This included the right of use by the tenant, as well as any of the other stipulations. But if this provision of the contract should be treated as identical with that in the case of *Snook & Austin*, supra, the tenant does not set up in his affidavit or show by evidence that the premises were untenable. In his counter affidavit he says that "a large portion of said premises" was untenable after the fire, and in another place that the landlord refused to restore the premises "partially destroyed by fire." The evidence shows that he continued to occupy the premises after the fire until just before the trial of the case. His position apparently was that the premises, though damaged, were sufficiently tenantable to occupy, but not to require him to pay rent. If he had a right to terminate the tenancy, he should have done so, and not have claimed the benefits of occupancy for himself, while refusing the corresponding payment of rent to the landlord. Having continued to occupy and use the premises he continued to be liable for the rent.

[2] 2. It was contended that, if the defendant was wrongfully holding over, he was a tenant at sufferance, and was liable only

for double what the rent of the premises was shown to be worth, and not for double the contract rental. The affidavit, made for the purpose of evicting the tenant, alleged that he failed to pay the rent due, and was also holding over beyond his term. The written contract showed that the term had not expired by lapse of time. From what has been said above, it will appear that the defendant was not in a position to contend that the obligation to pay rent had terminated by reason of the fire. The Civil Code, section 5389, declares that, if the issue provided for in the preceding sections should be found against the tenant, "judgment shall go against him for double the rent reserved or stipulated to be paid, or, if he be a tenant at will or sufferance, then for double what the rent of the premises is shown to be worth"; and that a writ of possession shall issue. Under section 5385, a demand for possession and refusal or omission to deliver it is necessary before commencing such proceedings. There can be no eviction of the tenant until it is wrong for him to continue to hold adversely to the landlord. If it should be held that, whenever he ought to deliver on demand and fails to do so, he becomes a tenant at sufferance, and is liable only for double what may be proved to be the rental value of the property, then the portion of the section in regard to recovering double the rent "reserved or stipulated to be paid" would have no room for application. It is evident that the statute contemplated cases in which it should become wrongful for the tenant to continue to hold possession against his landlord's demand, and in which he might be ousted, and at the same time double the stipulated rent might be recovered. This is just such a case as the statute contemplates. The time to which the tenancy was to continue, subject to the terms and stipulations of the contract, was April 30, 1911. The fire occurred in April, 1909. The tenant then ceased to pay rent. The proceeding to dispossess him was commenced in July of that year. The presiding judge submitted to the jury the question of whether there had been a demand for possession, and they found that there was. We thus have a case, not of a tenant holding over after the expiration of the time mentioned in the contract of rental, but of a tenant refusing to pay rent or deliver the premises, without sufficient legal ground therefor. The rate named in the contract was \$50 per month. The defendant contended that after the fire the premises were not worth above \$10 per month. The court ruled that if the plaintiffs were entitled to recover they could recover double rent at the contractual rate, and rejected evidence to show the reduced rental value after the fire. In this he ruled correctly. See *Purtell v. Farris*, 137 Ga. 318, 73 S. E. 634.

[3, 5] 3. Several rulings in regard to the rejection of evidence were assigned as error. The foregoing discussion covers the merits of the case, so far as the rights of the plaintiffs to recover are concerned. None of the rulings mentioned furnish any ground for a new trial. Certain letters from the agent of the plaintiffs to the attorney of the defendant were rejected. In one of them he expressed the opinion that the result of the fire was to cancel the lease, and stated that "we" would entertain a wish on the part of the tenant to make a new lease on the rear end of the lot. In another he stated that he had been informed that the tenant was preparing to build an office on the front end of the lot, and that "we" are unwilling that this should be done until a satisfactory arrangement has been made. One of these letters was dated April 20, and the other April 28, 1909, after the tenant had given a check for the payment of the rent for April, due on the 1st day of that month, and had later stopped its payment. Under the pleadings and evidence, the rejection of such letters does not require a reversal.

[4] 4. The remedy provided by the statute for the summary eviction of a tenant is primarily one for the recovery of possession, and not a suit to recover ordinary rent due prior to the demand by the landlord for possession. The statutory provision authorizing the recovery of double rent imposes this liability upon the tenant who improperly falls or refuses to deliver possession upon demand, and resists the proceeding to dispossess him by his landlord. Such a liability does not attach to the tenant, merely because he fails to pay rent when it is due, nor until demand by the landlord. The recovery in the case before us evidently includes double rent from the 1st day of April, 1909, thus giving double rent prior to the date of the demand. Whatever remedy the landlord may have for the rent due prior to the demand, it is not to be enforced by giving him double rent under the statute. *Willis v. Harrell*, 118 Ga. 906, 45 S. E. 794. The exact date on which demand for possession was made cannot be fixed with certainty by this court. The agent for the plaintiffs testified that, "prior to the issuing of the dispossessionary warrant, on the 28th day of July, 1909, he made demand on Talley for possession of the premises." It is therefore directed that if the plaintiff shall, within 20 days from the filing of the remittitur in the office of the clerk of the superior court, write off from the recovery the sum of \$400, to cover the double rent included in the verdict as accruing prior to the commencement of the proceeding, the judgment will stand affirmed; otherwise it is reversed.

Judgment affirmed on condition. All the Justices concur.

(138 Ga. 353)

ATLANTA, B. & A. R. CO. v. ATLANTIC COAST LINE R. CO.

(Supreme Court of Georgia. July 10, 1912.)

(Syllabus by the Court.)

1. RAILROADS (§ 22*)—ACTION—BREACH OF CONTRACT.

By section 2798 of Civil Code 1910, the court of the county in which a contract is to be performed has jurisdiction of a suit brought to recover damages by one railroad company against another such company, alleging a breach of such contract.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 46-50; Dec. Dig. § 22.*]

2. RAILROADS (§§ 142, 143*)—CONSOLIDATION—CONSTRUCTION OF CONTRACT—LIABILITY OF PARTY.

Where the stockholders of a railroad corporation authorize its board of directors to "purchase, absorb, and merge into itself the stock, property, assets, etc." of another designated railroad corporation, which is done accordingly, and by the terms of a contract entered into by the acquired railroad, prior to its acquisition by the other corporations, it is provided that "all covenants and agreements herein contained shall be binding upon the successors and assigns of the parties hereto," the acquisition of the one railroad corporation by the other constitutes a merger and not a sale.

(a) The acquiring corporation by reason of the merger becomes liable for the payment of all unpaid debts and unperformed contracts of the acquired corporation, and is bound by the terms of the contract entered into between the latter and another corporation prior to the merger.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 392, 444-450; Dec. Dig. §§ 142, 143.*]

3. RAILROADS (§ 144*)—CONTRACTS—ACTIONS BETWEEN RAILROADS—QUESTION FOR JURY.

The verdict was demanded by the evidence, and the court did not err, under the facts of this case, in directing a verdict for the plaintiff.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 392, 393, 451-455; Dec. Dig. § 144.*]

Error from Superior Court, Glynn County; W. E. Thomas, Judge.

Action by the Atlantic Coast Line Railroad Company against the Atlanta, Birmingham & Atlantic Railroad Company. Judgment for plaintiff, and defendant brings error. Affirmed.

The Atlantic Coast Line Railroad Company brought its suit against the Atlanta, Birmingham & Atlantic Railroad Company for the recovery of the sum of \$730.29, alleged to have arisen and become due from the breach of a contract originally made between the plaintiff and the Atlantic & Birmingham Railway Company, the predecessor in title of the plaintiff in error. The contract was in respect to certain changes in the track of the plaintiff, as the same was at that time laid in a street in Brunswick, Glynn county, Ga., which the Atlantic & Birmingham Railway Company desired made. The latter company also desired to lay a track in a street in said city and county, and

there was not sufficient room between the track of the plaintiff and the eastern line of the street to allow the Atlantic & Birmingham Railway Company to lay its proposed track, and therefore it was necessary for the latter company either to condemn private property to the east of the street, or to contract with the plaintiff to remove its track further to the west before the desired track could be laid. The Atlantic & Birmingham Railway Company agreed to contract to pay the expense "of changing the track of the second party from its present location to its proposed position, including all filling necessary to be done for the laying of the track of the second party on such new location at the grade as shown in blueprint or map attached, and also whatever expense may be incurred in making said filling permanent and satisfactory; and should said fill hereafter settle or give way, then the same shall be repaired and restored by the first party, or by the second party at the expense of the first party, provided such settlement or caving shall not be caused by the failure of the second party to maintain its present wharf or bulkhead on the line of the Atlantic Land & Improvement Company's property on Academy creek; it being understood that the first party is under no obligation or duty to maintain said wharf or bulkhead on the wharf of Academy creek. * * * It is further understood and agreed that the second party will change its present track location between L. and O. streets in the new town of the city of Brunswick so as to occupy the new location marked 'Proposed line of A. C. L. R. R.,' and the second party will do the same as promptly as the circumstances will permit, and in doing thereof will charge the party of the first part with all expense of all character arising by reason, not only of the filling in and grading of the new location, the laying of the tracks, cost of ties and appurtenances rendered requisite by the change of line, but as well such other filling as may be made to insure permanency in the maintenance of said fill and new tracks of the second party, and the first party hereby binds itself that it will, within fifteen (15) days from receipt of any bill or bills rendered its general manager, promptly repay unto the second party in making such changes, grading and filling, and the first party binds itself to hereafter and from time to time pay any and all proper charges which may arise in the repairing or restoring such new embankment so to be constructed for the track of the second party, should the first party become liable therefor under the contract. * * *

After such new fill is constructed and the track of the second party laid thereon as herein provided, the cost of ordinary maintenance of said fill or track thereon shall be borne by the second party, it being the in-

tent of this contract that after said fill is once constructed and made permanent by the first party to the satisfaction of the second party, that any expense in maintaining said fill or track thereon shall be borne by the second party, save or except such expense as is caused by giving away or caving of the said fill shall always be paid for and borne by the first party, its successors and assigns, provided such caving in or giving away shall not be caused by the failure of the second party to maintain said wharf-line bulkhead on Academy creek." The petition alleged: That the Atlantic & Birmingham Railway Company "is now, by consolidation and merger," the Atlanta, Birmingham & Atlantic Railroad Company; that the terms of the contract are binding upon the defendant; that in pursuance of the terms of the contract the track of the petitioner was removed to the westward of its original location on said street to the new location named in the contract; that the track as removed rested and lay upon made ground, or a fill, and before the same had become settled and permanent, on account of rains during the months of May and June, 1906, the fill or foundation of petitioner's track became washed away and caved in so as to need and require repairs; that such giving away and caving in was not caused by the failure of petitioner to maintain its wharf-line bulkhead on Academy creek, but that this had been kept and maintained by petitioner in good order and condition; that defendant was notified of the condition of plaintiff's roadbed and requested to make the needed repairs under the terms of the contract, but failed to do so; that plaintiff made the necessary repairs to said roadbed and temporary bulkhead, at an actual cost and expense to plaintiff of the sum of \$730.29; and that said sum was a reasonable cost of such repairs. An itemized statement of such cost and expense in making the repairs was attached. A special demurrer to two of the items included in the exhibit, amounting to about \$15, was sustained, and these items stricken. No exception was taken to this ruling. A general demurrer to the petition was overruled, and error is assigned on this ruling. Upon call for trial the defendant made a motion to dismiss the case, on the ground, among others, that the court was without jurisdiction over the defendant on the case as laid. The court overruled this motion, and exceptions were taken. The plaintiff introduced evidence tending to support the material allegations in the petition. There seems to have been no issue of fact. On the close of the plaintiff's evidence defendant moved for a nonsuit. The motion was overruled, and this ruling was excepted to. No evidence was offered by the defendant, and its counsel asked the court to direct a verdict for it. The court, instead, directed

a verdict for the plaintiff, which ruling is made one ground of assignment of error by the defendant.

Bolling Whitfield, of Brunswick, for plaintiff in error. Bennet, Twitty & Reese, of Brunswick, for defendant in error.

HILL, J. (after stating the facts as above). [1] 1. Error is assigned because the court below overruled a general demurrer to the petition, and a motion to dismiss the case on the ground that the petition showed that the superior court of Glynn county was without jurisdiction to entertain the suit. It is insisted that the suit must be brought in the county of the principal office of the company, Fulton, and that any judgment obtained elsewhere is utterly void, unless the cause of action comes within the provision of Civil Code 1910, § 2798. It is contended that this is not a case in which the right to sue elsewhere than in the county of the defendant's principal place of business is given by statute. We cannot agree to this contention. Our Civil Code 1910, § 2798, broadly declares: "All railroad companies shall be sued in the county in which the cause of action originated, by any one whose person or property has been injured by such railroad company, its officers, agents, or employees, for the purpose of recovering damages for such injuries; and also on all contracts made or to be performed in the county where suit is brought; any judgment rendered in any other county than the one in which the cause so originated shall be utterly void. But if the cause of action arises in a county where the railroad company liable to suit has no agent, then suit may be brought in the county of the residence of such company." The contract was to be performed in Glynn county, where the suit was brought. It will thus appear that the venue of the suit was properly laid in that county. For a general discussion of the history of the above section of the Code, see *Bracewell v. Southern Ry. Co.*, 134 Ga. 537, 541, 68 S. E. 98.

[2] 2. Was the contract entered into between the Atlantic & Birmingham Railway Company and the Atlanta, Birmingham & Atlantic Railroad Company one of merger or of sale? It is insisted that the contract is one of sale, and that the fact that the Atlanta, Birmingham & Atlantic Railroad Company was the successor in title to the original contractor, the Atlantic & Birmingham Railway Company, did not make it liable as its predecessor might have been to the plaintiff under the contract, for the reason that it was a contract between two companies, and, without more, expired when the Atlantic & Birmingham Railway Company parted with its title to the property described in that contract, and that the contract was not binding upon any subsequent as-

signee of the Atlantic & Birmingham Railway Company. In support of this contention, the plaintiff in error cites the case of *Hawkins v. Central of Georgia Railway Co.*, 119 Ga. 159, 46 S. E. 82, and refers especially to page 164 of 119 Ga., to page 84 of 46 S. E., where it is said that, "where a railroad has a right to sell, the buyer is not responsible for more than the purchase price," and that the court held the purchaser not liable for the duty of its predecessor in title, unless it was assumed in the purchase, or cast upon it by operation of law. But we think, from a careful reading of the contract, that this is a merger and not a sale. The action of the stockholders of the Atlanta, Birmingham & Atlantic Railroad Company, authorizing the acquisition of this property, resolved to "purchase, absorb, and merge into itself the stock, property, and assets," etc., of the Atlanta, Birmingham & Atlantic Railroad Company. It seems, therefore, that the intention of those acquiring this property was that it should be a merger. In the case of the *A. B. & A. Ry. Co. v. Johnson*, 127 Ga. 392, 56 S. E. 482, 11 L. R. A. (N. S.) 1119, it was held that: "Where two corporations effect a consolidation, and one of them goes entirely out of existence, and no arrangements are made respecting its liabilities, the resulting consolidated corporation will, as a general rule, be entitled to all the property and answerable for all the liabilities of the corporation thus absorbed." The petition alleged that the Atlantic & Birmingham Railway Company "is now by consolidation and merger" the Atlanta, Birmingham & Atlantic Railroad Company, and that the terms of the contract are binding upon it.

The main contention in the case is, not so much that the defendant company is not liable because of the merger, but that there is no liability at all; that whatever damage was repaired was on account of the bulkhead of the Atlantic Coast Line Railroad Company. But the evidence in the record does not bear out this contention. It appears that the temporary bulkhead was the only one damaged, and the only one on account of which the work was done for which a charge was made. And this being true, the recovery was proper; the repairs being made on account of temporary bulkhead coming within the terms of the contract.

[3] 3. Error is assigned, because the evidence of the plaintiff in the court below was insufficient to show that the reasonable, actual cost of making the repairs, as claimed by the plaintiff, amounted to the sum found to be due by the jury, viz., \$715.14; and that the cost of the material was not shown, nor its market value; and that the expense for making the repairs on the bulkhead was placed by the contractor upon the plaintiff and not upon the defendant. A proper construction of the contract was that the plain-

tiff was only bound to repair damages to the fill on A. street, caused by caving, settling, etc., in the event damage was occasioned by the giving way of the wharf bulkhead on Academy creek, and that any such damage not thus caused was to be repaired by or at the expense of the defendant. The evidence shows that there was no giving way or other defect in the wharf bulkhead on Academy creek, nor any repairs necessary thereon; it remaining in good condition. The contract did not exempt the defendant from any damage occasioned by the giving way of the temporary bulkhead, which the evidence shows to have occurred. The defendant therefore was liable under the contract to bear the expenses of repairs for which suit was brought.

We think the evidence sustained the allegations as laid in the petition. This being true, and no evidence being offered by the defendant denying the correctness of the account sued upon, the verdict was demanded.

Judgment affirmed. All the Justices concur.

(133 Ga. 420)

WESTERN & A. R. CO. v. WESTERN UNION TELEGRAPH CO.

(Supreme Court of Georgia. July 11, 1912.)

(Syllabus by the Court.)

1. EMINENT DOMAIN (§ 47*) — TELEGRAPH LINE—RAILROAD RIGHT OF WAY.

A telegraph company may condemn a right of way on and along the right of way of a railroad company, when the proposed line of telegraph will be so constructed as to produce no material interference with the railroad company's free exercise of its franchise or with the actual operation of the railroad.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 107-120; Dec. Dig. § 47.*]

2. EMINENT DOMAIN (§ 10*) — TELEGRAPH LINE ON RAILROAD RIGHT OF WAY.

It is not a prerequisite to the exercise of such right of condemnation that the telegraph company should first file with the railroad commission its consent that the commission shall have jurisdiction over it for the purpose of regulating tolls on messages originating and ending within the state of Georgia.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 35-48; Dec. Dig. § 10.*]

3. EMINENT DOMAIN (§ 47*) — TELEGRAPH LINE ON RAILROAD RIGHT OF WAY.

A telegraph company may not condemn a railroad company's right of way on both sides of the track, at least without making it appear that it is necessary to occupy both sides and that the railroad company's operation of its trains is not materially interfered with.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 107-120; Dec. Dig. § 47.*]

4. EMINENT DOMAIN (§ 47*) — TELEGRAPH LINE ON RAILROAD RIGHT OF WAY.

Where it appears that the demands of a modern railroad company are such that a telegraph system is a necessary auxiliary to its safe and proper operation, and where it ap-

pears that present telegraph service is afforded to the railroad company by an existing line of telegraph by virtue of a contract between the railroad company and the telegraph company, which contract is about to terminate, and where it appears that the existing lines are located on an advantageous portion of the right of way and that the railroad company, in order to obtain the necessary telegraphic service, intends and purposes, in good faith, to construct a line of its own on the location of the old telegraph line, relatively to the telegraph company proposing to condemn a right of way, the railroad company has a preferential selection of the route. Under such circumstances, the telegraph company will be enjoined from condemning the route which has been selected in good faith by the railroad company.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 107-120; Dec. Dig. § 47.*]

5. EMINENT DOMAIN (§ 47*) — RAILROADS — RIGHT OF WAY—TELEGRAPH LINE.

A railroad company cannot defeat the exercise of the right of eminent domain by a telegraph company in constructing a line of telegraph on a portion of its right of way by the construction and maintenance of a line on both sides of its track, when a line on one side of its track is ample to furnish it with necessary telegraph service.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 107-120; Dec. Dig. § 47.*]

6. EMINENT DOMAIN (§§ 169, 177*) — TELEGRAPH LINE OVER STATE PROPERTY.

A telegraph company cannot construct a line of telegraph over the land of the state without permission of the state. Civil Code, § 2811, does not grant that permission except upon due compensation. That section allows condemnation of the state's land by telegraph companies upon the same plane as the right of way of a railroad company and private land. The lessee of the state's road has only a usufructuary interest therein, and this cannot be condemned by a telegraph company, separately and apart from the state, in the absence of legislative sanction. Any condemnation proceeding must be against both.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 461, 478, 480, 481, 483, 485; Dec. Dig. §§ 169, 177.*]

7. EMINENT DOMAIN (§ 171*) — TELEGRAPH LINE—CONDEMNATION.

Where a telegraph company in its notice of condemnation seeks only to occupy a railroad company's right of way for the purpose of constructing and maintaining a telegraph line, the possibility of stringing telephone wires for the use of a telephone company is no objection to the right to condemn. When the telegraph company attempts to impose an additional servitude, the railroad company has its remedy against such act.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 468, 469; Dec. Dig. § 171.*]

8. COMMERCE (§ 48*) — EMINENT DOMAIN (§ 47*) — TELEGRAPH LINE ON RAILROAD RIGHT OF WAY.

A telegraph company will not be permitted to condemn the right of way of a railroad company for the construction and maintenance of lines of telegraph in such a manner as to materially interfere with the railroad company in the operation of its trains and in the transportation of passengers and goods. A telegraph line so constructed and maintained as not to interfere with the transportation of pas-

sengers and goods beyond the state is not a burden on interstate commerce.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. §§ 38-44, 46; Dec. Dig. § 48;* Eminent Domain, Cent. Dig. §§ 107-120; Dec. Dig. § 47.*]

9. CONSTITUTIONAL LAW (§ 280*)—DAMAGES—DUE PROCESS OF LAW.

The ruling in the case of Atlantic Coast Line R. Co. v. Postal Telegraph, etc., Co., 120 Ga. 268, 48 S. E. 15, 1 Ann. Cas. 734, that the measure of damages, where the right of way of a railroad company is taken by a telegraph company, is the value of the land actually taken, and the extent to which the use of the right of way by the railroad company is diminished by its use by the telegraph company, that the right of way of a railroad company has no general market value for other uses than that to which it is applied, and that peculiar advantages and benefits accruing to a telegraph company from its use of the railroad's right of way cannot be considered in the assessment of damages, has not the effect of putting the eminent domain laws of the state in opposition to the due-process clause of the fourteenth amendment of the Constitution of the United States.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 877-890; Dec. Dig. § 280.*]

Error from Superior Court, Fulton County; Geo. L. Bell, Judge.

Suit by the Western & Atlantic Railroad Company against the Western Union Telegraph Company to restrain proceedings to condemn a right of way for telegraph line along complainant's railroad. From a decree denying an injunction, complainant brings error. Reversed and remanded.

Tye, Peeples & Jordan, of Atlanta, and Claude Waller, of Nashville, Tenn., for plaintiff in error. Dorsey, Brewster, Howell & Heyman, of Atlanta, for defendant in error.

EVANS, P. J. Many of the questions presented by this record are novel, and arise from the peculiar facts of the case. The state of Georgia owns a railroad extending between Atlanta and Chattanooga, Tenn. On the 19th day of July, 1890, by authority of the General Assembly (Acts 1889, p. 141), the railroad was leased to the Nashville, Chattanooga & St. Louis Railway for the period of 29 years from December 27, 1890. The leasing company by the terms of the act became a body corporate under the name and style of the Western & Atlantic Railroad Company. Prior to the lease there had been erected on the right of way of the railroad a line or lines of telegraph poles and wires. At that time and continuously since a line of wire on these poles was set apart for the exclusive use of the lessee in the transaction of its railroad business. In 1891 another line of wire was strung for the exclusive use of the leasing company, at considerable cost to the lessee. And in 1906 a line of double wires and a line of single wire were stretched upon the same poles at segmental parts of the railroad, at considerable expense

to, and for the exclusive use of, the leasing company in the operation of the railroad. In 1884 the Western Union Telegraph Company and the Nashville, Chattanooga & St. Louis Railway Company entered into a contract for the maintenance and operation of a telegraph line upon its own railroad and such other railroads that it might subsequently acquire by lease or purchase. This contract was to continue in force for 25 years from July 1, 1884, and thereafter until the expiration of one year after written notice by either party to terminate the contract. In this contract the telegraph company obligated itself to set apart one wire on the main line for the preferential use of the railroad company and agreed that, if the railroad company should require greater wire facilities, the telegraph company would furnish an additional wire at the cost price upon poles already erected, and that the railroad company at its own cost would string such additional wires. In August, 1911, the telegraph company gave to the railroad company written notice of its intention to terminate the contract after the expiration of one year. The telegraph company then opened up negotiations with the Western & Atlantic Railroad Company to purchase an easement for their line of poles and wires, which negotiation was fruitless. Whereupon the telegraph company served the Western & Atlantic Railroad Company with written notice of its purpose to condemn, along its right of way in this state, a right of way upon which to construct (when necessary), maintain, and operate its telegraph line. "The location of the right of way sought to be acquired is substantially that location now occupied by the telegraph line of the Western Union Telegraph Company along main line of your railroad from Atlanta, Ga., to the Tennessee line at or near Graysville, Ga., and along the branch line known as the Rome branch"; the main line running from Atlanta, Ga., to the Tennessee state line at or near Graysville, Ga., through the counties of Fulton, Cobb, Bartow, Gordon, Whitfield, and Catoosa, a distance of approximately 121.37 miles. The telegraph line will enter upon the right of way of the railroad company at the Marietta Street Bridge at the same point where it now enters upon the right of way, and continue upon the east side of the tracks a specified distance of about three miles, then to cross the tracks and continue on the west side, a specified distance, to a point north of the 5-mile post, then to cross the tracks and continue on the east side at a specified distance to the 6-mile post, at which point the line would divide, and part of the line cross to the west side of the tracks. From the 6-mile post to the Tennessee state line the line would extend on both sides of the track as now located, except at Marietta, Adairsville, Dalton, and Tunnel Hill. The right of way thus sought to be acquired by the telegraph

company to be of sufficient width to enable it to conveniently construct (when necessary), maintain, and operate its line located and constructed substantially as follows: As many wires or cables of wire as might be necessary from time to time to transact the business of the telegraph company, to be strung on poles placed at an average distance from the center of the main line track of 27 feet, except where your right of way is limited or widened, with a minimum distance from edge of right of way (except where right of way is limited or widened) of 6 feet. Poles to have a length of not less than 20 feet, to be placed in the ground a depth of not less than 4 feet. At highways, railway crossings, depots, and side tracks, poles to have a height of from 25 to 40 feet above the ground, with an average of 40 poles per mile on both sides of the track from Atlanta, Ga., to Kingston, Ga., and of 80 poles per mile from Kingston, Ga., to the Tennessee line. "Said poles will nowhere be placed upon any of the embankments or in the cuts of your railway, nor will said wires be attached or fastened to any of the bridges or trestle work of said railway." There will be wires crossing the tracks from the main telegraph line to reach the offices of the telegraph company at various points mentioned along the railroad. At all points where the wires so cross the tracks, the lowest wires to be not less than 25 feet above the tracks. The term for which the condemnation was desired was the term expiring December 27, 1919, which date is the expiration of the railroad company's lease with the state. Thereupon the Western & Atlantic Railroad Company filed a petition to enjoin the proposed condemnation by the Western Union Telegraph Company. The telegraph company showed cause by demurrer and answer, and after hearing evidence the court refused an interlocutory injunction.

[1] 1. It is settled law in this state that a telegraph company, in the exercise of the right of eminent domain granted to it by the state, may condemn a right of way on and along the right of way of the railroad company when the proposed line of telegraph will be so constructed as to produce no material interference with the railroad company's free exercise of its franchise or with the actual operation of the road. Whether the construction of the telegraph line on a particular portion of the railroad's right of way will or will not materially interfere with the operation of the railroad is ordinarily a question of fact. Savannah, etc., Ry. Co. v. Postal Telegraph Co., 112 Ga. 941, 38 S. E. 353.

[2] 2. The railroad company denies that a telegraph company possesses any power of condemnation without first filing with the railroad commission of this state its consent that the railroad commission shall have jurisdiction over it for the purpose of regulating tolls charged on long-distance mes-

sages originating and ending within the state of Georgia. Originally the railroad commission of Georgia had jurisdiction only over railroads. In 1891 its authority and jurisdiction were extended so as to embrace telegraph companies and express companies. Acts of 1890-91, p. 151; Civil Code 1895, §§ 2217, 2218. In 1894 an act was passed providing for the condemnation of private property for public uses by all corporations or persons authorized to take or damage private property for public purposes. Civil Code, § 5206 et seq. In 1898 the provisions of this act were made applicable to telegraphic companies. Civil Code, § 5235. In 1905, section 2347 of the Code of 1895, which authorizes a telegraph company to construct, maintain, and operate telegraph lines through or over any lands of this state, and on, along, and upon the right of way and structures of any railroad, and, when necessary, under or over any private lands in this state, was so amended as to extend its provisions to telephone companies and to confer upon both telephone and telegraph companies the power of eminent domain; provided, that where it is necessary for such companies to exercise the right of eminent domain, they shall proceed to exercise it in the same manner as heretofore provided by law for the exercise of such right of eminent domain by telegraph companies; and further provided, that no corporation shall have the benefit of this section until it has filed with the railroad commission of the state its consent that the railroad commission shall have jurisdiction over it for the purpose of regulating intrastate rates. Civil Code, § 2811. In 1907 the railroad commission of this state was expressly given jurisdiction over both telegraph and telephone companies for the regulation of their intrastate business. Civil Code, § 2662. The history of the legislation on this subject, as thus outlined, shows that telegraph companies were not originally under the jurisdiction of the railroad commission; that, as soon as the commission was given jurisdiction over them, the power of eminent domain was conferred upon them; that the telephone companies were not brought within the jurisdiction of the railroad commission until 1907; and that prior to that time telephone companies could not exercise the right of eminent domain without first voluntarily submitting to the jurisdiction of the commission. It would seem from a reference to the act of 1905 that so much of Civil Code, § 2811, as requires a filing with the railroad commission of its consent to submit to its jurisdiction was applicable to telephone companies which did a purely telephone business or in conjunction therewith a telegraph business. The Code section is a little confusing, but this confusion is dissipated by a reference to the act of 1905. Given this construction, the provision of section 2811, about filing consent to submit to the jurisdiction of the railroad

commission, is not applicable to telegraph companies.

We therefore hold that it is not prerequisite that a telegraph company, in the exercise of the right of eminent domain under the statute, shall first file with the railroad commission its consent to submit to its jurisdiction.

[3] 3. The telegraph company claims the right to condemn the railroad company's right of way on both sides of the track. We have been unable to find any reported case dealing with the exact question. In solving this problem we must look to our statute to ascertain the extent of the power of condemnation which is given to telegraph companies. The act of 1894 (Civil Code, § 5206 et seq.) is a general statute defining the manner of the exercise of the right of condemnation by those entitled to take or injure private property for public use upon making adequate compensation. It was specially made applicable to telegraph companies by amendment. Civil Code, § 5235. It is declared in section 5236 that "when a telegraph company undertakes to condemn so much of the right of way of a railroad company as may be necessary for its use for the purpose of constructing, maintaining and operating its telegraph line along and upon such right of way, the notice provided for in section 5218 of the Code shall be directed to the railroad company and shall set out the manner in which the telegraph company proposes to construct its line on the right of way of the railroad company." This implies that a telegraph company can only take of the railroad's right of way so much thereof as may be necessary for the purpose of constructing, maintaining, and operating its line of wire. Without such limitation it would be in the power of a telegraph company with a monopolistic tendency to acquire, by condemnation proceedings, the right to occupy all of the right of way of a railroad company not required for railroad use, to the arbitrary exclusion of any other telegraph company that subsequently might wish to occupy a portion of the right of way, either with the consent of the railroad company or by virtue of the exercise of eminent domain. We are mindful of the case of *S. F. & W. Ry. Co. v. Postal Telegraph Co.*, supra, wherein it was ruled that "it is not essential that the telegraph company should affirmatively show that in order to erect, maintain, and operate its telegraph lines between the points proposed it is necessary for it to condemn such right of way; nor is it essential for it to show that it is necessary for it to use the particular portions of such right of way which it proposes to condemn." No case is broader than its facts; and the quotation we take from the headnotes in that decision, as illustrated by the discussion in the opinion, was not intended to cover the question in hand. In that case the telegraph company

was only seeking to condemn a portion of the right of way on one side of the track, and there arose a controversy as to the right of the telegraph company to select that particular portion without showing a necessity for the location of its poles on the particular portion. And in that connection the court said: "In the very nature of things it would be impossible to show this; for a similar strip located almost anywhere else on the right of way, at a sufficient distance from the railroad track, might answer for the purpose in view, and certainly numerous other locations for such a strip could be found upon the right of way." The court had in mind only one strip of land, and not two strips separated by the railroad track. And even where a single strip of the right of way is sought to be taken by the telegraph company, the telegraph company cannot take more than may be necessary for its use for the purpose of constructing, maintaining, and operating its telegraph lines along and upon the railroad's right of way. If the corporation should attempt to take more land than is authorized, a court of equity will restrain it from so doing. *Savannah Ry. Co. v. Postal Tel. Co.*, 115 Ga. 554, 560, 42 S. E. 1. The condemnor has a large discretion in the selection of its route, but we do not understand that it was ever contemplated by the statute that a telegraph company could arbitrarily condemn both sides of a railroad track for the construction of lines of wire on both sides of the track, when the necessary wires could be strung upon poles on one side of the track.

[4] 4. It appeared from the evidence that the railroad company could not safely and expeditiously operate its cars and engines without the aid of a telegraph line; that the demands of a modern railway are such that a telegraph system is a necessary auxiliary to its safe and proper operation. In view of the telegraph company's voluntary termination of its contract with the railroad company, the latter is compelled to erect and maintain its own telegraph post and wires, in order to operate its road by means of electrical signals and orders. The railroad company contends that it should have the right of prior selection in the location of a line of telegraph for railroad use, and that it intends to erect poles upon substantially the same location as at present occupied by those of the telegraph company. On the other hand, the telegraph company denies that the railroad company has any such right, but asserts that it has the right to select a route over the railroad's company's right of way at any point which does not materially interfere with the railroad company in the conduct of its business. These conflicting claims must be solved by the application of the rule that property dedicated to one public use cannot be subjected to another public use, except in cases where the later use

does not materially interfere with the former. If the railroad company owned the existing line of telegraph, and it was necessary to maintain and have it for the safe and convenient handling of its trains and cars, no one would seriously contend that the telegraph company could deprive the railroad company of its use by virtue of the exercise of the right of eminent domain. Assuming, of course, the necessity of a line of telegraph as auxiliary to the operation of a railroad company, the railroad company would have the same right in locating its telegraph lines as it would have in locating its railroad track, or its depot, and its warehouses on its own right of way. If a railroad company was originally constructing its track, could it be said that a telegraph company could arbitrarily select sites for its poles so as to force the railroad company to build its track on a less desirable place on its own right of way? Surely not. The fundamental basis of the principle of subjecting one public use to a second public use is that the first use must not be materially interfered with. It would indeed be most unfair demand to make of the owner of property charged with the discharge of a public duty, that he must make his property subservient to the convenience of the demandant who desires it for another public use. The railroad company is held off by its contract from constructing its line of telegraph on that portion of its right of way which it prefers, and which it has selected, until the contract expires; and the telegraph company should not be given a preference because it is not fettered by the same contract in proceeding to condemn the same portions of the railroad right of way. This conclusion cannot be affected by the fact that the telegraph line was in existence at the execution of the lease. There was no exception, either in the leasing act or the contract of lease, that the lessee was to take the road burdened with a use by the telegraph company. The telegraph company recognizes that its right to occupy the right of way is contractual; hence its notice to the railroad company to terminate the contract, and its proceedings to acquire the right of occupancy by condemnation.

[§] 5. The telegraph company at present occupies with its poles and wires both sides of the railroad track for nearly the entire distance of the main line of the railroad. According to the evidence a single set of poles is sufficient to carry the necessary wires for a telegraph line for railroad use. It therefore cannot be said that it is necessary that the railroad needs a line on both sides of its track. But, as we have already said, the railroad company has the right of prior selection of the route.

[§] 6. The railroad company takes the position that the telegraph company has no power to condemn its usufructuary interest in the right of way without express permis-

sion of the state, and that, at all events, the state is a necessary party to the condemnation proceedings. The telegraph company contends that the state has expressly given its assent to any telegraph company to construct and maintain a line of telegraph upon the lands of the state. In support of this contention section 2811 of the Civil Code is cited. That section, after declaring that any chartered telegraph company shall have the right to construct and maintain its line along and over the public highways of the state with the approval of the county or municipal authorities, proceeds as follows: "And, upon making due compensation, shall have the right to construct, maintain, and operate telegraph or telephone lines, or both, through or over any lands of this state, and on, along, and upon the right of way and structures of any railroad, and, where necessary, under or over any private lands in this state, and to that end may have and exercise the right of eminent domain." The quoted clause does not give to a telegraph company a free license to construct its lines over the lands belonging to this state. It expressly provides that "upon making due compensation" a telegraph company is given the right to construct its lines upon the lands of the state, upon the right of way of a railroad company, and upon private lands. The telegraph company's making due compensation is put forth as a condition precedent for the construction of its lines. This provision of the Code places the land of the state upon the same plane as railroad's right of way and private owners of land, with respect to condemnation. There is nothing in the language granting this concession which can be construed into a general permission to telegraph companies to build their lines upon the state's land without compensation.

In this state a tenant can neither assign his lease nor sublet the premises without the landlord's permission. Nor can a tenant who leases premises for a particular use devote them to other uses without the landlord's consent. *Dodd v. Ozburn*, 128 Ga. 380, 57 S. E. 701. Acquisition of the right of occupancy of land by means of condemnation is the equivalent of a conveyance. The difference consists in the means of acquiring the right; the former is involuntary and the latter is voluntary. If a tenant cannot convey the right to devote the premises to a use not authorized by the lease, it must follow that the right cannot be acquired by condemnation. A telegraph line can only be constructed by an invasion of the premises of the landlord; and that cannot be accomplished except by his voluntary consent, or by condemnation. It is true that, if a tenant's possession be disturbed by the construction of a telegraph line, he is to be separately compensated for his injury; but it does not follow that separate condemnation proceedings may be taken against landlord and tenant. The relation of the state to the lessee of its

railroad is that of landlord and tenant. The lessee has but a usufructuary interest in the possession of the leased premises, for the specific uses named therein. *State of Georgia v. W. & A. R. Co.*, 138 Ga. 619, 625, 71 S. E. 1055. Because of this relation any condemnation proceeding must be instituted jointly against the state and the lessee, unless the state gives to the telegraph company permission to occupy its railroad without condemnation, which it has not done.

Our attention is called to the provisions of the eminent domain law respecting the right of a telegraph company to condemn the right of way of a railroad company, and especially to the provision that in such cases only the railroad company is to be notified. The argument is that the lessee is a railroad company, and therefore falls within all of the provisions of the statute on the subject. We do not think so. The statute refers to railroad companies who own their rights of way; the ownership extending either to the easement of right of way or to the fee in the soil. For reasons already stated, it is manifest that the statute does not contemplate proceedings solely to condemn the right of way of a railroad company which has no ownership or easement of the right of way or of the fee; one which is merely a tenant, possessing no estate, but only a usufructuary interest in the land.

[7] 7. Another objection to the telegraph company's right to condemn is its contractual stipulation with the American Telegraph Company and subsidiary companies that the respective parties shall use in common as far as practicable the facilities of each other in order to avoid unnecessary duplication of lines and wires. This contract was made to cover large systems of telegraph and telephone companies, and it will not be imputed to the telegraph company that it will attempt to impose an additional use not mentioned in the notice of condemnation. If the telegraph company undertakes to impose an additional servitude, the railroad has its remedy against such an act. *Nolan v. Cen. Ga. Power Co.*, 134 Ga. 201, 210, 67 S. E. 656.

[8] 8. The railroad company further sets out that it is a common carrier engaged in interstate business; that, if a portion of its right of way is condemned for the construction of a telegraph line, the danger of falling poles and other inconveniences would interfere with its traffic and would be a burden on interstate commerce. The deduction is sought to be drawn that the condemnation of the railroad's right of way is prohibited by that provision of the Constitution of the United States giving to Congress the exclusive power to regulate commerce between

the states. We fail to appreciate this objection. A telegraph company cannot condemn any portion of a railroad's right of way necessary for the operation of its trains and cars. The possibility of poles falling upon the track is too remote a contingency to be considered. *Atlantic Coast Line Railroad Co. v. Postal Tel.-Cable Co.*, 120 Ga. 268, 48 S. E. 15, 1 Ann. Cas. 734. The railroad is now being operated with a telegraph line on both sides of its track, and yet no complaint is made that existing conditions interfere with the railroad company in the discharge of its duties as a carrier of passengers and goods.

[9] 9. A further contention advanced by the railroad company in bar of the proposed condemnation of its right of way is that the eminent domain laws of this state, as construed in *Atlantic Coast Line R. Co. v. Postal Tel.-Cable Co.*, 120 Ga. 268, 48 S. E. 15, 1 Ann. Cas. 734, authorizing condemnation of the right of way of a railroad company by a telegraph company, are unconstitutional, in that they allow the property of the railroad company to be taken without due process of law. In the case cited this court ruled "that the measure of damages in such cases is the value of the land actually taken, and the extent to which the use of the right of way by the railroad company is diminished by its use by the telegraph company; that the right of way of a railroad company has no general market value for other uses than that to which it is applied; and that peculiar advantages and benefits accruing to a telegraph company from its use of the railroad's right of way cannot be considered in the assessment of damages." The effect of this ruling is alleged to be that a railroad company is entitled to no more than nominal damages for the appropriation of a portion of its right of way under condemnation proceedings for the erection or maintenance of lines of poles and wires of a telegraph company, and hence it is not permitted to receive the full value of the property taken and the injury inflicted. The rule laid down for the measure of damages in 120 Ga. 268, 48 S. E. 15, 1 Ann. Cas. 734, is the correct rule, supported by reason and by authority. The measure of damages as there defined affords to the railroad company full compensation for the value of the land taken, and the statute providing for the condemnation of a railroad's right of way is not unconstitutional for the reason that the railroad company's property is taken without due process of law.

The case is reversed and remanded for another hearing.

Judgment reversed. All the Justices concur.

(138 Ga. 432)

LOUISVILLE & N. R. CO. v. WESTERN
• UNION TELEGRAPH CO.LOUISVILLE & N. R. CO. et al. v. SAME.
(Supreme Court of Georgia. July 11, 1912.)*(Syllabus by the Court.)*

These cases and that of Western & Atlantic R. Co. v. Western Union Telegraph Co., 75 S. E. 471, were argued together, and are controlled by the rulings made in the latter case, this day decided.

Error from Superior Court, Fulton County; Geo. L. Bell, Judge.

Suit by the Louisville & Nashville Railroad Company against the Western Union Telegraph Company, and by the Louisville & Nashville Railroad Company and others against the Western Union Telegraph Company, to restrain proceedings to condemn a right of way along complainants' line for telegraph facilities. From a decree refusing an injunction, complainants bring error. Reversed.

Tye, Peeples & Jordan, of Atlanta, Jos. B. & Bryan Cumming, of Augusta, and Ohas. R. Clark, Jr., of Atlanta, for plaintiffs in error. Dorsey, Brewster, Howell & Heyman, of Atlanta, and Wm. H. Barrett, of Augusta, for defendant in error.

EVANS, P. J. Judgment reversed. All the Justices concur.

(138 Ga. 360)

WILKINSON v. LEE.

(Supreme Court of Georgia. July 10, 1912.)

*(Syllabus by the Court.)*1. PARENT AND CHILD (§ 2*)—CUSTODY—
STATUTORY PROVISIONS.

A father is entitled, prima facie, to the control of his minor child.

(a) But parental power may be lost "by voluntary contract, releasing the right to a third person," or "by failure of the father to provide necessities for his child."

(b) A contract releasing the right of parental power over a child must be clear, definite, and certain.

[Ed. Note.—For other cases, see Parent and Child, Cent. Dig. §§ 4-32; Dec. Dig. § 2.*]

2. CONTRACTS (§ 10*)—PARENT AND CHILD (§ 2*)—CUSTODY AND CONTROL.

Where a father, a few days after the death of his wife, voluntarily told the great-grandfather of his child, three days old, that he might take and keep the child as long as he and his wife lived, or until the child was 21 years old, and the grandparent did take, keep, maintain, and protect it until it was abducted by the father, at three years of age, this was a voluntary contract on the part of the father releasing his right to the child to a third person, and it was sufficiently definite and certain to be enforced.

(a) In such a case the contract is not void as being unilateral.

(b) Nor is it void and unenforceable for want of consideration.

(c) The evidence is amply sufficient to support the finding in this case.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 21-40; Dec. Dig. § 10;* Parent and Child, Cent. Dig. §§ 4-32; Dec. Dig. § 2.*]

3. HABEAS CORPUS (§ 113*)—PROCEEDINGS—
CUSTODY OF CHILD.

In a habeas corpus proceeding by a great-grandfather to recover possession of a child alleged to have been given to him by its father, and who was alleged to have been abducted from him by the latter, it is not reversible error for the court, pendente lite, to award the temporary custody of the child to the grandparent from whom it had been so taken, upon his giving bond for its production in court, where it appears that the final judgment was right.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. §§ 102-115; Dec. Dig. § 113.*]

4. HABEAS CORPUS (§§ 6, 53, 113*)—PLEAD-
INGS—DISCRETION OF TRIAL COURT.

As strict technical pleadings are not required in habeas corpus proceedings as in some others.

(a) Judges of the superior court are vested with large discretion in habeas corpus cases, and their judgment in such cases on questions of law and fact will not be interfered with by this court, unless manifestly abused.

(b) The court below did not abuse its discretion in this case.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. §§ 6, 50, 50½, 102-115; Dec. Dig. §§ 6, 53, 113.*]

5. OTHER GROUNDS OF ERROR WITHOUT
MERIT.

The other grounds of error assigned are without merit.

Error from Superior Court, De Kalb County; L. S. Roan, Judge.

Habeas corpus proceedings by J. R. Lee against R. A. Wilkinson for custody of Theodore Lee Wilkinson, a minor child. From a judgment overruling certiorari to a judgment awarding the custody of the child to the plaintiff, defendant brings error. Affirmed.

Alonzo Field and Paul L. Lindsay, both of Atlanta, for plaintiff in error. Hooper Alexander and J. D. Kilpatrick, both of Atlanta, for defendant in error.

HILL, J. This is a habeas corpus proceeding commenced by J. R. Lee, the great-grandfather of Theodore Lee Wilkinson, a minor child three years old, to recover possession of the minor from his father, R. A. Wilkinson. The plaintiff in error, Wilkinson, married the granddaughter of the defendant in error. By this union the child in controversy was born. The mother died seven hours later. After the funeral of the mother, the question arose as to what should be done with the child. There is a conflict in the evidence, but the preponderance of it is to the effect that the father, the plaintiff in error, being consulted about the disposition of the child, said, in substance, to the great-grandfather, Lee, that he "couldn't just give the child away like a puppy," but that he might take the child and keep it as long as he and his wife lived, or until the child was 21 years old. The plaintiff in error insists that the child was left as a temporary loan, and that no definite contract was set forth. This old couple did take the child,

cared for it, and paid all of its expenses, of whatever kind, including medical bills, etc. The wife of Lee was not related to the child, she being a second wife; but the evidence discloses that she was kind and attentive, and loved and cared for the child as a mother. Some time after the death of his wife, Wilkinson moved from Henry county, where he had lived and worked around in various places, and in the neighborhood where the Lees lived, and sometimes for the Lees. He was frequently a visitor at the Lee home, and seemed fond of the child. He was permitted to see the child as often as he wished, and on one occasion was allowed to take the child away from the Lee home to a picnic. Leave to take the child to his home for a visit shortly thereafter was refused. At one time Wilkinson gave Lee \$2 for the child, which he loaned out for the latter, but would never accept any compensation for the rearing or expenses of the child. About a year before the bringing of the present action, Wilkinson, the father, married a second time, and his wife was received at the Lee home on the same terms as her husband had been. No claim to the child as a matter of right seems to have been asserted by Wilkinson; and Mrs. Lee testified that on one occasion she told Wilkinson she had heard of a threat on his part to take the child away, which he denied. He testified that he made no reply. No question is raised in the record as to the excellent character of either party to the case, or as to the ability of either to properly raise, maintain, and educate the child. On Sunday, the 28th day of August, 1910, the day previous to the suing out of the writ of habeas corpus, Wilkinson with his wife came on a visit to the Lee home, and were received as usual. His two brothers came in a buggy, but concealed themselves in the woods near the house, where they could not be seen by the Lees. The Lees and the Wilkinsons sat on the porch and ate watermelons. A little later Wilkinson walked out in the yard with the boy, then about three years old, placed him in a buggy from which the horse had never been unhitched. Suddenly and without any apparent warning he drove off with the boy at a rapid gait. His wife, seizing her hat, rushed out into the road and was taken in the buggy of the brothers and driven rapidly away. The two sons of Lee, as soon as a horse could be hitched to a buggy, gave pursuit and overtook Wilkinson about two miles from the Lee home. Being called on by them to stop, he informed the Lees he had a gun. The pursuit was there abandoned, and the present action begun the next day before the Hon. J. R. George, ordinary of De Kalb county, to recover possession of the child so taken. The trial was postponed several times at the instance of Wilkinson, in order to allow him to take the testimony of his mother, who was unable to attend court. A

continuance later, in order to take the testimony of other witnesses as to Wilkinson's good character, was denied; the counsel for Lee stating that the character of Wilkinson was admitted to be good. The court, after hearing all the testimony in the case and argument of counsel, awarded the custody of the child to the plaintiff, Lee. To this judgment Wilkinson applied for a writ of certiorari to the superior court. After the hearing upon the certiorari, the superior court declined to interfere with the judgment of the ordinary, and the present writ of error was sued out, excepting to the judgment of the superior court.

[1] 1. A father is entitled, prima facie, to the control of his minor child. Civil Code, § 3021. But parental power may be lost, among other ways, "by voluntary contract, releasing the right to a third person," "or by failure of the father to provide necessities for his child." Civil Code, § 3021; *Janes v. Cleghorn*, 54 Ga. 9; *Bently v. Terry*, 59 Ga. 555, 27 Am. Rep. 399; *Miller v. Wallace*, 76 Ga. 479, 2 Am. St. Rep. 48; *Townsend v. Warren*, 99 Ga. 105, 24 S. E. 960; *Lamar v. Harris*, 117 Ga. 993, 44 S. E. 866; *Eaves v. Fears*, 131 Ga. 820, 64 S. E. 269. The contract releasing the right to the parental power and custody of a child must be clear, definite, and certain. *Miller v. Wallace*, 76 Ga. 479 (c), 2 Am. St. Rep. 48. The case last cited relied on by the plaintiff in error makes a very different situation from the present. In that case Miller was as much in possession of the child as the grandparents. And the court says of Miller, at page 488 of 76 Ga. (2 Am. St. Rep. 48), that "he never at any time assented to claims set up by its grandmother, by act or word, to its exclusive custody and control, but always, when such issues were raised, denied her authority by courteous and deferential conduct and language." Here the reverse is true. The stepgreat-grandmother asserted the right in her husband to the child, and the parent said nothing, according to her testimony. Wilkinson, it is true, denies this; but the great weight of evidence was with the Lees, that neither "by act or word" did Wilkinson ever assert any right to the power over or custody of the child, after making the contract, until the Sunday on which he abducted the child. See, also, *Janes v. Cleghorn*, 54 Ga. 13.

[2] 2. The main question in this case is whether there was a contract between the father of the child and the great-grandfather, and whether the contract was sufficiently definite that by its terms the parental power over the child was lost by the father and acquired by the great-grandparent. On the question of the existence of a contract the evidence is conflicting, but the great preponderance of it is in favor of the defendant in error. His testimony, corroborated by a number of witnesses, was to the effect that

the father had told him, when the child was but a few days old, that he might take and keep it as long as he and his wife lived, or until the child was 21 years old. The evidence shows that the great-grandparent did take and keep the child from that time until it was three years old, before the father asserted any positive claim of right to it. We think the evidence and all the circumstances of the case were sufficient to authorize the ordinary to award the custody of the child to its great-grandparents. Nor do we think the superior court erred in refusing to interfere with the judgment of the court of ordinary. *Townsend v. Warren*, 99 Ga. 105, 24 S. E. 960; *Eaves v. Fears*, 131 Ga. 820, 64 S. E. 269. See *Moore v. Dozier*, 128 Ga. 93, 57 S. E. 110. The contract was sufficiently definite and certain to be enforced. According to the contention of the defendant in error, the great-grandparent was to have the child as long as he and his wife lived, or until the child was 21 years old. If this contract be proved (and the preponderance of the evidence is to that effect), then the father has lost his power over and control of the child as long as the great-grandparent and his wife live, or until the child becomes 21 years old. We do not see how the contract could be much more definite or specific.

Nor do we think there is any merit in the contention of the plaintiff in error that the contract is unilateral and without consideration. The parent gave up the possession of his child, with his right of power and control, and, on the other hand, the great-grandparent received the child and assumes all the responsibility of its maintenance, education and protection, and thus stands in loco parentis; and such a contract entered into by a parent and great-grandparent cannot be said to be unilateral and without consideration. The evidence in the case shows there was a sufficient consideration to support the contract. See *Eaves v. Fears*, supra.

[3] 3. One ground of exception taken is that the ordinary, pending the hearing of the main issue of the case, after several motions had been made to continue the case and the same were overruled, awarded the temporary custody of the minor child to the great-grandparent upon his giving bond for the production of the body of the child in court. It is insisted that this action on the part of the court was a prejudgment of the case, and disqualified the court from passing a final judgment awarding the child. We do not so consider. At the conclusion of the entire case, the ordinary awarded the custody of the child to its great-grandparent, and the judgment of the superior court was in effect the same; and on a careful review of the whole case, we cannot say that the temporary awarding of the custody of the child to the great-grandparent, pendente lite, is cause for a reversal where, upon a review

of the entire record, the final judgment of the court of ordinary and of the superior court is found to be right.

[4] 4. Error is assigned on the refusal of the court to sustain a demurrer to the traverse of the answer to the writ of certiorari, and a motion to strike exceptions to the same. It is sufficient to say that technical pleadings in a case like this are not required. The necessity for strict technical pleadings do not apply to habeas corpus proceedings as in some others. As Mr. Justice Lumpkin well said in the case of *Robertson v. Heath*, 132 Ga. 313, 64 S. E. 74: "Still the rule is not arbitrary or inflexible in certain hearings. On the subject of writs of habeas corpus to test the legality of the detention of one deprived of his liberty, the Penal Code [1895] § 1222, provides as follows: 'If the return denies any of the material facts stated in the petition, or alleges others upon which issue is taken, the judge hearing the return may, in a summary manner, hear testimony as to the issue, and to that end may compel the attendance of witnesses, the production of papers, or may adjourn the examination of the question, or exercise any other power of a court which the principles of justice may require.' The writ is also used as a means of determining the custody of minor children. The presiding judge often has to use great discretion in judging of the status of parties and what is for the welfare of the child. He needs all the light he can obtain for the just and faithful discharge of his duty. It may be that a witness is beyond seas, or inaccessible, or for other reason cannot be put upon the stand. The writ is a speedy writ. The proceeding is summary in its nature. It is a judicial proceeding, and to be conducted in an orderly manner as such. But it is not exactly a lawsuit in the ordinary sense of the term. *Simmons v. Georgia Iron & Coal Co.*, 117 Ga. 309, 43 S. E. 780, 61 L. R. A. 739. To delay its hearing until a witness absent from the state or the country can return, or until interrogatories can be prepared, notice given, cross-questions propounded in writing, and commission forwarded to a distant state or country and there formally executed, might require so much time that the hearing under the writ would be unreasonably delayed. It may be necessary to admit an affidavit, or, in default of it, to exclude much needed light altogether. Or there may be other circumstances rendering the use of affidavits proper." In habeas corpus cases the judge of the superior court is vested with large discretion, and his judgment in such cases will not be interfered with by this court, unless it is manifestly abused. *Bently v. Terry*, 59 Ga. 555 (4), 27 Am. Rep. 399.

[5] 5. The other grounds of error assigned are without merit.

Judgment affirmed. All the Justices concur.

(133 Ga. 239)

PALMER BRICK CO. v. WOODWARD et al.
WOODWARD et al. v. PALMER BRICK CO.
 (Supreme Court of Georgia. June 13, 1912.)

*(Syllabus by the Court.)***1. CONTRACTS (§ 10*)—VALIDITY—MUTUALITY.**

A contract is not unilateral and unenforceable which contains mutual obligations equally binding on both parties to the contract.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 21-40; Dec. Dig. § 10.*]

2. MINES AND MINERALS (§ 56*)—LEASES IN GENERAL—REQUISITES OF CONTRACT.

A contract which grants to one of the parties thereto the use and occupation of premises for a definite term, with the right to take brick clay from certain land of the other party and manufacture the same into merchantable brick, for a valuable consideration moving from the other party thereto during a specified term of years, is a contract of lease.

[Ed. Note.—For other cases, see *Mines and Minerals*, Cent. Dig. § 166; Dec. Dig. § 56.*]

3. MINES AND MINERALS (§§ 62, 70*)—LEASE—CONSTRUCTION.

Where in such a contract it is provided that the lessee, "the said brick company, [is] to have the exclusive right to take from said land, or any portion thereof, and use, in the manufacture of brick, such amount of dirt and clay as they may see proper, for the said period of 20 years," and the said brick company shall pay "a royalty of 12½ cents per thousand for all merchantable brick manufactured out of the clay taken from said land herein leased, payments to be made as follows: Two hundred and fifty dollars cash, and \$100 on the 1st day of each month during the continuance of this lease; but, on the 1st day of January, in each year, an accounting shall be had between the said parties, when the said * * * trustee, as aforesaid, shall account for any overpayment made, and the * * * brick company shall account for any deficit on the said basis of 12½ cents per thousand for said brick, as aforesaid." *Held*:

(a) The lessee is to have the exclusive right to take from the land, or any portion thereof, and use in the manufacture of brick, all clay that it chooses to take therefrom, and to pay ultimately for the clay so used at the rate of 12½ cents per 1,000 of merchantable brick manufactured therefrom.

(b) The payment of the \$100 per month is to continue regularly as a minimum alternative sum, subject to be reduced if, at the end of each year, the company shows on an accounting that, after using reasonable diligence in operating the clay mine and brick plant under ordinary conditions, there was not sufficient clay mined to make the sum of \$1,200 at 12½ cents per 1,000 merchantable brick, and in that event the lessee could require the lessor to refund the overpayment.

(c) If the lessee, after operating the mine and brick plant as stated in note (b), took clay from the mine in quantities sufficient to make a sum in excess of \$1,200 during the year previous to 1st day of January in each year, pending the lease, as to which the accounting was to be had, the lessor had the right to demand and receive from the lessee the amount of such excess on the basis of 12½ cents per 1,000 merchantable brick manufactured out of the clay so taken.

(d) By necessary implication the lessee is bound to exercise reasonable diligence in taking clay from the mine and operating the brick plant, or else is liable to the lessor in the min-

imum alternative sum of \$100 fixed in the contract.

(e) If the lessee failed to exercise reasonable diligence in mining the clay and operating its brick plant in the manufacture therefrom of merchantable brick, or declined altogether to mine the clay and operate its plant in the manufacture of brick, the lessee would lose its right of having an accounting on the 1st day of January of each year, and would be liable, absolutely and unconditionally, to the lessor for the \$100 per month agreed to be paid, and the latter could recover of the former such payments, or deferred payments, with interest.

[Ed. Note.—For other cases, see *Mines and Minerals*, Cent. Dig. §§ 173, 175-180, 192-197; Dec. Dig. §§ 62, 70.*]

4. FINDINGS OF AUDITOR—SUFFICIENCY OF EVIDENCE.

There being ample evidence to support the findings of the auditor on the questions of fact, and his findings of law being in accord with the rulings herein made, the judgment of the court overruling the exceptions of law and fact to the auditor's report was not erroneous.

Fish, C. J., and Atkinson, J., dissenting.

Error from Superior Court, Fulton County; Geo. L. Bell, Judge.

Action by A. P. Woodward, trustee, and others, against the Palmer Brick Company. Judgment for plaintiffs. Defendant excepts, and plaintiffs file a cross-bill of exceptions. Judgment affirmed, and cross-bill of exceptions dismissed.

See, also, 135 Ga. 450, 69 S. E. 827.

The petition of the plaintiffs against the Palmer Brick Company showed substantially the following facts:

In 1876 C. Howell, father of Catherine S. Woodward, conveyed to A. P. Woodward, the husband of Catherine S. Woodward, as trustee for his wife and children, 300 acres of land, more or less, in Fulton county, situated on and near the Chattahoochee river, a large portion of which was bottom land, valuable for farming purposes, and also containing large deposits of clay suitable for making brick. In 1896 negotiations were entered into between A. P. Woodward, trustee, and the Collins Brick Company, resulting in a lease of the said lands by said trustee to said brick company for a term of 20 years, for the purpose of establishing thereon a brick manufacturing plant and using the clay for the manufacture of brick. Before the lease was executed, a petition was filed by counsel for the brick company (who was paid by the trustee) in the superior court of Fulton county, praying an order of the court authorizing the trustee to make the lease. Service was perfected on the beneficiaries, and a guardian ad litem was appointed for the minors. The order of the court authorizing the lease was granted on the 17th day of September, 1896. In accordance with the authority granted by the order, the contract of lease (prepared by the same counsel) was duly executed on the 25th day of September, 1896, the material portions of which are as follows:

"This memorandum of agreement, made and entered into this 25th day of September, 1896, between A. P. Woodward, as trustee for his wife, Catherine S. Woodward, and her children, of the one part, and Collins Brick Company, a corporation, of said county, of the second part, witnesseth as follows: The said A. P. Woodward, trustee as aforesaid, by this instrument hereby leases to the said Collins Brick Company, for the term of 20 years from this date, the certain tracts of land herein described, to wit: [Here follows detailed description of tracts of land amounting to 200 acres, more or less.] The said Collins Brick Company to have the exclusive right to take from said land, or any portion thereof, and use in the manufacture of brick, such amount of dirt and clay as they may see proper, for the said period of 20 years. The said Collins Brick Company also to have the use of such part or parts of said land as may be necessary for the purpose of establishing a brickyard thereon, and building such sheds or houses, tramways, and roads, and digging such wells, ditches, and waterways, as may be necessary for the carrying on of said business of making brick, in such quantities as to them may seem proper, and for the carrying of such live stock and implements, and providing quarters for employes as may be necessary in the conduct of said business. The said Collins Brick Company shall have the further right, by themselves, or through the agency of others, to build, equip, and operate, for the carrying on of said brick manufacturing business, a railroad, of such gauge as may to them seem proper, from such point on the line of the Western & Atlantic Railroad as may be most accessible and convenient, to and across the property herein leased, or such portion of the same as may be desirable or needful, with full right of way for the same, and the privilege of changing the location of the tracks, and having such side tracks and terminals, as the exigencies of the work may seem to demand. And the said A. P. Woodward, trustee as aforesaid, further covenants and agrees, without further change [charge?] than the consideration hereinafter expressed, to procure for the said Collins Brick Company, from Nathan Lyons, trustee, etc., a right of way across his property, lying between the property herein leased and the right of way of the Western & Atlantic Railroad, for the building, equipping, and operating of the railroad hereinabove provided for, procuring from him the same right, as to the point of beginning, etc., as is provided hereinabove on his own land. It is further agreed and understood that, for the rights and privileges above granted, the said Collins Brick Company shall pay to the said A. P. Woodward, trustee as aforesaid, a royalty of 12½ cents per 1,000 for all merchantable brick manufactured out of the clay taken from said land herein leased,

payments to be made as follows, to wit: Two hundred and fifty dollars cash, and \$100 on the 1st day of each month during the continuance of this lease; but on the 1st day of January in each year an accounting shall be had between the said parties, when the said A. P. Woodward, trustee as aforesaid, shall account for any overpayment made, and the said Collins Brick Company shall account for any deficit on the said basis of 12½ cents per 1,000 for said brick as aforesaid. It is further understood that the said Collins Brick Company may take said clay from any one or more parts of said land, at the same or different times, and may have and use the right of way for such wagon roads and other ways as may be necessary for the conduct of said business. This lease is not to restrict the right of the said A. P. Woodward, trustee as aforesaid, to the use of the farming lands of said property; but the right of the said Collins Brick Company to ingress and egress is not to be interfered with by the cultivation thereof."

The brick company took possession of the leased land, and began to mine and remove the clay and to manufacture it into brick. In 1898 the name of the brick company was changed to Palmer Brick Company, and in July, 1899, W. D. Palmer sold his stock in the Palmer Brick Company and ceased to be an officer or stockholder therein. On July 5, 1899, the Palmer Brick Company made a contract with one Lyons, whereby it leased from him certain land adjoining the Woodward land, for the purpose of mining clay therefrom. The clay taken from the Lyons land was moved to the railroad over the Woodward land. Until the lease of the Lyons land, the monthly payment of the \$100 was regular, but subsequently became irregular, and the quantity of clay mined on the Woodward land became less, until the brick company ceased to mine clay and manufacture brick from the Woodward land, or to pay rent therefor, but continued to occupy the Woodward land for the purposes stated in the lease contract, other than mining the clay and manufacturing the same into brick, and, while retaining possession of the land, paid no rent after 1904, nor until the filing of this suit on July 24, 1909. Prior to 1900 rent was paid as it became due, but from that time until 1904 the payments were irregular and not in full.

The case was referred to an auditor, C. L. Pettigrew, Esq., who, after hearing the case, made his findings both on questions of law and fact, which were (generally) in favor of the plaintiffs. To the auditor's report the defendant filed exceptions to findings of law and fact, on various grounds, which were overruled by the court, and the report was confirmed and approved, and a decree entered in favor of the plaintiffs for the amount the auditor found to be due by the defendant to the plaintiffs. To this judgment and de-

cree the defendant excepted, and the plaintiffs took a cross-bill of exceptions to certain rulings.

Mark Bolding and Madison Bell, both of Atlanta, for plaintiff in error. Dorsey, Brewster, Howell & Heyman and H. C. Erwin, all of Atlanta, for defendants in error.

HILL, J. (after stating the facts as above). The vital issue in this case is the proper construction to be given to the contract which is the foundation of the present suit, and which is set out in the facts above recited. (1) Is it a unilateral contract, as contended, and not enforceable? (2) If it is not unilateral, but mutual, does it create a lease? (3) If it creates a lease, what is the meaning of it, and what are the rights of the parties thereunder? The auditor to whom the case was referred in the court below made a remarkably clear report, finding for the plaintiffs on questions of law and fact, to which the defendant filed exceptions. Some of these exceptions are substantially as follows: That this contract, while called a lease, was in reality a sale of clay or a license to mine the clay upon the best terms obtainable, without any fixed rental by the month or year; that there was no right of user in anything granted, and no contract to pay rent; that the sale of the clay was the real consideration of the contract, and all else was merely incidental to it; that the clay that was sold was the clay actually mined, and what was not mined was not sold, but remained the property of the estate; that no certain amount was to be mined, but what was mined was sold at the rate of 12½ cents per 1,000 brick manufactured therefrom, or \$1 per car of clay suitable for making brick. It is also insisted that the contract is unilateral and unenforceable; that no definite amount of clay was sold; that, in order to sustain the contract, the plaintiffs must have agreed to sell and the defendant to take a certain and definite amount of clay. All of these contentions were argued by counsel for the plaintiff in error with much ingenuity and skill; but after giving the case, and all the questions involved, much consideration and research, we cannot bring ourselves to agree with the conclusions reached by the able counsel for the plaintiffs in error.

[1] In construing a contract, the intention of the parties will be ascertained, if sufficient words be used to arrive at the intention; and if the intention be clear, and contravenes no rule of law, it will be enforced. Civil Code, § 4266; *Fletcher v. Young*, 69 Ga. 592; *Maxwell v. Hopple*, 70 Ga. 160 (2). That construction should be given to a contract which will uphold and make it valid and legal, rather than a construction which will make it otherwise. Civil Code, § 4268. Unless there are mutual promises in the contract which will bind both parties, it may

be conceded that the mere promise of one of the parties to do or not to do a particular thing, without binding both, would make the contract unilateral and unenforceable. *Harrison v. Wilson Lumber Co.*, 119 Ga. 6 (3), 45 S. E. 730, and cases cited: 1 Page on Contracts, § 17; *Swindell v. First Nat. Bank*, 121 Ga. 714, 49 S. E. 673; *Singer v. Grand Rapids Match Co.*, 117 Ga. 86, 43 S. E. 755. But where there is a mutuality of obligations and promises, the contract is enforceable. The issue is squarely raised in this case. There is no middle ground that can be taken in the construction of this contract. The plaintiff in error insists that there is nothing in the contract which imposes on it the obligation to take clay from the premises with which to make brick, nor to pay any sum to the defendant in error unless it does so take and use clay for the purpose of manufacturing brick. Under this contract, the plaintiff in error is bound thereby, either to take and use the clay located on the premises, as provided in the contract, or, failing in that, to pay the alternative minimum sum agreed to be paid monthly, or else it is not so bound. If it is so bound, and the lessor is also bound by his covenants, then the contract cannot be unilateral, but is a bilateral contract, binding on both the plaintiff and the defendant alike. Applying the familiar rules of construction above stated, we are clear that this contract is a mutual one, equally binding upon both parties. The contract itself, the conduct of the parties after the contract was first executed, and all the attendant circumstances, leave little room for doubt that the intention of the parties was that both should be bound in the manner herein contended for. Both were bound in terms of the contract. The plaintiff gave up possession of his land and the right to cultivate the portions used for mining purposes, or to mine the clay, or lease it to others for either purpose. He was getting, prior to the contract, an income of \$500 annually from the land for farming purposes, and all of these things he relinquished to the defendant for the purposes stated in the contract. He is still out of possession, and of the right to use the land for mining clay. On the other hand, the defendant is in possession, and those under whom it holds went into possession, of the land containing the brick clay, and built thereon houses, wells, ditches, railroad, and other improvements necessary to a well-equipped brick plant. For several years it paid, and the plaintiffs received, the minimum alternative sum fixed in the contract, without protest. It is still in possession of the premises, without any offer of yielding up possession, or of paying the amount stipulated in the contract for the use of the same. We are clearly of the opinion that the contract is mutual, and binds both parties thereto, and that the parties themselves so regarded it until a comparatively recent date.

[2] 2. Having held that the contract is not a unilateral, but a mutual, or bilateral, one, we pass to the next step in this inquiry, namely: Does the contract create a lease? The Civil Code, § 3690, declares: "When one grants to another an estate for years out of his own estate, reversion to himself, it is usually termed a lease. It may be confined to a particular interest in lands, such as mining or agricultural, in which event no other interest passes. If no object of the lease is stated, the mining interest will not pass unless the circumstances justify an implication of such an intention in the parties." In *Jones on Landlord & Tenant*, § 41, it is said: "Where the acts of digging, and so forth, are of such a character that they necessitate an actual occupation of the licensor's land, the license must be in writing to be valid, as the transaction is really a lease of the premises to that extent. Thus the right to mine certain land must be created by a lease. The case would be no different than if the piece of ground had been demised for cultivation or for any other purpose. A lease may not only confer upon the lessee the right to occupy and cultivate and to remove the products of cultivation, but it may confer on him the power to occupy and remove a portion of that which constitutes the land itself. Familiar and common examples of such leases are those authorizing the lessee to quarry and remove stone, to open mines and remove minerals, or to sink wells for petroleum and natural gas. The power to execute leases for such purposes, and the fact that the instrument by which such interest in land is granted may be in all essential particulars a lease, will not be questioned." And in cases like the present, what constitutes a lease is stated in 27 Cyc. 690, as follows: "It is an established rule of law that whatsoever words are sufficient to explain the intent of the parties that one should divest himself of the property and the other come into it for a definite time, whether they are in the form of a license, covenant, or agreement, will, in the construction of law, amount to a lease as effectually as if the most proper and pertinent words were made use of for that purpose." See, also, note to *Barnsdall v. Bradford Gas Co.*, 225 Pa. 338, 74 Atl. 207, 26 L. R. A. (N. S.) 614, 615. And see *Bouvier's Law Dict.*, title "Lease." By the very terms of the contract itself the estate granted is termed a lease. It provides that "the said A. P. Woodward, trustee as aforesaid, hereby leases to the said Collins Brick Company, for the term of 20 years from this date," the lands on which is located the brick clay. The contract then defines the rights of the lessee and of the lessor, binding both to the performance of their obligations.

But it is insisted that the lessee is not bound to use any clay from the leased premises, nor to pay any rental when it uses no

clay. This insistence is founded on two expressions in the lease contract, to wit: "The said Brick Company to take from said land, or any portion thereof, and use in the manufacture of brick, such amount of dirt and clay as they see proper for said period of 20 years," and "The said Brick Company shall pay a royalty of 12½ cents per 1,000 for all merchantable brick manufactured out of the clay taken from said land herein leased." The quoted language is only a part of the contract. The contract is to be construed as a whole, and not from one or two isolated excerpts from it. If it be conceded that the Brick Company is not bound to use any clay, nor to pay anything whether it has used any clay or not, then the contention of the plaintiff in error might be correct. But to this contention we cannot agree. We think the lessee was bound to exercise reasonable diligence in using clay, and in supplying its plant with a sufficient amount of clay to meet its reasonable requirements under ordinarily favorable conditions. Such was evidently the intention of the original parties to the contract, and they provided against just such a contingency as that insisted upon here. There was to be in any event, whether the lessee took clay or did not take clay from the mine, a payment of \$100 a month, not for the term the lessees actually did take clay and manufacture the same into brick, but monthly for the full term of 20 years from the date of the lease. This view is abundantly sustained by the authorities cited to that effect later in this opinion. The parties to the contract evidently estimated that the amount of clay mined would make brick and yield an income to the lessor of at least \$100 per month; that the capacity of the plant and mine would yield at least that much on a basis of 12½ cents per 1,000 brick manufactured from the clay taken from the leased premises, or \$1 per car of clay used for making brick, and the contract provides that that amount used shall be paid by the lessee to the lessor each month during the continuation of the lease, and at the end of each 12 months there shall be an accounting between the two. In the accounting, if the lessee shows that, by the exercise of reasonable diligence in the use of his brick plant and in mining the clay, it makes brick in quantities less than sufficient to yield the lessor \$1,200 annually on the basis of 12½ cents on every 1,000 brick made, or on a basis of \$1 for every car load of clay used, then the lessee is to have a reduction accordingly; but if the clay used on the above basis yields more than \$1,200 annually, according to the accounting, then the lessor is to have the excess above that amount, calculated on that basis.

But surely it was never in the contemplation of the parties to so important a contract as this that the lessee could use the

leased premises, with houses, wells, railroad, and all the other privileges granted, and arbitrarily refuse to mine the clay for the purpose of making brick, and thus defeat the plaintiffs in their right to collect any of the rent at all. This idea is negated by the terms of the contract itself, which provides that the \$100 shall be paid each month during the continuance of the lease of 20 years. If the lessee could keep possession of the leased premises for the period of 20 years with its entire plant thereon, lease all adjoining land containing brick clay, and create a monopoly of the brick business, and thus prevent the lessor from either using his own clay or getting pay for his leased premises, it would impute to the original parties to the contract an inconceivable amount of stupidity. It would be unjust and unreasonable to place such a construction upon the contract. It would contravene the very nature and spirit of it, as manifest by the instrument itself, and by the conduct of the parties for several years after the execution of the lease. The \$100 to be paid monthly was paid regularly and promptly from the beginning of the lease until the year 1904, and no question was raised, so far as the record discloses, of the construction of the contract now insisted upon. It cannot be that under the contract the lessee was to be allowed to hold this property for any considerable length of time without making any effort to mine the clay or to pay the lessor his rent. Such a construction would deprive the lessor of his rent, the privilege of mining the clay himself, or from leasing it to others for that or any other purpose. The law does not sanction such an absurdity, or allow such an injustice to be done. When premises are leased for a certain purpose, and the amount of rent is contingent in part upon the diligence which the lessee exercises in the operation of the leased premises, the law implies such reasonable diligence. In 2 Snyder on Mines (1902) § 1284, it is said: "The lease of a mine, in the absence of covenants requiring a certain amount of work, at least implies that the lessee will work the same with reasonable diligence. Thus, where a right to mine coal or other minerals is granted in consideration of the reservation of a certain portion of the product to the grantor, the law implies a covenant on the part of the grantee to work the mine in a proper manner and with reasonable diligence, so that the lessor or grantor will derive the income which both parties had in contemplation when the contract was entered into." In the case of Hiller v. Ray, 59 Fla. 285, 52 South. 623, 20 Ann. Cas. 1162, it was held: "Where the lessors of land for the specific purpose of taking therefrom phosphate rock of a specified character and volume do not covenant that the rock actually exists in the land, and the lessees do not covenant actually to find the rock in the land,

but the contract contemplates the existence of the rock and a search for it by the lessees, there is an implied obligation on the lessees to make due and reasonable effort to find the rock in the land." And in a note to the above case in 20 Ann. Cas. at page 1172, citing a number of authorities, it is said: "Thus it has been held that where a lease provides for a definite rental per well for each gas well drilled, and the lessee fails to perform his implied covenant to prosecute the work of drilling wells with reasonable diligence, an action at law for damages is an adequate remedy, and an action in equity for the cancellation of the lease will not lie." See, also, Venedocia Oil & Gas Co. v. Robinson, 71 Ohio St. 302, 73 N. E. 222, 104 Am. St. Rep. 773, 2 Ann. Cas. 444.

[3] 8. From what has been said, we conclude that the contract under review created a lease of the land described therein for mining purposes for a term of 20 years. The lessee was to have the exclusive right to take from the land, or any portion thereof, and use in the manufacture of brick, all clay that it chooses to take therefrom, and to pay ultimately for the clay so used at the rate of 12½ cents per 1,000 of merchantable brick manufactured therefrom, or at the rate of \$1 per car load of clay so used. The Brick Company was to pay the lessor \$250 in cash and \$100 on the 1st day of each month during the entire continuance of the lease. The payment of the \$100 per month was to continue regularly as a minimum alternative sum, subject to be reduced if, at the end of each year, the company shows on accounting that, after using reasonable diligence in operating the clay mine and brick plant, under ordinary conditions, there was not sufficient clay mined at 12½ cents per 1,000 merchantable brick, or at \$1 per car load of clay taken and used, to make the sum of \$1,200, and, in that event, the lessee could require the lessor to refund the overpayment. If the lessee, the Brick Company, after operating the mine and brick plant as above, took clay in quantities sufficient to make a sum in excess of \$1,200 during the year previous to the 1st day of January in each year, on which the accounting was to be had, the lessor had a right to demand and receive from the lessee the amount of such excess on the basis of 12½ cents per 1,000 of merchantable brick manufactured out of the clay so taken, or at \$1 per car load of clay so taken and used. We hold, further, that if the Brick Company failed to exercise reasonable diligence in mining the clay and operating its brick plant by the use of such clay in the manufacture of merchantable brick, or declined altogether to mine the clay and operate its brick plant therewith in the manufacture of brick, the lessee would lose its right of having an accounting on the first day of each year, and would be liable to the lessor for the \$100 per

month agreed to be paid, absolutely and unconditionally, and the latter could recover of the former such payments, or deferred payments, with interest.

[4] 4. There being ample evidence to support the findings of the auditor on the questions of fact, and his rulings of law being in accord with this opinion, the trial judge did not err in overruling the exceptions filed to the report of the auditor.

Judgment affirmed. Cross-bill of exceptions dismissed.

FISH, C. J., and ATKINSON, J., dissent. LUMPKIN, J., disqualified. The other Justices concur.

FISH, C. J., and ATKINSON, J. (dissenting). It will be noted, from the terms of the contract, that the Brick Company did not lease the land for all purposes, as the owner reserved the right to the use of the farming lands, provided such use should not interfere with the Brick Company's right of ingress and egress. The Brick Company, under the contract, procured the exclusive right to take from the land "such amount of dirt and clay as they may see proper" for a given time, to be used in the manufacture of brick, as well as the right to use such parts of the land as might be necessary for establishing a brick-yard thereon, and building such houses, etc., as might be necessary for the carrying on of the business of making brick "in such quantities as to them may seem proper"; the Brick Company agreeing to pay a given price per 1,000 "for all merchantable brick manufactured out of the clay taken from said land." The company was to pay down a given amount in cash and \$100 on the 1st day of each month for a specified time; but on the 1st day of January in each year thereafter an accounting should be had between the parties, when the owner of the land should account for any overpayments made, and the Brick Company should account for any deficit, on the basis of the price stipulated as royalty. In view of these express stipulations in the contract, there was no implied obligation on the part of the Brick Company to use reasonable diligence in operating the clay mine and brick plant under ordinary conditions. The cardinal rule of construction of contracts is to ascertain the intention of the parties. If that intention be clear, and it contravenes no rule of law, and sufficient words be used to arrive at the intention, it shall be enforced, irrespective of all technical or arbitrary rules of construction. Civil Code, § 4266. Of course, the whole contract should be considered in arriving at the intention of the parties, and all parts of the instrument should be construed with reference to each other, but no part should be discarded or ignored if such a course can be avoided; and in the absence of any fraud, accident, or mistake, the instrument, if free

from ambiguity, must be taken as written—in other words, in such a case the parties must stand or fall by the terms of the writing.

In the majority opinion, as it seems to us, no force whatever is given to the terms of the contract which clearly indicate that the Brick Company should have the option to use such amount of dirt and clay from the land as to the company might seem proper. While it is true that the company obligated itself to pay \$100 on the 1st day of each month, an accounting was to be had on the 1st day of January of each year for the purpose of ascertaining whether or not the company had paid for more or for less clay than it had used during the preceding 12 months. It had paid for more than it had used, the owner of the land was to repay the company the overplus; and if it had paid for less than had been used, the company was to pay the deficit. Doubtless the very reason for having such an accounting was that the company had the option, under the express terms of the contract, of determining how much clay should be taken and used from the land. The quotation from 2 Snyder on Mines, § 1284, used in the opinion of the majority of the court, is not, in our opinion, applicable to the contract involved in the case at bar. The gist of that quotation is: "The lease of a mine, in the absence of covenants requiring a certain amount of work, at least implies that the lessee will work the same with reasonable diligence." While it is true that the contract in the present case does not contain a covenant requiring a certain amount of work to be done in mining the clay, there are, as we have seen, express provisions to the effect that the Brick Company should have the option to remove from the land such amount of clay as it should see proper, and to pay for the amount so removed a given price. In support of the text from Snyder on Mines, quoted in the majority opinion, are cited the following cases: Koch's Appeal, 98 Pa. 434; Sharp v. Wright, 28 Beavan, 150; Brainerd v. Arnold, 27 Conn. 617; Watson v. O'Hern, 6 Watts (Pa.) 362. In none of the contracts construed in these cases, nor in any other case cited in the majority opinion, was there anything indicating that the person who was given the right under the contract to mine the coal or other mineral had the option or discretion of determining the quantity of the mineral that he should take from the land. In the case in hand, as we have already indicated, the contract clearly expresses all of the obligations undertaken by the Brick Company, and there is no room for imposing more upon it by implication. The intention expressed in the instrument must be given its legal effect.

If, however, the majority of the court are right in deciding that, under the terms of the contract, the Brick Company was under an implied obligation to use reasonable diligence in operating the clay mine and brick

plant under ordinary conditions during the entire lease, then we are of opinion that the measure of damages which the owner of the land would be entitled to recover of the Brick Company for failure to mine the clay and operate its brick plant would not be \$100 per month, with interest thereon. The exclusive right given to the Brick Company under the contract in this case to take clay from the land for the purpose of making brick does not stand upon the same footing as, say, a lease by the owner of his gristmill to another for a given term; the rental to be paid being a given proportion of the tolls. In such a case, if the lessee should immediately shut down the mill and refuse to operate it at all during the term, the lessor at the end of the lease would merely get back his mill without receiving any rental, and would therefore have a right of action for the value of the full amount of what would have been his proportion of the tolls, had the mill been operated as the parties contemplated. Where, however, a right to mine minerals is granted in consideration of the reservation of a certain portion of the product for the lessor, and the lessee wholly fails to operate the mine, the lessor, at the end of the term, would still have the minerals which the lessee had failed to mine, and therefore the lessor would not be entitled to get back all of his ore and also recover from the lessee for the portion of it which he would have received, had the lessee mined it all. In such a case, as to the proportion of the mineral which the lessor would have received, had it been mined as contemplated, the damages which he would be entitled to recover would be the difference between its stipulated price and its value in the mine. *Lyon v. Miller*, 24 Pa. 392.

(11 Ga. App. 391)

SHAW v. CITY OF ATLANTA (two cases).
(Nos. 4,200, 4,201.)

(Court of Appeals of Georgia. July 10, 1912.)

(Syllabus by the Court.)

1. COMMERCE (§ 60*)—SUBJECTS OF REGULATION—TRAFFIC IN INTOXICATING LIQUORS.

Section 1537 of the Code of Atlanta, which prohibits the keeping for unlawful sale of intoxicating liquors in any of the places described in the section is not invalid as being an attempt to regulate or interfere with interstate commerce. The section has no application to the keeping of intoxicating liquors by a carrier while engaged in interstate commerce.

[Ed. Note.—For other cases, see *Commerce*, Cent. Dig. §§ 91-95; Dec. Dig. § 60.*]

2. COMMERCE (§ 41*)—INTERSTATE SHIPMENTS—INTOXICATING LIQUORS.

A citizen of Atlanta, who has ordered intoxicating liquors to be shipped to that city in interstate commerce, cannot be convicted of a violation of section 1537 of the Code of Atlanta until after the contract of carriage is completed by delivery to the person for whom

the liquors were intended, or some agent authorized by him to receive the same.

[Ed. Note.—For other cases, see *Commerce*, Cent. Dig. §§ 30, 31; Dec. Dig. § 41.*]

3. COMMERCE (§ 41*)—INTERSTATE SHIPMENTS—INTOXICATING LIQUORS.

Where intoxicating liquors are brought to Atlanta in interstate commerce, for delivery to a resident of that city, who pays the freight and surrenders the bills of lading, and receives from the carrier an order directed to its agent for the delivery of the liquors, the contract of carriage is ended, and the carrier thereafter holds the goods as the agent of the person entitled to receive them; and if such person intends to use the liquors for the purpose of unlawful sale, he can be convicted of a violation of section 1537 of the Code of Atlanta, even though he has not taken the liquors from the custody of the carrier.

[Ed. Note.—For other cases, see *Commerce*, Cent. Dig. §§ 30, 31; Dec. Dig. § 41.*]

4. INTOXICATING LIQUORS (§ 140*)—OFFENSES—INTERSTATE SHIPMENTS.

As a general rule, where an owner of goods delivers them to a common carrier in one state, consigned to his own order in another state, with direction to the carrier to notify a third person in the latter state, delivery to the carrier is delivery to the consignee. In such a case the title remains in the shipper, and the goods are subject to his direction and control until delivery is consummated in the state of destination.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. § 150; Dec. Dig. § 140.*]

5. INTOXICATING LIQUORS (§ 236*)—CRIMINAL PROSECUTIONS—SUFFICIENCY OF EVIDENCE.

Where a bill of lading issued by a common carrier calls for the delivery of a certain package said to contain whisky, and a package is found in the possession of the carrier, corresponding in number and weight to the description in the bill of lading, and having thereon marks indicating that it contains intoxicating liquor, a prima facie case is made out that the package in fact contains such liquor.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. §§ 300-322; Dec. Dig. § 236.*]

Error from Superior Court, Fulton County; Geo. L. Bell, Judge.

Dan Shaw was convicted of violations of an ordinance of the City of Atlanta, and brings error. Affirmed in one case, and reversed in the other.

The plaintiff in error was convicted in two cases of violating the provisions of an ordinance of the city of Atlanta, a copy of which is as follows:

"Any person, firm, or corporation who shall keep for unlawful sale in any store, house, room, office, cellar, stand, booth, stall, or other place, or shall have contained for unlawful sale in any barrel, keg, can, demi-john, or other package, any spirituous, fermented, or malt liquors for such sale, shall on conviction be punished by fine not exceeding five hundred dollars, or imprisonment not exceeding thirty days, or labor on the public works for not exceeding thirty days, or, in the discretion of said recorder, such offender may be punished by a fine not exceeding five hundred dollars and imprisonment not exceeding thirty days, or by fine

not exceeding five hundred dollars and labor on the public works for not exceeding thirty days."

Intoxicating liquors were shipped by freight from Chattanooga, Tenn., from R. M. Rose, consigned to his order, with a direction in the bill of lading to notify a named person. In some way, not disclosed by the record, Shaw came into possession of the bills of lading. On the back of each bill was an order, signed by the consignor, to deliver the goods to —; the name of the person entitled to receive them not being filled in by the consignor.

In case No. 4,201 it appears that Shaw was in possession of a large number of these bills of lading, which described the goods shipped as whisky, consigned to R. M. Rose, the shipper, "order notify Fred Walker." It does not appear whether Walker was a real or a fictitious person, nor does it appear how Shaw came into possession of the bills of lading. He employed one Coggins to receive the goods for him. Coggins signed his own name in the blank indorsement on the reverse side of each bill of lading, and presented them to the agent of the carrier and demanded the goods. This agent accepted the bills of lading and delivered to Coggins orders upon another agent of the carrier for the goods; these orders being referred to in the record as "expense bills." Coggins delivered the expense bills to Shaw. It appears that in the carrier's warehouse, and in a place called the "whisky pen," there were boxes and packages corresponding to those described in the bills of lading and expense bills; each of the packages having marks on the outside indicating that it contained intoxicating liquors. None of the packages ever came into the actual manual possession of either Shaw or Coggins, and none of them were ever broken to ascertain if they in fact contained intoxicating liquors.

In case No. 4,200 Shaw was arrested while he had upon his person 17 bills of lading such as are described above, except that the order was to "notify Salesman's Club." The testimony of the police officer indicates that there is probably no such organization in Atlanta as the "Salesman's Club." If there is, Shaw was not shown to have any connection with it. While on the way to the police station in a buggy, Shaw surreptitiously dropped the bills of lading to the ground. The police officer recovered them, signed his own name in the blank indorsement on the back, delivered them to the carrier, and received in their stead "expense bills," upon the surrender of which the packages were delivered to him. When broken open, they were found to contain intoxicating liquor. When found by the officer, the goods had but shortly arrived from Chattanooga, and no effort had been made to effectuate delivery to Shaw or to any one for

him. The delivery of the packages to the officer in the manner above pointed out was made without the knowledge or consent of Shaw.

The questions presented by the record in each of the two cases are: (1) Is the ordinance void, as being an unlawful attempt to interfere with interstate commerce? (2) Can the plaintiff in error, on the facts proved, be convicted of keeping intoxicating liquors for the purpose of unlawful sale, before obtaining the actual custody of the liquors? (3) If he can, is the evidence otherwise sufficient to sustain the conviction?

John A. Boykin, of Atlanta, for plaintiff in error. Jas. L. Mayson and W. D. Ellis, Jr., both of Atlanta, for defendant in error.

POTTLE, J. [2] Prior to the passage of the act of Congress known as the "Wilson Act," the right of a citizen of one state to import intoxicating liquor from another state and sell it in the original package could not be taken away by the state. Intoxicating liquor being a legitimate subject of commerce, the police power of the state did not become operative until after the original package was broken and the contents had become intermingled with the general mass of property in the state. The right to sell "was an inseparable incident to the right to import." *Bowman v. Chicago Ry. Co.*, 125 U. S. 466, 8 Sup. Ct. 689, 1062, 31 L. Ed. 700; *Lelsy v. Hardin*, 135 U. S. 100, 10 Sup. Ct. 681, 34 L. Ed. 128. The Wilson act provided that intoxicating liquors shipped in interstate commerce from one state to another "should, upon arrival in a state or territory, be subject to the operation and effect of the laws of such state or territory." It was at first thought and was so held by several of the state courts that this language of the act gave the states the right to legislate the moment the shipment arrived at the state line; but the Supreme Court of the United States in several cases distinctly held that a shipment of intoxicating liquors moving in interstate commerce was protected from adverse legislation by the state, under its police power, until delivery to the person entitled to receive it. *Vance v. Vandercook Co.*, 170 U. S. 438, 18 Sup. Ct. 645, 42 L. Ed. 1100; *Rhodes v. Iowa*, 170 U. S. 412, 18 Sup. Ct. 664, 42 L. Ed. 1088; *American Express Co. v. Iowa*, 196 U. S. 133, 25 Sup. Ct. 182, 49 L. Ed. 417.

In *Heymann v. Southern Ry. Co.*, 203 U. S. 270, 27 Sup. Ct. 104, 51 L. Ed. 178, 7 Ann. Cas. 1130, the writ of error was sued out to test the correctness of a decision of the Supreme Court of Georgia, reported in 118 Ga. 616, 45 S. E. 491. The Supreme Court of Georgia held that although the goods had not been delivered to the consignees, and although there was no showing of notice to them from the carrier of the lapse of a reasonable time for the consignees

to call for and accept delivery, or even if by the local law such notice was unnecessary, the interstate transportation ended when the goods were placed in the carrier's warehouse, and the carrier was thenceforward liable only as a warehouseman, and the goods ceased to be under the shelter of the interstate commerce clause of the Constitution. This conclusion was based upon the theory that the goods must be considered as having arrived, within the meaning of the Wilson Act (Act Aug. 8, 1890, c. 728, 26 Stat. 313 [U. S. Comp. St. 1901, p. 3177]), when they were warehoused by the carrier. The Supreme Court of the United States reversed the judgment of the Supreme Court of Georgia, and announced its ruling as follows: "As the general principle is that goods moving in interstate commerce cease to be such commerce only after delivery and sale in the original package, and as the settled rule is that the Wilson law was not an abdication of the power of Congress to regulate interstate commerce, since that law simply affects an incident of such commerce by allowing the state power to attach after delivery and before sale, we are not concerned with whether, under the law of any particular state, the liability of a railroad company as carrier ceases and becomes that of a warehouseman on the goods reaching their ultimate destination, before notice and before the expiration of a reasonable time for the consignee to receive the goods from the carrier. For, whatever may be the divergent legal rules in the several states concerning the precise time when the liability of a carrier, as such, in respect to the carriage of goods, ends, they cannot affect the general principle as to when an interstate shipment ceases to be under the protection of the commerce clause of the Constitution, and thereby comes under the control of the state authority." In the course of the opinion the court took occasion to say that it did not hold, and that the court was not called upon to decide, if the goods, after arrival at the point of destination, and after notice and full opportunity to receive them, are "designated left in the hands of the carrier for an unreasonable time, that such conduct on the part of the consignee might not justify, if affirmatively alleged and proven, the holding that goods so dealt with have come under the operation of the Wilson act, because constructively delivered."

A careful examination of the various decisions of the Supreme Court of the United States upon the subject will conclusively show that the Wilson act did not affect the right of an importer to ship intoxicating liquors in interstate commerce, nor the right of the purchaser to receive them, and that the only effect of the Wilson act was to permit the state to which the goods were consigned to legislate under its police power upon the subject after the contract of carriage had ceased and the goods had been

delivered to the person entitled to receive them. Some of the state courts have held that interstate commerce does not cease and transportation is not ended until the goods are actually delivered at the home of the person entitled to receive them in the state to which they are shipped. The Supreme Court of Maine announced this rule as being applicable in a case where a C. O. D. shipment was made by express, directed to the consignee, at his residence. In Oklahoma, however, the same rule was announced in the case of a shipment by freight without any direction to deliver at any particular address. *Hugh v. State*, 2 Okl. Cr. 161, 101 Pac. 115, 28 L. R. A. (N. S.) 162; *Moreland v. State*, 2 Okl. Cr. 237, 101 Pac. 138; *Hudson v. State*, 2 Okl. Cr. 176, 101 Pac. 275. In *State v. Eighteen Casks of Beer*, 24 Okl. 786, 104 Pac. 1093, 25 L. R. A. (N. S.) 492, the Supreme Court of Oklahoma held that, where a bill of lading had been surrendered by the consignee and the freight paid, intoxicating liquors were subject to the state law, notwithstanding the liquors were left on the premises of the carrier. It was accordingly ruled that, where it appeared that the consignee intended to sell such liquors contrary to the laws of the state, they were subject to seizure and confiscation under the state law, notwithstanding they had not been taken from the carrier's premises. In *State v. Intoxicating Liquors*, 102 Me. 206, 66 Atl. 393, 11 L. R. A. (N. S.) 550, it was held that the interstate commerce transportation was not ended, in the absence of a special contract to the contrary, until the freight was transported to the carrier's warehouse and there removed from the car. In *McCord v. State*, 2 Okl. Cr. 214, 101 Pac. 280, the accused was convicted of unlawfully having in his possession certain intoxicating liquors with the intention of selling the same in violation of the state prohibition law. It appeared that five barrels of beer were shipped in interstate commerce, consigned to the defendant, who sent a dray to the carrier's depot and had the beer unloaded from the car onto the dray. While on the dray they were seized by the sheriff, and the arrest of the defendant followed. The judgment of conviction was reversed, and it was held that the section of the statute which prohibited the having in possession of intoxicating liquors with the intention of violating any of the provisions of the section had no application to an interstate shipment, until there had been a delivery of the liquors at their destination.

[3] We are not prepared to go to the extent to which the Oklahoma court has gone, that an interstate shipment of intoxicating liquors will be protected against adverse state legislation until actual delivery at the home or place of business of the person entitled to receive it. It is protected until delivery to such person, but delivery may be

consummated as well at the warehouse of the carrier as elsewhere. Certainly in a case where the bill of lading is surrendered and the freight paid, and an order issued for the delivery of the goods, and the liquors are thereafter held for the holder of the order, this would in law amount to delivery, and the interstate transportation would be ended, even though the goods be left in the actual custody of the carrier. In such a case the carrier would simply be the agent of the person entitled to receive the goods, holding them subject to his order. The general rule is that if goods be left in the hands of the carrier at the place of destination, after notice to the consignee of their arrival, and a sufficient length of time has elapsed after receipt of notice to enable him to take them from its possession, the relation of the carrier to the goods is that of warehouseman, and not that of carrier. 1 Wollen & Thornton, *Law of Intoxicating Liquors*, § 204; Hutchinson, *Carriers* (3d Ed.) § 789.

There can be no doubt that if the person to whom intoxicating liquors are shipped in this state in interstate commerce, by agreement with the carrier, stores them in the carrier's warehouse and keeps them there for the purpose of unlawful sale, he would be subject to conviction under an ordinance such as that involved in this case. *Stradley v. Atlanta*, 7 Ga. App. 441, 67 S. E. 107. Such is the distinct intimation of the Supreme Court of the United States in one of the cases above referred to. In such a case it is also clear that the agent of the carrier and every other person who colludes with the owner to violate the law would be equally guilty. In this connection the remarks of the Supreme Court of the United States in reference to the conduct of the carrier handling interstate commerce shipments of intoxicating liquors, in the case of *Adams Express Co. v. Kentucky*, 206 U. S. 129, 27 Sup. Ct. 606, 51 L. Ed. 987, are pertinent. We therefore conclude that the evidence in case No. 4,201 was sufficient to show that delivery was consummated, that the contract of carriage was ended, and that the agent of the carrier held the goods as agent for the true owner. The evidence was sufficient to authorize a finding that the plaintiff in error was the owner of the goods, and that Cogins had receipted for them as his agent, and the circumstances were sufficient to authorize the finding that the goods were being held for the purpose of unlawful sale.

[5] It is contended that, inasmuch as there was no proof as to the actual contents of the packages, the recorder was not authorized to find that they contained intoxicants. The bills of lading called for whisky, and packages corresponding to the description in the bills of lading were found in the carrier's warehouse, in a portion thereof called the "whisky pen," and set apart and used for the storage of intoxicating liquors. The

packages all had marks on them indicating that the contents were intoxicating liquors. This was sufficient to authorize a finding that the packages did in fact contain intoxicating liquors, and to cast the burden on the accused to show that they did not. See *Tompkins v. State*, 2 Ga. App. 639, 58 S. E. 1111.

[1] The point that the ordinance is unconstitutional is entirely without merit. Courts are inclined to so construe a law as to uphold its constitutionality. There is nothing in the ordinance which on its face appears to interfere in any way with interstate commerce. It cannot, therefore, be held to be void on its face. The presumption is that the city authorities did not intend the ordinance to apply to interstate shipments until after the contract of carriage had ended. Where it appears that the goods are still under the shelter of the interstate commerce clause of the Constitution of the United States, it will be held that the city ordinance of Atlanta has no application. We therefore think that the conviction of the plaintiff in error in case No. 4,201 was authorized, and that the judge of the superior court did not abuse his discretion in overruling the certiorari.

[4] In case No. 4,200 a different conclusion must be reached. The liquors had never been actually or constructively delivered to the plaintiff in error. The general rule that delivery to the carrier is delivery to the person for whom they were intended has no application to this case. The goods were consigned to R. M. Rose, the shipper. Presumptively, therefore, delivery to the carrier was delivery to Rose. The title remained in Rose until an actual sale, consummated by delivery at destination. The order on the bill of lading to notify a named person does not change this presumption. The effect of this order was simply to ship goods to Atlanta for Rose, the consignor, and in care of the person to be notified. This person was the agent of Rose. See, in this connection, *Raleigh Ry. Co. v. Lowe*, 101 Ga. 320, 331; 28 S. E. 867; *American Natl. Bank v. Lee*, 124 Ga. 863, 53 S. E. 268; *Fla. Central & P. R. Co. v. Berry*, 116 Ga. 19, 42 S. E. 371; *Hutchinson, Carriers* (3d Ed.) § 187. If direction had been given to the carrier by Rose upon the back of the bill of lading to deliver the goods to a named person, the rule might be different; for such an indorsement would be valid and a sufficient assignment of the bill of lading to the person named. *Allen v. Farmers Natl. Bank*, 129 Ga. 748, 59 S. E. 813. Of course, there might be an actual agreement between the shipper and the carrier to deliver the goods to a named person, or there might be an understanding or arrangement under which delivery to the carrier would be held to be delivery to the person at destination, notwithstanding a form of bill of lading or receipt might be

used such as was employed in the present case; but here there is no evidence of any agreement or arrangement different from that appearing from the bill of lading. The case, so far as appears from the evidence, is simply one where Rose shipped intoxicating liquors from Chattanooga to himself in Atlanta, in care of a person whose name appeared in the bill of lading, with direction to deliver the shipment to some person not named. This direction was not valid, and ought to have been ignored by the carrier. As between Rose and the carrier, delivery would be made at the peril of the carrier, and if the agent of the carrier did make such delivery, knowing that the goods were to be used for an unlawful purpose, or had reasonable grounds to suspect it, it is not at all certain that the agent would not be equally guilty with the person who received them and the person who ultimately intended to sell them.

Under the facts as disclosed by this record, the goods were still in the hands of the carrier, in interstate commerce, when delivered to the police officer. The contract of carriage had not been completed, and delivery was made to the officer without authority of law and without the knowledge or consent of the consignor, Rose, or of any person to whom delivery was intended. Even if possession of the bills of lading by Shaw was sufficient to authorize a finding that the liquors were intended for him, he did not consent for delivery to be made to the police officer; nor could he be said to have had the liquors in his possession at all, for any purpose. The carrier was not his agent, and until the contract of carriage had ended, and as long as the goods were in interstate commerce, the plaintiff in error could not be said to have had such dominion or control over them, either by himself or by his agent, as would authorize his conviction for keeping them on hand for unlawful sale. It may be that he intended to get possession of them for the purpose of selling them illegally; but mere preparation to commit a crime is no offense. He could no more be convicted than could one be said to be guilty of murder because he had a loaded gun and had indicated his intention to take human life.

It has been suggested that, while the interstate commerce clause of the federal Constitution will protect an interstate shipment of intoxicating liquors, and forbids the state's seizing them or doing any other act which would prevent or unduly hamper the interstate transportation of the goods, yet at the same time the state may penalize any person who orders such goods to use them for an unlawful purpose. In our opinion this is entirely too narrow a view of the interstate commerce clause of the federal Constitution, as construed and applied by the

Supreme Court of the United States. If the state could say to one of its citizens, "You may order liquors to be shipped to you in interstate commerce as often and as freely as you please, because you are protected by the federal Constitution, but at the same time we will seize your person and thus prevent you from receiving the shipment," it is clear that interstate commerce in intoxicating liquors could be totally destroyed. The interstate commerce clause of the federal Constitution not only protects interstate shipments, but it protects the person to whom the goods are shipped, and it protects the carrier until the contract of carriage is ended and the person for whom they are intended gets possession of the goods, either himself or through an agent. The Supreme Court of the United States has repeatedly expressed sympathy with the efforts of the states to prevent traffic in intoxicating liquors, but at the same time it has uniformly held that, being a subject of interstate commerce, they are beyond the power of the state, except in so far as the right to legislate has been granted by Congress, under and in pursuance of the Constitution of the United States.

The records before us disclose a practice participated in by the carriers which is to be condemned, and which we may say, in passing, is a very dangerous one for the agents of the carriers who participate in it. It seems that it has been the practice among some of the carriers to effect a constructive delivery of intoxicating liquors to citizens of Atlanta who have ordered them, and to retain actual possession of the liquors for the benefit of such persons, permitting them to take possession of the liquors as they needed them from time to time. When a carrier ceases the legitimate business of transportation of intoxicating liquors, and goes into the business of a warehouseman in reference to the liquors, holding them for a long time for the benefit of persons who have not ordered them for a legitimate purpose, a grave suspicion arises that the agents of the carrier, if not in actual collusion with the persons to whom the liquors are shipped, are at least complacently acquiescent in the violation of the law. As said by the Supreme Court of the United States in one of the cases cited above, a carrier, though engaged in interstate commerce, may violate the law in reference to the sale and disposition of intoxicating liquors as well as any other person. In misdemeanors all are principals.

In case No. 4,201, a judgment of affirmance will be entered; and in case No. 4,200, the judgment overruling the certiorari will be reversed, upon the ground that the conviction was without evidence to sustain it.

Judgment affirmed in No. 4,201. Judgment reversed in No. 4,200.

(11 Ga. App. 383)

WOOD v. STATE. (No. 4,287.)

(Court of Appeals of Georgia. July 28, 1912.)

*(Syllabus by the Court.)***CRIMINAL LAW (§ 1092*)—WRIT OF ERROR—BILL OF EXCEPTIONS—TIME FOR FILING.**

The bill of exceptions in this case was certified by the judge on May 1, 1912, and was filed in the office of the clerk of the trial court on May 21, 1912. Not having been filed within the 15 days from the date of the certificate of the judge, in compliance with the mandatory requirements of the statute, the writ of error must be dismissed. Civil Code 1910, § 6187; *Lawrence v. State*, 8 Ga. App. 373, 69 S. E. 29; *Foote & Davies Co. v. Evans Furniture Co.*, 10 Ga. App. 194, 72 S. E. 1098.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2808, 2829, 2834-2861, 2919; Dec. Dig. § 1092.*]

Error from City Court of Americus; J. A. Hixon, Judge.

Emmett Wood was convicted of crime, and brings error. Writ of error dismissed.

R. L. Maynard, of Americus, for plaintiff in error. Zach Childers, Sol., of Americus, for the State.

HILL, C. J. Writ of error dismissed.

(11 Ga. App. 417)

STRICKLAND v. STATE. (No. 4,287.)

(Court of Appeals of Georgia. Aug. 6, 1912.)

*(Syllabus by the Court.)***1. CRIMINAL LAW (§ 922*)—TRIAL—INSTRUCTIONS—CIRCUMSTANTIAL EVIDENCE.**

Where, in the trial of a criminal case, the judge instructed the jury that in cases of circumstantial evidence, such as the case on trial, the evidence must be not only consistent with the guilt of the defendant, but such as to exclude every other reasonable hypothesis than that of his guilt, it was not error demanding a new trial that the judge omitted from his instructions the definition of circumstantial evidence. Having expressly stated that the guilt of the defendant rested solely upon circumstantial evidence, it was immaterial that the court failed to definitely explain to the jury the meaning of the term "circumstantial evidence."

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2210-2218; Dec. Dig. § 922.*]

2. INSTRUCTIONS — RECENT POSSESSION OF STOLEN GOODS.

The evidence warranted the instruction to the jury to the following effect: "Recent possession of stolen goods, unexplained, may be sufficient to authorize a conviction of the person in possession of them of a larceny or of a burglary, if a burglary is shown, to the degree of proof required, to have been committed by some person."

3. CRIMINAL LAW (§ 828*)—TRIAL—INSTRUCTIONS—NECESSITY FOR REQUEST.

The evidence touching the defense of alibi was not such as to show the impossibility of the defendant's presence at the time when and the place where the crime was committed, and it was consequently not error, in the absence of a written request to that effect to fail to charge the jury the law of alibi. *Coney v. State*, 76 S. E. 445, this day decided, and citations.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2007; Dec. Dig. § 828.*]

4. CRIMINAL LAW (§ 1158*)—WRIT OF ERROR—REVIEW—DISCRETION OF TRIAL COURT.

While the evidence is in some respects weak and unsatisfactory, inasmuch as there are some facts and circumstances tending to show that the accused committed the crime for which he was convicted, the discretion of the trial judge in refusing to set the verdict aside will not be controlled by this court.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3067-3071; Dec. Dig. § 1158.*]

Error from Superior Court, Appling County; C. B. Conyers, Judge.

Sylvanus Strickland was convicted of crime, and brings error. Affirmed.

W. W. Bennett, of Baxley, for plaintiff in error. J. H. Thomas, Sol. Gen., of Jesup, and Parker & Highsmith, of Baxley, for the State.

POTTLE, J. Judgment affirmed.

RUSSELL, J., absent because of sickness.

(11 Ga. App. 427)

WARREN v. STATE. (No. 4,294.)

(Court of Appeals of Georgia. Aug. 6, 1912.)

*(Syllabus by the Court.)***HOMICIDE (§ 334*)—WRIT OF ERROR—HARMLESS ERROR.**

The evidence for the prosecution demanded a verdict that the accused was guilty of murder, and his own statement demanded the verdict of voluntary manslaughter, returned against him. Any error of law was immaterial.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 705; Dec. Dig. § 334.*]

Error from Superior Court, Laurens County; K. J. Hawkins, Judge.

Bud Warren was convicted of voluntary manslaughter, and brings error. Affirmed.

Howard & Hightower, of Dublin, for plaintiff in error. E. D. Graham, Sol. Gen., of McRae, for the State.

HILL, C. J. Judgment affirmed.

RUSSELL, J., absent because of sickness.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Index

(11 Ga. App. 385)

CORBETT & TAYLOR et al. v. CONNOR.
(No. 3,881.)

(Court of Appeals of Georgia. July 31, 1912.)

*(Syllabus by the Court.)***1. PARTNERSHIP (§ 174*) — LIABILITIES — TORTS.**

"Partners are not responsible for torts committed by a copartner." If, however, all the partners join in the commission of a tort within the scope of the partnership business, the partnership, as well as the individual members of the firm, might be liable.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. § 306; Dec. Dig. § 174.*]

2. APPEAL AND ERROR (§ 1173*)—DISPOSITION OF CAUSE—REVERSAL—CODEFENDANTS.

Where a suit is brought against a partnership as master, to recover damages for the homicide of a servant, alleged to have been caused by the negligent conduct of a copartner, and the case is tried only upon the theory that the partnership is responsible as master for the tort committed by the copartner, and the evidence is not sufficient to show that the partnership is liable, the judgment against the firm will be reversed; and although the allegations of the petition are sufficient to show that the individual partner may be personally responsible for his individual act of negligence alleged to have caused the homicide, yet, it appearing that the case was tried solely on the theory that the partnership was liable, and the liability of the members of the firm was only incident to their relationship to the partnership, and the individual liability of the members was not otherwise considered or submitted as an issue, the judgment as to them will also be reversed. The liability of the individual member whose personal act is alleged to have caused the homicide should be tried under rules of law applicable to him as an individual, entirely disconnected from any liability arising against him by reason of his relationship to the firm.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4562-4572; Dec. Dig. § 1173.*]

Error from City Court of Moultrie; J. D. McKenzie, Judge.

Action by Mary E. Connor against Corbett & Taylor and others. Judgment for plaintiff, and defendant named brings error. Reversed.

W. F. Way and J. A. Wilkes, both of Moultrie, Colquitt & Conyers, of Atlanta, and Battle & Hollis, of Columbus, for plaintiff in error. J. T. Hill and J. W. Dennard, both of Cordele, W. A. Covington, of Moultrie, and Little & Powell, of Atlanta, for defendant in error.

HILL, C. J. [1] 1. Mary E. Connor obtained a verdict and judgment against Corbett & Taylor, a partnership, and R. J. Corbett and G. F. Taylor, members of the partnership, for the negligent homicide of her husband. The defendants excepted to the overruling of a general demurrer to the petition, and the refusal of a new trial.

The material facts, briefly stated, are as follows: Corbett & Taylor were engaged in the sawmill and timber business, and in con-

nection with this business operated locomotives and cars on and over the tracks of the Flint River & Northeastern Railroad by permission of the railroad company. The deceased husband of the plaintiff was employed by the firm of Corbett & Taylor as a locomotive engineer. On the day of his death he was operating a locomotive and two cars, and G. F. Taylor, a member of the firm of Corbett & Taylor, was riding with him on the locomotive. The deceased engineer was suffering from a scalded foot, and, a short time before the accident, he asked Taylor to take charge of the engine for him and run it while he took off his shoe and allowed his scalded foot to cool. Taylor did so, and Connor took off his shoe and sat down on the gangway between the tender and the engine. When the locomotive was approaching a trestle, Connor, from his seat, called Taylor's attention to the fact that the trestle was on fire. Taylor replied that there was no danger, and that they would run across the trestle and stop and put out the fire. Connor said nothing more, and Taylor attempted to run across the burning trestle. The heat of the fire caused the rails to "buck," and the engine ran off the track several feet beyond the trestle, and turned over on Connor, inflicting serious injuries, from which he died. The plaintiff charges that Taylor was negligent and reckless in attempting to cross the burning trestle; that he could and should have stopped the engine before reaching the trestle.

Taylor denied the allegations of negligence, claiming that he was very near the trestle when the fire was discovered, and that he was unable to stop the engine before reaching the trestle. The defendants charge that Connor was guilty of contributory negligence, in sitting in a dangerous place at the time of the casualty; that he assumed the risk of danger in crossing the trestle; that the firm of Corbett & Taylor was in no event liable, as the act of Taylor was a personal act, not for the firm or within the scope of its business; that Taylor, in running the engine, was voluntarily performing an act solely for the benefit and at the request of the deceased engineer; that this voluntary act was entirely outside of any duty which the firm owed Connor, was unknown, unauthorized, and unratified by the firm of Corbett & Taylor, and was entirely a personal matter between Connor and Taylor, for which, if there was any liability, Taylor was alone liable.

The view we take of the legal questions raised by the record as to the liability of the firm of Corbett & Taylor renders unnecessary any decision of the other features of the case. Conceding that the homicide was caused by Taylor's negligence, is the copartnership of Corbett & Taylor liable? "Partners are not responsible for torts com-

mitted by a copartner. For the negligence or torts of their agents or servants they are responsible under the like rules with individuals." Civil Code 1910, § 3187. The second paragraph of the section has no direct application to the question now under consideration, as this part of the section manifestly refers to "agents or servants" who are not members of the partnership, and not to the partners themselves. *Ozborn v. Woolworth*, 106 Ga. 460, 32 S. E. 581. The first part of the section, which applies to torts of the partners themselves, explicitly declares that "partners are not responsible for torts committed by a copartner." The words used are exclusive; they neither express nor imply any exception. The language is a statutory declaration that any tort committed by one partner is beyond the scope of the partnership business and does not bind the partnership. In some other jurisdictions partnerships are held liable for the acts of a partner in the commission of a tort; but the statute of this state does not even make the exception that the partnership would be liable if the tort of the partner was committed within the scope of the partnership business. "Some courts have held that the partnership is not liable for the willful torts of one of the partners, and others that the partnership is liable when such tort is within the scope of the partnership business. After a careful investigation of the text-books and decisions, we find that the great trend of modern authority is to make the partnership liable for all torts of its members which are within the scope of the partnership business. *But whatever may be the law in other jurisdictions, the question has been settled in this state by the Civil Code, § 2658 [now § 3187].*" * * * This is an act of the General Assembly and is binding upon the courts of this state, whatever the law may be elsewhere." *Martin v. Simkins*, 116 Ga. 256, 42 S. E. 483. We do not think that the Supreme Court has attempted by judicial construction to ingraft any exception upon the plain language of the statute, or has made any decision in conflict with the clear and emphatic utterance of Mr. Chief Justice Simmons in the *Martin-Simkins* Case, *supra*. There are several decisions to the effect that the partnership would be liable "when all the members joined in the commission of the tort." In *Page v. Citizens' Banking Co.*, 111 Ga. 73, 36 S. E. 418, 51 L. R. A. 463, 78 Am. St. Rep. 144, "the tort was the joint act of all the partners." See explanation of the *Page* Case by Mr. Chief Justice Simmons in the *Martin-Simkins* Case, *supra*, 116 Ga. 256, 42 S. E. 484. In *Alexander v. State*, 56 Ga. 491, it was held that "one copartner is not responsible and liable * * * for the torts * * * of his copartner, unless he has participated therein." And in *Ozborn v. Woolworth*, *supra*, referring to the section of the Code now considered, it is said: "Since the Code expressly declares that a partnership

is not liable for the torts of its members, the mere fact that all the partners approved of a tort committed by one of their number cannot make the partnership liable for that tort upon the idea of ratification." It would be profitless to extend the discussion. If the act of Taylor complained of constituted actionable negligence (which is not now determined), it was his personal tort, not within the legitimate scope of the partnership business, not an act "that he might be expected to do in the scope of his duty to the firm." His partner Corbett did not participate therein, and, under the statute quoted and the decisions of the Supreme Court cited, the verdict and judgment against the firm of Corbett & Taylor were unauthorized.

[2] 2. Learned counsel who represented the defendant in error in this court suggested that if the conclusion should be reached that the firm of Corbett & Taylor is not liable, and that the individual, G. F. Taylor, is liable, the ends of justice would be reached by molding the judgment in conformity to the law and the facts; that the judgment as to Corbett & Taylor should be reversed, and direction given that the suit as to the firm and as to Corbett individually be dismissed, and the judgment against Taylor individually be affirmed. In support of this proposition it is insisted that the suit was not only against the firm, but also against R. J. Corbett and G. F. Taylor as individuals; that process was issued against Taylor and served on him as an individual; and that the judgment was also against him individually. It is not clear that we have the right to do so. In *Campbell v. Bowen*, 49 Ga. 418, it is held that, in a suit against partners, the verdict should be against both, and not one alone. See, also, *Howes v. Patterson*, 76 Ga. 689. In *Brownlee v. Abbott*, 108 Ga. 761, 33 S. E. 44, in an action *ex delicto* against three defendants, with a verdict against all, it was ruled that, there being no evidence to support the verdict as to one of them, a new trial should have been granted.

The case of *Austin v. Appling*, 88 Ga. 54, 13 S. E. 955, was relied on as authority for the position that this court can reverse as to Corbett & Taylor and affirm as to Taylor. The cases are distinguishable on the facts. In that case Appling sued three persons as "a partnership doing business under the name of the Fulton Lumber & Manufacturing Company," for damages alleged to have been sustained by him in their service, arising out of the unsafe character of the place in which he was put to work. The gravamen of the suit was the failure to perform a nondelegable duty of master to servant. The evidence proved that the Fulton Lumber & Manufacturing Company was derelict in the performance of the alleged duty, and it also showed that one man composed the Fulton Lumber & Manufacturing Company. The verdict was not only against the manufacturing company, but was also against the three

men as composing the firm. It was ruled that the verdict could be set aside as to the two men who the evidence showed were not members of the firm, and allowed to stand against the firm as master and against the one defendant who was the sole proprietor of the business. Here suit is brought by the servant against the master, and, under the evidence and the law applicable thereto, the servant is not authorized to recover against the master, and we are asked to reverse the judgment against the master, but allow it to stand against a third person, and against this third person as an individual not bearing any relation as master to the servant.

Under the allegations and the evidence, what duty did Taylor as an individual owe to Connor? It is alleged and proved that Connor was the servant of the firm of Corbett & Taylor, and that the firm was responsible for the negligence of Taylor as a member of the firm, not as an individual. In the suit he was found liable individually because of his relationship to the firm, and because of personal service on him as a member of the firm. This court is for the correction of errors. It has no original jurisdiction. Taylor's liability as an individual was never presented to the court or ruled on by the court or passed on by the jury disconnected from his liability as a member of the firm. The pleadings in the case show that it was treated as a case against the firm; the liability of the members resulting from that relationship alone.

The trial judge tried the case as one exclusively against the firm of Corbett & Taylor as the master of the deceased servant. In the beginning of the charge he states the case: "Gentlemen of the jury, this is a civil case in which Mrs. Mary E. Connor, who is the plaintiff in the case, brings suit against the partnership of Corbett & Taylor, who is the defendant in the case. The plaintiff in the case is suing the defendant for damages, or for the value of her husband, claiming that the death of her husband was caused by the negligent conduct of the defendant partnership. The defendant denies that it was negligent in the manner alleged and claimed." Nowhere in the charge was any suggestion made as to the individual liability of Taylor, but the instructions were confined to the question of the firm's liability. In the conclusion of the charge the judge says: "If you see fit to render a verdict in favor of the plaintiff, the form of your verdict will be, 'We, the jury, find for the plaintiff so many dollars.' If you find under these instructions in favor of the defendant, the form of your verdict will be, 'We, the jury, find for the defendant.'" The verdict was, "We, the jury, find for the plaintiff \$5,500." On this verdict a judgment, it is true, was rendered not only against the firm as the defendant, but also against R. J. Corbett and

G. F. Taylor. But this judgment was based solely on the fact of the partnership relation and personal service. It seems to us that it would not be just to hold Taylor individually liable, when the entire record shows that the question of his individual liability was never considered by the trial court, and when it is raised for the first time in this court. The case as to him should be tried and determined under rules of law relating to his individual liability for his personal tort, and entirely free from any extraneous circumstance that might influence the jury against him.

We reverse the judgment of the court below, because the court erred in not dismissing on demurrer the action as against Corbett and Taylor as a partnership and Corbett individually; and a new trial is granted as to the remaining defendant, Taylor, individually.

Judgment reversed.

(11 Ga. App. 411)

WADE v. STATE. (No. 4,261.)

(Court of Appeals of Georgia. Aug. 6, 1912.)

(Syllabus by the Court.)

1. CRIMINAL LAW (§ 564*)—SUFFICIENCY OF EVIDENCE—VENUE.

The evidence was insufficient to prove the venue.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 726, 1277-1284; Dec. Dig. § 564.*]

2. CRIMINAL LAW (§ 762*)—TRIAL—INSTRUCTIONS—OPINION AS TO FACTS.

On the trial of one indicted for the offense of assault with intent to rape, where the female assaulted was a child between the ages of 10 and 11 years, the trial judge did not commit a reversible error because, in referring to her in his instructions to the jury, he in one or two places called her "this child." His reference to her as "this child" did not tend to impress upon the minds of the jury that the court entertained an opinion that the female alleged to have been raped was of immature development, and therefore not capable in law of consenting to the sexual act. The case of *Jordan v. State*, 6 Ga. App. 571, 65 S. E. 299, is distinguished, on the facts, from the present case. In that case the charge was enticing away a child under the age of 18 years, and the issue was as to the age of the female, and this court held that it was error for the judge, in his instructions, to refer to her as "this child under the age of 18 years."

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1731, 1750, 1754, 1758, 1759, 1769; Dec. Dig. § 762.*]

3. CRIMINAL LAW (§ 762*)—TRIAL—INSTRUCTIONS—OPINION AS TO FACTS.

The following excerpt from the charge is excepted to: "I charge you, gentlemen of the jury, that although if the evidence shows that the girl assaulted was over 10 years old, yet if she was a child in stature, constitution, and physical and mental development, and you believe from her age and appearance that she was incapable of consenting, the defendant would be guilty, although she made no objection to the intercourse." This excerpt is not

justly subject to the criticism that, in the use of the words "girl assaulted," the judge expressed an opinion that an assault was actually perpetrated on the female, or to the criticism that, in the use of the language "although she made no objection to the intercourse," the judge expressed an opinion that such intercourse actually took place.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1731, 1750, 1754, 1758, 1759, 1769; Dec. Dig. § 762.*]

4. CRIMINAL LAW (§ 762*)—TRIAL—INSTRUCTIONS—OPINION AS TO FACTS.

There was no error in the hypothetical instruction by the judge that the jury might take into consideration, in determining as to the weight and credit to be given to the evidence of the female alleged to have been assaulted, whether she was of good fame, whether she presently discovered the offense, whether she made pursuit after the offender, whether she showed circumstances and signs of the injury, whether the place where the alleged act was done was remote from people, inhabitants, or passengers, etc. The instruction to this effect was not the expression or intimation of any opinion by the court as to what had been shown by the evidence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1731, 1750, 1754, 1758, 1759, 1769; Dec. Dig. § 762.*]

5. CRIMINAL LAW (§ 814*)—TRIAL—INSTRUCTIONS—APPLICABILITY TO EVIDENCE.

There was no error in omitting to charge the jury on the law of assault, or assault and battery, for these offenses were not involved. The accused denied that he committed any assault or assault and battery at all, and the evidence of the female, if it was the truth, proved the felonious assault as alleged in the indictment.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1821, 1833, 1839, 1860, 1865, 1883, 1890, 1924, 1979-1985; Dec. Dig. § 814.*]

6. RAPE (§ 59*)—CRIMINAL PROSECUTION—INSTRUCTION.

The following excerpt from the charge is objected to: "Upon the question as to whether or not the offense, if any, was committed against her will, or without her consent, it is proper for you to determine, first, as to whether or not Mamie Stanfill was of sufficient capacity, mentally, to give her consent to an act of this kind; and that is a question solely for your determination, taking into consideration the age of the child, her intelligence or want of intelligence, whether or not, under the evidence, she had or not arrived at a stage of maturity and development that would cause her to consent from sexual desire; and you may consider any other fact or facts which may have been made to appear to you upon the trial of this case, which may tend to illustrate that question." It is insisted that this charge eliminated from the jury the consideration of any motive for consent by the female to sexual intercourse except sexual desire, whereas, if she consented to sexual intercourse, there might be other reasons why she should have consented thereto, and this was an improper restriction in the charge to the one motive of sexual desire. The excerpt is not subject to the criticism made. The sexual desire of the female is only one of the tests suggested, but the judge leaves to the jury the right to consider any fact, whether it be immature age, lack of intelligence, or any other fact, which may tend to illustrate the question.

[Ed. Note.—For other cases, see Rape, Cent. Dig. §§ 88-100; Dec. Dig. § 59.*]

7. WITNESSES (§ 243*)—EXAMINATION—LEADING QUESTIONS.

Leading questions may be allowed by the trial judge in his discretion, and it is not an abuse of this discretion to permit leading questions to be asked of a young female child relating to delicate subjects of a sexual character.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 795, 847; Dec. Dig. § 243.*]

8. NO ERROR OF LAW—SUFFICIENCY OF EVIDENCE.

No error of law appears, and another trial is granted solely because of the failure to satisfactorily prove the venue.

Error from Superior Court, Grady County; Frank Park, Judge.

Oble Wade was convicted of assault with intent to rape, and brings error. Reversed.

W. M. Harrell, of Bainbridge, Ira Carlisle and R. C. Bell, both of Cairo, and Little & Powell, of Atlanta, for plaintiff in error. W. E. Wooten, Sol. Gen., of Albany, F. A. Hooper, of Atlanta, and Roscoe Luke, of Thomasville, for the State.

HILL, C. J. The plaintiff in error was convicted of the offense of assault with intent to rape. His motion for a new trial was overruled, and he brings error. There are numerous assignments of error in the amended motion for a new trial, none of which need be dealt with more fully than in the headnotes, except the question as to proof of venue.

[1] It is insisted that the evidence is not sufficient to prove the venue, and, under repeated rulings of the Supreme Court on this subject, we are constrained to hold that this contention is well founded. The only evidence relating to venue was as follows: The victim of the assault testified: That she lived in Grady county, and that the courthouse where she was testifying was about 5 miles from her home. That on the occasion of the assault she and the accused were going to school together, and that the school was about 2½ miles from her home. That she saw the accused in December, 1910, in Grady county, "at my home, and at lots of other places. I went to school with him in December. I had to go by his boarding place, and we got together there. When we had gone a little piece from his boarding place, he made me stop. No one was with us. He picked me up and carried me out of sight of the road and laid me down," and then the assault was made. "It was near the Cairo and Thomasville road, and about two miles from the schoolhouse. We were about a half mile from home."

The Constitution of this state requires that all criminal cases shall be tried in the county where the crime is committed (Const. art. 6, § 16, par. 6), and numerous decisions of the Supreme Court have held that the venue must be clearly and distinctly proved beyond a reasonable doubt. *Murphy v. State*, 121 Ga. 143, 48 S. E. 909. The statement

of the accused that she lived in Grady county was immaterial in the fixing of the venue. *Tarver v. State*, 123 Ga. 494, 51 S. E. 501; *Pope v. State*, 121 Ga. 801, 53 S. E. 384, 110 Am. St. Rep. 197, 4 Ann. Cas. 551. In *Gosha v. State*, 56 Ga. 38, it was held that evidence to prove the place where the crime was committed, to the effect that it was within 50 yards of a certain named residence in that county, was not sufficient. In *Moye v. State*, 65 Ga. 765, the only proof touching the venue was that the crime was committed in the lumber yard of a Mr. Sloan, in the city of Americus, and it was held that this was not sufficient to show that it was committed in the county of Sumter; that the court did not judicially know that the Americus referred to was in the state of Georgia. In *Cooper v. State*, 106 Ga. 119, 32 S. E. 23, the proof as to venue was that the difficulty occurred "in Lawrenceville, in front of Dan Rutledge's store," and it was decided that this did not show affirmatively that the offense was committed in Lawrenceville, Gwinnett county. If it were an open question for this court, we would be inclined to hold that the court would judicially recognize in the last two cases that the crime was committed in Sumter and Gwinnett counties and in the state of Georgia, as the court judicially knows that Americus is in Sumter county and Lawrenceville is in Gwinnett county, and it seems to us that the court could not by any possibility conjecture that a trial in these two counties might have been for offenses committed in Americus or Lawrenceville in some other state. But the question is not open, and the decisions cited are binding upon us as precedents, and have been followed in *Smith v. State*, 2 Ga. App. 413, 58 S. E. 549; *Stringfield v. State*, 4 Ga. App. 842, 62 S. E. 569; and *Minter v. State*, 7 Ga. App. 14, 65 S. E. 1079.

It is insisted by learned counsel for the state that the language of the witness, that she saw the defendant in December, 1910,

in Grady county, at her home, and "at lots of other places," is sufficient to prove the venue; that the plain inference from this testimony is that all the "other places" at which she saw him in December, 1910, were in Grady county, and that one of these places in which she saw him was the place where they went to school together in December, and where the offense was committed. Proof of venue by inference is not sufficient, unless that is the only possible inference from the facts.

It is also insisted that the venue was not an issue in the case; that no question as to venue was made on the trial. Whether it was an issue on the trial or not, if the question is specifically raised by the motion for a new trial as provided by the act of 1911 (Acts 1911, p. 150), the brief of evidence in this court must disclose the fact that the venue was affirmatively and clearly proved. Here the question is properly made in the record.

It is further insisted that this court will judicially know that five miles from the county site of Grady county, where the trial took place, was in Grady county. Even if this were true, it would not show that the offense was committed in Grady county, for the witness testified that it was committed about a mile from her home, which was about five miles from the courthouse, on the side of the road where the defendant took her while on their way to school. But whatever may be the law in other jurisdictions, it is very clear, under the decisions above cited, that, while courts of this state may take judicial notice of the geographical divisions of the state and the location of the cities and towns thereof, they will not in a criminal prosecution supply by that means an omission to prove the venue. We reverse the judgment on this ground alone.

Judgment reversed.

RUSSELL, J., absent because of sickness.

(92 S. C. 305)

SULLIVAN v. MOORE.

(Supreme Court of South Carolina. Aug. 26, 1912.)

1. DEEDS (§ 129*)—INTEREST CONVEYED.

Under the common-law rule, a deed to G., not expressing in the premises or the habendum clause a conveyance to her and her heirs, conveys only a life estate; the legal title reverting to the grantor at G.'s death, though the warranty was to G. and her heirs and assigns.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 380-385, 416-435; Dec. Dig. § 129.*]

2. DEEDS (§ 211*)—MISTAKE—EVIDENCE—SUFFICIENCY.

Evidence held to show that a fee-simple conveyance was intended, warranting reformation, though by a mistake the word "heirs" was left out of the deed.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 687-647, 649; Dec. Dig. § 211.*]

Appeal from Common Pleas Circuit Court of Laurens County.

Action by Mrs. Rosalie A. Sullivan against John Moore. Judgment for defendant, and plaintiff appeals. Affirmed.

Grier, Park & Nicholson, of Greenwood, and Richey & Richey, of Laurens, for appellant. Simpson, Cooper & Babb, of Laurens, for respondent.

WOODS, J. [1] In this action to recover possession of a tract of land, the decree in a former appeal adjudged that on the trial of the issue of legal title the circuit judge should have directed a verdict for the plaintiff on these undisputed facts: On August 26, 1886, the plaintiff, being the owner of a tract of land containing 200 acres, conveyed the entire tract to Mrs. Alice P. Greer. On October 31, 1892, Mrs. Greer conveyed the 90 acres in dispute to Mrs. P. O. V. Martin; and on January 23, 1896, Mrs. Martin conveyed to the defendant, John Moore. The deed of conveyance from the plaintiff to Mrs. Greer did not express, either in the premises or the habendum clause, that it was a conveyance to her and her heirs, though the warranty was to her "her heirs and assigns." The court held that, under the common-law rule which still prevails in this state, Mrs. Greer took only a life estate, and upon her death in 1906 the legal title would revert to Mrs. Sullivan; and, further, that there was no evidence to support the defense of estoppel. 84 S. C. 426, 65 S. E. 108, 66 S. E. 561.

[2] The defendant set up, also, the defense of mistake, alleging that the parties to the deed from Mrs. Sullivan to Mrs. Greer intended that it should convey a fee simple, and demanded judgment that the deed be reformed accordingly. This last defense was not passed on by the circuit court at the first trial, and in disposing of the former appeal this court left that issue open. On this defense at the second trial, the following were the issues submitted by the court and the responses made by the jury:

"First. Did Rosalie Sullivan intend to convey only a life estate by the deed? No.

"Second. Was the word 'heirs' left out of the deed by mistake of both parties, and did the parties to the deed intend to convey a fee simple (absolute) estate? Yes.

"Third. What was the value of the land at the time of the execution of the deed? \$2,000."

The circuit judge made an order refusing a motion for a new trial, and directed a reformation of the deed. The eight exceptions raise only the one question whether the circuit judge should have directed a verdict in favor of the plaintiff on the issues submitted, or withdrawn the issues from the jury, and should have refused to reform the deed, on the ground that there was no evidence of such a character as would warrant the inference that there was mutual mistake, and that the intention was to convey and to take a fee-simple title.

The plaintiff can have no complaint of the view taken by the circuit judge of the degree of proof necessary to warrant a finding of mutual mistake and a judgment of reformation; for, in charging the jury, he expressed his conviction on the subject in this language: "But before a court of equity will reform a solemn instrument, it must be shown by evidence which is the most clear and convincing, not simply it was a mistake on the part of one of the parties, but that it was a mutual mistake; that both parties intended a certain thing; and that by mistake in the drafting of the paper did not get what both parties intended."

Mrs. Sullivan and her husband testified that she intended to convey only a life estate, and that it was so understood by all the parties to the transaction. But the circumstances, we think, negative that intention, and show clearly and convincingly that the intention was to convey a fee simple. According to the testimony of the plaintiff and her husband, the deed was made at the request of Hewlett Sullivan, the uncle of plaintiff's husband, and of Mrs. Greer, the grantee, in consideration of the satisfaction of a mortgage held by Hewlett Sullivan against the plaintiff. The testimony shows, and the jury found, that the land was worth at the time about \$2,000. Although Mrs. Sullivan and her husband testified on this trial that the mortgage had been reduced by gift of Hewlett Sullivan to a little less than \$1,000, on the former trial Mrs. Sullivan testified that there might have been \$4,000 or \$5,000 due; and, what was still more significant, there was nothing to show the gift of three-fourths of the mortgage debt, except the indefinite statement of the plaintiff and her husband. W. R. Osborne testified that he heard the negotiations between the plaintiff and Hewlett Sullivan, and that in speaking of the conveyance of the land

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes 75 S.E.—32

nothing was said about conveying only a life estate. The plaintiff and her husband testified that from 1886, when the conveyance was made to Mrs. Greer, until 1907, after Mrs. Greer's death, they never spoke to each other, their children, or any one else of the fact that Mrs. Sullivan would get the land back on the death of Mrs. Greer. It is highly improbable, under the circumstances, that such a valuable interest in land so near by would not be mentioned, if the husband and wife supposed that it existed.

Mrs. Greer died in November, 1906, and even then not a word was said by the plaintiff in assertion of her claim until the defect was brought to her attention by Mr. Babb, who had discovered it in examining the title for a prospective purchaser, and she was asked to sign a paper perfecting the form of the title into a fee simple.

The deed of conveyance to Mrs. Greer was written by Jared D. Sullivan, plaintiff's husband. Unless the courts must look away from the obvious, they know that it is probable almost to the point of certainty that in writing a deed no layman would express the conveyance of a life estate by the mere omission of the word "heirs" in the premises and the habendum, when using it in the warranty, and that no lawyer would do so, except one wholly possessed with the spirit of priggishness.

These circumstances taken together make proof clear and convincing that it was the intention of Mrs. Sullivan and Mrs. Greer that the conveyance to the latter, for valuable consideration, should convey a fee-simple title, and under such proof the defendant was entitled to have the deed reformed. *Austin v. Hunter*, 85 S. C. 472, 67 S. E. 734, and cases cited.

Affirmed.

GARY, C. J., and HYDRICK and WATTS, JJ., concur. FRASER, J., concurs in the result.

(92 S. C. 297)

**SPEARS et al. v. ATLANTIC COAST
LINE R. CO.**

(Supreme Court of South Carolina. Aug. 20, 1912.)

1. DAMAGES (§ 143*)—CROSSING ACCIDENTS—COMPLAINT.

In an action against a railway company for injury to a traveler at a highway crossing, it is proper for plaintiff to allege that at the time she was enroute.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. §§ 410, 433; Dec. Dig. § 143.*]

2. PLEADING (§ 236*)—AMENDMENT—TIME—JUDICIAL DISCRETION.

In a personal injury action, it was not an abuse of discretion to permit plaintiff to withdraw the case from the jury, and to allow an amendment of the complaint so as to more clearly charge a claim for punitive, as well as actual, damages.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. § 601; Dec. Dig. § 236.*]

3. RAILROADS (§ 313*)—CROSSING ACCIDENTS—FAILURE TO GIVE SIGNAL.

To render a railway company liable, under Civ. Code, § 2139, for injury resulting from failure to give required signals on approach of a train to a highway crossing, a collision at the crossing is unnecessary to entitle plaintiff to recover for injury caused by the mule she was driving taking fright at the train.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1002, 1004, 1005; Dec. Dig. § 313.*]

4. TRIAL (§ 252*)—INSTRUCTIONS—APPLICABILITY TO FACTS.

In a highway crossing accident, it was not error to refuse to instruct that the action was based on Civ. Code, § 2139, which gives a right of action for injuries received in a "collision" resulting from failure to give locomotive signals, where that section was inapplicable to the facts, because there was no actual collision, and the court repeatedly instructed that contributory negligence was a defense.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 505, 596-612; Dec. Dig. § 252.*]

5. RAILROADS (§ 350*)—HIGHWAY CROSSING ACCIDENTS—PROXIMATE CAUSE—JURY QUESTION.

In an action against a railway company for injury to a traveler in a highway crossing accident, *held*, under the evidence, a jury question whether any failure of the approaching locomotive to give the statutory signals caused the injury.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1152-1192; Dec. Dig. § 350.*]

6. APPEAL AND ERROR (§ 1078*)—REVIEW—WAIVER OF OBJECTIONS.

Objections omitted from the argument on appeal are deemed withdrawn.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4256-4261; Dec. Dig. § 1078.*]

7. DAMAGES (§ 161*)—PERSONAL INJURY—MENTAL SUFFERING—EVIDENCE.

Where, in an action against a railway company for injury to plaintiff in a highway crossing accident while riding in a vehicle, she alleged mental suffering, it was not error to admit proof that two of her small children were with her at the time, since she must have suffered in apprehending harm to them.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. § 446; Dec. Dig. § 161.*]

8. EVIDENCE (§ 501*)—OPINIONS—ADMISSIBILITY.

In an action against a railway company for injury received in a highway crossing accident, it was not error to permit a witness to express an opinion that the crossing was the most dangerous crossing of which he knew, where he stated fully the facts on which the opinion was based.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 2292-2305; Dec. Dig. § 501.*]

9. RAILROADS (§ 350*)—ACCIDENT AT CROSSING—ACTION—PROVINCE OF JURY.

In an action against a railway company for injury to a traveler in a highway crossing accident, due to the company's failure to give statutory signals on approach of a train to the crossing, whether such failure was advertent was an inference to be drawn by the facts proved.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1152-1192; Dec. Dig. § 350.*]

Appeal from Common Pleas Circuit Court of Marlboro County; S. W. G. Shipp, Judge. Action by Hannah J. Spears and another

against the Atlantic Coast Line Railroad Company. Judgment for plaintiffs and defendant appeals. Affirmed.

Knox Livingston, of Bennettsville, for appellant. Townsend & Rogers, of Bennettsville, for respondents.

FRASER, J. This was an action for damages. It seems that the plaintiff respondent, Mrs. Spears, was going home from Bennettsville and driving along a public highway that approached the track of the appellant railroad company. The public road and the railroad made a V, and were almost parallel. The plaintiff alleged that the defendant did not ring its bell or blow its whistle, as required by law, on approaching the crossing, and that the train was running at a dangerously high rate of speed, and that by reason of the conduct of the defendant she was injured; that she was not in a normal condition of health, and had with her two small children of her own and a child of a friend, who was traveling with her; that the mule she was driving became frightened by the train, and, in order to keep the mule from running into the train, she was obliged to turn it across a ditch; that there was a ditch on both sides of the road.

The defendant moved to strike out of the complaint all reference to the physical condition of the plaintiff, on the ground that the defendant was not responsible for her condition, and objected to all testimony in reference to the children, as they had an independent action for their injury. These objections were overruled. The action was for both actual and punitive damages. The case was called for trial, and during the progress of the trial a question arose as to whether the complaint alleged that the failure to give the statutory signals was willful or not. The presiding judge (Judge Shipp) held, over plaintiff's objection, that the complaint did not charge willfulness as to this allegation of negligence, but allowed the plaintiff to amend her complaint and withdraw the case from the jury. The case was subsequently tried before Judge Copes and a jury. Judgment was rendered for the plaintiff, and the defendant appealed.

[1] There are 19 pages of exceptions, but appellant has stated the questions in a more succinct form, and we will accept his consolidation and answer his questions.

"(1) Was it not error in his honor to refuse to strike out the words 'she being at the time enceinte?' Anyhow, was it not error in Judge Copes to hold that question *res adjudicata*, because Judge Shipp had refused a similar motion; but, the case having been withdrawn from the jury and an amendment allowed, setting up practically a new complaint, with a new cause of action, in which the same allegation is made, was it not error to admit testimony to support such allegation?"

The answer to this question is, it was not error. No one could suppose that the defendant was in any way responsible for the plaintiff's condition; and therefore there could be no confusion of issues by allowing the allegation to remain. The physical condition of the plaintiff might have determined the extent of the injuries, both mental and physical. It was entirely proper that the defendant should know facts upon which the plaintiff would base her estimate of her injury; and it was for the jury to say whether the injury to the plaintiff would be greater in the abnormal than in the normal condition, and, if so, to what extent.

[2] "(2) Was it not error, or an abuse of legal discretion, to withdraw the case from the jury, after the plaintiffs had practically closed their testimony, and allow an amendment of the complaint which made a 'substantial change' in the original cause of action, to change a claim for actual damages alone to one for both actual and punitive?"

The answer here is that there was no error. It was within his honor's discretion to allow the plaintiff to allege what she intended to allege and claimed that she had alleged. In order that no injustice be done the defendant, or that he might lose by reason of a surprise during the trial, the case was withdrawn from the jury. The amendments, therefore, upon which the case was finally tried were amendments before, and not amendments during, trial, within the meaning of the law. The action before amendment was for actual and punitive damages, and after amendment it was for actual and punitive damages.

[3, 4] "(3) Was it not error in refusing to hold, as the trial judge did in the first instance, that the cause of action set up in the complaint was based upon section 2139 of the Civil Code, regard being had to the language used in the complaint generally, as well as specific allegations, and especially to the order of Judge Shipp allowing the amendment, and the amendment allowed?

"(4) In that subsequently his honor charged the jury that the action brought 'for personal injuries and damages, or for injury to her property * * * at a public crossing,' and using other language, whereby he substantially told the jury that the action was brought under the statute, although there was no collision between plaintiff's person or property and defendant's locomotive or train?

"(5) In that, while he, in the first instance, construed the complaint, and subsequently the jury, as hereinbefore indicated, he refused to charge defendant's first, second, third, and fourth propositions, embodying well-established and unquestionable principles of law, showing the distinction between an action at common and an action under the statute for personal injuries—a distinction most material to the defense in this ac-

tion? It being an admitted or undisputed fact that there was no collision between the person or property of the plaintiff, Hannah J. Spears, and the locomotive or cars of defendant, was it not error in his honor, especially in view of his refusal to charge defendant's first four requests to charge the jury?"

There was no error here. Section 2132 is the section that requires the signal, and it makes no reference whatever to a collision at the crossing. The only effect of section 2139 would have been to eliminate a contributory negligence as a defense. His honor charged the jury seven times that contributory negligence was a defense. His honor charged the jury that if they found that the plaintiff in any way, by her own negligence or want of proper care, brought about or contributed to the accident, whereby she was injured, she could not recover. It is hard to see how the defendant could have asked for more. The failure of the judge to charge that the plaintiff could not recover under a statute that did not apply was not only not harmful error, but it was not error at all.

[5] People traveling a public highway are entitled to fixed warnings of the approach of a train, not only in order to avoid going on the crossing, but in order that they may take such precautions as they may think best to prepare for the coming train; and they are entitled to the whole time in which to take precaution. Section 2139 does not limit the right of the traveler to a collision. It was for the jury to say whether the failure to give the signals, if there was a failure, did not produce the necessity for driving her mule across the ditch and produce the injury. Sometimes seconds count. Did they count here? That was for the jury, and it was left to them, with explicit instructions that if she was in any way negligent she could not recover. There was no error here.

[6] Questions 7 and 8, omitted from the argument, are deemed withdrawn.

"(6) Substantially, that the action was brought and could be sustained under the statute by use of the following language:

"(a) 'The negligence, wantonness, and recklessness and willfulness alleged is that the defendant ran its train down upon that crossing, without giving the statutory signal, at a high and reckless rate of speed.'

"(b) 'If the defendant failed to ring the bell or blow the whistle, and that failure caused the plaintiffs,' etc.

"(c) Again: 'Where a person is injured at a point where a railroad crosses a public highway and the statutory signals are not given, the burden is on the defendant company to show that the injured person knew, or ought to have known, of the approach of the train to have avoided.'

"(d) Again: 'No actual collision is alleged

in this suit, and it is not necessary to prove a collision.'

"(d) Again: 'If the evidence in this case satisfies you by its preponderance that the defendant did not give the statutory signal' (after reading section 2132), 'then it was guilty of negligence, and, if that negligence was the proximate cause of the injury, then the defendant is liable.'"

These statements refer to 2132, and not to 2139. There is no error.

"(9) Was it not error, in charging the jury as to defendant's liability for its negligence, to ignore the plea of and testimony establishing plaintiff's contributory negligence?"

His honor twice charged the jury that they must take his charge as a whole. It is hard to see, with that statement thus emphasized, how contributory negligence could have been eliminated from any portion of it.

"(10) There being no allegation or claim set up in the complaint for damages to the property of the plaintiff, to wit, the buggy and harness, was it not error in his honor to charge the jury that the action was brought to recover damages 'for injury to her property, which she alleges she received through the negligence and willfulness and wantonness and recklessness of the defendant at a public crossing'?"

"(11) Was it not error to admit testimony, where there were no allegations to that effect in the complaint, as to the value of the property and the damage it sustained?"

Injury to the buggy was set up in the complaint. There was no error here.

[7] "(12) The action being brought by Hannah J. Spears alone (her husband being joined only as a nominal party), was it not error to admit testimony in regard to the children who were in the buggy with the plaintiff at the time she received the alleged injuries, and the injuries received by them, each of them having a right of action?"

Mental sufferings were alleged. If Mrs. Spears was a normal woman and mother, her greatest sufferings were her apprehensions of harm to her own children and her little kinswoman, committed to her care. That they may have a cause of action in no way diminished her own sufferings. There is no error here.

[8] "(13) Was it not error to allow a witness to express the opinion that the crossing in question in this action 'was the most dangerous place I knew of to cross,' said witness giving no facts showing he had a right to give an opinion?"

It does not appear from the case that his honor ruled on the question; but, if he did, the witness stated the facts fully upon which the opinion was based. There is no error here.

[9] "(14) In refusing defendant's motion for nonsuit as to exemplary or punitive damages on the grounds, in writing, taken on circuit and renewed in this court, said

grounds constituting subdivision 1 of third section of grounds of appeal.

"(15) Did he not err in refusing to grant a nonsuit generally on the grounds, in writing, taken at the trial and renewed in this court as subdivision 2 of said third section?"

"(16) Did he not err in refusing to grant defendant's motion for direction of a verdict on same grounds?"

"(17) Did his honor not err in refusing to grant defendant's motion for a new trial upon the grounds submitted in writing and renewed in this court as grounds of appeal as the fourth section of said grounds of appeal?"

Whether a thing is done advertently or inadvertently is an inference from all the facts proved, and this inference is to be drawn by the jury. There is no error here.

The judgment of this court is that the judgment of the circuit court be affirmed.

GARY, C. J., and WOODS, HYDRICK, and WATTS, JJ., concur.

(92 S. C. 291)

CRAFT v. SEABOARD AIR LINE RY.

(Supreme Court of South Carolina. Aug. 20, 1912.)

1. APPEAL AND ERROR (§ 882*)—RIGHT TO COMPLAIN.

Where the complaint, in an action against a railroad company for injury received while crossing defendant's right of way, alleged that it was a place over which the public had a right to travel, and asked the trial judge to instruct as to the public's right over the path, plaintiff cannot complain that instructions defining that right were not germane to the issue.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3591-3610; Dec. Dig. § 882.*]

2. RAILROADS (§ 356*)—INJURY TO PEDESTRIAN—INSTRUCTIONS—"TRAVELED PLACE."

In an action against a railway company for injury to a pedestrian who fell into an excavation on defendant's right of way, along a pathway, it was not error to instruct that, for a pathway or a "traveled place" to be characterized as such, it must be used by the public generally and not particular individuals, must be such as is common to all, etc.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1228-1234; Dec. Dig. § 356.*]

For other definitions, see Words and Phrases, vol. 8, p. 7079.]

3. RAILROADS (§ 398*)—PEDESTRIANS—LICENSE TO USE PATHWAY—EVIDENCE—SUFFICIENCY.

In an action against a railway company for injury to plaintiff through falling into an excavation on defendant's right of way while using the pathway, evidence held insufficient to show that defendant invited or was willing that plaintiff use the track.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1856, 1358-1363; Dec. Dig. § 898.*]

4. RAILROADS (§ 855*)—DUTY TO TRESPASSERS.

Persons who use a railway right of way without invitation or willingness of the com-

pany are trespassers to whom the company owes no duty except not to harm them willfully or wantonly.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1220-1227, 1235; Dec. Dig. § 355.*]

Appeal from Common Pleas Circuit Court of Richland County; John S. Wilson, Judge. Action by H. C. Craft against the Seaboard Air Line Railway. Judgment for defendant, and plaintiff appeals. Affirmed.

Best & Cunningham and Porter McMaster, all of Columbia, for appellant. Lyles & Lyles, of Columbia, for respondent.

FRASER, J. This is an action brought by the appellant against the respondent for personal injury. The appellant's statement contains the following: "The plaintiff brings this action against respondent herein on account of injuries which he alleges to have received on the night of November 3, 1910, as he was returning to his home along a footway or pathway extending from Olympia avenue across the right of way of said defendant to a certain pasture and from thence to Congaree river. That while returning home along said pathway, and on account of a hole being dug therein some five feet deep and five feet wide, being open and unprotected, that plaintiff fell therein. That all the testimony shows that said pathway as alleged in the complaint extended from a certain point on Olympia avenue across the right of way of the Seaboard Air Line Railway to a pasture which was used by the mill employes and from there on to Congaree river, where the mill employes often resorted for the purpose of fishing, hunting, pleasure, and recreation. That the testimony shows that the pathway as alleged and described in the complaint had been used by the people of the mill neighborhood from eight to ten years without objection or protest on the part of the defendant and traveled frequently and continuously by the said mill people in going to the pasture and the Congaree river and in visiting each other in the community of the Olympia village, and that about 5,000 people resided in the mill village, and it is a suburb of Columbia."

While there is some conflict of testimony as to whether the path was made by the mill people or the railroad employes while some concrete and steel work was being done on the railroad, it is not important in the view we take of this case. It may be well to state further that the hole into which the plaintiff fell was in the pasture, and that at the entrance into and exit from the pasture the path was crossed by a barbed wire fence, and in order to cross the fence pedestrians pulled the strands of wire apart. There were gates to the pasture, but they were on the other side of the pasture. The

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

testimony showed that the railroad company or its contractors (immaterial here) had made some improvements in the track near by, and afterwards the people walked nearer the track, and at the time of the accident the path was partly overgrown with grass. The plaintiff himself testified as follows: "Q. Now, Mr. Craft, you say the hole that night was grown up in grass? A. It was grown up and blown full of fine grass, grass all over it." Some months before the employees of the company had dug a hole directly in the path to put up a derrick, thus completely blocking the path. Plaintiff testified at folio 56 of the case: "I traveled this path the last time, before my leg was broke, was when they had the derrick up there placing the machinery about, and did not travel it any more until I got my leg broke."

There was a verdict for the defendant, and plaintiff appealed with six exceptions.

[1] Appellant thus states the questions, and we will adopt his statement: "The plaintiff raises six exceptions to his honor's rulings, and they allege error on the part of his honor in charging the defendant's seventh, ninth, tenth, eleventh, twelfth, and thirteenth requests, and for convenience these exceptions will here be treated together, as they more or less embody the same propositions of law relative to the issues of the case and to which the plaintiff excepts as being erroneous. The foregoing requests charged that, in order for a pathway or a 'traveled place' to be characterized as such, it must begin at a public place and end at a public place; must be used by the public generally, and not particular individuals; must be such a way as is common to all; that it must not be used by a limited community or class of people. It is respectfully submitted that under the law of this state (which will hereafter be set forth) a pathway, footway, or traveled place is not subject to those conditions incident to public roads." The complaint alleged that "it was a place over which the public had a right to travel." The appellant also asked the presiding judge to charge the jury as to right the public have over the path and cannot complain that the charge was not germane to the issue.

[2-4] The appellant complains that his honor applied to a public footpath the test of a public road. His honor did not apply the whole test. There has been no sufficient reason suggested for holding that "public" in the one case should have one meaning and another meaning in the other.

In the case of *State v. Duncan*, 1 McCord, 404, the court said that a way leading from a highway and terminating at a private house or a particular neighborhood is not a public but a private way. In *State v. Randall*, 1 Strob. 110, 47 Am. Dec. 548, the court said that the ending of a way at a river

where country produce was shipped was not public, for the use was for a particular purpose.

The case of *State v. Gregg*, 2 Hill, 387, said a way to a church was not public but private. His honor charged more favorably to the plaintiff than he was entitled. These exceptions as to a public use and public place cannot be sustained.

The appellant, however, relies upon *Matthews v. Railway*, 67 S. C. 499, 46 S. E. 335, 65 L. R. A. 286, to show that he was entitled to a judgment. While this court is not required to do more than pass upon the exceptions, it will, in order that it may not decide the case upon a technicality, consider the case according to the rules laid down in the *Matthew Case*: "While a railroad company cannot lose its right of way by alienation or prescription, because of the public's interest in its holding it for public purposes, it may impose upon itself as a private corporation duties and obligations to the public or to individuals, by inviting the use of the right of way, or indicating its willingness that it should be used by the public or particular individuals. In such circumstances, the duty devolves on the railroad company to exercise ordinary care to avoid injury to those so using the right of way. This rule is not peculiar to railroads, but is of general application. The invitation need not be expressed in words, but may be implied in a number of ways; such, for instance, as the actual construction or repairing by the railroad company of a road or a bridge along the right of way, which would not be suggestive of any other use except travel on foot or in the ordinary vehicles of the country."

It would be impossible for the writer of this opinion to make a clearer statement than that. Had the company done anything from which an invitation or permission could have been inferred? On both sides of the hole and across the path there was a fence, and on the path no provision for crossing. The plaintiff said it was a barbed wire fence, and he lifted it to get through. We see no evidence from which an invitation or even a willingness could be inferred.

Besides this, the company, not being able to surrender its right of way could reclaim the exclusive use at any time its public business required. It did reclaim it and erected obstructions in the path itself, and of this obstruction the plaintiff knew. Plaintiff himself said: "I traveled this path the last time, before my leg was broke, was when they had the derrick up there placing the machinery about, and did not travel it any more until I got my leg broke." The plaintiff knew that the invitation was at least temporarily withdrawn. If the invitation was ever renewed, there is no evidence of it in the case. One of the plaintiff's witnesses said the path is not there now and

most of the people walk by the fill and not by the path. It really does not make any difference whether this path was used by the public, or by a particular class of people, or by one person.

The defendant asks this court to sustain the judgment appealed from on the ground that there is no evidence to sustain a judgment for the plaintiff. We find that there is no evidence that the defendant invited or showed any willingness that the plaintiff should use this path. Those who use the right of way without invitation or willingness are trespassers, and the railroad company owes them no duty except not to harm them willfully or wantonly. The allegations of willfulness and wantonness were withdrawn.

The deed to the Southbound Railway Company, referred to in plaintiff's argument, was introduced in evidence in the circuit court, but is not a part of the case before this court, so that we have no means of making any finding as to what rights plaintiff had under that deed.

The judgment of this court is that the judgment appealed from is affirmed.

GARY, C. J., and WOODS, HYDRICK, and WATTS, JJ., concur.

(92 S. C. 312)

DOVE v. KIRKLAND et al.
(Supreme Court of South Carolina. Aug. 1, 1912.)

1. SCHOOLS AND SCHOOL DISTRICTS (§ 91*)—BONDS—ELECTIONS FOR ISSUANCE—CONDITIONS PRECEDENT.

There is no provision of the Constitution requiring the making of a survey of a school district, or the filing of a plat thereof, before the district can hold an election on the question of issuance of bonds.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. § 210; Dec. Dig. § 91.*]

2. SCHOOLS AND SCHOOL DISTRICTS (§ 91*)—BONDS—ELECTION FOR ISSUANCE—CURATIVE ACT.

Though it be a condition precedent, under Acts 1907, p. 522, to the holding of an election on the question of issues of bonds by a school district that a survey of the district be made and a plat thereof filed, omission thereof, being a thing the Legislature could have previously authorized, is cured by Acts 1912, p. 1062, validating the election.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. § 210; Dec. Dig. § 91.*]

3. SCHOOLS AND SCHOOL DISTRICTS (§ 99*)—BONDS—TAXES FOR PAYMENT—"COUNTY OFFICERS."

"County officers," in Acts 1907, p. 523, § 4, declaring it the duty of the county officers, charged with assessment and collection of taxes, to levy and collect from the property within a school district a sum to pay interest on bonds issued by the district, and to create a sinking fund to pay the bonds, has reference to those officers in the county who are authorized to levy and collect the taxes in such cases, and so does not contravene Const. art. 10, § 5, if

vesting in the board of trustees of the district the power to levy and collect such taxes.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. §§ 233, 234; Dec. Dig. § 99.*]

For other definitions, see Words and Phrases, vol. 2, pp. 1663-1666.]

4. SCHOOLS AND SCHOOL DISTRICTS (§ 91*)—BONDS—ISSUANCE—GROUNDS FOR INJUNCTION.

Were Acts 1907, p. 523, § 4, unconstitutional as attempting to authorize the wrong officers to assess and collect taxes to pay bonds issued by a school district, it having nothing to do with the issuance of the bonds, would not be ground for enjoining their issue, as, even in the absence of a provision for levying a special assessment for their payment, a remedy for their enforcement will be found.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. § 210; Dec. Dig. § 91.*]

5. STATUTES (§ 122*)—TITLE AND SUBJECT.

Acts 1912, p. 1062, entitled "An act to validate, ratify and confirm all proceedings of the trustees of a school district, * * * calling and holding an election * * * on the question of issuing of bonds, * * * and authorizing the issuing of bonds pursuant to the vote at such election," does not contravene Const. art. 3, § 17, providing that every act shall have but one subject, and that shall be expressed in the title, because declaring all proceedings in connection with the election validated, providing that bonds are to be \$500 each, declaring that they shall be valid and have the qualities of negotiable paper, and, when issued and paid for, shall be noncontestible in the hands of bona fide purchasers, and that they shall be exempt from taxation.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 175; Dec. Dig. § 122.*]

6. SCHOOLS AND SCHOOL DISTRICTS (§ 91*)—BONDS—ELECTION FOR ISSUANCE—CURATIVE ACT.

The irregularities of holding an election on the question of issuance of bonds, by a school district, without the trustees having ascertained whether the petition for the election contained the necessary number of signatures, or having had the district surveyed and a plat thereof filed, though not expressly mentioned, are cured by Acts 1912, p. 1062, providing that all acts and proceedings of the trustees in calling and holding the election, including the notice thereof, the designation of the time and place of voting, the appointment of managers of the election and all proceedings in the conduct of it, and receiving the returns and declaring the result, are validated with like effect as if all steps taken by the trustees had been authorized by law, notwithstanding any irregularity or omission which may have occurred in the conduct and management of the election and the giving of said notice and the other proceedings of the trustees.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. § 210; Dec. Dig. § 91.*]

7. SCHOOLS AND SCHOOL DISTRICTS (§ 53*)—OFFICERS—DE FACTO OFFICERS—HOLDING OTHER OFFICE.

Though when one was appointed a trustee of a school district he was a member of a township board of assessors, and thereafter continued to act as such, he was a de facto trustee of the school district, notwithstanding Const. art. 2, § 2, declaring no person shall hold two offices of honor or profit at the same time.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. §§ 127-135; Dec. Dig. § 53.*]

8. SCHOOLS AND SCHOOL DISTRICTS (§ 53*)— OFFICERS—DE FACTO OFFICERS.

One appointed a trustee of a school district, though, under Civ. Code 1902, § 1210, not qualified to act as such, because not a qualified elector of the district, is a de facto trustee.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. §§ 127-135; Dec. Dig. § 53.*]

"To be officially reported."

Original proceedings by W. Banks Dove against B. B. Kirkland and others, as the Board of Trustees of School District No. 13, Richland County and others. Petition dismissed.

The petition is as follows:

"The petitioner herein, through his attorneys, Clarkson & Clarkson, respectfully presents:

"(1) That the said petitioner is a resident taxpayer and freeholder residing within the limits of school district No. 13, Richland county, the state of South Carolina.

"(2) That the respondents B. B. Kirkland, J. B. Duke, and Geo. W. Taylor are exercising the duties of the board of trustees of the above-mentioned district. That the respondents B. C. Du Pre and P. B. Spigener are the auditor and treasurer, respectively, of the said county, and that the respondents William Stork, S. W. Dent, and William Platt are the board of assessors of Columbia township, in said county. That the respondents Geo. W. Taylor, C. S. Lever, and W. H. Sondley are the board of assessors for Upper township, in said county, and that the respondents J. B. Duke, G. S. Pooser, and Geo. W. Newman are the county board of assessors for Eau Claire, a tax district in said county. That the said school district No. 13 is composed of parts of Columbia township, Upper township, and all of Eau Claire, and that the said auditor, treasurer, and boards of assessors are the county officers charged with the assessment and collection of taxes within the said district.

"(3) That on information and belief, on or about the — day of —, 1900, the county board of education for Richland county, acting by and under the authority vested in them by law, created school district No. 13, with certain boundaries, and thereafter, on the 31st day of March, 1911, the said board enlarged the boundaries of the said district and established them as follows, to wit: 'From where the C. C. & A. Railroad leaves limits of Columbia, and up the said road to the five-mile post of said road, then extending in a northwesternly direction to the intersection of the Winnsboro road and Crane creek; thence up said Winnsboro road to the seven-mile post; thence in a westernly direction parallel with Crane creek to Broad river and down Broad river to the city limits; thence along city limits to the intersection of the limits of the city of Columbia and C. C. & A. R. R.' That there-

after, on the 20th day of June, 1912, after the election hereinafter set forth, the board of trustees of the said district caused a survey of the said district to be made by a competent surveyor by and in accordance with and upon the boundaries as fixed by the county board of education, as set out above, and a plat thereof to be filed in the office of the clerk of court for Richland county; and the size and extent of the said district were correctly ascertained by the said surveyor to be thirteen and 76/100 (13.76) square miles. That your petitioner alleges that the said survey as made was not sufficient, in that the northern boundaries of the said district were not actually run out upon the ground, but were fixed by the location of the extremities thereof.

"(4) That the respondent Geo. W. Taylor was appointed a member of the township board of assessors for Upper township on or about the — day of February, 1911, and has been since that day exercising the duties thereof. That the said respondent was appointed a member of the board of trustees for school district No. 13 on or about the 18th day of August, 1911, and has been since that day exercising the duties thereof. That the respondent J. B. Duke was appointed a member of the board of trustees of the said district on the 5th day of July, 1910, and a member of the county board of assessors for Eau Claire on the — day of February, 1911, and has been, since the respective dates of his appointment, exercising the duties of both offices. That the respondent B. B. Kirkland is not a qualified elector of Richland county.

"(5) That on the 15th day of August, 1911, an election was held within the said district on the question of issuing bonds under the act of 1907, p. 522, which provides as follows, to wit: 'That the trustees of any public school district in the state of South Carolina are hereby authorized and empowered to issue and sell coupon bonds of the said school district, payable to bearer, in such denominations and amounts as they may deem necessary, not to exceed four per cent. of the assessed valuation of the property of such school district, for taxation, and bearing a rate of interest not exceeding six per cent. per annum, payable annually or semi-annually, and at such times as they may deem best: Provided, that the question of issuing the bonds authorized in this section shall be first submitted to the qualified voters of such school district, at an election to be held upon the written petition or request of at least one-third of the resident electors and a like proportion of the resident freeholders of the age of twenty-one years to determine whether said bonds shall be issued or not, as herein provided: Provided further, that before any election is held under this act, it shall be the duty of the trustees of the

school district to have a survey of said school district made by some competent surveyor, and a plat thereof made and filed in the office of clerk of court.' That the amount of the bonds to be issued were not to exceed \$20,000, and were for the purpose of providing funds with which to build a schoolhouse, and that the said election resulted in favor of the issuance of the said bonds by a vote of twelve for and three against.

"(6) That on information and belief the said election was illegal, null and void, for the reason that the provisions of the act of 1907, p. 522, authorizing the issuance of bonds by school districts, was not carried out in the following points, to wit:

"(a) That there has been no ascertainment as to whether the petition filed with the board of trustees contained the signatures of the necessary one-third (1/3) of the resident electors, etc.

"(b) That at the time of the said election no survey of the said district had been made; nor had a plat thereof been filed in the office of the clerk of the court.

"(7) That thereafter, on the _____ day of February, 1912, the General Assembly attempted to validate the said election by the passage of the following act, to wit:

"An act to validate, ratify and confirm all proceedings of the trustees of school district No. 13, of Richland county, calling and holding an election on the 15th day of August, 1911, on the question of issuing bonds of said school district in an amount not exceeding \$20,000.00, and authorizing the issuing of bonds pursuant to the vote at such election.

"Section 1. Be it enacted by the General Assembly of the state of South Carolina, that all acts and proceedings had and taken by the trustees of school district No. 13, of Richland county, in calling and holding a special election in the said school district on the 15th day of August, 1911, on the question of issuing bonds of said school district to an amount not exceeding \$20,000.00, bearing interest from January 1, 1912, at the rate of five per cent. interest, payable semi-annually, and principal payable twenty years after date, for the purpose of erecting a school building for maintaining a public school in said district, including the notice of such election, given by said trustees, the designation of the time and place of voting, the appointment of the managers of such election and all proceedings in the conduct of said election, and in receiving the returns of the managers and declaration of the result thereof, be, and the same are hereby, validated, ratified and confirmed with like effect, as if all the steps taken by said trustees had been duly authorized by law, notwithstanding any irregularity or omission which may have occurred in the conduct and management of the said election, and the

giving of said notice, and the other proceedings of the said trustees. The said bonds are to be in denominations of \$500.00 each, and bonds of said school district to be issued by virtue of said election are hereby declared to be valid bonds of the said school district and shall have all the qualities of negotiable paper, under the law merchant, and when sold and paid for in the manner prescribed by law shall be incontestible in the hands of bona fide purchasers for value. The bonds so issued are hereby exempted from all taxes, state, county and municipal.

"Sec. 2. This act shall take effect immediately upon its approval by the Governor.' Acts 1912, p. 1062.

"(8) That on or about the 27th day of April 1912, the said B. B. Kirkland, J. B. Duke, and Geo. W. Taylor, acting as the board of trustees of the said district, sold the said bonds, above mentioned, to the Palmetto National Bank, and are now about to issue and deliver the same to the said purchasers as a valid debt of the said district.

"(9) That on information and belief said bond issue is illegal, null and void, for the following reasons, to wit:

"(a) That article 11, § 5, Const. 1895, which provides, among other things, that 'the General Assembly shall provide * * * for the division of counties in suitable school districts, as compact in form as practicable, having regard to natural boundaries and not to exceed forty-nine nor less than nine square miles,' contemplates an actual survey and location of the boundaries of a school district upon the ground; whereas the northern boundaries of school district No. 13 have never been actually laid out on the ground, and in consequence thereof the said school district has never been properly formed.

"(b) That the method provided by the act of 1907, p. 522, for the assessment and collection of taxes, to wit: 'Section 4. * * * It shall be the duty of the county officers charged with the assessment and collection of taxes to levy and collect annually from all the property, real and personal, within the limits of such school district, a sum sufficient to pay interest on such bonds, and also a sum sufficient to provide a sinking fund for the payment of such bonds when due'—is unconstitutional, for the reason that the corporate authorities of school districts, to wit, the board of trustees, are vested with this power by the Constitution of 1895, art. 10, § 5, to wit: 'The corporate authorities of counties, townships, school districts, * * * may be vested with power to assess and collect taxes for corporate purposes.'

"(c) That the validating act of 1912, p. 1062, is unconstitutional, in that it relates to more than one subject, to wit, to the validation of the proceedings taken in the elec-

tion of August 15, 1911, to the investment of the bonds to be issued thereunder with the qualities of negotiable paper, to the fixing of their denominations, to the rendering of them noncontestible in the hands of bona fide purchasers for value, and to the exemption of them from all taxes, all of which is contrary to article 3, § 17, Const. 1895, which provides as follows, to wit: 'Every act or resolution having the force of law shall relate to but one subject, and that shall be expressed in the title.'

"(d) That the validating act of 1912, p. 1062, does not cure the failure of the board of trustees to ascertain as to whether or not the petition filed with them, calling for the election held on the 15th day of August, 1911, contained the necessary number of signatures, or their failure to have the school district surveyed and a plat thereof filed with the clerk of court, for the reason that those defects are not set out in the act.

"(e) That the survey of the — day of June, 1912, and the subsequent filing of the plat is not sufficient, for the reason that the making of a survey and the filing of a plat is a condition antecedent to the holding of an election upon the question of issuing bonds.

"(f) That the trustees Geo. W. Taylor and J. B. Duke are not qualified to hold the positions of school trustees, for the reason that they are now holding positions on the boards of assessors in the tax districts included in school district No. 13, contrary to article 2, § 2, Constitution 1895, which provides as follows, to wit: 'Sec. 2. * * * But no person shall hold two offices of honor or profit at the same time.'

"(g) That the respondent B. B. Kirkland is not a qualified elector, and therefore not qualified to act as trustee, as appears by reference to section 1210, Code 1902, vol. 1, which provides: 'Each county board of education * * * shall appoint from each school district in their county, three school trustees from the qualified electors and taxpayers, residing within the district. * * *'

Clarkson & Clarkson, for petitioner. Thomas & Lumpkin, for respondents.

GARY, C. J. This is an application to the court, in the exercise of its original jurisdiction, for an order enjoining the respondents from issuing bonds not exceeding \$20,000 in amount, to be used in building a schoolhouse; the result of an election held under the act of 1907 being in favor of issuing said bonds.

In order to understand clearly the questions involved, it will be necessary to set out the petition in the report of the case. The facts alleged in the petition are not denied by the defendants in their return to the rule to show cause why the prayer of the petition should not be granted. The grounds upon which the petitioner relies are lettered as follows: (a), (b), (c), (d), (e), (f), and (g), and will be considered in regular order.

[1, 2] (a) This ground cannot be sustained for the reason that there is no provision of the Constitution requiring that a survey should be made, or a plat filed, before an election could be held; and, even conceding that such requirement, under the case of *McLaurin v. Tatum*, 85 S. C. 444, 67 S. E. 560, is a condition precedent, it was rendered ineffectual by the validating act of 1912.

"The pivotal point in a healing or validating statute is that it must be confined to acts which the Legislature could previously have authorized." *State v. Whitesides*, 30 S. C. 579, 9 S. E. 661, 3 L. R. A. 777; *State v. Neely*, 30 S. C. 587, 9 S. E. 664, 3 L. R. A. 672.

"Although necessarily retroactive, curative acts are not, for that reason, invalid; for the general rule is that the Legislature can validate any act which it might originally have authorized." 28 Enc. of Law, 698, 699.

"A retrospective statute, curing defects in legal proceedings, where they are in their nature irregularities only, and do not extend to matters of jurisdiction, is not void on unconstitutional grounds, unless expressly forbidden. Of this class, are the statutes to cure irregularities in the assessment of property for taxation and the levy of taxes thereon, irregularities in the organization or election of corporations, irregularities in the votes or other action by municipal corporations, or the like, where a statutory power has failed of due and regular execution through the carelessness of officers or other cause, irregular proceedings in courts, etc. The rule applicable to cases of this description is substantially the following: If the thing wanting, or which failed to be done, and which constitutes the defect in the proceedings, is something, the necessity for which the Legislature might have dispensed with by prior statute, then it is not beyond the power of the Legislature to dispense with it by subsequent statute. And if the irregularity consists in doing some act which the Legislature might have made immaterial by prior law it is equally competent to make the same immaterial by a subsequent law." *Cooley's Con. Lim.* 456, 457.

These authorities are quoted with approval in the case of *Hodge v. School District*, 80 S. C. 518, 61 S. E. 1009, and are conclusive of this question.

[3, 4] (b) There are two reasons why this ground cannot be sustained: (1) Because the provision in section 4 of the act of 1907, that "it shall be the duty of the county officers charged with the assessment and collection of taxes to levy and collect annually from all the property, real and personal, within the limits of such school district, a sum sufficient to pay the interest on such bonds, and also a sum sufficient to provide a sinking fund for the payment of such bonds when due," has reference to those officers in the county who are authorized to levy and collect the taxes in such cases; and (2) be-

cause the provisions of the section just quoted have reference to future action, and are not a condition precedent to the holding of an election for the purpose of determining whether the bonds should be issued. That section does not relate to the issuing of the bonds, but to their payment after they have been issued. A similar question arose in the case of *Welch v. Getzen*, 85 S. C. 156, 67 S. E. 294, and was thus disposed of by the court: "Conceding 'that there is no provision of the law allowing the levy of a special tax in the high school district for the purpose of paying off coupon bonds, issued to raise funds for high school purposes in such district,' we fail to see why that should be a ground for enjoining the issue of such bonds, as it is not a condition precedent. When bonds are issued, there arises a contract between the purchaser and seller, the obligation of which cannot be impaired, as it would be in violation of article 1, § 10, of the United States Constitution, and of article 1, § 8, of the Constitution of South Carolina. All parties having entered into a valid contract, a remedy for its enforcement will always be found."

[6] (c) It is only necessary to cite the following cases to show that this ground cannot be sustained: *Connor v. Railway*, 23 S. C. 427; *Floyd v. Perrin*, 30 S. C. 1, 8 S. E. 14, 2 L. R. A. 242; *Riley v. Union Station Co.*, 71 S. C. 457, 51 S. E. 485, 110 Am. St. Rep. 579; *State v. O'Day*, 74 S. C. 448, 54 S. E. 607; *Park v. Cotton Mills*, 75 S. C. 560, 56 S. E. 234; *Aycock-Little Co. v. Railway*, 76 S. C. 331, 57 S. E. 27; *Buist v. Charleston*, 77 S. C. 260, 57 S. E. 862; *State v. Hunter*, 79 S. C. 91, 60 S. E. 226; *Jellico v. Commissioners*, 83 S. C. 481, 65 S. E. 725; *Power Co. v. Walker*, 89 S. C. 84, 71 S. E. 356; *State v. Fant*, 88 S. C. 493, 70 S. E. 1027.

[6] (d) This ground cannot be sustained for the reason that the validating act of 1912 cures such irregularities.

(e) What has already been said disposes of this question.

[7] (f) The case of *Welch v. Getzen*, 85 S. C. 156, 67 S. E. 294, shows that this ground cannot be sustained, as Geo. W. Taylor and J. B. Duke were de facto trustees.

[6] (g) What has already been said disposes of this ground.

Petition dismissed.

WOODS, HYDRICK, WATTS, and FRASER, JJ., concur.

(11 Ga. App. 407)

HARRELL v. STATE. (No. 4,254.)
(Court of Appeals of Georgia. Aug. 6, 1912.)

(Syllabus by the Court.)

1. INDICTMENT AND INFORMATION (§ 34*)—FORMAL REQUISITES—INDORSEMENT.

Where an indictment or special presentment is returned into court as a "true bill,"

containing the names of as many as 18 persons, written in the face thereof, as constituting the members of the grand jury who acted on it, and the minutes of the court show that these persons were the regularly impaneled grand jurors for the term, a manifest clerical error made by the foreman in failing to write his full name on the back of the indictment, following the indorsement "a true bill," is immaterial.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 138-143; Dec. Dig. § 34.*]

2. JURY (§ 116*)—CHALLENGES—GROUNDS.

It is not a good ground for challenge to the array that the jurors heard the evidence relating to the commission of the offense on the trial of a special plea in abatement. The objection, if good at all, should be made to the poll.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 542, 543; Dec. Dig. § 116.*]

3. CRIMINAL LAW (§ 586*)—CONTINUANCE—DISCRETION OF COURT.

Continuances are in the sound discretion of the trial judge. No abuse of discretion in refusing a continuance appears in the present case.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1311; Dec. Dig. § 586.*]

4. NO ERROR—SUFFICIENCY OF EVIDENCE.

No error of law appears, and the evidence supports the verdict.

Error from Superior Court, Berrien County; W. E. Thomas, Judge.

Dan Harrell was convicted of the statutory offense of stabbing, and brings error. Affirmed.

Hendricks & Christian and J. P. Knight, all of Nashville, for plaintiff in error. J. A. Wilkes, Sol. Gen., of Moultrie, for the State.

HILL, C. J. [1] This was an indictment for assault with intent to murder, and a conviction of the statutory offense of stabbing. When the case was called for trial, and before arraignment, the accused filed a plea in abatement, based upon the allegation that there was no valid indictment returned against him. The evidence introduced in support of this plea showed that the indictment, as returned into court by the grand jury, had the name "A. W. Patter," or "A. W. Patten," written on the back as the foreman of the grand jury, when in fact there was no such grand juror; the real name of the foreman being A. W. Patterson—the last syllable of the name having been omitted. The solicitor general, deeming this defect sufficient to make the indictment void, attempted to secure another indictment at a subsequent term of the court; but for some reason the bill was not found true by the grand jury, and he put the accused on trial on the first indictment. The minutes of the court showed that A. W. Patterson was regularly drawn and sworn as a grand juror, and that he was the foreman of the grand jury that found the bill. Besides, his name was properly written in the face of the indictment as a member of the grand jury. Patterson himself testified that he signed the bill in question as foreman, and

intended to sign his full name on the back as foreman, and thought that he had done so; that in signing his name he usually failed to write out the last syllable in full, indicating it by a line. The indictment appeared to have been found true by the requisite number of grand jurors, all of whose names were written in the indictment.

We think the alleged error in the signature of the foreman was immaterial. In the absence of a mandatory statute, the doctrine best sustained by reason and authority is that the words "true bill" and the signature of the foreman may be dispensed with altogether, if the fact of the jury's finding appears in any other form in the record; and, even where the words "true bill" are required by statute, the foreman's signature thereon is not necessary. 1 Bishop's New Criminal Procedure, § 700. In *Commonwealth v. Smyth*, 11 Cush. (Mass.) 473, it is held that this omission in the indictment is simply the omission of a form which, if oftentimes found convenient and useful, is in reality unimportant, and that the lack of the indorsement was not necessarily fatal to the indictment. And see *Frisbie v. U. S.*, 157 U. S. 160, 15 Sup. Ct. 586, 39 L. Ed. 657. In *McGuffie v. State*, 17 Ga. 510, it is held that there is no positive law requiring that the foreman of a grand jury should sign the finding at all; that this seems not to have been the practice at common law; and that our statute made no change in this respect. The court said, however, that the practice of the foreman signing his name to the true bill as foreman was advisable. In that case the court further held, in effect, that the minutes of the court would show who in fact was the foreman of the grand jury that found the bill. Section 812 of the Penal Code of 1910 requires that "a grand jury shall consist of not less than eighteen and not more than twenty three persons." We therefore think that if the bill of indictment or special presentment contains the names of as many as 18 persons written therein, and these persons are shown by the minutes to have been the regular qualified grand jurors by whom the indictment or presentment was returned, this would be sufficient, although the indictment was not signed by any one of them as foreman. In the present case the minutes of the court showed that A. W. Patterson was in fact a grand juror. He testified that he was the foreman of the grand jury, and that he had signed his name as foreman to the true bill; and it appeared that his name was written in the face of the bill as foreman of the grand jury, and his explanation was entirely satisfactory as to the apparent error in writing out the last syllable of his name. The irregularity was trivial, and the trial judge very properly held that it was immaterial. A merely

clerical misprision in writing a name of the grand jurors will not avoid the indictment. *State ex rel. Dunn v. Noyes*, 87 Wis. 340, 58 N. W. 386, 27 L. R. A. 783, 41 Am. St. Rep. 45, and notes. The fact that the solicitor general attempted to get another bill, and failed to do so, did not invalidate the one that had already been properly found and returned into court.

[2] 2. The challenge to the array of jurors was made on the alleged ground that they had heard the testimony relating to the offense on the trial of the special plea in abatement. The record does not show that this was true; but, if so, it was not a good ground for challenge to the array. If any one of the jurors heard the testimony on the trial of the special plea in abatement, and was thereby disqualified, the disqualification would doubtless have appeared in the examination on the voir dire, and, if good at all, could then have been made by challenge to the poll.

[3] 3. There was no abuse of discretion in overruling the motion to continue on the ground of the absence of witnesses.

[4] 4. No error of law prejudicial to the accused appears to have been committed on the trial of the case, and the verdict of stabbing was supported by the evidence.

Judgment affirmed.

RUSSELL, J., absent because of sickness.

(11 Ga. App. 440)

MANGHAM et al. v. STATE. (No. 4,063.)
(Court of Appeals of Georgia. Aug. 9, 1912.)

(Syllabus by the Court.)

1. CRIMINAL LAW (§ 1178*)—WRIT OF ERROR—ABANDONMENT OF ERROR.

Assignments of error, not relied upon in the argument or referred to in the briefs, will be treated as having been abandoned.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3011-3013; Dec. Dig. § 1178.*]

2. CORPORATIONS (§ 152*)—DIVIDENDS—"NET EARNINGS."

Dividends can lawfully be declared and distributed only out of the actual, legitimate net earnings of the corporation; and the difference between the present value of all the corporate assets and the amount of all losses, expenses, and liabilities, including the capital stock, constitutes "net earnings" for the purpose of dividends. It follows that an insolvent corporation cannot have net earnings out of which dividends can be lawfully declared and paid.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 564-567; Dec. Dig. § 152.*]

For other definitions, see Words and Phrases, vol. 5, pp. 4777-4779.]

3. CORPORATIONS (§ 152*)—OFFICERS—CRIMINAL RESPONSIBILITY.

Where a corporation declares and pays a dividend, not from its actual, legitimate net earnings, but from cash which should be applied to the payment of current expenses, and

from borrowed money, the payment of such dividend "necessarily increases its debts."

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 564-567; Dec. Dig. § 152.*]

4. CORPORATIONS (§ 369*)—OFFICERS—CRIMINAL RESPONSIBILITY.

Where the evidence showed that the business of the corporation was largely, if not entirely, intrusted to the control and management of the accused, and that, as officers of the corporation in actual charge of its current business, they had full opportunity to acquire detailed knowledge of its financial condition, such knowledge will be presumed; and where it is also shown that they prepared and presented to the directors a statement purporting to give a true exhibit of the financial status of the corporation, and, based on this statement, they joined with the directors in the declaration and distribution of the dividend, and it subsequently appeared that this statement was in fact not a true presentation of the financial condition of the corporation, the jury was authorized to infer that the accused, with knowledge of the true financial condition of the business of the corporation, made and presented the false and fictitious statement for the purpose of deceiving the directors as to its true financial status.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1510; Dec. Dig. § 369.*]

5. FORMER DECISION CONTROLLING.

All other propositions of law raised by the record are fully controlled by the decision of this court in *Cabaniss v. State*, 8 Ga. App. 129, 68 S. E. 849.

Error from Superior Court, Spalding County; Robt. T. Daniel, Judge.

J. J. Mangham and another were convicted of unlawfully declaring and distributing a dividend of a corporation, and bring error. Affirmed.

R. R. Arnold, W. A. Fuller, and Dodd & Dodd, all of Atlanta, and Frank Flynt and Charles Mills, both of Griffin, for plaintiffs in error. J. W. Wise, Sol. Gen., of Fayetteville, and Wm. H. Beck and T. E. Patterson, both of Griffin, for the State.

HILL, C. J. J. J. Mangham, as treasurer and director, and J. W. Mangham, as secretary and director, were jointly indicted and convicted for a violation of section 740 of the Penal Code of 1910, which declares: "No joint-stock company, corporation, or other association shall declare any dividend, or distribute any money among its members as profits, when such dividend, or money, is not declared or distributed from the actual legitimate net earnings of its investments, and does in any manner increase its debts. Any president, director, or other officer or agent of any joint-stock company, corporation, or other association, violating the provisions of this section, shall be guilty of a misdemeanor."

[1] The accused filed a demurrer to the indictment, based on numerous grounds, and excepted to the overruling of the demurrer; but in the argument and brief in this court their counsel do not refer to these excep-

tions, and we will therefore consider them as having been abandoned. It may be stated, however, that the decision of this court in *Cabaniss v. State*, 8 Ga. App. 129, 68 S. E. 849, fully controls the questions raised by the demurrer.

[2] Before this court learned counsel for the plaintiffs in error insist that the verdict of guilty is contrary to law and without evidence to support it. In other words, they present for determination squarely the merits of the case against the accused. The law applicable to the facts, they insist, was correctly charged by the court, as follows: "The state, in making out its case against these defendants, must satisfy your minds beyond a reasonable doubt, first, that a dividend was declared and paid to the stockholders; second, that these defendants participated in the act of declaring and paying and distributing that dividend; third, that the declaration and payment of the dividend in question was made out of funds of the corporation other than those arising out of the net earnings of its legitimate investments; fourth, that the declaration and payment of the dividend increased in some way the debts of the corporation; fifth, that unless the defendants knew that this dividend, declared and distributed from funds of the corporation, was other than actual net earnings, there could be no conviction."

We thoroughly agree with the statement of learned counsel that these instructions correctly stated the provisions of law involved and cast the burden upon the state. It is conceded that a dividend was declared by the directors of the corporation as charged in the indictment, and that there is positive evidence of the fact that the accused participated in the declaration and payment and distribution of this dividend. But it is insisted that the state has failed to establish at least three of the essential elements of the offense: (1) That the state failed to prove that the company did not earn any profits for the year ending May 28, 1910, out of which the dividend was declared and paid; (2) that the state did not prove that the debts of the company were increased by the declaration and payment of dividends, or that the payment of the dividend in question bore any relation to the debts of the company; and (3) that the evidence fails to show knowledge on the part of either of the defendants that the dividend in question was not declared and paid and distributed in fact from the net earnings of the investments of the corporation. In the able and exhaustive argument and briefs presented to us relating to these propositions, it is justly contended that, if either one of the three propositions is not proved, the conviction of the accused is contrary to law. We will take up the propositions in their order and discuss them in the light of the evidence.

Does the evidence show that the corporation declared and distributed dividends for the year ending May 28, 1910, from the actual, legitimate net earnings of its investments? If it did, the law was not violated; if it did not, the statute was violated, and all of the directors and officers who participated in the declaration and distribution of the dividends were guilty of a misdemeanor. Under the express terms of the statute, no joint-stock company, corporation, or other association can lawfully declare any dividend or distribute any money among its members as profits when such dividend or money is not declared or distributed from "*the actual legitimate net earnings of its investments.*" This prohibition of the statute is but the declaration of the general rule that dividends can be declared and paid only out of the profits or surplus earnings of the company. What is meant by the term "net earnings?" This term is simply a synonym for the profits of the business, and, popularly speaking, the net receipts of a business are its profits, and the surplus over and above the capital stock and debts constitutes profits. We give several clear and comprehensive definitions of "profits." As defined by the New Jersey Chancery Court, "net profits" mean what shall remain as the clear gains of any business venture, after deducting the capital invested in the business, the expenses incurred in its conduct, and the losses sustained in its prosecution." *Park v. Grant Locomotive Works*, 40 N. J. Eq. 114, 3 Atl. 162. "The surplus over and above the capital and debts constitutes profits." *Barry v. Merchants' Exchange*, 1 Sandf. Ch. (N. Y.) 280, 307. And the Supreme Court of the United States said that the term "profits," out of which dividends alone can be declared, denotes what remains after defraying every expense, including loans falling due, as well as interest on such loans. *Eyster v. Centennial Board*, 94 U. S. 500, 24 L. Ed. 188. Comprehensively speaking, the net earnings are the amount of earnings left after deducting the indebtedness of the company from its gross earnings; and it therefore follows that there can be no actual, legitimate net earnings as long as the outstanding indebtedness of the company is greater than its income. In other words, a valid dividend can only be declared out of the surplus, after paying all liabilities. The purpose of this law is twofold: First, to preserve the assets or property of the corporation for its creditors; and, secondly, to prevent the obtaining of money, to be invested in the stock of the corporation, by false declarations of profitable business.

[5] The learned trial judge in the present case instructed the jury that "a corporation which is insolvent may, from its actual, legitimate earnings on its investment for a particular and definite period, pay a dividend, and an insolvent corporation may, for a particular period, have legitimate earn-

ings." This view of the law was very favorable to the accused. We do not think it is sound. We think that dividends may be paid from the surplus which may have accumulated from the profits of previous years, although there may have been no actual profits during the year in which such dividends are declared and paid; but we think it absolutely a condition precedent to the declaration and distribution of dividends that there must be a surplus previously accumulated or made during the current year; for it is not possible for an insolvent corporation to lawfully declare and distribute a dividend, for the very simple reason that it cannot have any surplus or net earnings as long as it is unable to pay its indebtedness. 5 *Thompson on Corporations*, § 5311. As dividends can only be declared and paid out of profits, it is clear that they cannot be declared unless there are profits; and, even if there are profits, still they cannot be declared and paid where the corporation is clearly insolvent. 5 *Thompson on Corporations*, § 5383. See, also, *Cabaniss v. State*, 8 Ga. App. 129, 68 S. E. 849, where it is held by this court that no declaration of a dividend is lawful in a condition of insolvency or impairment of capital stock; for any profits that may be made must first be applied to the payment of the debts of the corporation and to the restoration of the capital stock.

We now make a brief application of these general principles, which are well settled, to the evidence in the present case. The dividend declared May 31, 1910, which, it is alleged in the indictment, was an unlawful dividend, was declared by the board of directors upon faith in the correctness of a financial statement which was prepared principally by J. J. Mangham and partly by J. W. Mangham, and presented to the board of directors as a true exhibit of the financial status of the corporation. The expert accountant testified that this statement was not a true presentation of the financial condition of the corporation, but that, on the contrary, it was made up of many false entries taken from the books, such as juggling with the cash accounts, false representations as to the actual amount of cash on hand, many worthless accounts which had been carried for years as live assets, failing to charge up expenses, increasing and diminishing the cash at will by fictitious entries, and many other fraudulent manipulations of the books, for the purpose of showing a fictitious net earning; that, as a matter of fact, at the time this financial statement was submitted to the directors, instead of there being a profit, there was a loss of money and a condition of insolvency; that, instead of there being a profit of \$97,000, there was a loss of over \$7,000, making a difference of over \$104,000, even without deducting doubtful accounts; and that in less than 10 months thereafter an audit of the affairs of the company showed it to be insolvent to the amount

of \$111,332, and the capital stock had been impaired or reduced from \$150,000 to \$38,000. The bookkeeper of the corporation testified that at this very time when the corporation claimed to have made net earnings it was borrowing money to meet its pay rolls and maturing obligations, and for the purpose of paying these dividends. The jury had a right to believe the testimony of this expert and the bookkeeper. The fact that the mill failed so soon afterwards by such a large amount, without there being any unusual financial depression affecting mill industries, clearly indicated that the financial statement was not a truthful presentation of the financial status of the corporation when the dividends were declared and distributed. It is insisted by counsel for plaintiffs in error that there was sufficient cash on hand to pay these dividends. This fact is not at all significant of a condition of solvency, and it is not by any means proof of the existence of profits or net earnings. Even an insolvent corporation can frequently have cash on hand without net earnings; but whatever cash is on hand should be applied to the payment of its debts or the restoration of its capital, and not be distributed as dividends to stockholders.

[3] It is said, in the next place, that there was no evidence showing that the debts of the company had been increased by the declaration of the dividend in question, and that under the statute this fact is an essential element of the offense. The language of the statute is, "does in any manner increase its debt." Does the declaration and payment of the dividend in any manner increase the debts of the corporation? We think learned counsel give to this language a too restricted meaning. We think it necessarily follows that an unlawful appropriation of the assets of an insolvent corporation for the payment of dividends necessarily increases its debts, in that it takes away from its creditors the assets which lawfully belong to them and gives them to the stockholders. The declaration of a dividend itself increases the debt of a corporation; for, when the dividend has been declared, it becomes a debt due the stockholders by the corporation. In other words, to the extent of the dividend, the stockholders become the creditors. This would probably not be the case, unless the dividend was lawfully declared; but in any event it is an appropriation of the money of the corporation otherwise than to the payment of its debts, and to this extent constitutes a diminution of its assets and a consequent increase of its liabilities. The testimony of the bookkeeper is that at this very time, instead of using the cash on hand to meet its pay rolls and its maturing obligations, the company actually borrowed money to pay these debts. Certainly the appropriation of the cash to pay these dividends made it necessary to bor-

row this money, and this certainly was increasing in some manner the debts of the corporation.

[4] It is next insisted that the state failed to show knowledge on the part of either of the defendants that the dividends were not paid from the net earnings of the investments of the company. The evidence clearly shows that, if any one connected with the company knew of its financial condition, it was J. J. Mangham. The entire management of the business of the corporation, it seems, was intrusted to him, and had been intrusted to him for years. All the contracts of the corporation were made by him; all the collections of money for the output of the mills were made by him. He bought all the cotton for the mill. He contracted all the debts for the mill. He prepared the annual statements from which the directors declared dividends. The bookkeeper testified that J. J. Mangham kept the inventory book of the mills; that, while he (the bookkeeper) kept the books of the company, they were made up from data furnished to him by J. J. Mangham; and that J. J. Mangham himself made up the financial statements presented to the directors. "I got every item that I put on the books from Mr. Mangham. He gave me the information from which I made the trial balance. They were made from the books, and he gave me the information that went into the books." If the books, therefore, were improperly manipulated, if they contained false entries, according to the testimony of the bookkeeper, Mr. Mangham was responsible for them. It is inconceivable that an officer who had entire charge of the business of the corporation for its entire life, and who made up the annual financial statements for the directors, could have been ignorant of its real financial condition. The very fact that he furnished untrue data to be put on the books shows that he did have knowledge of such condition, and was endeavoring to hide the true condition of affairs from the stockholders and creditors. Unquestionably the opportunity and ability to know the facts was, as correctly stated by the trial judge, equivalent to a knowledge of the facts.

The only evidence especially relating to the knowledge of J. W. Mangham was the statement of the bookkeeper that he assisted J. J. Mangham in the preparation of the financial statements made to the directors. But we think the law charges directors and officers with the duty of knowing the financial condition of the corporation intrusted to their management. We do not think that an officer or director can participate in an unlawful declaration and distribution of dividends, the unlawful appropriation of money which belongs to the creditors of the corporation, the improper use of the assets of the corporation, and, when called upon to account for such unlawful conduct, protect

himself by the statement that he was ignorant of the affairs of the corporation. If present, participating in the declaration of the dividend, the law presumes that he did so with knowledge of the affairs of the corporation, and holds him to a strict accountability for his official act. The burden is on him to show that, although he did participate in the unlawful distribution of the property of the corporation, he did so without any knowledge of its financial condition. In the present case both of the accused, in their statements to the jury, insisted that they had protested against the declaration of the dividend in question; that while, in their opinion, there were sufficient net earnings from which to declare a dividend, yet, in their judgment, the profits earned should have been used for the benefit of the corporation in the protection of its business and the improvement of its plant, and should not have been distributed among the stockholders; and the court told the jury that, if they believed this statement to be the truth, the defendants would not be guilty. But some of the directors testified that they were present, and that neither one of the accused made any objection to the declaration of the dividend, but both of them voted for it. This was a matter for the jury. After giving the record a most careful investigation, and considering the very fair and most favorable charge of the trial judge, we have been unable to find any reason why another trial should be had.

Judgment affirmed.

RUSSELL, J., absent because of sickness.

(11 Ga. App. 427)

MANGHAM v. STATE. (No. 4,062.)

(Court of Appeals of Georgia. Aug. 9, 1912.)

(Syllabus by the Court.)

1. EMBEZZLEMENT (§ 5*)—ELEMENTS OF OFFENSE—INTENT.

To constitute the offense of embezzlement, there must be both a wrongful conversion and a fraudulent intent; but where the money of the principal is knowingly used by the agent for his own private benefit, and in violation of his duty to the principal, it is none the less embezzlement because, at the time of the unlawful use, the agent intended subsequently to restore the money. An officer or agent of a corporation cannot take money of the corporation which is intrusted to him, or which comes into his possession by virtue of his official connection or agency, and use it temporarily for his private benefit and avoid criminal responsibility by calling it a loan. The law calls such a transaction a wrongful conversion, from which a fraudulent intent can be inferred.

Applying the foregoing principle of law to the proved facts of this case and the inferences fairly and reasonably deducible therefrom, the verdict of guilty was authorized.

[Ed. Note.—For other cases, see Embezzlement, Cent. Dig. § 3; Dec. Dig. § 5.*]

2. CRIMINAL LAW (§ 112*)—VENUE—PLACE OF OFFENSE.

Where the evidence shows that the treasurer of a corporation took possession of notes executed by the corporation, by virtue of his official position, and subsequently discounted them and deposited the proceeds to his personal account in banks in a different county from that in which the corporation was located and transacted business, and failed thereafter to account for the funds, or to pay them into the treasury of the corporation in the county where the corporation was located, the venue of the offense of embezzlement, growing out of this wrongful conversion of these funds of the corporation by the treasurer, was properly laid in the county where the corporation was located and had its principal office and place of business, and where the treasurer obtained possession of the notes and presumptively formed the criminal intent.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 220-226, 230; Dec. Dig. § 112.*]

3. CRIMINAL LAW (§ 371*)—INDICTMENT AND INFORMATION (§ 67*)—LIMITATION OF PROSECUTION—EVIDENCE—OTHER OFFENSES.

An indictment charged the embezzlement of an aggregate sum of money; the aggregate embezzlement being made up of a series of specific criminal conversions extending through a continuous series of years, some without and some within the statute of limitations as to criminal prosecutions. As to the former, the indictment contained an allegation of a statutory exception to the application of the statute. *Held:* (a) The question as to the bar of the statute of limitations is fully controlled by the decision of this court in *Cohen v. State*, 2 Ga. App. 689, 59 S. E. 4. (b) Evidence of all acts of embezzlement, whether without or within the bar of the statute of limitations, was admissible for the purpose of showing fraudulent intent.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 830-832; Dec. Dig. § 371.* Indictment and Information, Cent. Dig. § 189; Dec. Dig. § 67.*]

4. CHARGE OF COURT—SUFFICIENCY.

The charge of the court, considered as a whole, was a full, fair, clear, and accurate presentation of the law as to all the material issues. It was most favorable to the contentions of the accused, and, if any error was committed, it was not against, but in favor of, the accused.

5. ASSIGNMENT OF ERROR WITHOUT MERIT—NEW TRIAL REFUSED.

The numerous assignments of error are without merit, and no reason appears that would warrant the grant of another trial.

(Additional Syllabus by Editorial Staff.)

6. CRIMINAL LAW (§ 762*)—TRIAL—INSTRUCTIONS—OPINION AS TO FACTS.

In a prosecution for embezzlement, a charge that the intention to fraudulently appropriate may be inferred from the facts and circumstances, and may be inferred from falsified accounts, or from making false statements, is not objectionable as an expression of opinion upon the facts.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1731, 1750, 1754, 1758, 1759, 1769; Dec. Dig. § 762.*]

Error from Superior Court, Spalding County; Robt. T. Daniel, Judge.

J. J. Mangham was convicted of embezzlement, and brings error. Affirmed.

R. R. Arnold, W. A. Fuller, Dodd & Dodd, and Walter R. Brown, all of Atlanta, and Frank Flynt and Charles Mills, both of Griffin, for plaintiff in error. J. W. Wise, Sol. Gen., of Fayetteville, and Wm. H. Beck and T. E. Patterson, both of Griffin, for the State.

HILL, C. J. [1] J. J. Mangham was convicted of the offense of embezzlement, as defined by section 186 of the Penal Code of 1910. His motion for a new trial being overruled, the case is here for review. The record is exceeding voluminous, containing a demurrer to the indictment, based on numerous grounds; and the motion for a new trial, besides the general grounds, contains 35 special grounds. The grounds of the demurrer are substantially repeated in the motion for a new trial, and any consideration of these grounds which we deem of sufficient importance to require special elaboration will be treated without reference to where they are made, whether in the demurrer or in the motion for a new trial. For the purpose of illustrating the questions raised by the record which we deem material to be decided, we will make a general preliminary statement of the facts.

The Boyd-Mangham Manufacturing Company was a corporation, created under the laws of Georgia, for the purpose of manufacturing and selling cotton goods, having its principal place of business and location in Spalding county. Its capital stock was \$150,000. J. J. Mangham was officially the treasurer of the company, and, in addition to his duties as treasurer, during all the time in which the corporation was carried on, the entire management of its affairs was intrusted to him by the stockholders and the board of directors. The mills manufactured annually 2,500 bales of cotton; the output amounting to about \$200,000 a year. Mangham bought all the cotton, whether "spot" or for future delivery, and sold all the manufactured goods, principally through A. D. Smith & Co. of New York City, collected for the sale of these goods, borrowed money, whenever he deemed it necessary, on the notes of the corporation, furnished to the bookkeepers and clerks under him the data to be entered on the books, and furnished annually to the stockholders and the board of directors a financial statement, made up under his personal and direct supervision. The board of directors gave very little attention to the management of the affairs of the corporation, but seemed to be contented with an annual declaration of dividends, based upon the statement furnished to it by Mangham, the treasurer. During this period, Mangham's management of the mills was apparently successful and profitable to the stockholders; they having received in dividends nearly \$200,000. In 1911 the corporation was declared insolvent, and bankrupt-

cy proceedings were instituted against it. An examination of its books by expert accountants developed many and serious irregularities and numerous false entries, evidently designed to conceal its true financial condition. It would be profitless and a useless consumption of space to note all of these false entries and irregularities; and it is impossible to say whether they were made for the purpose of concealing the true condition of the company from the directors and stockholders and creditors, or for the purpose of enabling the defendant, as treasurer, and as the exclusive manager of the affairs of the company, to carry on, undiscovered, an improper individual use of the funds of the corporation. The writer of this opinion, after a careful consideration of the evidence, believes the first hypothesis to be correct. The jury, however, were authorized to accept as the truth the latter hypothesis.

It is interesting to note some of the more prominent false entries shown by the books, according to the testimony of the experts. In 1911, the difference in round numbers in the condition of the Boyd-Mangham Manufacturing Company as shown by its books, and its true condition as shown by the audit, was \$200,000. The books showed \$200,000 more assets than the company really had. The books also showed that the company had \$150,000 of unimpaired capital and \$80,000 of surplus. The audit showed that it actually had no surplus, and that its capital stock was greatly impaired, if not entirely eliminated. The amount carried on the books as cash by statement made April 30, 1910, was \$27,954.11, while the actual cash was only \$7,388.40. On September 18 and 19, 1908, the book entries showed cash at that time amounting to \$33,457.72, while the actual cash was only \$1,717.44. On February 4, 1911, the actual cash on hand was \$43.15, and the book entries representing cash showed \$44,757.95. The expert accountant who made the examination and audit of the books in 1911 testified that, although these book entries contained a cash item of \$40,000, there was in fact no cash on hand. He also testified that, while the ledger and the financial statement made by the treasurer on May 8, 1910, showed a surplus of \$97,295.69, there was in fact at that time a deficit of \$111,372.34, or over \$200,000 difference between the amount shown by the ledger and the statement and the amount discovered by the examination.

The difference between the apparent situation shown by the entries on the books and the real situation shown by expert examination is comprehensively summed up in a full statement made by one of the experts: First. The real estate and the machinery were carried on the books at a much greater valuation than they were really worth. Second. The mill supplies represented to be on hand were a great deal more than were actually

on hand. Third. The statements showing money, assets, and interest were incorrect. Fourth. The value of coal on hand was stated to be \$5,451, when in fact there was no coal on hand. Fifth. The books showed as assets \$100,771.80, accounts receivable, the vast majority of which were valueless. And the conclusion is that when these items, which were valueless, and which were carried as valuable assets, were eliminated, the value of the stock and overplus were all wiped out. Entries on the books showed that Smith & Co. of New York, who, as before stated, sold the products of the mill, owed the company \$40,000. In other words, the books showed that they had sold goods for the mill for which they had not paid. The examination made by the expert in connection with the examination of the books of Smith & Co., showed, as a matter of fact, that Smith & Co. did not owe the mill anything, but, on the contrary, the mill owed Smith & Co. about \$40,000, a difference of \$80,000. This one entry alone from the books made it appear that the mills possessed a valuable asset of \$40,000 more than it really did possess. There are many other discrepancies between the apparent condition of the mills as shown by the books and the real condition of the mills as proved by the expert examination and audit; and, while, as before stated, these discrepancies and irregularities may be consistent with the personal honesty of Mangham, they cannot be reconciled with official integrity, and were sufficient to permit the jury to deduce the theory that they were made for fraudulent purposes, and unquestionably this theory of the many false entries and discrepancies largely influenced the verdict.

Coming down to the specific charges of embezzlement against Mangham. The indictment alleges that, as treasurer, at divers times, continuously during the years of 1905, 1906, 1907, 1908, 1909, and 1910, he embezzled of the funds of the company the sum of \$23,412.50; and it further alleges that during these years he made fraudulent entries on the books of the corporation, for the purpose of concealing from the corporation the embezzlement of this amount of money; that he converted this amount of money to his private use by illegal speculation, and by otherwise disposing of it, not for the benefit of the corporation. The evidence in support of these allegations as to the false entries has already been partially discussed. As to the allegation that he fraudulently appropriated the sum specified to his own personal use, several specific instances are shown, a few of which we will note. The president of the Fulton National Bank, located in the city of Atlanta, testified that his bank discounted notes in the year 1910, made by the Boyd-Mangham Manufacturing Company, for \$11,500; that the company did not have an account at his bank, and that

the proceeds arising from the discounting of these notes were placed by Mangham to his individual account at the bank; and that subsequently, from time to time, all the proceeds so deposited were checked out by him. The president of this bank stated that there was nothing in the transaction that indicated to his mind any irregularity or impropriety; that he knew that Mangham was the financial man of the mill, and Mangham said at the time that he had authority to discount the papers, and the witness supposed that Mangham used it legitimately, or he would not have discounted the notes; that he extended the credit to Mangham, Mangham having indorsed the notes; that these notes had not been paid by the mill or Mangham, and were now an outstanding obligation against both. The note teller of the Atlanta National Bank testified that on January 11th his bank discounted a note of the mill for \$2,000, which was presented to the bank by Mangham, and that the proceeds were deposited by Mangham in the bank to his individual credit; that the note in question was indorsed by J. J. and J. W. Mangham and that \$1,000 of this note was never paid. The discount clerk of the Central Bank & Trust Corporation of Atlanta testified that during the years 1906, 1907, 1908, 1909, and 1910, his bank discounted notes of the Boyd-Mangham Manufacturing Company ranging from \$5,000 to \$15,000, which were presented to the bank for discount by J. J. Mangham; that some of the proceeds of these notes were placed in the bank to the individual credit of Mangham. All of these notes, however, were paid a year before the insolvency of the manufacturing company.

There are other specific instances given in the evidence which, it is claimed by the state, tend to prove the allegation of embezzlement made in the indictment. Without going specifically into this evidence of alleged technical embezzlement at least, it may be stated generally that Mangham apparently treated the funds of the corporation as his own. To use the language of the bookkeeper, "He continually put in money and drew it out." In this connection, he says again: "The situation was that J. J. Mangham would put in a certain amount of money, and possibly the same day he would get the money from the mill. He loaned the mill money, then executed a note to himself for it and discounted it, and debited himself with the proceeds of it. While the mill was borrowing money from Mr. Mangham, he was borrowing money during the same period from the mill. The amount of his notes from July, 1907, to the present time [1911] aggregated \$13,949.80, and all his notes were paid by being charged to his personal account." The bookkeeper testified further, that at the time of the failure the books showed that the mills owed Mangham \$10,000. The expert accountant testified that

in fact at this time Mangham owed the mills \$8,582.99. It was for the jury to settle this conflict in the evidence.

The accused did not deny this method of dealing with the trust funds, nor the discounting of the notes of the corporation, and the deposit of the proceeds thereof to his credit. He claimed that he was entitled to do so, because the corporation owed him more than the amount of these notes at the time the discounts were made, and that he was fully authorized by his position in the corporation, and by his uniform transaction of its business in this manner, to reimburse himself for the use of his individual funds by the corporation. As to these matters, it may be remarked here that the learned trial judge charged the jury in substance as follows: That if the evidence showed that the accused was an executive officer of the corporation, having in charge the business and the investing of the funds of the corporation, and generally financed the business of the company, the deposit of the funds of the corporation to his own individual account in the bank would not constitute the offense of embezzlement, but the presumption would be that he was using the money of the corporation for the business of the corporation; and the state would have to go further and show that he did not use the money for the corporation, but that in taking such money he intended not to apply it to the business of the corporation.

This must be recognized as a statement of the law most favorable to the accused; but we cannot concur in the view of the trial judge that this is a correct statement of the law with reference to the crime of embezzlement. On the contrary, we think that an official of a corporation, whatever may be his duty in reference to the funds of the corporation, whether or not the entire matter of financing the affairs of the corporation was intrusted to him, would in no event be legally authorized to discount the paper of the corporation and deposit the proceeds thereof to his individual credit; and, if he did so, it would amount to a wrongful conversion of the funds of the corporation, and would cast upon him the burden of proving that the money thus deposited to his individual credit was used for the benefit of the corporation, and not for himself. The law relating to official duties and official trusts is plain and inflexible on this subject. It does not fix a period of time during which an official intrusted with the funds of a corporation could make individual use of these funds before it would amount to a wrongful conversion, but fixes the existence of the wrongful conversion as contemporaneous with the individual deposit of the funds to his own credit, and puts upon him the burden of showing that, notwithstanding an apparent wrongful conversion, there was in reality no such conversion by him, by

compelling him to show that, although he deposited the funds to his individual credit, it was then done for the benefit of the corporation of which he was the trusted official. It is true an official to whom the corporation is indebted at the time of this apparent conversion might relieve himself of the charge of embezzlement by showing that, as a matter of fact, the funds so deposited were used for the benefit of the corporation, and in payment of its debt due him, yet the burden would certainly be upon the accused official to make it very clear that at that time the corporation did in fact owe him the amount of the proceeds of the deposit arising from the notes made by the company which he had discounted; and, unless he did so, the jury would be authorized to infer that the use of the funds by him was for his individual benefit, and not for that of the corporation.

Right here it may be stated, in justice to the accused, that the evidence is very clear that he frequently indorsed notes for the purpose of raising money for the corporation; indeed, that he went to the limit of his own personal credit for this purpose, and that there was rarely a time during his connection with the corporation (which amounted to the life of the corporation) that the corporation did not owe him, and he did not owe the corporation; and when the corporation's failure came the evidence was in conflict as to which was the creditor or debtor, the corporation or the accused official. The jury were authorized to accept the statement of the expert accountant that at the time of this failure the accused was indebted to the corporation, and to discredit the statement of the accused, made to them that at that time, as well as the testimony of the bookkeeper, that the corporation was indebted to him. But we will not extend this discussion of the evidence any further. It is sufficient to say that there were transactions, extending through a period of five or six years, from which the jury were authorized to infer that the accused had used the funds of the corporation, certainly in an unwarranted manner. Coupled with this fact were the untrue entries made during this period of time on the books of the company, apparently for the purpose of concealing the true condition of the corporation; and the jury were authorized to infer that these entries, which were made from data furnished by the accused, were made for the purpose of concealing his individual indebtedness to the corporation and his wrongful dealing with its funds, rather than for the purpose of concealing the condition of the corporation, in order that it might be continued as a growing concern.

We confess that we are very greatly impressed with the clear, detailed statement which the accused made in his own defense. This statement was a very lucid explanation

of the specific acts of alleged fraudulent conversion apparently proved against him, and we may state, also, that the record discloses that the management of this corporation by the accused had been for many years very successful; that its eventual failure was not due to his mismanagement, or to his dishonesty, but to other causes, such as business conditions of the country which were beyond his control, and it is well-nigh incredible that a career of honesty and efficiency should have ended in the crime of embezzlement. It is difficult to find a motive for the commission of such a crime by a trusted official who had for years carried on the business of his trust, not only honestly, but most successfully, and whose financial success depended upon the continued successful existence of the corporation in his charge. The failure of this corporation meant his personal, individual failure; it meant his financial ruin; it meant the end of his business career; it meant individual bankruptcy for him and his brother, for the evidence discloses that they were indorsers on the paper of the corporation, at the time of its failure, for a very large amount. All these questions, however, were for the decision of the jury; and this court cannot say that the conclusion at which they arrived, while it may not be entirely satisfactory to the members of the court as individuals, was not supported by the evidence.

This court lays down the rule of law to be, under the statute defining embezzlement, that there can be no legal individual use, however temporary, of trust funds. The trusted official may not intend, at the time of such wrongful temporary use, a permanent misapplication or the funds entrusted to him; but if he uses for a short time, for his individual benefit, the funds of the corporation entrusted to him as an official and coming into his hands as an official, it is none the less the crime of embezzlement, even though he may have at the time intended subsequently to make restitution. The fraudulent intent will be inferred from a temporary individual use of the trust funds, and the act, prima facie at least, will be branded as embezzlement. *Orr v. State*, 6 Ga. App. 628, 65 S. E. 582; *Jackson v. State*, 76 Ga. 551. An officer or agent of a corporation cannot take the money of the corporation which is entrusted to him, or which comes into his possession by virtue of his office or agency, and use it even temporarily for his personal benefit and avoid criminal responsibility by calling it a loan. The law calls such a transaction a wrongful conversion, from which a fraudulent intent can be inferred. It may be that Mangham, as treasurer, could lawfully loan his own money to the mills and subsequently repay these loans by taking the money of the mills, and by discounting its notes; but the practice is not to be approved. It is of doubtful propriety and dangerous, and

certainly placed upon him the burden of showing that the balance was at all times in his favor.

We conclude this discussion of the general grounds of the motion for a new trial by the statement that, while, in our opinion, the evidence did not demand the verdict of guilty, yet there were circumstances from which the jury, in the exercise of their exclusive prerogative to weigh motive and conduct and to draw inferences from facts, were authorized to find a verdict of guilty.

We will now take up and consider, in so far as deemed material, the special assignments of error made in the amended motion for a new trial.

[2] 2. It is insisted that the venue was not shown by the evidence; that, as to the specific acts of the accused in discounting the notes of the corporation in the city of Atlanta, and in depositing the proceeds of such notes thus discounted to his individual credit in the banks of Atlanta, the fraudulent conversion took place in Fulton county, and not in the county of Spalding. Even as to the acts which took place in the county of Fulton, we think the venue was properly laid in the county of Spalding. The corporation of which the accused was an official was located in Spalding county. There was its principal office and place of business. The books of the company were all located in Spalding county. In contemplation of law, the funds of the company were received by its treasurer in Spalding county. The notes of the company which he discounted in Fulton county were presumptively made in Spalding county by the corporation. These notes came into his possession by virtue of his official connection with the corporation in Spalding county. It was his duty as an official to account to the corporation for these funds which thus came into his hands in Spalding county. The company may have had many deposits elsewhere than in Spalding county; but, in contemplation of law, all of these deposits were in the possession of the accused as treasurer of this corporation in Spalding county. If he went out of Spalding county, and by reason of his position as treasurer of the corporation got actual possession of these funds in some other county, this would make no difference. The embezzlement—that is, the taking and carrying away with intent to steal—would be where his duty as an official called upon him to make an official accounting, and to pay into the treasury of the company the money which came into his possession as such official.

It would be absurd to hold that, if a president of a bank located in the city of Atlanta, in the county of Fulton, should go to York City, where his bank keeps an account, and draw from that bank the funds of the bank of which he is the official head, and in New York City deposit the funds

thus drawn to his individual credit, the embezzlement of the money of the bank would take place in the city of New York. To so hold would put it in the power of an official of a bank or other corporation, either to avoid altogether criminal responsibility for his offense, or to make very difficult the prosecution and proof of such offense. In other words, wherever the money of the corporation may be deposited, subject to the check of its treasurer, whether in this state or in another state, if the treasurer checks the money out of the bank where deposited, and uses it for his own benefit, with a fraudulent intent to deprive the corporation of it, his prosecution for the offense of embezzlement can be properly and legally had in the county where the corporation is located and transacts its business, and where the official in the discharge of his duties should account to the corporation for its funds which have come into his possession by reason of such official position, and where presumptively the fraudulent intent was formed. Irrespective of this, however, there are specific acts which the jury were authorized to believe constituted wrongful conversions of the funds of the corporation, which were consummated within the county of Spalding.

[3] 3. It is further insisted that some of the acts alleged by the state to have been criminal occurred four years prior to the filing of the indictment, and were therefore barred by the statute of limitations, and that the testimony relating to these alleged criminal acts should have been excluded from evidence. The allegation in the indictment is that an aggregate sum was embezzled, but that this aggregate sum was made up of repeated and continuous acts, of a series of embezzlements extending through a period of six years prior to the filing of the indictment. Conceding that some of the alleged criminal acts were barred by the statute of limitations, evidence relating to them was nevertheless admissible for the purpose of showing fraudulent intent as to those which were not barred. *Jackson v. State*, 76 Ga. 551. This point in the opinion covers many of the exceptions made to rulings on testimony, and to excerpts from the charge of the court. Again, in addition to what has been said on this subject, the indictment alleged that the offense, as described therein, was "unknown until on or about the 1st day of January, 1911," and this allegation was sufficient to make an issue, and evidence relating to this issue was submitted to the jury, and there was sufficient evidence to show that the offense was not known until 1911, when an audit of the books of the mills was made. Besides, this was a special presentment by the grand jury, and the allegation that the offense charged thereon was unknown was sufficient to cast upon the defendant the burden of showing that it was not true. *Cohen v. State*, 2 Ga. App. 689, 59

S. E. 4. The evidence also shows that the accused had entire control and management of the mill during its entire existence; that he frequently loaned money to the mill and borrowed money from it during the period of his management. Many of these loans were subsequently repaid by the accused; and it might be well said that the crime of embezzlement was not complete until it was definitely determined as to the amount of the funds of the mill which he had wrongfully converted to his own use by a failure to replace the funds in the treasury of the company. But irrespective of this, the statute of limitations is not a material question in the case, in view of the fact that some of the acts of alleged criminality were proved to have been committed, if at all, within the statutory period.

[8] 4. The following excerpt from the charge is assigned as error: "I charge you that the intention to fraudulently appropriate may be inferred from the facts and circumstances; that is, by direct or circumstantial evidence. It may be inferred from falsified accounts, from making false statements and attempting to conceal the true state of the financial condition of a corporation. And when these things are shown, it is sufficient to require the defendant to explain such facts and circumstances; and, if not satisfactorily explained, a conviction will be authorized, if the fraudulent taking has been proved." This extract from the charge is objected to on the ground that it was an expression of an opinion by the judge upon the facts, and was equivalent to telling the jury that an intent to steal in this case could be inferred from falsified accounts, or from making false statements, or from attempting to conceal the true state or financial condition of the corporation, and this was entirely a question for the jury.

The excerpt is not justly subject to this criticism. There was much evidence relating to irregularities in keeping the books. Many false entries were proved. Whether this juggling with the books was for the purpose of concealing the existence of embezzlement or improper use of the funds of the corporation by the accused, or was for the purpose of keeping the corporation a growing concern and preventing its bankruptcy and failure, was one of the material issues to be decided by the jury. The jury could reasonably infer that an official who had had almost the exclusive control and management of the corporation during its existence, and who had proved that he was very efficient in the management of its affairs, should be able to give a clear account of every dollar of the corporation which had been expended in its behalf by him, or which had come into his hands as its treasurer and general manager; and they could also well infer that the books which were kept under his direct supervision were improperly kept for the

purpose of covering up improper appropriations and use of the company's money. The judge did not tell the jury, as a matter of law, that these facts would show a fraudulent intent, but he simply told them that they might consider these facts in arriving at a conclusion as to the existence of a fraudulent intent; and that the fraudulent intent might be inferred from such false entries or irregularities. This unquestionably was a correct statement of the law applicable to the evidence. *Jackson v. State*, supra, and citations.

[4] 5. Some exceptions are made to other excerpts from the charge. We have examined them carefully in connection with the entire charge and the evidence, and find that these exceptions are without merit. In fact, we do not hesitate to say that the instructions of the trial judge contain a full, fair, and accurate statement of the issues made by the evidence. The truth of this statement is shown by the fact that many of the exceptions contained in the amended motion are based upon the allegation that the verdict was contrary to the charge on the various issues involved. The learned judge gave the accused the benefit of a favorable charge on every contention insisted upon by him. In many instances the criticism might be justly made that the instructions were much more favorable to the accused than he was entitled to expect or to receive under the law. The record clearly demonstrates that the accused has had a fair trial; that no error of law was committed against him, but that, on the contrary, if any errors were committed, they were in his favor.

[5] An exhaustive and careful examination of the record fails to disclose any reason why another trial should be granted.

Judgment affirmed.

RUSSELL, J., absent because of sickness.

(11 Ga. App. 358)

HILL v. HARRIS. (No. 4,202.)

(Court of Appeals of Georgia. July 23, 1912.)

(Syllabus by the Court.)

1. DISMISSAL AND NONSUIT (§ 58*)—PLEADING (§§ 207, 433*)—GROUNDS FOR DISMISSAL—BILL OF PARTICULARS—CURE BY VERDICT.

A failure to attach a bill of particulars, where required, does not authorize a dismissal, on the ground that the petition did not, without such a bill of particulars, set forth a good cause of action. The defect is amendable, must be taken advantage of by special demurrer, and is cured by the verdict. *Gonackey v. General Accident Assur. Corp.*, 6 Ga. App. 381, 384, 65 S. E. 53.

[Ed. Note.—For other cases, see Dismissal and Nonsuit, Cent. Dig. §§ 134-139; Dec. Dig. § 58;* Pleading, Cent. Dig. §§ 511, 512, 1451-1477; Dec. Dig. §§ 207, 433.*]

2. CONTINUANCE (§ 30*)—GROUNDS—SURPRISE—DISCRETION OF COURT.

Motions for continuance on the ground of surprise, occasioned by an amendment to the opposite party's petition, are addressed to the sound legal discretion of the trial judge. It will never be held to be an abuse of discretion to overrule a motion for continuance based on this ground, unless the movant or his counsel shall state how and wherein he is less prepared to go on with the trial, so as to give the court an opportunity to exercise a sound legal discretion. Civil Code 1910, § 5714; *G. F. & A. Ry. Co. v. Sasser*, 4 Ga. App. 276, 61 S. E. 505.

[Ed. Note.—For other cases, see Continuance, Cent. Dig. §§ 99-112; Dec. Dig. § 30.*]

3. TRIAL (§ 296*)—INSTRUCTIONS—APPLICABILITY TO ISSUES.

In view of the fact that in his general charge the trial judge fully and distinctly instructed the jury with reference to all of the issues raised by the pleadings, it will not be held to be prejudicial error that in one portion of the charge he instructed them as follows: "You will find that the disagreement in this suit arises with reference to the amount of lumber that was cut." Under the pleadings and the evidence, and the law applicable thereto, the issue thus referred to by the trial judge was the main and controlling question in the case.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 705-713, 715, 716, 718; Dec. Dig. § 296.*]

4. EVIDENCE (§ 91*)—BURDEN OF PROOF—SCOPE.

The following instruction was not erroneous: "The burden of proof is upon the plaintiff in this case to prove to your minds, by a preponderance of evidence, the material allegations set forth in the petition."

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 113; Dec. Dig. § 91.*]

5. TRIAL (§ 259*)—INSTRUCTIONS—NECESSITY FOR REQUEST.

Where the trial judge sets forth in his charge the contentions of the parties, and instructs the jury that, if the defendant sustains by proof a contention set forth in his pleadings, he will be entitled to prevail, and, under his plea of recoupment, recover against the plaintiff such amount as the jury might find in his favor, if fuller and more explicit instructions upon the issue as thus set forth are desired, they should be duly requested in writing. Under the rule just announced, there is no error requiring a new trial in the instructions set out in the fifth ground of the amended motion for a new trial.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 648-650; Dec. Dig. § 259.*]

6. NEW TRIAL (§ 41*)—GROUNDS—ERROR IN INSTRUCTIONS—HARMLESS ERROR.

The jury having found in favor of the plaintiff the full amount sued for, and against the plea of recoupment filed by the defendant, any inaccuracy in the charge, with reference to the amount which should have been found for the defendant in the event his plea of recoupment was sustained, is not cause for a new trial.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 67-71; Dec. Dig. § 41.*]

7. LOGS AND LOGGING (§ 21*)—MANUFACTURING LOGS—CONTRACTS.

The parties having entered into a written contract, under the terms of which the plaintiff was to cut into lumber certain pine timber at an agreed price to be paid upon delivery of the lumber, it was not erroneous to charge the jury

that, if the defendant failed and refused to pay for the lumber upon delivery, as provided for in the written contract, after demand for payment by the plaintiff, the latter would have been authorized, under the contract, to suspend operations.

[Ed. Note.—For other cases, see Logs and Logging, Cent. Dig. § 53; Dec. Dig. § 21.*]

8. APPEAL AND ERROR (§ 1066*)—HARMLESS ERROR—INSTRUCTIONS.

While, under the terms of the contract between the parties, the question as to where the lumber was to be checked, and where it was in fact checked and measured, was immaterial, an instruction to the jury that the parties were at issue in reference to this question, and it should be determined from the evidence, was not prejudicial under the facts of this case.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4220; Dec. Dig. § 1066.*]

9. LOGS AND LOGGING (§ 21*)—MANUFACTURING LOGS—CONTRACTS.

The written contract between the parties provided that the lumber was to be delivered to the defendant at the plaintiff's sawmill, and that the defendant was to pay for the lumber as soon as such delivery was made. There was no provision in the contract in reference to the quality of lumber to be delivered; but the law will imply that the parties intended the lumber to be merchantable and suitable for the uses to which it was to be put by the defendant. If lumber was delivered to the defendant at the plaintiff's sawmill and accepted, the defendant was bound to pay the agreed price for the lumber. It was therefore not error to charge the jury as follows: "I charge you that the defendant in this case would be responsible for all lumber that was cut and delivered at the plaintiff's sawmill."

[Ed. Note.—For other cases, see Logs and Logging, Cent. Dig. § 53; Dec. Dig. § 21.*]

10. EVIDENCE (§ 596*)—BURDEN OF PROOF—CROSS-PETITION.

The following instruction contained an accurate statement of the law: "I charge you that it is the duty of the defendant, upon his cross-petition or plea of recoupment, as it is on the plaintiff on his part, in law, to make out his case by a preponderance of evidence; and, unless this is done, you are authorized to find against his contentions."

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2446-2448; Dec. Dig. § 596.*]

11. APPEAL AND ERROR (§ 273*)—PRESENTING QUESTIONS IN TRIAL COURT—EXCEPTIONS—SUFFICIENCY.

An exception to the charge as a whole, upon the ground that it does not present in a clear and lucid manner the issues involved in the case, and is misleading, and omits to refer to some of the issues, magnifying the contentions of one of the parties, presents no assignment of error for consideration by the reviewing court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1590, 1608, 1620-1623, 1625-1630, 1764; Dec. Dig. § 273.*]

12. LOGS AND LOGGING (§ 21*)—MANUFACTURING LOGS—CONTRACTS—ACTIONS.

The written contract between the parties containing simply an obligation on the part of the plaintiff to cut and deliver certain lumber to the defendant, and binding the latter to take and pay for the lumber, evidence that the defendant relied upon the contract with the plaintiff to keep a planing mill supplied with lumber was irrelevant and immaterial in the trial of an action brought by the plaintiff to recover

the agreed price of certain lumber which had been delivered to the defendant.

[Ed. Note.—For other cases, see Logs and Logging, Cent. Dig. § 53; Dec. Dig. § 21.*]

13. SUFFICIENCY OF EVIDENCE—NO ERROR.

The evidence authorized the verdict, and there was no error requiring a new trial.

Error from City Court of Oglethorpe; E. Wall, Judge.

Action by C. P. Harris against Youncey Hill. Judgment for plaintiff, and defendant brings error. Affirmed.

Jule Felton, of Montezuma, for plaintiff in error. Jere M. Moore, of Montezuma, and J. J. Bull & Son, of Oglethorpe, for defendant in error.

POTTLE, J. Judgment affirmed.

(11 Ga. App. 419)

OWENS v. STATE. (No. 4,286.)

(Court of Appeals of Georgia. Aug. 6, 1912.)

(Syllabus by the Court.)

1. HOMICIDE (§ 218*)—EVIDENCE—DYING DECLARATIONS.

The evidence offered upon the subject of alleged dying declarations was sufficient to authorize the submission to the jury of the question whether or not, at the time the declarations were made, the declarant was in the article of death and conscious of his condition.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 458, 459; Dec. Dig. § 218.*]

2. HOMICIDE (§ 215*)—EVIDENCE—DYING DECLARATIONS.

A statement, made by one who had received a mortal wound, that a named person had "assassinated" him, is a statement of fact and not a mere conclusion or expression of opinion, and, upon the trial for murder of the person who fired the shot, is admissible in evidence as a dying declaration, if sufficient foundation for its admission is first laid.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 451-456; Dec. Dig. § 215.*]

3. WITNESSES (§ 246*)—EXAMINATION BY COURT.

While a trial judge should not so interrogate a witness as to intimate or express any opinion in reference to the weight of the evidence, or as to the guilt or innocence of the person on trial, still it is the right and duty of a trial judge, in a proper case, to assist in the elucidation of the truth of the transaction under investigation, and it is not error for him, for this purpose, to ask a witness questions pertinent to the issue and couched in appropriate language. The questions propounded by the trial judge in the present case were not subject to the criticism that they tended to impress the jury with the idea that in the opinion of the trial judge the accused should be convicted.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 852-857; Dec. Dig. § 246.*]

4. HOMICIDE (§ 203*)—EVIDENCE—DYING DECLARATION.

The charge upon the subject of dying declarations, which is copied in the opinion herewith filed, is in exact accordance with previous decisions of the Supreme Court and of this court, and is sufficiently full and explicit,

especially in the absence of any written request for more particular instructions.

[Ed. Note.—For other cases, see *Homicide*, Cent. Dig. §§ 480-487; Dec. Dig. § 203.*]

5. CRIMINAL LAW (§ 655*)—TRIAL—CONTROL BY COURT.

To the end that the trial should be fair and impartial and conducted in an orderly way, it is the duty of the trial judge to regulate the conduct of counsel, parties, and witnesses, provided that in so doing he does not take away or abridge any right of a party under the law.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 1520-1523, 1527, 1535; Dec. Dig. § 655.*]

6. HOMICIDE (§ 255*) — EVIDENCE — WEIGHT AND SUFFICIENCY.

The evidence warranted the verdict, and there was no abuse of discretion in overruling the motion for new trial.

[Ed. Note.—For other cases, see *Homicide*, Cent. Dig. §§ 539-541; Dec. Dig. § 255.*]

Error from Superior Court, Colquitt County; W. E. Thomas, Judge.

J. D. Owens was convicted of voluntary manslaughter, and brings error. Affirmed.

Edwin L. Bryan, of Moultrie, and D. B. Nicholson, of Rochelle, for plaintiff in error. J. D. McKenzie and J. A. Wilkes, Sol. Gen., both of Moultrie, for the State.

POTTLE, J. [1] Owens was convicted of voluntary manslaughter, and his motion for new trial was overruled. The point mainly insisted on is that the court erred in admitting in evidence certain alleged dying declarations of the person killed. In order for dying declarations to be admitted in evidence, four things must appear: (1) The statements must have been made by the person killed; (2) he must have been in a dying condition at the time the statements were made; (3) he must have been conscious of his condition; and (4) they must have been of such character as to make them admissible under the Penal Code 1910, § 1026, that is, the statements must relate to the cause of the death of the declarant and to the person who killed him. In the present case the fact that the deceased made the statements admitted in evidence is undisputed; that he was in a dying condition cannot be questioned, because he died a few hours after having made the statements, from a mortal wound which had been inflicted upon him by the accused. The objection mainly urged by counsel for the accused is that it does not appear, from the evidence, that at the time the statements were made the accused was conscious of his condition, and that the nature of the statements was such as to render them inadmissible as dying declarations.

The question whether sufficient foundation has been laid for the admission of dying declarations is one primarily for the court. Assuming that the statement made is one which would be admissible as a dying declaration, if there is any evidence to support the in-

ference that at the time the statement was made the accused was in articulo mortis and conscious of his condition, it is the duty of the court to admit the evidence and submit to the jury the question whether or not they believe the evidence is sufficient to show that the deceased was in extremis and conscious of his condition at the time the statement was made. They should be instructed to first ascertain whether these things were true, and, if they so find, then to consider evidence of the dying statement and give it such weight as they think it entitled to, and that if they find that the person who was shot was not conscious that he was in a dying condition, then they should reject the evidence in relation to the alleged dying statement altogether. In passing upon the question whether or not one in extremis is conscious of his condition, all of the facts and circumstances must be considered. Statements made by the wounded man himself, statements made to him by his physician or others, the nature and character of the wound, and any other facts or circumstances which throw light on this question, should be considered. The fact that the accused shot and killed the deceased is shown by the testimony of eyewitnesses, and is not denied by the accused. His theory was that the killing was done in self-defense, in order to prevent the commission of a felony upon him, or at least that at the time he shot he was acting under the fears of a reasonable man that his life was in danger. The wounded man lived some 16 hours after he received the mortal wound. He made five statements to his physician. On direct examination the physician who had attended the deceased testified that statements in reference to the shooting were made to him by the deceased several times; that the first statement was made about an hour after the shooting, and the last statement from six to eight hours before the death of the deceased. With reference to this last statement, the physician testified that the deceased was conscious that he was in a dying condition, because his pulse began to fail, and the witness informed him that his pulse did not respond to a stimulant, and that the deceased was in extremis and was conscious of this fact. The witness testified that while in this condition the wounded man said "they assassinated him"; that in addition to this he told the witness to take his sister some message, but never did finish the latter statement. The witness further stated that the deceased said that old man Owens had assassinated him; that he never did call the name of the person who shot him other than in this way. In view of the fact that it was not disputed that Owens, the accused, did the shooting, and that Owens and the deceased were in a difficulty at the time the shooting took place, there could be no question, of course, that the deceased intend-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

ed to refer to the accused when he used the expression "old man Owens." On cross-examination the witness who testified as to the dying statements was examined at great length and in detail in reference to each of the five statements which he claimed the deceased had made to him in reference to the shooting. In reference to the first statement, the witness testified that in his opinion the wounded man was not conscious of his condition at the time the statement was made. As to the second statement, the witness testified that the deceased had not abandoned hope of recovery, because he stated, "I may get over this and some day come back here." The same was true of the third statement. The last two statements were made under the following circumstances: The fourth statement was on the train between Moultrie and Tifton, about seven or eight hours after the shooting and about eight hours before death ensued. At that time the physician tried to persuade the wounded man to drink some ginger ale as a stimulant. He refused to take any, stating that he did not believe it would do him any good, "because he did not believe he was going to get well." The last statement was made on the train between Fitzgerald and Manchester. The physician again tried to get the wounded man to take a stimulant, stating that his pulse was falling, and he replied, declining the stimulant and endeavoring to send some message to his sister, but was never able to complete the message before his death. He said at that time he was going to die. He made no other statement. The following question was asked the witness: "That is all he said to you the last time he spoke to you about it?" Answer: "The last time he said anything intelligent."

It is argued by counsel for the accused that it is apparent from the physician's testimony on cross-examination that in the last conversation all that the wounded man said was, in effect, something about a message to his sister, and that he made no statement at that time in reference to the accused. We do not think this a fair construction of the statement of the deceased. The witness having testified positively, on direct examination, that when the last statement was made on the train the deceased stated that Owens had assassinated him, the manifest inference from the cross-examination is that the witness meant to say that, besides making this statement in reference to the shooting, the deceased endeavored to send a message to his sister, and the effort to do so involved the last statement made before his death. The same construction is to be placed upon the testimony of the witness in reference to the fourth statement, made on the train between Moultrie and Tifton. The evidence perhaps did not require a finding that at the time these statements were made the wounded man was conscious of the fact that he was about to

die, but it certainly authorized such a finding and warranted the jury, in considering the dying statements and in giving such weight to them as the jury believed they were entitled to receive. See, in this connection, *Smith v. State*, 9 Ga. App. 403, 71 S. E. 606; *Campbell v. State*, 11 Ga. 353; *Walton v. State*, 79 Ga. 446, 5 S. E. 203; *Wheeler v. State*, 112 Ga. 43, 37 S. E. 126; *Young v. State*, 114 Ga. 849, 40 S. E. 1000.

[2] 2. It is also insisted that evidence as to the dying declarations should have been excluded because the statement of the deceased was a mere conclusion and opinion, and not admissible as a statement in reference to the cause of death and the person who killed the deceased. The decisions in reference to the admissibility of this class of evidence have not been confined strictly to the terms of the section of the Code, and great liberality has been allowed in the admission of evidence of this character. No fixed, definite rule can be announced which would be applicable in all cases and to all statements; but, generally speaking, any statement made by one in the article of death and conscious of his condition, in reference to the cause of his death, the manner in which he was killed, and as to the person who killed him, is admissible if it would have been admissible as evidence had the person wounded not died, and had he been testifying under oath as a witness on the stand. The solemnity of the occasion, the consciousness of approaching death, the common belief that one in that condition, knowing that he is about to appear before his Maker and give an account "of the deeds done in the body," is supposed to take the place of the sanctity of an oath and to justify an inference that one in that condition would not deliberately falsify for the purpose of wreaking vengeance upon one who had inflicted upon him a mortal wound. Whether this supposition is well founded or not is purely speculative. It is doubtless true that it is well founded in many cases, and it is also probable that, under color of dying declarations, false statements have been sometimes admitted in evidence and used against one on trial for murder. This fact makes it a question peculiarly for the jury to determine, under all the facts and circumstances surrounding the transaction, together with any knowledge which they may properly have of the character of the declarant and the character of the assailant, the proximity of death, the nature of the statement, and other pertinent facts or circumstances, whether the statement ought to be accepted as true. In making the statement the declarant cannot make a statement of a bare conclusion or expression of opinion, but he must state facts. The statement that the accused assassinated him, as used by the deceased in the present case, simply means that the accused shot him without provocation. This being so, the

statement was one of fact, and was not objectionable as stating a mere conclusion or opinion of the declarant. It has been held that a statement by one in the article of death and conscious of his condition, that the accused shot him down like a dog, was admissible. So, also, with reference to the statement that the killing was done without any provocation on the part of the person killed, and also the statement that the deceased was "butchered" by the accused. See *White v. State*, 100 Ga. 659, 28 S. E. 423; *Underhill*, *Criminal Evidence* (2d Ed.) § 108, p. 202. Tested by these authorities, as well as upon the principles announced above, the declaration of the deceased in this case was admissible as a statement of fact, and was not objectionable as a statement of a mere conclusion or expression of opinion.

[3] 3. Further complaint with reference to the admission of the dying statement is that the trial judge committed prejudicial error in interrogating the state's witness, in that he thereby intimated an opinion as to the guilt of the accused, and intended to impress the jury with the idea that the court thought that the accused should be convicted. We do not think the examination of the trial judge was subject to this criticism. Indeed, a careful examination of the questions propounded by the court and of the answers of the witness seems to indicate that the witness rather lessened the force of his former testimony on the question as to whether the wounded man was rational at the time the statements were made and conscious that he was in a dying condition. In this examination the court simply required the witness to explain to the jury whether or not the declarant was rational when the statements were made and what the witness meant by the use of the term "rational." It seems to have required several questions to make the witness understand just exactly what the court meant to bring out. The questions were carefully guarded, and do not contain any intimation on the part of the court that the accused was guilty.

[4] 4. The court charged the jury as follows: "Now, then, the court instructs you that dying declarations made by any person in the article of death who is conscious of his condition, as to the cause of his death, and the person who killed him, are admissible in evidence in a prosecution for homicide. The court instructs you further that, as to testimony touching what are claimed to be dying declarations, the court instructs you that, in order to make this evidence at all for your consideration, you must be satisfied beyond a reasonable doubt that the declarations, if any, were made while the person making them was in a dying condition, and that he knew at the time the declarations were made that he was in such condition; and, if either one of these conditions does not exist, the alleged declarations would

not be testimony to be considered by you at all; but, if both exist, they would become what the law terms dying declarations, and, if made under such conditions, would be testimony to be considered with all the other testimony in the case." The criticism on this charge is that it is not sufficiently full and explicit. The charge is in exact accordance with numerous decisions, both of the Supreme Court and this court; and, if for any reason it was not sufficiently full and explicit, counsel for the accused should have requested the court, in writing, to charge with more particularity upon the subject.

[5] 5. In another ground of the motion for a new trial complaint is made that while counsel for the accused on cross-examination had one of the state's witnesses on the floor before the jury, demonstrating by gestures and signs the respective positions and conduct of both the accused and the deceased, the court remarked: "Nobody can understand that. I can't, and the jury can't. Let him come back to the stand, and ask the question. Let him answer anything you want to ask him about it." It is complained that this action of the court unduly restricted the right of cross-examination; particularly in view of the fact that the court had permitted the Solicitor General to examine the witness in the same way counsel for the accused desired to. In regard to this the court certified: "I was sure that neither the court nor the jury could get the evidence of the witness in the manner in which the examination was conducted at the time I called the witness back to the stand in order that the jury and court might understand what counsel was trying to prove." In light of this explanation, there was clearly no error in the action of the judge. It is the right of the trial judge to police the trial, and it would take a very strong case of abuse of discretion in such a matter to authorize the reviewing court to interfere. The trial judge understands the situation much better than this court can possibly do from the printed record, and we are quite sure that so able and impartial a magistrate as was the judge who presided at the trial of this case would not consciously unduly hamper or interfere with counsel in the defense of his client. There is nothing in the record of the occurrence as it is presented to us which calls for interference by this court.

[6] 6. The evidence warranted the verdict. The deceased was shot by the accused during the progress of a personal difficulty between them. The circumstances indicate that the deceased first, without cause, made an assault upon the accused, and that at the time the assault was made he had a knife in his hand and indicated a purpose to use it. The theory of the defense was that, at the time the fatal shot was fired, the deceased was making a felonious assault upon the accused with a knife; that the accused

had retreated as far as he could with safety; and that it was necessary for him to shoot in order to save his own life. There was, however, evidence to authorize the theory of the state that the deceased had dropped the knife before the shooting took place, and that at the time the shot was fired the deceased was not attempting to commit a felony upon the person of the accused, and that there was no necessity for the accused to take his life. It appears, from the testimony of one witness, that after the shot was fired the accused walked about 15 feet and picked up the knife which had previously fallen from the hands of the deceased. It was argued in the brief of counsel for the plaintiff in error that there was no evidence to show that at the time the shot was fired the accused knew that the deceased had dropped the knife. From the nature of the case there could be no positive direct evidence that the accused knew this, but the fact that the knife was a long butcher knife, the fact that the parties were very close together, with their hands touching each other, and other circumstances surrounding the transaction, all indicate that the accused must have known that the deceased did not have the knife, and that the killing was the result of that passion, supposed to be irresistible, which had been engendered by the assault made by the deceased and the language which he used at the time. The trial judge having reviewed the evidence upon the motion for a new trial, and having signified his approval of the verdict, and there being evidence to warrant the finding, and no error of law having been committed, this court has no power to set aside the conviction.

Judgment affirmed.

RUSSELL, J., absent because of sickness.

(11 Ga. App. 371)

HAYES v. STATE. (No. 4,233.)

(Court of Appeals of Georgia. July 23, 1912.)

(Syllabus by the Court.)

1. HOMICIDE (§ 68*)—MANSLAUGHTER—"UNLAWFUL."

An act is not "unlawful," within the purview of the statute of this state defining involuntary manslaughter, unless it is prohibited by some valid law of this state.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 91, 92; Dec. Dig. § 68.*]

For other definitions, see Words and Phrases, vol. 8, pp. 7186, 7187.]

2. STATUTES (§ 47*)—VALIDITY—DEFINITENESS.

A penal law which is of doubtful construction, and in which the act denominated as a crime is described in terms so general and indefinite as to make the question of criminality dependent upon the idiosyncrasies of the men who may happen to constitute the court and jury, and is of such a nature that

honest and intelligent men are unable to ascertain what particular act it seeks to condemn, is incapable of enforcement, and will be held to be null and void. So much of the act of 1910, approved August 13, 1910 (Acts 1910, p. 92, § 5), regulating the use of automobiles, as undertakes to make penal the operation of an automobile on one of the highways of this state "at a rate of speed greater than is reasonable and proper, having regard to the traffic and use of such highway, or so as to endanger the life or limb of any person or the safety of any property," is too uncertain and indefinite in its terms to be capable of enforcement.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 47; Dec. Dig. § 47.*]

3. STATUTES (§ 47*)—VALIDITY—DEFINITENESS.

So much of the act of 1910 (Laws 1910, p. 90), regulating the use of automobiles, as makes it a misdemeanor to operate an automobile at a rate of speed greater than six miles per hour upon approaching a crossing of intersecting highways, is sufficiently definite and certain in its terms to be capable of enforcement.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 47; Dec. Dig. § 47.*]

4. MUNICIPAL CORPORATIONS (§ 594*)—ORDINANCES—VALIDITY—DEFINITENESS.

A city ordinance which undertakes to make punishable the operation of an automobile upon one of the streets of the city "in a careless or reckless manner" is null and void, because it fails to sufficiently define the prohibited act.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1316-1318, 1320, 1327-1329; Dec. Dig. § 594.*]

5. CRIMINAL LAW (§ 1144*)—TRIAL—VERDICT—SEPARATE COUNT.

Where there are two counts in an indictment, each charging the same offense, but varying the manner in which the criminal act is alleged to have been committed, and one count is bad and the other good, it will be presumed, where a general verdict of guilty was rendered, that the verdict was founded upon the good count, and that the jury disregarded the bad count.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2736-2781, 2901, 3016-3037; Dec. Dig. § 1144.*]

6. MUNICIPAL CORPORATIONS (§ 703*)—STREETS—USE FOR TRAVEL—"CROSSES AND INTERSECTS."

A street or highway which extends to, but not beyond, another highway, "crosses and intersects" such highway, within the meaning of section 5 of the act approved August 13, 1910 (Laws 1910, p. 92), regulating the use of automobiles.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1509-1513; Dec. Dig. § 703.*]

7. HOMICIDE (§ 129*)—INDICTMENT—MALICE.

An indictment, which charges the offense of involuntary manslaughter, in that the homicide was committed without any intention to do so on the part of the slayer, but while he was engaged in the commission of an unlawful act, is sufficient, although it does not expressly allege that the homicide was without malice.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 197, 198; Dec. Dig. § 129.*]

8. CRIMINAL LAW (§ 885*)—INVOLUNTARY MANSLAUGHTER—PUNISHMENT—RECOMMENDATION OF JURY.

Involutary manslaughter in the commission of an unlawful act is not one of the felonies which can be punished as for a misdemeanor, upon the recommendation of the jury.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2108; Dec. Dig. § 885.*]

9. CRIMINAL LAW (§ 1187*)—WRIT OF ERROR—HARMLESS ERROR—RULING ON INDICTMENT.

Failure of the judge to quash the second count in the indictment, and to charge the jury that the accused could not be convicted upon the theory that he had violated the city ordinance of Atlanta set forth in the indictment, will not, under the facts of this case, demand that the judgment of conviction be set aside.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3101, 3103-3106; Dec. Dig. § 1187.*]

Error from Superior Court, Fulton County; Robt. T. Daniel, Judge.

Ed. Hayes was convicted of involuntary manslaughter, and brings error. Affirmed.

The defendant was indicted for the offense of involuntary manslaughter in the commission of an unlawful act; it being charged that he unlawfully ran over and killed the person named in the indictment, with an automobile, at a point in the city of Atlanta where Gordon street and Holderness street intersect and cross. It was alleged that the unlawful act consisted in a violation of the act of the General Assembly (Laws 1910, p. 90) approved August 13, 1910, entitled "An act to regulate the running of automobiles," etc., in that at the time of the homicide the defendant was driving his machine "at a rate of speed greater than was reasonable and proper, having regard to the traffic and use of said street or highway," and that he "did run and operate said automobile so as to endanger the lives and limbs of persons using said street, and that he [the defendant], upon approaching the crossing and intersection of said streets, did not so run and operate said automobile as to have the same under control, but did run and operate the same at a greater rate of speed than six miles per hour, to wit, at a speed between 15 and 20 miles per hour." It was further alleged in the indictment that the defendant was guilty of an unlawful act, in that at the time of the homicide he was driving the automobile at such a rate of speed and in such a manner as was prohibited by an ordinance of the city of Atlanta, which provides that "it shall be unlawful for any driver or person in charge of an automobile to run or operate the same in a careless or reckless manner, whether said automobile is running under or over the speed limits herein provided. Said automobiles must be operated with due regard to the safety of persons and vehicles upon the

streets and public places, and in such a manner as to avoid collisions therewith."

The accused demurred to the indictment, upon the following grounds: (1, 2) Because no offense was set forth in the indictment. (3) Because the indictment failed to allege that the homicide was without malice and without any mixture of deliberation. (4) Because it was not alleged that the unlawful act charged was such an act as in its consequences naturally tended to destroy human life. (5) Because the allegation that the machine was being driven "at a rate of speed greater than was reasonable and proper, having regard to the traffic and use of said street or highway," was a mere conclusion of the pleader. (6) Because the allegation that the machine was operated in such a way as to endanger the lives and limbs of persons using the street is a mere conclusion of the pleader. (7) Because the allegation that the machine was being run at a greater rate of speed than six miles per hour upon approaching the crossing and intersection of two streets is not an averment of an act prohibited by law. (8) Because the ordinance of the city of Atlanta set forth in the indictment is null and void, as being in conflict with the act of the General Assembly regulating automobiles, and is void for uncertainty and indefiniteness, and because the entire ordinance is not set out in the indictment. (9) Because the indictment is duplicitous, in that it charges the accused with the commission of a homicide committed in violation of an act of the General Assembly and in violation of an ordinance of the city of Atlanta. (10) Because so much of the act of the General Assembly of Georgia referred to in the indictment as provides that no person shall operate an automobile on any of the highways of the state at a rate of speed greater than is reasonable and proper, having regard to the traffic and use of such highway, or so as to endanger the life or limb of any person or the safety of any property, is null and void for want of certainty, definiteness, and clearness and fails to sufficiently define the acts and things which it undertakes to make unlawful and penal. (11) Because section 5 of the act of the General Assembly referred to in the indictment, and the ordinance of the city of Atlanta therein set forth, are both void, for lack of certainty and definiteness in defining the acts thereby prohibited and declared unlawful. The demurrer was overruled, and exception was duly taken to this judgment. The accused was convicted, and assigns error upon the overruling of his motion for new trial, and also upon the judgment refusing to sustain his demurrer.

Evans & Evans, of Sandersville, and Hines & Jordan, of Atlanta, for plaintiff in error. Hugh M. Dorsey, Sol. Gen., of Atlanta, for the State.

POTTLE, J. (after stating the facts as above). [1] 1. In this state "involuntary manslaughter" is thus defined: "Involuntary manslaughter shall consist in the killing of a human being without any intention to do so, but in the commission of an unlawful act, or a lawful act, which probably might produce such a consequence, in an unlawful manner: Provided, that where such involuntary killing shall happen in the commission of an unlawful act which, in its consequences, naturally tends to destroy the life of a human being, or is committed in the prosecution of a riotous intent, or of a crime punishable by death or confinement in the penitentiary, the offense shall be deemed and adjudged to be murder." Punishment for involuntary manslaughter in the commission of an unlawful act is from one to three years in the penitentiary, and involuntary manslaughter in the commission or performance of a lawful act, where there has not been observed necessary discretion and caution, is punished as for a misdemeanor. Penal Code 1910, §§ 68, 69. At common law manslaughter was defined to be "the unlawful killing of another without malice, either express or implied; which may be either voluntarily, upon a sudden heat; or involuntarily, but in the commission of some unlawful act." 4 Blackstone, 191. It has been held that a lawful act done in an unlawful or negligent manner is in law an unlawful act. *Commonwealth v. Hunt*, 4 Metc. (Mass.) 111, 38 Am. Dec. 346. In Indiana the definition of "involuntary manslaughter" is the same as it was at common law, and the Supreme Court of that state has held that an act might be unlawful within the meaning of the definition of involuntary manslaughter, although not subjecting the actor to criminal prosecution, and upon this principle a judgment of conviction of involuntary manslaughter was affirmed in a case where a railroad engineer carelessly and negligently ran his locomotive into a passenger coach standing on the track, and thereby caused the death of one of its passengers. *State v. Dorsey*, 118 Ind. 187, 20 N. E. 777, 10 Am. St. Rep. 111. The statute of this state, however, draws a clear distinction between an unlawful act and a lawful act committed without the observance of due caution and circumspection. In this state it could not be held that a lawful act, however negligently or recklessly committed, is an unlawful act, within the purview of the statute defining and punishing involuntary manslaughter. An unlawful act within the meaning of our statute is an act prohibited by law; that is to say, an act condemned by some statute or valid municipal ordinance of this state. In order, therefore, to support an indictment for involuntary manslaughter in the commission of an unlawful act, some act must be alleged which is prohibited by a valid law.

[2] 2. It is contended that the act of the

General Assembly of Georgia regulating the use of automobiles and the ordinance of the city of Atlanta, both of which it is alleged in the indictment the defendant was violating at the time of the homicide, are so indefinite and uncertain as to be incapable of enforcement. It is the duty of the judicial department, wherever possible, to construe an act of the legislative department so as to make it valid and binding and give due effect to all of its terms. Hence a statute ought not to be held void for uncertainty if it is possible to give a reasonably particular construction to its terms, so as to make them capable of enforcement. But while this is true, the state cannot make an act penal without defining the act in terms sufficiently clear for any person to understand that in performing the act he is guilty of a violation of the statute. The maxim that "ignorance of the law is no excuse for crime" is founded upon the theory that the citizen may ascertain the law and know that the act which he is performing has been condemned. If it is impossible for him to ascertain that a given act has been made penal, it would be manifestly unfair for the state to punish him for a commission of the act. If the law is of such doubtful construction, and describes the act denominated as a crime in terms so general and indeterminate as to make the question of criminality dependent upon the idiosyncrasies of individuals who may happen to constitute the court and jury, and of such a nature that honest and intelligent men are unable to ascertain what particular act is condemned by the state, the law is incapable of enforcement and will be held to be null and void.

The foregoing proposition is supported by the authorities with practical unanimity. Reference to a few of the adjudicated cases will serve to illustrate the application of the rule above stated. In *Ex parte Jackson*, 45 Ark. 158, it was held that a statute making it a misdemeanor to "commit any act injurious to the public health or public morals, or the perversion or obstruction of public justice, or the due administration of the law," is void for uncertainty. A statute making it a crime for a railway corporation to charge, collect, or receive more than a just or reasonable rate of toll as a compensation for the transportation of passengers has been held to be unconstitutional. *L. & N. R. Co. v. Commonwealth*, 99 Ky. 132, 35 S. W. 129, 33 L. R. A. 209, 59 Am. St. Rep. 457. The same rule has been announced with reference to a statute which undertook to make penal the combining of two or more persons for the purpose of "mob violence"; the statute not undertaking to define or designate what acts should be deemed or considered mob violence. *Augustine v. State*, 41 Tex. Cr. R. 59, 73, 52 S. W. 77, 96 Am. St. Rep. 765. The Supreme Court of the United States has said that: "Laws which create

crime ought to be so explicit that all men subject to their penalties may know what acts it is their duty to avoid. Before a man can be punished, his case must be plainly and unmistakably within the statute." *United States v. Brewer*, 139 U. S. 278-288, 11 Sup. Ct. 538, 541, 35 L. Ed. 190-193. A statute of Indiana undertook to make it unlawful for any person to haul over any of the turnpikes or gravel roads during certain conditions of the weather on a narrow tired wagon a load of more than 2,000 pounds, or on a broad tired wagon a load of more than 2,500 pounds. This statute was held to be too uncertain and too indefinite, for the reason that the statute did not sufficiently describe a narrow tired wagon and a broad tired wagon. *Cook v. State*, 26 Ind. App. 278, 59 N. E. 489. The Supreme Court of Wisconsin has thus announced the rule: "A law which takes one's property or liberty as a penalty for an offense must so clearly define the acts on which the penalty is denounced that no ordinary person can fail to understand his duty and the departure therefrom which the law attempts to make criminal, since one cannot be said to willfully violate a statute which is so contradictory or blind that he must guess what his duty is thereunder." *Brown v. State*, 137 Wis. 543, 119 N. W. 338. See, also, to the same effect: *State v. Partlow*, 91 N. C. 550, 49 Am. Rep. 652; *Czarra v. Medical Supervisors*, 25 App. Cas. D. C. 443; *State v. Ashbrook*, 154 Mo. 379, 55 S. W. 627, 48 L. R. A. 265, 77 Am. St. Rep. 765; *L. & N. R. Co. v. Railroad Commission (C. C.)* 19 Fed. 679; *Lewis' Sutherland on Statutory Construction* (2d Ed.) § 83. In *James v. Bowman*, 190 U. S. 141, 23 Sup. Ct. 680, 47 L. Ed. 979, the Supreme Court of the United States said: "It would certainly be dangerous if the Legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large. This would, to some extent, substitute the judicial for the legislative department of the government." The following language of the Supreme Court in *Savannah, F. & W. Ry. Co. v. Daniels*, 90 Ga. 610, 17 S. E. 648 [20 L. R. A. 416] is pertinent: "The opinion of the court is supposed to be consistent in the construction of laws, and the interpretation adopted by the trial judge is subject to review by a court of last resort, whose construction is controlling in all similar cases; but the opinions of juries may vary, and there may be different verdicts on exactly the same state of facts. It is highly important, to the public in general as well as to the railroad companies, that the duty imposed by this statute should be clearly defined and understood; but if the jury in each case could construe the law for itself, there would be no means of arriving at a construction which could be regarded

as final, and the limits of the duty imposed must remain unsettled."

Let these principles be applied to the laws involved in the present case. It must be apparent that so much of section 5 of the act of 1910, regulating the use of automobiles (Acts 1910, p. 92), as undertakes to make penal the operation of an automobile upon one of the highways of this state "at a rate of speed greater than is reasonable and proper, having regard to the traffic and use of such highway, or so as to endanger the life or limb of any person or the safety of any property," is too uncertain and indefinite in its terms to be capable of enforcement. What rate of speed is reasonable and proper? Who should determine this question? What is this test as to the rate of speed which can be employed, and how is the driver of an automobile to know when he is driving at a rate of speed prohibited by the act? Manifestly this question cannot be determined by the consequences which ensue from driving a machine. The law must so definitely and certainly define the offense that a person of reasonable understanding can know at the time of the commission of the act that the law is being violated. One jury might say that a certain rate of speed was reasonable and proper. Another jury might reach exactly the opposite conclusion from exactly the same state of facts and the same circumstances. One court might hold, upon a review of the facts, that the rate of speed used was in violation of the act, and another court might rule otherwise. We appreciate thoroughly the difficulty in prescribing the maximum rate of speed which can be employed in all cases; but this furnishes no reason why, in the language of the Supreme Court of the United States, the Legislature should be permitted to set a dragnet and leave the courts to determine who shall be detained in the net and who should be set at liberty.

[3] 3. We do not, however, think that the first count in the indictment was subject to demurrer. It is averred that the accused was approaching the intersection of two streets; that he did not have his machine under control; and that he was operating the same at a greater rate of speed than six miles per hour, to wit, at a speed of between 15 and 20 miles per hour. Section 5 of the act of 1910 expressly prohibits the operation of an automobile at a rate of speed greater than 6 miles per hour upon approaching a "crossing of intersecting highways." This part of section 5 is certainly sufficiently definite to enable any person coming within the operation of the act to know that it is a violation of the law, and a misdemeanor under the statute, to operate an automobile at such a point on one of the highways of the state at a greater rate of speed than 6 miles per hour. Here the statute is clear and definite in its terms. It says, in effect, that under

all circumstances and in all cases it shall be a misdemeanor to drive an automobile when approaching a crossing of highways at a rate of speed greater than 6 miles per hour.

It is insisted that, under a proper construction of section 5 of the act, a greater rate of speed than 6 miles an hour is unlawful only when approaching a railroad crossing along one of the highways of the state. But we do not think a proper construction of the act limits the section to a railroad crossing. It says when approaching a "crossing of intersecting highways and railroad crossings." We construe this to mean that it is unlawful to approach either a crossing of intersecting highways or a railroad crossing upon a highway at a greater rate of speed than that fixed by the act. Since, in the first count of the indictment, it is alleged that the accused approached a crossing where two streets intersected, at a rate of speed between 15 and 20 miles per hour, it alleged the commission of an unlawful act, in violation of the automobile law of 1910, and was sufficiently definite in its terms.

[4] 4. It is quite clear to our minds, however, that the second count in the indictment should have been stricken on demurrer. The provisions of the ordinance of the city of Atlanta, set forth in the indictment, were altogether too uncertain and indefinite to be capable of enforcement. Manifestly it will not do to denounce as a crime the operation of an automobile in a careless and reckless manner without undertaking to define in any way what shall constitute carelessness and recklessness in the manner in which the machine is being operated. The case would vary with circumstances. Sometimes 6 miles an hour would be a reckless rate of speed. Sometimes 15 or 20 would not be. A very careful driver might think that 10 miles an hour was reckless, and another driver might be of a different opinion. One accustomed to the use of automobiles would think that he could safely employ a certain rate of speed, while one unaccustomed to them would think a very much less rate of speed would be gross recklessness. When put on trial the question of guilt or innocence would depend upon the particular views held by the jury trying the case, or by the judge who presided at the trial. The terms of the ordinance are entirely too loose and vague and indefinite to be enforceable. This being so, no unlawful act is set forth and alleged in the second count of the indictment, and this count will be held to state no offense.

[5] 5. It does not follow, however, that the judgment must be reversed and the conviction set aside. The first count in the indictment was good. The evidence abundantly authorized a finding that at the time of the homicide the accused was driving his machine at a greater rate of speed than that

permitted by the automobile act of 1910. There was a general verdict of guilty. There was one good count and one bad count. Each charged the same offense, growing out of the same transaction, and the presumption is that the verdict was founded upon the good count and that the jury disregarded the bad count. *Bulloch v. State*, 10 Ga. 47 (3), 54 Am. Dec. 369; *Frain v. State*, 40 Ga. 529; 1 Bishop, New Crim. Procedure, § 1015.

[6] 6. The further point is made that the charge contained in the first count in the indictment was not sustained, for the reason that the two streets named in the indictment did not cross or intersect each other as alleged in the indictment, but that one of the streets ended at the point where it touched the other. It is contended that this is not a "crossing or intersecting of highways," within the meaning of the act of 1910, and does not support the allegation in the indictment that the homicide occurred at the point where Gordon and Holderness streets cross and intersect. We cannot assent to this view. On the contrary, we think that the two streets did intersect each other; within the meaning and purpose of the law. Manifestly the object of section 5 of the act was to protect persons who might be upon a highway which approached another highway along which an automobile was being driven. There would be just as much reason for holding that one of the streets ended at the farther margin of the other street as there would be in saying that it ended when it touched the first margin of the street. The highway was in a condition to be used by pedestrians and others entirely across the other highway upon which the automobile was being driven. The latter highway extended across the margin of the former highway, and the case is plainly within the spirit and reason of the law.

[7] 7. We do not think the indictment was defective because it failed to charge expressly that the homicide was without malice. It did allege that the defendant was accused of the offense of involuntary manslaughter. This offense does not involve malice, and is expressly defined in the statute to be the killing of a human being without any intention to do so. The indictment expressly charged that the killing was unintentional, but was done in the commission of an unlawful act. This was sufficient.

[8] 8. The presiding judge held that involuntary manslaughter in the commission of an unlawful act was not such a felony as that the court could in its discretion, upon the recommendation of the jury, impose a punishment as for a misdemeanor. Section 1062 of the Penal Code of 1910 provides that "all felonies, except treason, insurrection, murder, manslaughter," and several other felonies named in the statute, may, upon the recommendation of the jury, in the discretion

of the presiding judge, be punished as misdemeanors. The question raised depends upon the construction of the word "manslaughter" in the statute. Manslaughter is defined in our Code as follows: "Manslaughter is the unlawful killing of a human creature, without malice, either express or implied, and without any mixture of deliberation whatever, which may be voluntary, upon a sudden heat of passion, or involuntary, in the commission of an unlawful act, or a lawful act without due caution and circumspection." Penal Code 1910, § 64. From this definition it is apparent that manslaughter is of two kinds, and that involuntary manslaughter is as much manslaughter, within the meaning of the statute, as voluntary manslaughter. Of course, the word "manslaughter," as used in section 1062, would not embrace involuntary manslaughter in the commission of a lawful act, because that is made a misdemeanor by statute. But we see no reason for holding that the statute does not embrace both voluntary and involuntary manslaughter in the commission of an unlawful act. It is argued that the Legislature would not reasonably be presumed to have intended to put involuntary manslaughter in the commission of an unlawful act in the same class as treason, murder, and other felonies mentioned in the section. It is to be noticed that perjury, false swearing, and subornation of perjury and false swearing are likewise not reducible. What the Legislature may have intended we have no means of knowing, save as the intention may be gathered from the language employed, and we see no reason why the term "manslaughter," as used in section 1062 of the Code, was intended to have any other meaning than that given to it in section 64 of the Code, which had long been in force as the statutory definition of manslaughter when the act of the Legislature from which section 1062 was codified was passed.

[§] 9. The court refused to charge the jury that the ordinance of the city of Atlanta, referred to in the indictment, was void for uncertainty, and did charge that it was an unlawful act for any person in charge of an automobile to operate the same in a careless

and reckless manner upon any of the streets of the city of Atlanta. If the evidence were doubtful as to the guilt of the accused, the judgment of conviction would be set aside and a new trial ordered upon the first count in this indictment, with direction that the second count be stricken; but the evidence practically demands a finding that the accused was violating section 5 of the automobile act of 1910, and that he was at the time of the homicide operating his machine at a rate of speed greatly in excess of the maximum speed prescribed by that act. He was therefore plainly and unmistakably committing an unlawful act when he ran over and killed the person named in the indictment. There is no room for doubt on this question. No honest or impartial jury could reach any other conclusion from the evidence in the case. We do not see, therefore, how the accused could justly complain of the charge of the court that if he was operating his machine in a reckless or careless manner, in violation of the city ordinance, he would be guilty. It is utterly immaterial whether the ordinance was valid or not, or whether he was violating it or not. He was clearly acting in violation of the state law, and we will not set aside the conviction because the judge erroneously held that the city ordinance was valid and capable of enforcement, and submitted to the jury the question as to whether the accused was at the time of the homicide violating the ordinance. The same observations apply to the instructions of the court upon that part of section 5 of the act of 1910 which we have held to be too uncertain and indefinite to be enforced as a penal law. In view of the evidence, these instructions could not have been prejudicial.

Upon an examination of the whole record we are satisfied that no error was committed of sufficient materiality to require us to direct a new trial in the case. The accused was properly convicted. Indeed, under some of the evidence his conduct might well have been held to have amounted to such criminal negligence and disregard of consequences as to justify his conviction of a higher grade of homicide.

Judgment affirmed.

(28 S. C. 303)

BROWN et al. v. KOLB.

(Supreme Court of South Carolina. Aug. 26, 1912.)

1. JUSTICES OF THE PEACE (§ 160*)—APPEAL—NOTICE—SERVICE—SUFFICIENCY.

Service of notice of appeal from a magistrate's judgment in an action for claim and delivery was complete when he received the notice and, in writing, acknowledged service within five days.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 579-581, 658; Dec. Dig. § 160.*]

2. REPLEVIN (§ 11*)—DEMAND—SUFFICIENCY.

Where demand for possession of property is made before bringing suit for claim and delivery, no new demand is necessary on discontinuance of that action and commencement of another.

[Ed. Note.—For other cases, see Replevin, Cent. Dig. §§ 85-97; Dec. Dig. § 11.*]

3. CRIMINAL LAW (§ 1186*)—HARMLESS ERROR—APPEAL FROM INTERMEDIATE COURT—REFUSAL TO CHANGE VENUE.

Under Code Civ. Proc. 1902, § 368, which authorizes the Supreme Court to give judgment on the merits of a case without regard to technical errors and defects, a magistrate's error in refusing to send a case to another magistrate does not necessarily require the Supreme Court to grant a new trial on appeal from a judgment of the circuit court affirming the magistrate's judgment.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 8215-8219; Dec. Dig. § 1186.*]

4. CHATTEL MORTGAGES (§ 290*)—ATTORNEY'S FEES—RIGHT TO.

Under a chattel mortgage providing that on default the mortgagee might seize and sell the property and apply the proceeds, after deducting all expenses and charges, including attorney's fees, to the payment of the indebtedness, etc., he is not entitled to an attorney's fee in foreclosure by action.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. § 579; Dec. Dig. § 290.*]

Gary, C. J., and Fraser, J., dissenting.

Appeal from Common Pleas Circuit Court of Sumter County; H. F. Rice, Judge.

"To be officially reported."

Action by W. T. Brown and another, partners as Brown & Parler, against J. R. Kolb. From a judgment of the circuit court affirming a magistrate's judgment for plaintiffs, defendant appeals. Modified.

A. B. Stuckey, of Sumter, for appellant.
L. D. Jennings, of Sumter, for respondents.

WOODS, J. In this action for claim and delivery for the recovery of a lot of produce under a crop mortgage, the jury in the magistrate's court found a verdict in favor of the plaintiff for the property in dispute, which they valued at \$100, and found a special verdict that the defendant owed the plaintiffs \$100. Upon appeal the circuit court affirmed the judgment of the magistrate.

[1] There is nothing in the point made by respondents that the notice of appeal from the magistrate was not personally served.

Sending by mail would not have been a good service, but the service was complete when the magistrate received the notice and, in writing, acknowledged service within five days.

[2] The position that there was no demand before the action was brought is not tenable. The evidence shows that a demand was made and refused; that an action was then brought and the property taken, but, on account of some irregularity, this first action was discontinued and the property released. It seems obvious that a second demand was not necessary.

[3] The court is of opinion that the magistrate erred in refusing to send the case to another magistrate on the facts stated in defendant's affidavit; but it does not follow that there should be a new trial. This is not a case like *Wren v. Johnson*, 62 S. C. 583, 40 S. E. 937, and *Riley v. Mutual Life Ins. Co.*, 68 S. C. 383, 47 S. E. 708, where all the proceedings were absolutely void, because the court had never acquired jurisdiction. On the contrary, the magistrate did acquire jurisdiction of this case, and his refusal to send the case to another magistrate was like any other error of law, and should not result in a new trial if this court can "give judgment according to the merits of the case without regard to technical errors and defects," as required by section 368 of the Code of Procedure.

[4] The plaintiff having proved his account for \$77.55, and the defendant having offered no testimony upon which the jury could have found a less amount, the plaintiff, beyond doubt, was entitled to a verdict for that sum. As that was the entire debt, the verdict for \$100 must have included attorney's fees to the amount of \$22.45, which were not recoverable in this action. The mortgage provided that on default the mortgagee might seize and sell the property, and that upon the sale "he shall apply the proceeds of such sale, after deducting all expenses and charges, including attorney's fees, toward the payment and discharge of the indebtedness," etc. Under a similar contract, it was held, in *Walker v. Killian*, 62 S. C. 482, 40 S. E. 887; that the mortgagee could not claim the fees if he foreclosed by action, and not by seizure under the power.

The judgment of this court is that the judgment of the circuit court be modified by a reduction of \$22.45.

HYDRICK and WATTS, JJ., concur.

GARY, C. J. (dissenting). This is an action in claim and delivery, and was tried by a jury in a magistrate's court, where a verdict was rendered in favor of the plaintiffs.

The defendant made a motion before the magistrate for a change of venue, "because the defendant is apprehensive that the magistrate may not give him a fair and impar-

tial trial, for the reason that W. T. Brown [one of the plaintiffs] stated some time during the summer of 1911, in the presence of this defendant and others, that Magistrate Reese will not decide a case against him for anybody, and that said magistrate may be so under the influence of the plaintiffs as not to render a fair and impartial trial herein." There were also other grounds.

The magistrate refused the motion, and such refusal was made the basis of one of the appellant's grounds of appeal to the circuit court, which dismissed the appeal; whereupon the defendant appealed to this court upon this and other grounds.

Section 88, subd. 19, of the Code, provides: "Whenever either party to a civil case, * * * which is to be tried before a magistrate, shall file with the magistrate issuing the paper an affidavit to the effect that he does not believe he can obtain a fair trial before the magistrate, the papers shall be turned over to the nearest magistrate, not disqualified from hearing said cause in the county, who shall proceed to try the case as if he had issued the papers: Provided, such affidavit shall set forth the grounds of such belief."

When the affidavit complies with the requirements of the Code, it is mandatory upon the magistrate to change the venue; and it is reversible error for him to proceed with the trial of the case. *State v. Conkle*, 64 S. C. 371, 42 S. E. 173.

In construing said section of the Code, the court used this language, in the case of *Bacot v. Deas*, 67 S. C. 245, 45 S. E. 171: "The law does not provide that the grounds should be such as would convince the magistrate, and the reason, we think, for requiring them to be stated is to prevent arbitrary and capricious charges of prejudice; and to this end, it seems to us, the law contemplates that the affidavit shall contain such statements as would form the basis of an indictment for perjury." This principle is affirmed in the cases of *Witte v. Cave*, 73 S. C. 15, 52 S. E. 736, and *Mayes v. Evans*, 80 S. C. 362, 61 S. E. 216, 657. These authorities show that the affidavit herein complied with the requirements of the Code, and that the magistrate erred in refusing to change the venue.

As the magistrate did not have the right to try the case, the other questions involved were not properly before him for consideration; nor can they be considered by this court until they have been properly tried in the court below. *Wren v. Johnson*, 62 S. C. 535, 40 S. E. 937; *Riley v. Insurance Co.*, 68 S. C. 383, 47 S. E. 708.

I think the judgment of this court should be that the judgment of the circuit court be reversed, and that the case be remanded for a change of venue and a new trial.

FRASER, J., concurs.

(92 S. C. 65)

STEPHENS et al. v. LONG et al.

(Supreme Court of South Carolina. July 17, 1912.)

1. APPEAL AND ERROR (§ 1039*)—HARMLESS ERROR—COMPLAINT.

In an action to recover land, a clerical error in the complaint, in that it described one of the lots in controversy as "52," instead of "54," was harmless.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4075-4088; Dec. Dig. § 1039.*]

2. EVIDENCE (§ 341*)—DOCUMENTARY EVIDENCE—CERTIFIED COPY.

Under Rev. St. U. S. § 882 (U. S. Comp. St. 1901, p. 669), providing that certified copies of certain instruments shall be admitted in evidence equally with the originals thereof, a certified copy of a certificate given by the tax commissioners to the party under whom plaintiffs claimed was admissible in an action to recover land.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1289-1292; Dec. Dig. § 341.*]

3. APPEAL AND ERROR (§ 1033*)—HARMLESS ERROR—INSTRUCTION.

Where the undisputed evidence showed that defendants' only claim to the land sought to be recovered was under a deed to one defendant by plaintiffs, an instruction which limited defendants' right to acquire title to the land by limitations under a paper title, being more favorable to defendants than the evidence warranted, was harmless.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4052-4062; Dec. Dig. § 1033.*]

4. DEEDS (§ 119*)—QUESTION FOR JURY—AMBIGUOUS DEED.

Where, in an action to recover land, the description in the deed upon which one defendant relied was ambiguous, the question as to what land was intended to be conveyed thereby, being one of intention, was for the jury.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 342, 343; Dec. Dig. § 119.*]

5. TRIAL (§ 256*)—INSTRUCTIONS—REQUEST.

Where, in an action to recover land, the court charged by implication that plaintiffs were not entitled to recover if they conveyed the land in question to one of the defendants, failure to give a more specific charge was not error, in the absence of a request therefor.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 628-641; Dec. Dig. § 256.*]

6. DEEDS (§ 120*)—CONSTRUCTION—EXTRINSIC FACTS.

The land intended to be conveyed by an ambiguous description will be ascertained by reading the deed in the light of the circumstances under which it was executed, and of the subsequent conduct of the parties relative to it.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. § 239; Dec. Dig. § 120.*]

Appeal from Common Pleas Circuit Court of Beaufort County; Thos. S. Sease, Judge.

"To be officially reported."

Action by Lula V. Stephens and others against R. A. Long and another. From a judgment for plaintiffs, defendants appeal. Affirmed.

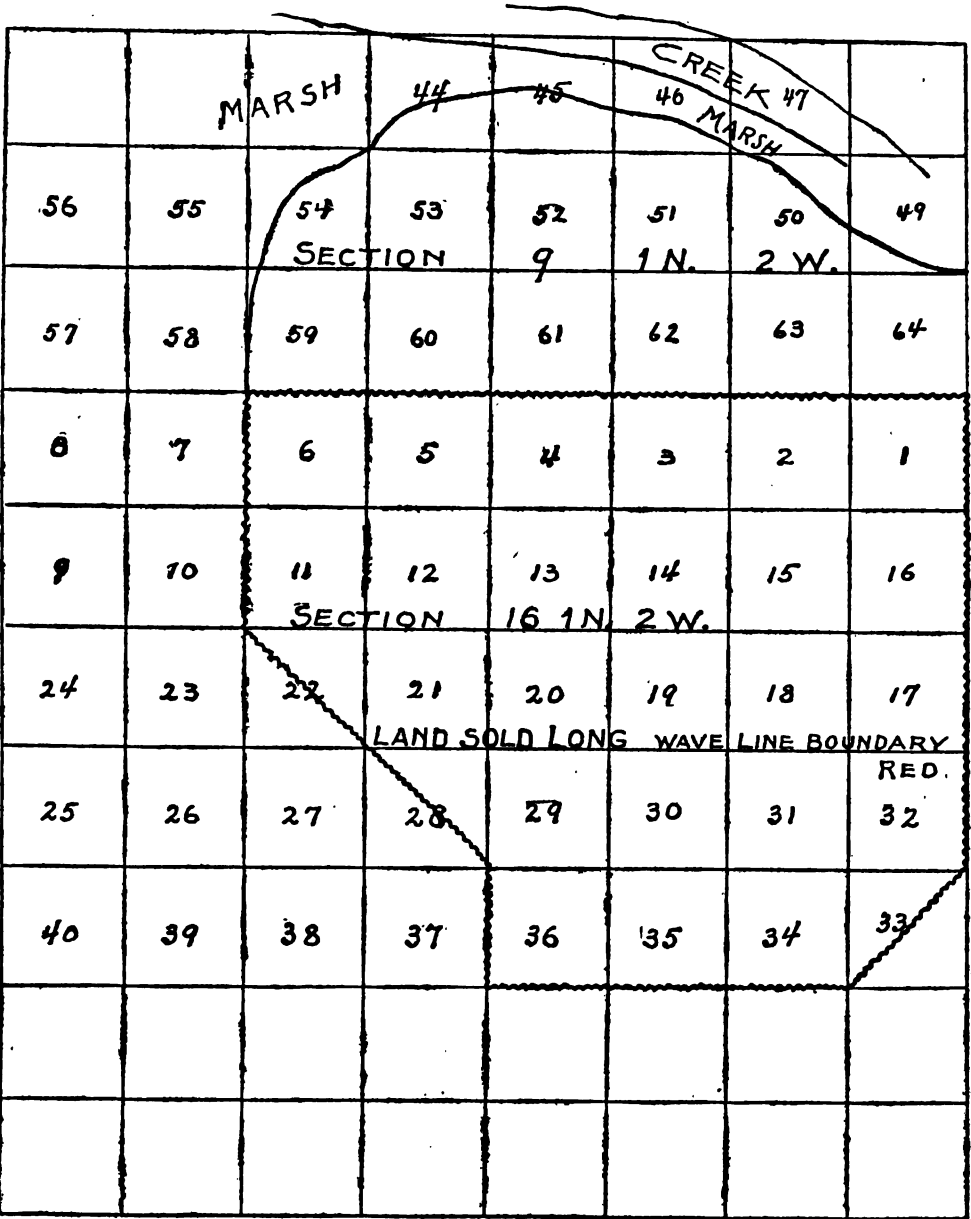
Appellants complain of the following part of the charge: "I charge you that if the defendants went into possession of this property under paper title, or rather this prop-

erty described in the complaint, under paper title, or either one of them went into possession under a paper title and held for an uninterrupted period of 10 years, then the rights of the plaintiffs would be barred by what is known as the statute of adverse possession."

Thos. Talbird and Tillinghast & Tillinghast, all of Beaufort, for appellants. W. J. Thomas, of Beaufort, for respondents.

HYDRICK, J. The plaintiffs, who are the heirs or the representatives of heirs of W.

J. Verdier, brought this action to recover a tract of land which is described in the complaint as follows: "All that land situate, lying, and being on Port Royal Island, Beaufort county, South Carolina, containing one hundred and ten acres, more or less, described as lots Nos. 51, 52, 53, 60, 61, 62, 63, and 64, and fractional lots 44, 45, 46, 49, 50, 52 and 59, all in section nine, township one north of the Beaufort base line, and range two west of St. Helena meridian, according to the plat of the United States direct tax commissioners for the district of South Carolina."



To understand clearly the questions presented for decision, it will be necessary to refer to the plat in evidence. Each lot on the plat contains 10 acres. W. J. Verdier bought the tract in section 9, which is described in the complaint, at a sale made by the United States direct tax commissioners in 1876. About the same time, he bought, also, the tract in section 16, which is particularly described in the deed made by certain of his heirs to the defendant Long. It is probable that the two tracts were conveyed to Mr. Verdier by separate deeds. At any rate, the certificate of the tax commissioners, in evidence, covers only the tract in section 9; and his daughter testified that he bought the two tracts at different times. It is not clear from the evidence whether the two tracts were, before the sale by the commissioners, parts of the same plantation; but there is evidence that, after they were purchased by Mr. Verdier, they were known together as "Spring Hill" plantation. Mr. Verdier had possession of both tracts, except 30 acres, which he conveyed to Moses Fields, and which is described in the deed to the defendant Long, from the date of his purchase until his death in 1902.

In 1903 six of his heirs conveyed to the defendant Long their undivided six-sevenths interest in a tract described in their deed as follows: "All of that certain piece, parcel, or lot of land situate, lying, and being on Port Royal Island, in the county of Beaufort and state of South Carolina, and known and described as lots 1, 2, 3, 4, 5, 6, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 29, 30, 31, 32, 34, 35, and 36, and fraction of lots 22, 28, 33, comprising two hundred and fifty acres, more or less, in section 16, township 1 north, range 2 west, according to the survey of the United States direct tax commissioners for the district of South Carolina, reserving the public right of way, and located on Port Royal Island, Beaufort county, South Carolina, and known as Spring Hill plantation, save and except that portion thereof which is included in the following lines, to wit: A line starting at the point where the western boundary line of said plantation strikes the north side of the road leading from the Shell road to 'Old House' plantation, running thence northerly along the western boundary line of said 'Spring Hill' plantation 628 $\frac{1}{4}$ feet; thence easterly and parallel to said road running to 'Old House' 2,087 $\frac{1}{2}$ feet; thence southerly to said road leading to 'Old House' 626 $\frac{1}{4}$ feet; thence along said 'Old House' road westerly 2,087 $\frac{1}{2}$ feet to the point of departure, having its northern and southern lines parallel and coextensive, and its eastern and western lines parallel and coextensive, measuring and containing thirty acres, more or less, being the portion of said plantation conveyed to Moses Fields by deed bearing

date the 31st day of March, 1891, by W. J. Verdier, deceased, the father of grantors."

It will be noticed that the tract last above described is designated as "Spring Hill" plantation; and that is the principal fact which caused and characterized this litigation.

[1] A certified copy of the certificate of the purchase of the tract in section 9, which was given to Mr. Verdier by the tax commissioners, describes that tract precisely as it is described in the complaint, except that "54" is given as one of the lots of which a fractional part was included, instead of "52," which is given in the complaint. This is evidently a clerical error in the complaint; for it appears from both the certificate and the plat that the whole of lot 52 was included in the sale, and that only a part of lot 54 was included.

It seems that after the death of Mr. Verdier his heirs moved away from Beaufort, and appointed Dr. White their agent to rent and sell their lands; and it was through him that defendant Long purchased. He testified that while he was negotiating with Dr. White for the purchase of the Verdier tract, and before he concluded the agreement, he went to look at the land, and that Dr. White referred him to Moses Fields to show him the lines, and that Fields showed him the boundaries of both the tracts in sections 9 and 16 as included in the Verdier tract. In this he is corroborated by Fields, except that Fields says that when Mr. Long came to look at the land he told him he *had bought* it. He says, also, that Dr. White told him he sold Mr. Long all the land.

After his purchase, the defendant Long took possession of all the Verdier lands in both sections 9 and 16; and he and his codefendant, claiming under that purchase, are still in possession of both tracts. He says that, on account of the absence from Beaufort of the Verdier heirs, he did not receive his deed from Dr. White until three months after he had bought the land, paid for it, and gone into possession; and that when the deed was delivered to him by Dr. White, he, supposing that it covered the land he had bought, put it into his safe, without examining it, and knew nothing to the contrary until he was notified by plaintiffs' attorney of their claim.

Besides the description of the tract conveyed as "Spring Hill" plantation, there were some circumstances tending to show that the Verdier heirs intended to convey to the defendant Long, by their deed of 1903, their interest in all the lands on the island which they had inherited from their father.

It appears from the evidence that the tract conveyed to Moses Fields by Mr. Verdier lies almost entirely in section 16. It may extend as far as 30 feet into section 9.

The answer of the defendants was a general denial. Notwithstanding they did not

plead mistake or misrepresentation, the jury were instructed that, "when there is a mutual mistake as to the property sold, the law will relieve against it." They were also charged, in substance, that, if the plaintiffs had established title to the lands described in the complaint in themselves, and if they had not conveyed it to the defendant Long, they were entitled to recover. The jury found for plaintiffs the land in dispute.

There is no merit in the first and second exceptions, which are based on the clerical error in the complaint herein before mentioned.

[2] There was no error in admitting in evidence a certified copy of the certificate given to Mr. Verdier by the tax commissioners. The act of Congress (section 882 of the Revised Statutes of the United States [U. S. Comp. St. 1901, p. 669]) provides that such copies "shall be admitted in evidence equally with the originals thereof."

[3] As the undisputed evidence showed that the defendants' only claim to the land was under the deed made to the defendant Long by the heirs of W. J. Verdier, in 1906, no question of title by adverse possession in the defendants could have arisen; and, for the same reason, the statute of limitations cannot aid the appellants, because charging that, if defendants had held the land uninterruptedly for 10 years, the plaintiffs would be barred was more favorable to the defendants than the evidence warranted, as defendants had not been in possession 10 years.

[4, 5] Appellants contend that the court should have construed the deed of the Verdier heirs to defendant Long, and have charged the jury that it conveyed the entire "Spring Hill" plantation. The court could not have done so without invading the province of the jury. The question was one of intention. It would have been more satisfactory if the issue whether the Verdier heirs, by their deed of 1903, intended to convey to defendant Long their interest in all the land in both sections, which they had inherited from their father, had been more clearly and specifically submitted to the jury. But, while the court did not charge directly upon the question of intention, he did charge, by implication, if they conveyed the land to Long, they were not entitled to recover. But appellants made no request for a more specific charge upon that subject, and we find no error in what was charged.

[6] In ascertaining the limits or boundaries of land which a grantor intended to convey, the courts will read his deed in the light of all the circumstances surrounding the parties when the deed was executed, and also of their subsequent conduct relative to it; and when the description involves a latent ambiguity, what the parties intended it to cover becomes a question of fact for the jury, and not one of construction for the court.

Foy v. Neal, 2 Strob. 156; Johnson v. McMillan, 1 Strob. 148; Norwood v. Byrd, 1 Rich. 135, 42 Am. Dec. 406; State v. Pinckney, 22 S. C. 507; Scates v. Henderson, 44 S. C. 548, 22 S. E. 724; Glover v. Gasque, 67 S. C. 18, 45 S. E. 113.

Affirmed.

GARY, C. J., and WOODS, J., concur. WATTS and FRASER, JJ., did not participate.

(32 S. C. 226)

HORSFORD v. CAROLINA GLASS CO.

(Supreme Court of South Carolina. Aug. 12, 1912.)

1. APPEAL AND ERROR (§ 231*)—PRESENTATION OF GROUNDS OF REVIEW IN COURT BELOW—NECESSITY.

Where defendant objected to testimony on the ground that it tended to show an effort to compromise, and plaintiff disclaimed any such purpose, and defendant's further objections failed to state the grounds thereof, its exceptions to the admission of such testimony cannot be reviewed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1299, 1352; Dec. Dig. § 231.*]

2. APPEAL AND ERROR (§ 1062*)—REVIEW—HARMLESS ERROR—WITHDRAWAL OF ISSUES FROM JURY.

In a personal injury action, where, at the close of the entire case, plaintiff withdrew the question of punitive damages, defendant, in the absence of a showing of prejudice, cannot complain that its motion to withdraw that issue from the jury was refused.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4212-4218; Dec. Dig. § 1062.*]

3. MASTER AND SERVANT (§ 264*)—INJURIES TO SERVANT—EVIDENCE—ADMISSIBILITY.

In an action for personal injuries received while attempting to place a belt on a pulley, where the servant alleged the defendant's negligence in failing to furnish him a safe place to work, testimony that the defendant had no loose or shifting pulleys on the shaft, and that these appliances would have avoided the injury, was admissible.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 861-876; Dec. Dig. § 264.*]

4. APPEAL AND ERROR (§ 1078*)—WAIVER OF ERRORS.

Exceptions not argued on appeal are waived.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4256-4261; Dec. Dig. § 1078.*]

5. JURY (§ 80*)—SUMMONING OF JURY—POSTPONEMENT.

It was not error for the trial court to refuse a postponement until the extra venire had been summoned and had answered, when 24 of the veniremen were present.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 380-387; Dec. Dig. § 80.*]

6. TRIAL (§ 127*)—INJURIES TO SERVANT—EVIDENCE—INSURANCE.

In a personal injury action by a servant, it is improper to introduce evidence tending to show that the master was protected by em-

ployer's liability insurance, and argument presenting that fact to the jury is improper.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 275; Dec. Dig. § 127.*]

Gary, C. J., dissenting in part.

Appeal from Common Pleas Circuit Court of Richland County; John S. Wilson, Judge. "To be officially reported."

Action by W. E. G. Horsford against the Carolina Glass Company. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

The exceptions were as follows:

"(1) That his honor erred in admitting in evidence, over the objection of the defendant, certain declarations or admissions claimed to have been made by certain officers of the defendant company to the plaintiff, W. E. G. Horsford, as follows, to wit: 'Mr. Nelson: State whether or not the company ever said anything to you about paying your wages? A. They paid me my salary for a while. Q. Why did they stop? Mr. Lyles: I object. Mr. Nelson: If they told you why they stopped, and if you had any conversation with Mr. Brewer, the manager, or Mr. Seibels, who was president, it is competent. A. I went to the Glass Works to get my pay. I thought I was still receiving it. When I got there, I saw Mr. Brewer. He told me he had a conversation with Mr. Seibels and that he had said the insurance companies— Mr. Lyles: I object, and ask that that be stricken out. If there is anything objectionable under our law, it is anything in the nature of a compromise; not competent. Mr. Nelson: We are not seeking to show a compromise. Just want to give the reason Mr. Seibels assigned to him for not paying him. The Court: Go ahead. Mr. Nelson: What did he say to you? Mr. Lyles: I object. The Court: Note exception. Mr. Lyles: This was long after the accident, and I don't know whether Mr. Brewer was then an officer of the company, but Mr. Brewer had no right or authority by admission of a statement at a late date, not anywise connected with this accident, to bind the company. Mr. Norton, I think, was the manager of the company at that time. This was long after the accident. Mr. Nelson: Instead of this being a compromise, it seeks to shirk liability; the answer will show no liability attached to them, and will give the reason. Q. How long after you got out before you went down there? A. I had been down there several times before. Q. How soon after Mr. Brewer had this conversation with you—how long after you were hurt? A. Some time. Q. Was Mr. Brewer still down there? Was he in the office doing what he had been doing when you were there? A. That is what I suppose he was doing—that is what he was doing. Q. What did he tell you? Mr. Lyles: I object. A. Mr. Brewer said that Mr. Seibels said to him under liability of the insurance company weren't due me

anything and would not pay me anything else, but Mr. Brewer said he was going to Mr. Seibels' office, and that he would bring Mr. Seibels back and let me talk to him myself. Mr. Nelson: He said the insurance company— Mr. Lyles: I object. The Court: (He has already stated what he said. Mr. Nelson: State what he said. A. Mr. Brewer told me Mr. Seibels had said something about the insurance company, liability insurance, not paying any sum; said not due me anything and would not pay me anything, but Mr. Brewer said, "I am going to Mr. Seibels' office now, and I will bring Mr. Seibels back in a few minutes' time," and told me to wait, and I waited at the factory until Mr. Seibels came, and he came, and he told me— Q. You had a talk with Mr. Seibels, the president of the company? A. Yes, sir. He told me the insurance company claimed they were not due me anything and would not pay me any more time, and the company would not advance me anything, and that is when my pay stopped. Q. That conversation was with which Mr. Seibels? A. Mr. John G. Seibels, the president of the company.' Whereas, his honor should have excluded the testimony for the reasons: (a) That such declarations or admissions by officers of the company a long time after the injury to plaintiff were not competent evidence to bind the defendant company; and the further reason (b) that they were declarations tending to establish an attempted compromise; and the further reason (c) that they were evidently attempted to be introduced for the purpose of establishing (as contended by plaintiff) that the defendant carried accident insurance covering the injury to plaintiff, so that the jury would conclude that any verdict they might render would be paid by the accident insurance company and not by the defendant.

"(2) That his honor erred in refusing the defendant's motion for a new trial made upon the twelfth ground, as follows, to wit: 'That his honor erred in allowing plaintiff to testify to an admission of Mr. Brewer to the effect that the defendant would pay all expenses and everything plaintiff wanted, after the defendant had objected for the reason that Mr. Brewer had no authority to bind the defendant by an admission made after the accident.' Whereas, his honor should have set aside the verdict and granted a new trial for the reasons therein stated.

"(3) That his honor erred in refusing the defendant's motion for a new trial made upon the eighth ground, as follows, to wit: 'That his honor erred in allowing, over defendant's objection, plaintiff to testify to an admission alleged to have been made by Mr. Brewer long after the injury to plaintiff, and also in allowing plaintiff to testify, over defendant's objection, to an alleged admission by Mr. Seibels long after the accident, both of which had reference to the

accident liability insurance company, to which plaintiff's counsel referred in his argument, for the reasons: (a) That it appeared that the admissions were made long after the injury to plaintiff, and for that reason were not binding upon the defendant, as neither Mr. Brewer nor Mr. Seibels had authority to make an admission under such circumstances; and (b) that the plaintiff's counsel thereby sought to bring before the jury the fact that he claims to exist that the defendant had liability insurance, in order to prejudice the jury by a subsequent argument that the verdict would not fall upon the defendant, but upon the liability insurance company.' Whereas, his honor should have set aside the verdict and granted a new trial for the reasons therein stated.

"(4) That his honor erred in refusing the defendant's motion for a new trial made upon the ninth ground, as follows, to wit: 'That the counsel for the plaintiff, in his closing argument to the jury, made remarks and drew inferences from the testimony, not based upon the evidence or the issues in the cause, of a character calculated to inflame the passions and prejudice of the jury, after objection had been made to the use of such language and to the statements and argument of counsel, and after the court had instructed him to confine himself to the record, the said remarks being to the effect that the jury should consider, in determining the amount of their verdict, that it would not sting the glass company, but would fall upon the accident insurance company, being practically a repetition of the statements and argument to which defendant's counsel had objected and which his honor had ruled improper.' Whereas, his honor should have set aside the verdict and granted a new trial for the reason therein stated.

"(5) That his honor erred in refusing the defendant's motion for a new trial upon the ground set forth in the notice duly served upon plaintiff's attorneys, as follows: 'To Messrs. Nelson, Nelson & Gettys, Attorneys for Plaintiff: You will please take notice that, upon the motion for a new trial, to be made before his honor, John S. Wilson, the defendant will rely, in addition to the grounds based upon the minutes of the court, upon the point that the counsel for the plaintiff in his argument to the jury went outside of the record, and made improper remarks to the jury of such a character as to prejudice and inflame them, and upon this point will use an affidavit, a copy of which is hereto attached. Shand & Shand, Lyles & Lyles, Attorneys for Defendant'—and the affidavit of J. B. S. Lyles, attached to said notice, and statements of W. S. and P. H. Nelson, which are a part of the record in this cause. Whereas, his honor should have granted the motion for a new trial upon the grounds and for the reasons set forth therein.

"(6) That his honor erred in allowing plaintiff's attorney, over the objection of defendant, to go outside of the record and improperly argue to the jury that some accident insurance company, in no wise a party to this cause, would pay any verdict that might be rendered against the defendant, and thus to persuade and prejudice the jury that the defendant would not be injured by any verdict; and his honor further erred in allowing such remarks without cautioning or charging the jury that they should not consider them or in some other manner relieving the defendant from the prejudice thereby created in the minds of the jury. Whereas, his honor should have required plaintiff's counsel to keep within the record and refrain from such argument on outside matter of a character to inflame and prejudice the jury, and, having failed in this, he should have cautioned and instructed the jury that such remarks were incompetent and improper and had nothing to do with the case, and that the jury should not consider them at all.

"(7) That his honor erred in refusing defendant's motion, made at the close of plaintiff's testimony, for a nonsuit upon the cause of action for punitive damages, as follows, to wit: 'Mr. Lyles: We ask for a nonsuit: First, as to the cause of action for exemplary or punitive damages, on the ground there is no evidence tending to establish the cause of action. * * * The errors being: (a) There was no evidence tending to establish such cause of action; and (b) that by the failure of his honor to grant the motion the defendant was misled and prejudiced in the presentation of its case to meet some such supposed evidence, when the plaintiff, by his counsel in open court, at the close of all the testimony, voluntarily acknowledged that there was no such testimony, and withdrew the cause of action.

"(8) That his honor erred in refusing the defendant's motion for a new trial made upon the second ground, as follows, to wit: 'That his honor erred, it is respectfully submitted, in refusing defendant's eleventh request to charge, as follows, to wit: "The only defect alleged in the appliances furnished plaintiff is that the belt was too tight or too short." The error being that the only defective appliance alleged in the complaint was a belt too short or too tight, and it was error, therefore, not to so instruct the jury and to allow them to consider any other defect.' Whereas, his honor should have granted the motion for the reasons therein stated.

"(9) That his honor erred in refusing defendant's eleventh request, as follows, to wit: 'The only defect alleged in the appliances furnished plaintiff is that the belt was too tight or too short.' The error being that this request set forth the proper construction of the complaint, and the defendant was entitled to have the cause submit-

ted to the jury under such proper construction; that is, to have the jury limited to the issues raised by the pleadings, which were the only issues of which it had notice.

"(10) That his honor erred in refusing defendant's motion for a new trial made upon the first ground, as follows, to wit: 'That his honor erred in refusing to charge defendant's tenth request, as follows, to wit: "There is no evidence that the defendant violated its duty to furnish plaintiff with a safe place to work." And thereby submitted and allowed the jury to consider the allegation and argument of counsel to the effect that defendant had failed to furnish the plaintiff with a reasonably safe place to work, when there was no competent evidence adduced to sustain this allegation in the complaint.' Whereas, his honor should have granted the motion upon the grounds therein stated.

"(11) That his honor erred in refusing the defendant's tenth request to charge, as follows, to wit: 'There is no evidence that the defendant violated its duty to furnish plaintiff with a safe place to work.' The error being that there was no evidence from which a reasonable juror could conclude that the defendant had failed to furnish plaintiff with a safe place to work, and, the plaintiff bearing the burden of establishing this, the defendant was entitled to have this issue withdrawn from the jury.

"(12) That his honor erred in admitting, over the objection of the defendant, testimony by the plaintiff, W. E. G. Horsford, to the effect that the defendant had no loose or shifting pulleys on the shafting in question, and that with such loose or shifting pulleys the accident could not have happened; the said testimony being as follows, to wit: 'Q. What is the shifting or loose pulley used for? Mr. Lyles: I object. The only allegation of any delict in this complaint, anything wrong with the machinery; was that the belt was too short. Incompetent for them to prove in any other particular except too short. The only allegation contained in any one of these subdivisions is that the belt was too short. Mr. Nelson: In failing to furnish a safe place to work and in requiring him to work endeavoring to place a belt around the two pulleys, one of which was revolving rapidly, we submit it is proper to show wherein that was unsafe. Proper to show if a loose pulley or lever was there, that that was the proper construction, and that would have made it safe. The Court: I think so. Mr. Lyles: Note exception. Mr. Nelson: State whether or not there was any loose pulley there? A. No, sir; no loose pulley. Q. If a loose pulley was there, would that make it perfectly safe? Mr. Lyles: I object. The Court: Leading. Mr. Nelson: State whether or not, if a loose pulley was there, would it make it safe? A. If a loose pulley had been there, would have had a lever to push the belt on, and

it would have been safe. Mr. Nelson: That loose pulley or lever, what is the operation for changing the belt from a loose pulley to a revolving pulley? Mr. Lyles: I object. There is no allegation of such defective machinery in the complaint. A safe place to work is a separate thing from unsafe appliances. The only allegation of unsafe machinery of which we have notice is that the belt was too short. It does not say that the machinery was defective in that there was no shifting pulley. Mr. Nelson: Counsel had the right to move to make this complaint more certain and definite; he could have done that, and we would have been obliged to say, and in failing to furnish a safe place to work. The Court: Go ahead, Mr. Nelson. Mr. Nelson: Where they have a loose pulley and lever or a shifter, what is the operation to transfer the belt from the loose pulley to the stationary pulley? Mr. Lyles: I object. A. If you have a loose pulley, that lever or shifter is fixed so that when you press the shifter you push it over and that will slide the belt onto the tight pulley, from the loose pulley to the tight pulley, and don't have to touch the belt, just this lever. Q. If you have no loose pulley or shifter or lever, tell us whether or not you have to handle the pulley with your hand to put on the pulley? A. Yes, sir; if you haven't got a loose pulley, you cannot get it on without putting your hands on. Q. Where they have a loose pulley, is there any danger in transferring the belt? A. No, just pull the lever over, and that shifts the belt. Q. Did they have a loose pulley or a lever down there at that time? A. No sir. Mr. Lyles: Your honor understands I am objecting to all these questions? The Court: Yes; go ahead. Mr. Nelson: In pulling the belt over the pulley which operated the air compressor, was it necessary to use the hand? A. Yes, sir.' Whereas: (a) His honor should have sustained the objection of the defendant that there was no allegation in the complaint that the machinery was defective in any other respect than that the belt was too short or too tight, and the plaintiff, having thus specified in his complaint the delictor acts of negligence of the defendant, his honor should have ruled this testimony incompetent and should have excluded the same; and (b) the plaintiff, not having established that it was customary or at all necessary to have loose or shifting pulleys, or that the machinery was in any manner not reasonably safe without them, his honor should have excluded the testimony for the reason that it did not tend to establish any negligence on the part of the defendant in the particulars specified in the complaint.

"(13) That his honor erred in refusing defendant's motion for a new trial made upon the third ground, as follows, to wit: 'That his honor erred in admitting, over the objection of defendant, the testimony of the

plaintiff to the effect that there were no loose or shifting pulleys on the shafting in question. The errors being: (a) That the only defect in the machinery alleged in the complaint was that the belt was too short or too tight and no defect in the shafting or pulleys was alleged; and (b) that the plaintiff did not endeavor to establish that shafting and pulleys of this character, without the shifting pulleys, were unreasonably unsafe and dangerous, or that shifting pulleys were customary or reasonably necessary for such purpose, and the testimony merely tended to confuse and mislead the jury in violation of his honor's charge that the defendant was merely under a duty to furnish reasonably safe machinery and a reasonably safe place to work.' Whereas, his honor should have set aside the verdict and granted a new trial for the reasons therein stated.

"(14) That his honor erred in refusing defendant's motion, made at the close of plaintiff's testimony, for a nonsuit upon the whole case, as follows, to wit: 'Mr. Lyles: * * * We ask for a nonsuit on the whole case, upon two grounds, first of which is that there is no evidence tending to establish the violation of any duty owed by the defendant to the plaintiff that approximately resulted in damages to the plaintiff, or the violation of any duty owed by any servant, for the violation of which duty the defendant is responsible under law. * * * Whereas, his honor should have granted the motion upon the grounds therein stated.

"(15) That his honor erred in refusing to direct a verdict for the defendant as requested by the defendant in its third request to charge, as follows, to wit: 'The jury is instructed to find a verdict for defendant, as there is no evidence tending to establish the violation of any duty owed plaintiff by defendant, directly and proximately resulting in damage or injury to plaintiff.' Whereas, his honor should have directed a verdict for the defendant as therein requested.

"(16) That his honor erred in refusing to direct a verdict for the defendant as requested in defendant's fourth request to charge, as follows, to wit: 'The jury is instructed to find a verdict for defendant for the reason that the evidence admits only of the inference that the plaintiff's injuries were caused by the negligence of a fellow-servant not in the performance of any duty owed by defendant to plaintiff.' Whereas, his honor should have directed a verdict for the defendant as therein requested.

"(17) That his honor having charged the defendant's ninth request to charge, as follows, to wit: 'A defect in machinery or appliances furnished by the master is not to be presumed from the mere fact that it failed or broke in use. The plaintiff must establish such defect by the preponderance of

the testimony'—he erred in failing to direct a verdict for the defendant as requested in defendant's first request, as follows, to wit: 'The jury is instructed to find a verdict for defendant.' The error being that his honor, having adopted for the law of the case the rule set forth in defendant's ninth request, there was no evidence from which a reasonable man could infer that there was any defect in the machinery or appliances furnished by defendant, and there was therefore a failure of evidence to establish any defect in the machinery or appliances, and consequently a failure to establish any breach of duty owed by the defendant to the plaintiff under the allegations of the complaint.

"(18) That his honor erred in modifying or changing defendant's seventh request, which reads as follows: 'The master is not under an absolute duty to furnish his servant with a safe place to work and safe machinery and appliances. He owes merely the duty of ordinary care to do so; that is, of furnishing such a place to work and such machinery and appliances as a man of ordinary sense and prudence would furnish under similar circumstances.' And in charging the same in the following form: 'Now for the defense, I charge you as follows: "(7) The master is not under an absolute duty to furnish his servant with a safe place to work and safe machinery and appliances"—not under an absolute duty, because, as I have tried to illustrate, it may be such work that the master cannot guarantee safety, cannot guarantee safety to the employé, but only to furnish what is reasonably safe and suitable under suitable circumstances. I charge you that.' The error being that the charge as requested stated a correct proposition of law, absolutely applicable to the issues raised by the pleadings and the testimony, which the defendant was entitled to have charged in the form requested; but in the form to which it was changed by his honor it took away from the jury the proper test under which they should have determined the question whether the defendant was negligent in failing to furnish the plaintiff a safe place to work and safe machinery and appliances, to wit, the test of ordinary care, that is, the care that would be exercised by a man of ordinary sense and prudence, and instructed the jury to the effect that the master was not under an absolute duty to furnish a safe place to work and safe machinery and appliances only in cases where the work was such that the master could not guarantee safety to the employé, thus instructing them that the master was under an absolute duty in other cases.

"(19) That his honor erred in refusing to direct a verdict for the defendant as requested in defendant's fifth request to charge, as follows, to wit: 'The jury is instructed to find for the defendant, for the

reason that the evidence admits only of the inference that plaintiff was guilty of negligence which contributed as a proximate cause of his own injuries.' Whereas, his honor should have granted the request and directed a verdict for the reasons therein stated.

"(20) That his honor erred in refusing defendant's motion for a new trial made upon the fifth ground, as follows, to wit: 'That his honor, having charged the defendant's eighteenth request, as follows, to wit: "If plaintiff had a choice of two ways to do the work in the doing of which he was injured—one safe and one dangerous—and he voluntarily chose the dangerous way and was injured thereby, as a proximate consequence of doing the work in this dangerous way, then he cannot recover." And this having thereby become the law of the case, and the evidence having conclusively established in the affirmative the facts upon which this law was hypothecated, his honor must, as a matter of law, set aside the verdict as being contrary to law.' Whereas, his honor should have granted the motion for the reasons therein stated.

"(21) That his honor having charged the defendant's eighteenth request, as follows: 'If plaintiff had a choice of two ways to do the work in the doing of which he was injured—one safe and one dangerous—and he voluntarily chose the dangerous way and was injured thereby, as a proximate consequence of doing the work in this dangerous way, then he cannot recover.' And this having thus become the law of the case, it was error for his honor to refuse to direct the jury to find a verdict for the defendant as requested in defendant's first request, as follows, to wit: 'The jury is instructed to find a verdict for defendant.' Because the only inference that could be drawn from the testimony was that the plaintiff had a choice between a safe and a dangerous way of doing the work, and that he voluntarily chose the dangerous way, and was injured as a proximate consequence of doing the work in this way.

"(22) That his honor erred in charging the plaintiff's fourth request, as follows, to wit: 'A servant is not ordinarily guilty of contributory negligence in obeying an order or rule of his master, unless the danger or peril of obeying such rule or order is so imminent or obvious that a man of ordinary prudence would not incur it. To show contributory negligence under such circumstances, it is not sufficient that the employé receiving the order should have misgivings and believe the act required to be hazardous, unless the danger is so imminent and obvious that a man of ordinary prudence would not incur it. If there is ground for reasonable difference of opinion as to the danger, the servant is not bound to set up his judgment against that of the master, whose or-

ders he is required to obey; but he may rely on the judgment of his superior.' The error being that there was no evidence from which a reasonable man could infer that the plaintiff had been ordered to do the work in the manner in which he did it, since the plaintiff did not even claim that he had been instructed by a superior servant or officer to do the work in the manner which caused his injury, and it was therefore error to submit to the jury the issue whether his obedience to such an order excused him from the danger of the work that he undertook.

"(23) That his honor erred in charging the plaintiff's sixth request, as follows, to wit: 'A servant may, without inspection, assume and rely upon the assumption that the machinery and appliances furnished him by the master are safe and suitable, and he is not ordinarily bound to exercise ordinary care to ascertain if they are so.' The errors being: (a) That the evidence admitted only of the inference that the plaintiff had full opportunity, certainly as much so as his superiors, of observing any defects in the machinery and appliances furnished him, and it was not a case of superior knowledge of the defect on the part of the master; (b) that there was no evidence from which a reasonable man could infer that there was a defect in the machinery and appliances; and (c) that a servant is ordinarily bound to exercise ordinary care to inspect and ascertain if there are defects in the machinery and appliances furnished him, certainly except in cases of superior knowledge on the part of the master of hidden defects, and there was no evidence bringing this case within the exception.

"(24) That his honor erred in refusing defendant's motion for a nonsuit, made at the close of plaintiff's testimony, upon the following grounds, to wit: 'Mr. Lyles: * * * We ask for a nonsuit on the whole case, upon two grounds: * * * Second, on the whole case. It is clear that the plaintiff is barred by his assumption of risk.' Whereas, his honor should have held, from the plaintiff's testimony, that the plaintiff had assumed the risk of the injury he sustained, and should have granted the motion.

"(25) That his honor erred in refusing to direct a verdict for the defendant as requested in defendant's sixth request to charge, as follows, to wit: 'The jury is instructed to find a verdict for the defendant, for the reason that the evidence admits only of the inference that plaintiff assumed the risks of the injuries he sustained.' Whereas, his honor should have granted the request and directed a verdict for the defendant for the reasons therein stated.

"(26) That his honor erred in refusing defendant's motion for a new trial, made upon the eleventh ground, as follows, to wit: 'That the verdict is so excessive that, coupled with the fact that it was returned by

the jury in less than one-half hour after the case was submitted to them, and the further fact that the plaintiff sought only \$15,000 damages and voluntarily consented to the exclusion of punitive damages, it shows that it was the result of prejudice and caprice, and was not founded upon a mature deliberation of the issues presented.' Whereas, his honor should have held that the facts therein stated, which appear of record in the cause, established as a proposition of law that the verdict was the result of caprice and prejudice, and should have granted the motion upon this ground.

"(27) That his honor erred in ordering and requiring the defendant, over the objection of its counsel, to proceed with the drawing of the jury and the trial of the case, when there were only 24 veniremen present, and he erred in refusing to postpone the trial until the extra venire had been summoned and had answered. Whereas, his honor should have upheld the objection of the defendant and allowed a postponement of the trial until the extra venire had been summoned and had answered, so that the defendant would have had the benefit of a full venire from which to draw the jury."

Lyles & Lyles and Shand & Shand, all of Columbia, for appellant. Nelson, Nelson & Gettys, of Columbia, for respondent.

GARY, C. J. This is an action for damages, alleged to have been sustained by the plaintiff through the wrongful acts of the defendant, while he was employed to work in its glass factory

The allegations of the complaint, material to the questions involved, are as follows: "That on or about the 6th day of May, 1910, plaintiff was in the employ of the defendant, in the blowing room of its said factory, and was by defendant's manager ordered to do certain work, in the blacksmith shop of said factory, to wit, to assist in placing a belt on the pulley, which operates the air compressor, in said blacksmith shop; the belt being around a small pulley, which was operated by an electric motor, which pulley was revolving rapidly. Plaintiff, together with other workmen, was ordered to put said belt around the larger pulley, which operated the air compressor. That said belt was too short or tight to be operated on said pulleys, and upon its being placed around, or nearly around, said large pulley, it was violently thrown therefrom, and violently struck this plaintiff on the face and head, and knocked him senseless to the floor, and the small pulley, continuing to revolve at a great speed, caused said belt to beat and whip this plaintiff all over his person, bruising and battering him from head to foot. That the aforesaid injuries and damage to the plaintiff were caused by the careless, negligent, reckless, willful, and wanton conduct of the defendant: In failing to furnish plaintiff a

safe place to work, and in requiring him to work at, and endeavor to place a belt around, two pulleys, one of which was revolving rapidly. In failing to furnish plaintiff safe appliances with which to work, and furnishing plaintiff a belt which was too tight or too short to be operated with safety. In ordering and requiring plaintiff to put said belt on said pulleys, when defendant knew, or should have known, that it was too tight and dangerous to operate. In ordering and requiring plaintiff and other employees to place said belt on said pulley while one of said pulleys was in motion."

The defendant denied the allegations of negligence and recklessness, and set up the defenses of contributory negligence and assumption of risk. The defendant made a motion for a nonsuit, which was refused. It also requested his honor, the presiding judge, to direct the jury to find a verdict in favor of the defendant, which request was also refused. The jury rendered a verdict in favor of the plaintiff for \$12,500. The defendant made a motion for a new trial which was refused, except in one particular. His honor, the presiding judge, ordered that a new trial be granted, unless the plaintiff would consent upon the record that the verdict be reduced to \$10,000. The plaintiff gave his consent, and the verdict was accordingly reduced. The defendant appealed upon exceptions, which will be reported.

Before proceeding to consider the exceptions specifically, we will first dispose of those assigning error, on the part of the circuit judge, in refusing the motions for a nonsuit, and to direct a verdict for the defendant, on the grounds that there was no testimony tending to sustain the material allegations of the complaint, or that the testimony showed that the plaintiff was guilty of contributory negligence or assumed the risk.

The "case" contains 140 pages, and consequently the testimony is voluminous. We have considered it carefully, and have reached the conclusion that there was testimony tending to sustain the material allegations of the complaint, and that the motions for nonsuit, and the direction of a verdict, were properly refused; also, that the testimony tending to show contributory negligence and assumption of risk was susceptible of more than one inference; and that these defenses were properly submitted to the jury.

A detailed statement of the testimony would prolong this opinion to a great length, and no useful purpose would thereby be subserved. We proceed to the consideration of the specific exceptions.

First, second, and third exceptions:

[1] These exceptions relate to the admissibility of certain testimony. The objections to the testimony upon the trial of the case, and the errors assigned in those exceptions, do not correspond. The first objection to the testimony was that it tended to show an ef-

fort to compromise, whereupon the plaintiff's attorneys disclaimed any such purpose. The other objections failed to state the grounds thereof, and consequently are not properly before this court for consideration.

Fourth, fifth and sixth exceptions:

These exceptions relate to remarks made to the jury by one of plaintiff's attorneys. The appellant's attorneys in their argument say: "The language to which these exceptions are directed is somewhat in dispute, and reference must be had to affidavit of J. B. S. Lyles, and statement of W. S. & P. H. Nelson. For the purposes of this argument, we are perfectly willing to confine ourselves to the statement of the Mr. Nelson, as we have no desire to raise an issue between counsel." They then quote from the statement of Mr. W. S. Nelson as follows, and base their argument upon the facts therein stated: "In his argument to the jury, Mr. Nelson referred to testimony (checks and vouchers offered by plaintiff) to show payment to Horsford after his injuries, and referred to the testimony that Mr. Seibels had told Horsford, that they had liability insurance. I was sitting within a few feet of Mr. Nelson, and directed his attention to this part of the argument. At this point Mr. J. B. S. Lyles objected to the argument, and asked the court to request counsel to keep within the record. Mr. Nelson called the attention of the court to the testimony, whereupon the court ruled about to this effect, 'Yes, keep within the record.' Mr. Nelson stated to the jury, in effect, that he did not wish to go out of the record, for it would be a ground for reversal if he did, for he thought the jury would give such a good verdict that he did not wish to run any chance of having it reversed. What Mr. Nelson did state to the jury was about this: That Mr. Seibels had stated that they had liability insurance; that we did not know whether these payments came from the glass company or insurance company. I did not understand the court directed Mr. Nelson to desist from argument along the line which was interrupted by Mr. Lyles, but, after the interruption, further than making to the jury a statement that he did not wish to go out of the record, I am sure Mr. Nelson did not dwell upon this line of argument, and about all he did say was that the Carolina Glass Company claims it has made certain payments to the plaintiff (referring to checks and vouchers offered in evidence), but Mr. Seibels said they had liability insurance, and we do not know whether the glass company or insurance company actually paid these amounts; as we do not know whether the glass company or the insurance company had paid these bills, and did not know by whom the verdict would be paid, if the jury rendered one for the plaintiff."

When Mr. J. B. S. Lyles objected to the

remarks of Mr. P. H. Nelson, as to the matter of liability insurance, and asked the court to request counsel to keep within the record, the court so requested, whereupon counsel disclaimed any desire to go out of the record. No further objection was made to the line of argument pursued by counsel. Under these circumstances, the exceptions must be overruled.

Seventh exception:

[2] The cause of action for punitive damages was withdrawn, and the appellant's attorneys have failed to show wherein this was prejudicial to the rights of the defendant.

Eighth and ninth exceptions:

It is only necessary to refer to the allegations of the complaint, to show that these exceptions cannot be sustained.

Tenth and eleventh exceptions:

What has already been said disposes of these exceptions.

Twelfth and thirteenth exceptions:

[3] One of the allegations of negligence was the failure of the defendant to furnish the plaintiff a safe place to work, and the testimony was competent, for the purpose of showing the condition of the place.

Fourteenth, fifteenth, sixteenth, and seventeenth exceptions:

These exceptions make the point that there was no testimony tending to establish negligence. What has already been said disposes of these exceptions.

Eighteenth exception:

When this exception is considered, in connection with the entire charge, it will be found to be free from error.

Nineteenth, twentieth, twenty-first, and twenty-second exceptions:

In these exceptions the appellant contends that the evidence admitted only of the inference that plaintiff was guilty of negligence, which contributed to his injury as a proximate cause. What has already been said disposes of this question.

Twenty-third exception:

What has already been said disposes of this exception.

Twenty-fourth and twenty-fifth exceptions:

These exceptions assign error, on the part of the circuit judge, in not holding that the plaintiff assumed the risk, and are disposed of by what has already been said.

Twenty-sixth exception:

There is nothing in the record tending to show that the verdict was the result of prejudice or caprice.

[4, 5] Twenty-seventh exception:

The appellant's attorneys did not argue this exception; but, waiving such objection, it cannot be sustained.

I think the judgment of the circuit court should be affirmed; but, as the other members of the court are of the opinion that the fourth, fifth and sixth exceptions should be

sustained, the judgment of the circuit court is reversed, and the case remanded for a new trial.

WOODS, J. [6] I am unable to resist the conclusion that matter universally recognized as extraneous and highly prejudicial, in the trial of issues like those involved in this case, was brought into the evidence and argument against the objection of defendant's counsel, and that for that reason the defendant did not have a fair trial. There can be no doubt on the bench or at the bar that, in an action by an employé against his employer to recover damages for personal injury, both reason and authority forbid bringing into the evidence or argument the fact that defendant is protected by employer's liability insurance. Such evidence or argument has a manifest and strong tendency to carry the jury away from the real issue and to lead them to regard carelessly the legal rights of the defendant on the ground that some one else will have to pay the verdict. This is the only reason that can be assigned for attempting to use such testimony and argument. One of the most manifest and pressing duties, not only of courts, but of lawyers, is to prevent influences of this kind from finding their way into the administration of justice. In the discharge of this duty the entire commonwealth is deeply concerned, for the use in evidence and argument of such influences produces injustice, and waste of the time and labor of courts and juries at great public cost.

In this instance the evidence was brought out under the guise of a conversation between the plaintiff and Seibels, the president, and Brewer, the manager of the defendant company. Such a conversation as to any matter germane to the issue on trial was not subject to objection, but it was here used as a medium for getting before the jury prejudicial testimony entirely foreign to the issue. There was no ground for the defendant's counsel to object to the questions as tending to elude testimony as to insurance, because the questions contained no reference to the subject, and counsel could not anticipate that the answers would be incompetent. When the incompetent answer came, counsel did not object generally; but the court responded by saying that the answer was already out.

It is said, however, that the objection to the testimony cannot be sustained, because counsel did not move to strike out. The general rule is indisputably established that, when in the course of a trial incompetent statements of witnesses are brought in either from accident, or when they might be reasonably, though erroneously, thought by counsel to be competent, the only remedy that the court can afford is to grant a motion to strike out and instruct the jury to disregard the testimony. The injury result-

ing from the jury having heard the incompetent statement is regrettable, but the trial cannot be estopped because of such accidents and mistakes liable to occur in every trial. *State v. Wideman*, 68 S. C. 119, 46 S. E. 769; *State v. Adams*, 68 S. C. 421, 47 S. E. 676; *Hagins v. Aetna Life Ins. Co.*, 72 S. C. 216, 51 S. E. 683; *Keys v. Winnsboro Granite Co.*, 76 S. C. 284, 56 S. E. 949.

But when testimony manifestly incompetent and prejudicial is adduced for the purpose of having such testimony influence the jury, the party who adduces it will not be allowed to hold his verdict and assert that the court can do nothing against the unfair advantage of having the statement before the jury, beyond striking it out and instructing the jury to disregard it. In such case it does not lie in the mouth of the offending party to say that, although he has brought in irrelevant and prejudicial testimony, the court cannot entirely deprive him of the benefit of it. It makes no difference that defendant's counsel did not move to strike out the testimony. Had the motion been made and granted, the plaintiff would still have had the unfair advantage of having testimony before the jury which he ought not to have offered. Justice can be satisfied only by the complete relief of a new trial. Reference to the subject in the argument was still more objectionable. In a written statement of facts made by Mr. W. S. Nelson, and accepted by counsel for defendant, it is said that Mr. P. H. Nelson stated in argument that "Mr. Seibels had told Horsford that they had liability insurance," that Mr. Lyles for defendant "objected to the argument and asked the court to request counsel to keep within the record," that Mr. Nelson called the court's attention to the testimony on the subject, and the court said, "Yes, keep within the record"; and, in summing up Mr. Nelson's remarks, the statement continues: "About all he did say was that the Carolina Glass Company claims it has made certain payments to the plaintiff (referring to checks and vouchers offered in evidence), but Mr. Seibels said they had liability insurance, and we do not know whether the glass company or insurance company had paid these bills, and did not know by whom the verdict would be paid if the jury rendered one for the plaintiff."

The inevitable conclusion that a party should not be allowed to hold a verdict obtained under such circumstances is enforced and illustrated in many cases. With respect to testimony as to employer's insurance, the Supreme Court of Mississippi said, in *Herrin v. Daly*, 80 Miss. 340, 31 South. 790, 92 Am. St. Rep. 605: "It could not conceivably throw any light on the issue, and could have no other tendency than to seduce a verdict on the ground that an insurance company, and not the defendants, would be affected." In *Cosselmon v. Dunfee*, 172 N. Y. 507, 65

N. E. 494, the question was asked: "Do you know whether they carry insurance for accidents, to their employes?" And the court went to the extent of holding that the plaintiff should not be allowed to hold his verdict, although the question was ruled out because by the question the plaintiff had improperly produced on the mind of the jury the impression there was such insurance. In the cases of *Iverson v. McDonnell*, 36 Wash. 73, 78 Pac. 202, and *Westby v. Washington Brick, etc., Co.*, 40 Wash. 289, 82 Pac. 271, similar questions were held to be ground for reversal. Other cases holding such evidence inadmissible are: *Roche v. Llewellyn Iron Works Co.*, 140 Cal. 563, 74 Pac. 147; *Prewitt-Spurr Mfg. Co. v. Woodall*, 115 Tenn. 605, 90 S. W. 623; *Barrett v. Bonham Oil & Cotton Co.* (Tex. Civ. App.) 57 S. W. 602; *Lowsalt v. Seattle Lumber Co.*, 38 Wash. 290, 80 Pac. 431; *Blanchard v. Olds Gasoline Engine Works*, 142 Mo. App. 319, 126 S. W. 828.

The same rule has been applied to the argument: *Prewitt-Spurr Mfg. Co. v. Woodall*, supra; *Hollis v. United States Glass Co.*, 220 Pa. 49, 69 Atl. 55; *George A. Fuller Co. v. Darragh*, 101 Ill. App. 664; *Tremblay v. Harnden*, 162 Mass. 383, 38 N. E. 972; *Lone Star Brewing Co. v. Voith* (Tex. Civ. App.) 84 S. W. 1100; *Coe et al. v. Van Why*, 33 Colo. 315, 80 Pac. 894, 3 Ann. Cas. 552. In *Tremblay v. Harnden*, supra, the trial judge refused to allow counsel to comment on evidence of the defendant himself that he had insurance; the court saying: "We are of opinion that the judge was right in this refusal. It does not appear that the defendant relied upon his insurance in any way as a defense to this suit, and very likely the fact of insurance was brought out in cross-examination. It was not a subject for legitimate argument to the jury."

It is not necessary for us to go the extent that many of the courts have gone on this subject. The principle on which all the courts proceed is the same, namely, that such testimony or argument is not unfair. For these reasons I think the circuit court should be reversed.

On the other points I concur in the opinion of the Chief Justice.

WATTS, J., concurs. FRASER, J., concurs in the result.

HYDRICK, J. I concur in this opinion as applied to the facts of this case. But I reserve my opinion as to whether such testimony would not be admissible in a case where it appeared that plaintiff's injury resulted from reckless, willful, or malicious acts of defendant. In such a case, it might be reasonably inferred that such conduct was induced by reliance upon the insurance, and, if punitive damages are awarded, the

general rule is that all the facts and circumstances should be laid before the jury in order that they may the more intelligently and justly award proper punishment.

(92 S. C. 364)

BROWN et ux. v. WESTERN UNION TELEGRAPH CO.

(Supreme Court of South Carolina. Aug. 28, 1912.)

1. APPEAL AND ERROR (§ 1032*)—ERRONEOUS ADMISSION OF EVIDENCE—PREJUDICIAL ERROR.

A party may not complain of the admission of immaterial and irrelevant evidence, unless he shows that it was prejudicial to his rights.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4047-4051; Dec. Dig. § 1032.*]

2. APPEAL AND ERROR (§§ 1097, 1195*)—LAW OF THE CASE.

The decision of the Supreme Court on appeal is the law of the case on a subsequent trial and appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4358-4368, 4427, 4661-4665; Dec. Dig. §§ 1097, 1195.*]

Appeal from Common Pleas Circuit Court of Charleston County; G. W. Gage, Judge.

Action by William Brown and wife against the Western Union Telegraph Company. From a judgment for plaintiffs, defendant appeals. Affirmed.

The following are the exceptions of defendant:

"(1) That his honor, the presiding judge, erred in overruling defendant's objection to and admitting the following testimony: 'Q. When you got to Summerville, what did you find? A. She was dead and buried. Q. Was that or not the first time you knew she was dead? A. Yes, sir; that was the first time. Q. When was it you came to Summerville—how long after the burial? A. The second day. She died on the 22d, and I got the letter on the 24th. She died Wednesday, and I got the letter on Friday. Q. Then you came? A. Yes, sir. Q. Rosa, when did you get this letter? A. On the 24th. Q. When you got that letter, what did you do? A. I began to pack my trunk. Q. To come on? A. Yes, sir. Q. Did you come immediately in response to that letter? A. Yes, sir. Q. What was the date of the letter? A. That letter was dated 22d, and I got it on the 24th. Q. When you got to Summerville, when did you first hear of the death of your sister? A. I did not hear until I got home in the house.' Whereas it is respectfully submitted that the said testimony was immaterial and irrelevant, as defendant was only liable in damages, if liable at all, for mental anguish caused to the plaintiff by being deprived of seeing her dead sister and of attending her funeral and burial, and the defendant could not be held liable for

any mental anguish of the plaintiff, caused by the death of her sister and knowledge thereof, and that where, how, and when she acquired such knowledge is irrelevant and immaterial, and is entirely apart and disconnected from the message that was sent, the failure to deliver which prevented her being present at her sister's funeral and seeing her dead body, and for which alone she could be entitled to recover damages; that this result could not have been contemplated from the wording of the message, and no notice thereof to the company was given.

"(2) Because the court erred in not granting defendant's motion for a nonsuit at the close of the plaintiff's case, on the ground that there was not only no allegation in the complaint, but no testimony whatsoever, that plaintiff paid or promised to pay for the transmission of the message, or that the sender paid or promised to pay therefor, or that there was any consideration to the defendant.

"(3) Because the court below erred in refusing to grant the defendant's motion for a nonsuit, made at the close of the plaintiff's case, as to the cause of action based on negligent tort (only), on the ground that it affirmatively appeared from the plaintiff's own case that the message sued on was an interstate message, and that it did not appear that there was any default or breach of duty with regard thereto on the part of the defendant within the territorial limits of the state of South Carolina; and the defendant maintains that the statute entitled 'An act to allow damages against telegraph companies doing business in this state for mental anguish or suffering even in the absence of bodily injury caused by negligence in receiving, transmitting and delivering messages,' approved February, 1901 (Stat. S. C. vol. 23, p. 748), which act is the foundation of the cause of action based on negligent tort, is, if construed as applicable to the message in this case, unconstitutional and void, because in contravention of the federal Constitution, to wit: (a) Article 1, § 8, subd. 3, of the Constitution of the United States, conferring on Congress power to regulate commerce among the several states, and (b) article 1, § 8, subd. 17, of the Constitution of the United States, conferring power on Congress to exercise exclusive legislation in all cases whatsoever over the District of Columbia, and (c) that part of the fourteenth amendment to the Constitution of the United States which provides that no state shall deny to any person within its jurisdiction the equal protection of the laws.

"(4) That the court below erred in refusing the defendant's motion for a nonsuit or a direction of verdict in its favor, at the close of the whole case, as to the cause of action based on negligent tort (only), on the grounds set out in defendant's motion for a

nonsuit at the close of the plaintiff's case, and on the additional ground that it then affirmatively appeared that there was no default or negligence within the state of South Carolina, and that whatever default or negligence there was on the part of the defendant occurred without the state of South Carolina and within the District of Columbia; and therefore, as the message sued on was an interstate message, the defendant maintains that the statute entitled 'An act to allow damages against telegraph companies doing business in this state for mental anguish or suffering even in the absence of bodily injury caused by negligence in receiving, transmitting and delivering messages,' approved February 20, 1901 (Stat. S. C. vol. 23, p. 748), which act is the foundation of the cause of action based on negligent tort, is, if construed as applicable to the message in this case, unconstitutional and void, in contravention of three parts of the federal Constitution, to wit: (a) Article 1, § 8, subd. 3, of the Constitution of the United States, conferring on Congress power to regulate commerce among the several states, and (b) article 1, § 8, subd. 17, of the Constitution of the United States, conferring power on Congress to exercise exclusive legislation in all cases whatsoever over the District of Columbia, and (c) that part of the fourteenth amendment to the Constitution of the United States which provides that no state shall deny to any person within its jurisdiction the equal protection of the laws.

"(5) That his honor, the presiding judge, erred in refusing to charge the eleventh request of the defendant, which was as follows: 'That the measure of damages is governed in this case by the law of the District of Columbia, where the tort was committed; and under the law of that state any mental anguish which does not proceed from or accompany physical injury is not an element of damage, and cannot be recovered. The jury is therefore instructed that the plaintiff cannot recover damages in this case for the mental anguish she claims to have suffered in not seeing her dead sister's face and attending her funeral.'

"(6) That his honor, the presiding judge, erred in refusing to charge the request of the defendant, numbered 11a, which was as follows: 'If the jury find from the evidence that the sole default of the defendant occurred in the District of Columbia, and that there was no breach of duty anywhere else, then the jury are instructed to bring in a verdict for the defendant, as far as compensatory damages for mental anguish are concerned.'

"(7) That his honor, the presiding judge, erred in refusing to charge the fourteenth request of the defendant, which was as follows: 'Unless the plaintiffs have proved by a preponderance of the evidence that there

was some default or breach of duty on the part of the defendant within the territorial limits of the state of South Carolina, there can be no recovery of damages for mental anguish, because the statute allowing such damages, if construed as authorizing recovery thereof where the plaintiff has not proved a default within the state, would be unconstitutional and void as in contravention of article 1, § 8, subd. 3, of the federal Constitution, conferring on Congress power to regulate commerce among the several states; and also of article 1, § 8, subd. 17, thereof, conferring power on Congress to exercise exclusive legislation over the District of Columbia.'

"(8) That his honor, the presiding judge, erred in refusing to charge the fifteenth request of the defendant, which was as follows: 'If the jury find from the testimony that there has been no default or breach of duty in the state of South Carolina, and that such default or breach occurred without the state of South Carolina and in the District of Columbia, there can be no recovery of damages for mental anguish; for the mental anguish statutes upon which such recovery depends, if construed as authorizing a recovery under such circumstances, would be unconstitutional and void as in contravention of article 1, § 8, subd. 3, of the Constitution of the United States, conferring on Congress power to regulate commerce among the several states, and also of article 1, § 8, subd. 17, thereof, conferring power on Congress to exercise exclusive legislation in all cases whatsoever over the District of Columbia.'

"(9) That his honor, the presiding judge, erred in refusing to charge the sixteenth request of the defendant, which was as follows: 'If the jury find that there was no default or breach of duty within this state, there can be no recovery of damages for mental anguish, as the mental anguish statute, if construed as applying to and authorizing recovery of damages for mental anguish under the circumstances of this case, would be unconstitutional and void as in contravention of that part of the fourteenth amendment to the Constitution of the United States which provides that no state shall deny to any person within its jurisdiction the equal protection of the laws.'

"(10) That his honor, the presiding judge, erred in charging the jury that the defendant telegraph company is liable for what it did under the laws of the state of South Carolina, and its right and remedies are under the laws of that state, irrespective of where the act of negligence may have occurred."

Mitchell & Smith, of Charleston, for appellant. Logan & Grace, of Charleston, for respondents.

GARY, C. J. This is an action for damages, alleged to have been sustained by the plaintiff Rosa Brown through the wrongful acts of the defendant in failing to deliver the following telegram: "Summerville, S. C., January 22, 1908. Mrs. W. M. Brown, No. 72 Canal St., S. W., Washington, D. C. Come at once. Your sister died this morning. Frederika Alsten."

The jury rendered a verdict in favor of the plaintiff for \$750 for negligence, thus eliminating the question as to the right of the plaintiff to recover punitive damages.

The appeal is from the refusal of his honor, the presiding judge, to grant the motion for nonsuit, and the direction of a verdict; also from his refusal to charge certain requests, and from certain parts of his charge, alleged to be erroneous.

This is the second appeal in this case; the first being reported in 85 S. C. 495, 67 S. E. 146, 137 Am. St. Rep. 914. The appellant's exception will be incorporated in the report of the case.

[1] The first exception cannot be sustained, for the reason that, even if the testimony therein mentioned was immaterial and irrelevant, the appellant has failed to show that it was prejudicial to its rights. The second exception was withdrawn.

[2] All the other questions presented by the exceptions herein were involved upon the former appeal, and were determined adversely to the contention of the appellant. They are therefore subject to the doctrine of *res adjudicata*, and, even if the rulings then made were erroneous, they could not be corrected in this case. *Jones v. Railway*, 65 S. C. 410, 43 S. E. 884.

These questions were also presented upon a petition for a rehearing on the former appeal in this case, but were again decided against the petitioner, and the petition dismissed. Again, they were affirmed in the case of *Heath v. Telegraph Co.*, 87 S. C. 219, 69 S. E. 283, and still again in the case of *Boyd v. Telegraph Co.*, 88 S. C. 518, 71 S. E. 28. In the last-mentioned case, the court had under consideration the question whether the addressee of a telegram, in a state which has not a mental anguish statute, has the right of recovery in this state for delay in delivering a message sent from this state to that, without reference to where the delay occurred, and ruled that he did have such right. In reversing the circuit judge, this court merely said: "This question has undergone judicial investigation so recently that we deem it only necessary to cite the cases of *Brown v. Telegraph Co.*, 85 S. C. 495, 67 S. E. 146, 137 Am. St. Rep. 914, and *Heath v. Telegraph Co.*, 87 S. C. 219, 69 S. E. 283, to show that the exceptions raising this question must be sustained."

These exceptions are therefore overruled. Judgment affirmed.

(93 S. C. 274)

TOLAR et al. v. MARION COUNTY LUMBER CO.†

(Supreme Court of South Carolina. Aug. 26, 1912.)

1. INFANTS (§ 30*)—CONVEYANCES—RATIFICATION—PRIORITY.

Mortgages ratified and executed after one became of age are superior to a deed made during his minority, but not ratified until after a ratification and execution of such mortgages.

[Ed. Note.—For other cases, see Infants, Cent. Dig. §§ 41-49, 54, 55; Dec. Dig. § 30.*]

2. INFANTS (§ 30*)—CONVEYANCES—RATIFICATION—PRIORITY.

A minor's deed to the timber on land is only inconsistent with mortgages covering the whole estate, executed and ratified after he became of age, but before ratification of the deed, so far as the timber is concerned.

[Ed. Note.—For other cases, see Infants, Cent. Dig. §§ 41-49, 54, 55; Dec. Dig. § 30.*]

3. INFANTS (§ 30*)—CONVEYANCES—RATIFICATION.

A conveyance made by an infant may be ratified on his reaching his majority, subject to mortgages previously executed and ratified.

[Ed. Note.—For other cases, see Infants, Cent. Dig. §§ 41-49, 54, 55; Dec. Dig. § 30.*]

4. INFANTS (§ 30*)—CONVEYANCES—RATIFICATION.

An infant's deed, ratified after reaching his majority, is superior to the title of persons claiming under a deed executed after such ratification, of which the subsequent grantee had notice.

[Ed. Note.—For other cases, see Infants, Cent. Dig. §§ 41-49, 54, 55; Dec. Dig. § 30.*]

5. APPEAL AND ERROR (§ 1177*)—DISPOSITION—REMAND.

An action involving title under a deed to timber, giving the grantee 10 years in which to cut the timber, dating from commencement to cut, and providing that, if at the end of that time the timber should not be removed, he might have 10 years longer by paying 6 per cent. of the purchase price, should be remanded, for the purpose of enabling the parties to introduce evidence upon an issue as to whether a reasonable time had elapsed for removal of the timber, where the trial court erroneously deemed it had no right to require removal within any time other than that fixed by the deed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4597-4604, 4606-4610; Dec. Dig. § 1177.*]

Appeal from Common Pleas Circuit Court of Dillon County; S. W. G. Shipp, Judge.

"To be officially reported."

Controversy, without action, between J. J. Tolar and another and the Marion County Lumber Company. From the judgment, plaintiffs appeal. Remanded.

Montgomery & Lide and Henry Buck, all of Marion, for appellants. Willcox & Willcox, of Florence, and M. C. Woods, of Marion, for respondent.

GARY, C. J. This is a controversy without action.

The facts, as agreed upon by the parties, are set out in the record.

The issue submitted to the court was: "Who has superior title to the timber on the two tracts of land hereinbefore described, plaintiffs or defendant?" And that issue involves the law as to the manner in which the contracts of an infant must be ratified after attaining his majority.

[1, 2] It appears from the agreed statement of facts that Ashton L. Berry was born on the 1st of March, 1881, and therefore attained his majority on the 1st of March, 1902; that Sarah A. Berry and Ashton L. Berry conveyed the timber on the two tracts of land described in the record, to the Cape Fear Lumber Company on the 9th of February, 1899, and that the deed of conveyance was duly recorded; that Sarah A. Berry and Ashton L. Berry executed a mortgage on one of said tracts of land to certain parties on the 26th of July, 1899, which was duly recorded on the 4th of August, 1899, and transferred to C. L. Willis on the 3d of October, 1900; that Ashton L. Berry made the following indorsement on said mortgage on the 4th of March, 1902, "I hereby indorse the within paper as just and correct;" that Sarah A. Berry and Ashton L. Berry executed a mortgage on the other tract of land to C. L. Willis on the 10th of December, 1900, which was duly recorded; that Ashton L. Berry made the following indorsement on said mortgage on the 4th of March, 1902, "I hereby indorse the foregoing paper as correct;" that Sarah A. Berry and Ashton L. Berry executed another mortgage to C. L. Willis on both tracts of land on the 4th of March, 1902; that Ashton L. Berry, on the 11th of December, 1902, ratified and confirmed his deed of conveyance, which he had made to Cape Fear Lumber Company on the 9th of February, 1899; that on the 12th of December, 1903, Sarah A. Berry and Ashton L. Berry conveyed both tracts of land to C. L. Willis in fee, and the deed was duly recorded; that on the — day of August, 1904, the Cape Fear Lumber Company conveyed said timber to the defendant, Marion County Lumber Company; that C. L. Willis and his wife conveyed the timber on said lands to the plaintiffs on the 1st of June, 1906.

In the case of *Norris v. Vance*, 8 Rich. 164, the court uses this language: "According to the decision in the case of *Norris v. Wait*, 2 Rich. 148 [44 Am. Dec. 283], and other authorities, this court is satisfied that to show a confirmation of an infant's contract, there must be, after he attains maturity, and with a full knowledge of his rights, one of these three things, viz: (1) Acquiescence, from which assent may be fairly inferred; (2) an adequate benefit enjoyed, which has grown, directly or indirectly, out of the contract; (3) some direct act of express assent."

There are exhaustive notes to the cases of

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Index.

Shreeves v. Caldwell, 8 Ann. Cas. 592, and *Craig v. Van Bebber*, 100 Mo. 584, 13 S. W. 906, 18 Am. St. Rep. 569, which discuss this subject in every aspect. The contract of an infant, except for necessities, is voidable, and is without force and effect until ratified by the infant after he becomes of age. *Ihley v. Padgett*, 27 S. C. 300, 3 S. E. 468.

If an infant executes a deed of conveyance, and, after attaining his majority, executes another deed or mortgage embracing the same land, the first deed will thereby be rendered as ineffectual as if it had never been made, for the reason that it is inconsistent with the second deed or mortgage, and was without vitality until confirmed in some way after the grantor ceased to labor under the disability of infancy. Therefore, when Ashton L. Berry, on the 4th of March, 1902, ratified the two mortgages executed by him during his minority, and also executed a third mortgage on that day, the lien of these respective mortgages became paramount to the rights of the Cape Fear Lumber Company, under its deed, dated the 9th of February, 1899; and such lien was not subject to be divested or rendered less effectual by the subject ratification of the deed of conveyance to the Cape Fear Lumber Company, which took place on the 11th of December, 1902. While it is true Ashton L. Berry could do no act, after ratifying the two mortgages and executing a third, that would render said mortgages less effective, nevertheless there are facts in this case by which Ashton L. Berry had the power to ratify the deed to the Cape Fear Lumber Company, subject to the lien of said mortgages. The reason why a subsequent deed or mortgage disaffirms a deed made during infancy is because they are inconsistent. A subsequent mortgage is inconsistent with a prior deed, for the reason that, if the deed should be considered as of force, there would be no power left in the grantor to make a valid mortgage. When, however, the deed executed during minority did not purport to cover all the land embraced within the mortgages, it cannot be said that they are wholly inconsistent.

[3] In the case under consideration, the deed to the Cape Fear Lumber Company did not purport to convey all the land, but only the timber thereon. Therefore the deed and the mortgages were only inconsistent to the extent that the mortgages had a prior lien, but which, after its enforcement by sale of the property, might leave the rights of the grantee unaffected to any great extent. When Ashton L. Berry ratified the mortgages, he took no other action tending to show an intention to repudiate the deed; and we see no reason why he could not thereafter ratify it, subject, of course, to the lien of the mortgages.

[4] When Sarah A. Berry and Ashton L.

Berry conveyed the two tracts of land to C. L. Willis, he knew that Ashton L. Berry had previously ratified the deed executed in favor of the Cape Fear Lumber Company; in fact, the instrument of writing, expressly confirming the deed made to said company on the 9th of February, 1899, was sent to him, and was then in his possession. The ratification of said deed created vested rights in the Cape Fear Lumber Company, which could not be divested by a subsequent deed. Therefore the title of the said company was paramount to that of C. L. Willis, and likewise to the title of the plaintiffs, as the deed of conveyance to them by C. L. Willis did not invest them with rights superior to those of C. L. Willis. This is shown by the following statement, which appears in the record: "Willis told J. J. Tolar, the partner who conducted the negotiations for his firm, that A. L. Berry was a minor at the time of the deed made by him to Cape Fear Lumber Company, and in corroboration of his statement produced, or offered to produce, and showed to Tolar, or offered to show to him, the confirmation above referred to," etc.

[5] The next assignment of error is as follows: "Because his honor erred, it is respectfully submitted, in holding that under the conveyance herein the defendant, Marion County Lumber Company, as grantee of the Cape Fear Lumber Company, took an estate in fee simple; it being respectfully submitted that by a proper construction of said conveyance it imposed upon the grantee and the defendant herein, as its successor, the duty of cutting and removal of said timber within a reasonable time."

The respondent's attorneys, in their argument, concede that under the cases of *Flagler v. Railway*, 89 S. C. 328, 71 S. E. 849, *McClary v. Railway*, 90 S. C. 153, 72 S. E. 145, and *A. C. L. Corporation v. Litchfield*, 90 S. C. 363, 73 S. E. 182, 728, the construction of said deed by his honor, the circuit judge, was erroneous.

The sixth and seventh exceptions, which are as follows, will be considered together:

"Because his honor erred, it is respectfully submitted, in not holding that more than a reasonable time in which to cut and remove said timber had elapsed before the commencement of this action, and that therefore the timber had revested and reverted in plaintiffs, as the successors in interest of C. L. Willis.

"Because, if the agreed statement of facts does not show the facts and circumstances surrounding the parties at the time of the execution of the timber deed sufficiently for the court to pass on the question of whether or not a reasonable time had elapsed in which to commence to cut and remove the said timber, his honor erred, it is respectfully submitted, in not remanding the case, or tak-

ing testimony to fully determine these facts; it being respectfully submitted that, this action being in the nature of a suit in equity, the court should be fully advised of all the facts before attempting to pass judgment."

The ruling of his honor, the circuit judge, in this regard, is as follows: "It was contended by plaintiffs that the deed under which defendant claims, when properly construed, bound the defendant to remove the timber within a reasonable time. This deed undoubtedly conveys the timber in fee simple. By a stipulation or provision contained in the deed, the defendant was to have 10 years from the time it commenced to cut the timber in which to cut and remove same, and, if at the end of that time it has not removed said timber, then, by a payment of 6 per cent. upon the purchase price, it was to have 10 years longer to remove same. Whatever may be my personal views as to the propriety of sustaining a contract of this character, I am constrained to hold, under the doctrine laid down in the cases of *Knotts v. Hydrick*, 12 Rich. 314, and *Wilson v. Alderman*, 80 S. C. 106, 61 S. E. 217, 128 Am. St. Rep. 865, that defendant's grantors received title to the timber in question in fee simple, and that I have no right to hold defendant to be required to remove this timber within a reasonable time, or within any time, except that which is provided for by the terms of the deed itself. I may add that, even if I did not regard myself bound by these decisions to give effect to the deed according to its terms, yet there is nothing from which I could ascertain whether or not a reasonable time for the removal of the timber in question has expired. The agreed statement of facts would seem to indicate that a reasonable time had not expired."

The circuit judge did not consider it necessary to decide the question whether the grantee had commenced to cut and remove the timber within a reasonable time, as the case of *Flagler v. Railway*, 89 S. C. 328, 71 S. E. 849, and the other cases hereinbefore mentioned, had not then been decided.

He states that there is nothing from which he could ascertain whether a reasonable time had elapsed, and merely remarked that the agreed statement would *seem* to indicate that a reasonable time had not expired. Furthermore, it does not appear from the agreed statement of facts whether the burden of proof rested upon the plaintiffs or the defendants.

Under these circumstances, justice and equity demand that the case should be remanded, for the purpose of enabling the parties to introduce testimony upon this issue.

Judgment modified.

HYDRICK, WATTS, and FRASER, JJ., concur. WOODS, J., disqualified.

(92 S. C. 324)

STATE ex rel. MUTUAL BEN. LIFE INS. CO. v. McMASTER, Ins. Com'r.

(Supreme Court of South Carolina. Aug. 26, 1912.)

INSURANCE (§ 11*)—LIFE INSURANCE—CIRCULARS—RIGHT TO ISSUE.

Act Feb. 27, 1908 (25 St. at Large, p. 1110), which prohibits a life insurance company from issuing circulars misrepresenting the benefits promised by policies, etc., authorizes the Insurance Commissioner to refuse permission to circulate a pamphlet containing statements which unreasonably assume that there will be no decrease in dividends from a scale based on a particular year, during which there was a considerable increase in dividends over any previous year.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 11.*]

"To be officially reported."

Mandamus proceeding by the State, on relation of the Mutual Benefit Life Insurance Company, against Fitz Hugh McMaster, Insurance Commissioner. Petition dismissed.

T. Moultrie Mordecai, of Charleston, for petitioner. J. Fraser Lyon, Atty. Gen., for respondent.

GARY, C. J. This is an application to the court, in the exercise of its original jurisdiction, for a writ of mandamus, requiring the respondent to grant to the petitioner permission to circulate a certain pamphlet, which the respondent had ruled was in violation of law. The pamphlet is entitled "The Accelerative Endowment Plan."

The respondent does not object to all the provisions thereof, but only to those on pages 14, 15, and 16, which are as follows:

Page 14: "The company does not publish any 'estimates' of future dividends. Such dividends are necessarily contingent upon existing business conditions, and their amount cannot be predicated or ascertained in advance. For purposes of illustration, however, it has computed the final results of various policies at certain ages, *based upon the assumption that the company's present dividend scale shall be maintained without change* and that all dividends upon the policies in question will be applied upon the accelerative endowment plan. Any change in the company's dividend scale will correspondingly affect the results shown on the following pages."

Page 15: "Illustrations of the accelerative endowment plan (not guaranteed) showing the age at which policy may be converted into a paid-up participating policy for \$10,000 payable at the same time as original policy and cash payable at such age. Based on dividends payable in 1912 on 3 per cent. reserve policies for \$10,000. Any change in the dividend scale will correspondingly affect the results.

Age at Issue.	21		25		30		35		40		45		50		55		60		65	
Ordinary Life..	48	\$145	51	\$127	55	\$208	58	\$ 12	62	\$214	65	\$ 69	69	\$491	72	\$485	75	\$531	78	\$ 684
Life, 10 Prem's.	30	190	34	195	39	204	44	222	49	249	54	294	59	373	64	509	69	745	74	1,203
Life, 15 Prem's.	34	261	38	275	43	401	48	441	53	510	57	2	63	95	67	392	72	718	76	424
Life, 20 Prem's.	37	302	41	316	46	344	51	401	55	10	60	107	65	319	69	22	74	750	77	65
End't, 20 Years	37	233	41	257	46	296	51	362	56	473	61	651	65	246	70	730	74	715		
End't, 25 Years	40	284	44	416	49	480	53	76	58	226	63	499	67	336	71	877				
End't, 30 Years	42	248	46	294	51	388	55	95	60	325	64	219	68	279						
End't, 35 Years	44	294	48	365	52	107	57	316	61	236	65	389								
End't, 40 Years	45	117	49	207	53	35	59	321	62	379										
End't, 45 Years	46	76	50	204	54	107	58	119												
End't, 50 Years	47	126	50	000	55	298														

Page 16: "Illustrations of the accelerative endowment plan (not guaranteed) showing the age at which policy will ultimately be payable as an endowment and amount payable at such age if paid-up option be not accepted. Based on dividends payable in 1912 on 3 per cent. reserve policies for \$10,000. Any change in the dividend scale will correspondingly affect the results.

years. The time has come when, it is believed, the company is justified in adopting a new dividend scale, which will be applied to the dividends of 1912. The new scale results in a considerable increase in the dividends, on all but a few policies." Indeed, the written argument of the petitioner's attorneys shows that these allegations are admitted.

Age at Issue.	21		25		30		35		40		45		50		55		60		65	
Ordinary Life....	58	10,449	60	10,444	62	10,118	65	10,552	67	10,230	69	10,005	72	10,575	74	10,255	77	11,000	79	10,519
Life, 10 Prem's...	50	10,238	52	10,077	55	10,146	58	10,263	61	10,410	63	10,097	66	10,231	68	10,000	71	10,196	75	10,977
Life, 15 Prem's...	51	10,428	53	10,265	56	10,361	59	10,479	61	10,164	64	10,356	66	10,093	70	10,859	74	11,124	77	10,095
Life, 20 Prem's...	51	10,124	44	10,454	56	10,073	59	10,222	62	10,403	65	10,630	68	10,051	72	10,481	75	10,000	79	11,128
End't, 20 Years...	38	10,003	42	10,032	47	10,081	52	10,165	57	10,307	62	10,540	67	10,963	71	10,594	75	10,605		
End't, 25 Years...	42	10,350	46	10,399	51	10,494	56	10,667	60	10,073	65	10,517	69	10,334	73	10,571				
End't, 30 Years...	45	10,066	49	10,148	54	10,319	59	10,622	63	10,292	67	10,249	71	10,627						
End't, 35 Years...	48	10,008	52	10,186	57	10,462	61	10,220	65	10,271	69	10,739								
End't, 40 Years...	51	10,160	55	10,430	59	10,248	63	10,355	66	10,085										
End't, 45 Years...	54	10,591	57	10,365	61	10,498	64	10,291												
End't, 50 Years...	55	10,008	58	10,027	62	10,516														

The respondent alleges "that the said pamphlet is wholly an estimate; that it is based upon the dividend scale of the year 1912, which is greater than that of any year since 1900; that representations and estimates contained in said pamphlet are not based upon the average earnings of the petitioner, or upon the said company's experience for a number of years, sufficient to enable it to state what will be the amount of dividends and other benefits which will be received by policy holders in future years, or the value of the policies at any definite time in the future." The respondent also alleges "that it is contrary to the public interest to allow the petitioner to circulate the pamphlet referred to in the petition, and that said pamphlet is misleading to the public."

As a part of his return, the respondent relied upon a circular letter, issued by the president of the petitioner to its agents November 25, 1911, which contains the following statements: "The company's present dividend scale, with certain modifications, which were first made applicable to the dividends of 1910, was adopted for the dividends of 1900, and has accordingly been in use 12

The act of 1912 (page 768) provides "that any order, ruling or decision of the Insurance Commissioner, in all matters either of law or discretion, within the jurisdiction of his department, shall be subject to review by certiorari or mandamus proceedings, before any circuit judge or justice of the Supreme Court, which may be held at chambers or in open court, upon thirty days notice to the Insurance Commissioner."

The act of 1910 (page 772) contains the provision that, "before granting a certificate of authority, to do business in this state, to any company, the Insurance Commissioner shall be satisfied, by proper evidence, that such applicant for license is duly qualified to do business under the laws of this state; that it is safe and solvent; that its dealings are fair and equitable; and that it conducts its business in a manner not contrary to the public interests."

The act of 1908 (page 1110) provides that "no life insurance company doing business in this state, and no officer, director or agent thereof, shall issue or circulate, or cause or permit to be issued or circulated, any estimate, illustration, circular, or statement of any sort, misrepresenting the terms of any

policy issued by it, or the benefits or advantages promised thereby, or the dividends or shares or surplus to be received thereon, or shall use any name or title of any policy or class of policies, misrepresenting the nature thereof."

The question raised by the pleadings is whether the petitioner is issuing or circulating an estimate, illustration, circular, or statement misrepresenting the benefits or advantages promised by the policy, or the dividends or shares of surplus to be received thereon.

The petitioner's attorneys, in their written argument, say: "The statements made in the leaflet complained of are based entirely and solely upon data which the Commissioner of South Carolina requires the company to file with him as a part of its annual return, and such data is a part of the public records of his office." The proposition for which the petitioner contends is not tenable, for the reason that the statement in the circular is based, not only upon the scale of dividends for the year 1912, but upon the assumption that there will not be a decrease in the scale of dividends during the two periods mentioned in the circular, to wit, 27 and 37 years. This assumption is unreasonable, and tends to mislead the public, for the reason that the scale of dividends is based upon a single year, and upon the further fact that the scale for that year resulted in a considerable increase in the dividends over any previous year.

The circular in question is in violation of the act of 1908, and the petition is therefore dismissed.

WOODS, HYDRICK, and WATTS, JJ., concur.

(32 S. C. 329)

RICHLAND COUNTY v. OWENS et al.

(Supreme Court of South Carolina. Aug. 26, 1912.)

1. ACKNOWLEDGMENT (§ 57*) — STATUTORY PROVISIONS.

By express provision of Act March 1, 1909 (26 St. at Large, p. 83), an instrument is entitled to record in the state when its execution is proved by affidavit before a foreign notary, who shall affix thereto his official seal within the state of his appointment; the requirement of Civ. Code 1902, § 595, that he accompany his seal with a certificate of his official character, being eliminated.

[Ed. Note.—For other cases, see Acknowledgment, Cent. Dig. § 264; Dec. Dig. § 57.*]

2. EVIDENCE (§ 370*)—ORIGINAL OF INSTRUMENT REQUIRED TO BE RECORDED.

By express provision of Civ. Code 1902, § 2897, production, on notice to the adversary, of the original of an instrument required to be recorded, is prima facie evidence of its execution.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1559, 1560, 1562-1578, 1592; Dec. Dig. § 370.*]

3. APPEAL AND ERROR (§ 1171*)—HARMLESS ERROR.

Error in finding, in an action on a bond, certain small sums to have been improperly paid out, was harmless, where the amount in fact improperly paid out exceeded the amount of the bond.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4546-4554; Dec. Dig. § 1171.*]

4. OFFICERS (§ 129*)—MISFEASANCE — BREACH OF BOND.

Failure of an officer to obey the positive mandate of the statutes is misfeasance in office, and a breach of his bond that he shall well and truly perform the duties of his office as required by law.

[Ed. Note.—For other cases, see Officers, Cent. Dig. §§ 225, 226, 229-234; Dec. Dig. § 129.*]

5. TRIAL (§ 142*)—QUESTION FOR COURT OR JURY—PROXIMATE CAUSE.

The question of proximate cause, though ordinarily for the jury, is for the court, when the evidence is susceptible of only one reasonable inference.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 387; Dec. Dig. § 142.*]

6. OFFICERS (§ 142*)—MISFEASANCE—LOSS OF FUNDS—PRESUMPTION.

When an officer pays out public funds without compliance with a mandatory statute, there is a presumption, which he is required to rebut, that his act was the direct cause of the loss of such funds.

[Ed. Note.—For other cases, see Officers, Cent. Dig. §§ 253-255; Dec. Dig. § 142.*]

7. COUNTIES (§ 98*)—SUPERVISOR — COUNTY FUNDS—LOSS.

The county supervisor, having left warrants signed in blank with the clerk of the county board, who filled them out and issued them to pay forged claims, is not excused under the doctrine of independent intervening cause, but is within the doctrine that, where an injury results from concurring causes, he who originates one of them is as responsible as if it had been the sole cause.

[Ed. Note.—For other cases, see Counties, Cent. Dig. §§ 141-143, 147; Dec. Dig. § 98.*]

8. ESTOPPEL (§ 72*)—ACTS MAKING INJURY POSSIBLE—COUNTY SUPERVISOR — LOSS OF FUNDS.

Under the doctrine that, if one of two innocent persons must suffer by the fraud of another, he must bear the loss whose negligence makes the loss possible, the county supervisor, and consequently his bondsman, is liable to the county, where by his negligence in intrusting the clerk of the county board with warrants signed in blank, and failing thereafter to examine the stubs and scrutinize the claims paid therewith, he enables the clerk to issue them to pay forged claims.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. § 188; Dec. Dig. § 72.*]

9. COUNTIES (§ 98*)—SUPERVISOR—WARRANT FOR FUNDS—"DRAW."

While, under the statute providing that the county supervisor shall "draw" his warrant, he need not personally write the whole warrant, or fill up the blank spaces, the word "draw" being used in the sense of "issue," yet it is his duty before signing them to examine the claims for payment of which they issued, and see that they are proper, and have been itemized, verified, and approved as required by

statute, which duty he cannot delegate, except at the peril of himself and bondsman.

[Ed. Note.—For other cases, see Counties, Cent. Dig. §§ 141-143, 147; Dec. Dig. § 98.*]

For other definitions, see Words and Phrases, vol. 3, pp. 2199-2200.]

10. COUNTIES (§ 166*)—FUNDS—WARRANTS—EVIDENCE.

That warrants drawn by the county supervisor were accompanied by the claims against the county for payment of which the warrants were issued is no evidence that the amounts paid out on the warrants were for services or materials furnished the county where the accounts were not itemized and verified as required by the statute.

[Ed. Note.—For other cases, see Counties, Cent. Dig. § 259; Dec. Dig. § 166.*]

11. APPEAL AND ERROR (§ 971*)—REVIEW — DISCRETION—QUALIFICATION OF EXPERTS.

The decision of the preliminary question of qualification of a witness as an expert is one for the trial judge, not to be interfered with, unless manifestly erroneous.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3852-3857; Dec. Dig. § 971.*]

12. EVIDENCE (§ 501*)—OPINIONS — HAND-WRITING.

One having stated the facts on which his opinion that claims were forgeries was based, his testimony was admissible, though he was not a handwriting expert.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2292-2305; Dec. Dig. § 501.*]

Appeal from Common Pleas Circuit Court of Richland County; Robt. Aldrich, Judge.

"To be officially reported."

Action by the County of Richland against Samuel H. Owens and another. Judgment for plaintiff. Defendants appeal. Affirmed.

See, also, 86 S. C. 571, 68 S. E. 753.

Green & Green, R. H. Welch, and W. H. Townsend, all of Columbia, for appellants. W. Hampton Cobb, Thomas & Lumpkin, and D. W. Robinson, all of Columbia, for respondent.

HYDRICK, J. The complaint sets up three causes of action on three official bonds, given by the defendant Owens, as supervisor of Richland county, for three consecutive terms of office, of two years each. The condition of each bond is that Owens, as supervisor, shall well and truly perform the duties of his office, as required by law.

[1, 2] Copies of the bonds, certified by the clerk of the court and register of mesne conveyances, in whose office the originals had been recorded, as required by law, and also the originals, which were produced by the state treasurer, who was the legal custodian of them, were properly admitted in evidence. Section 595, vol. 1, Code 1902, provides that copies of official bonds "so certified shall be good and sufficient evidence in all suits to be instituted in any court of this state." The surety company contends that the bonds could not have been legally recorded, and therefore that the certificate of their record was illegal, because the bonds were executed

by the surety company outside the limits of the state, and proof of their execution by the corporation was taken before a foreign notary, whose official seal was not accompanied by a certificate of a clerk of a court of record of the county in which the affidavit was taken as to his official character, as required by section 948, vol. 1, Code 1902. Evidently this appellant overlooked the fact that section 948 was amended (26 Stat. 83) so as to dispense with the necessity of such a certificate, and so as to make the official seal of a foreign notary, affixed within the state of his appointment, a sufficient authentication of his signature, residence, and official character; and the act was made to apply to and validate the probate of all instruments previously executed according to its provisions, whether the same were then recorded or not. Section 2897, vol. 1, Code 1902, as amended (23 Stat. 1073), affords authority for the introduction of the originals, the respondent having given the notice required. Under that section, the production of the original bonds was prima facie evidence of their execution.

The complaint alleges numerous breaches of the condition of each of the bonds, resulting in loss to the county; but it will be necessary to mention only those upon which the court directed a verdict for the plaintiff. They were in substance, as follows: (1) That Owens, as supervisor, issued warrants, in payment of claims against the county for labor and materials, which were not itemized and verified as required by law, and without proper scrutiny thereof. (2) That he issued warrants in payment of an extra salary or allowance to C. M. Douglas, as clerk of the county board of commissioners, in violation of law. (3) That he signed warrants in blank, and left them with C. M. Douglas, who filled them up and issued them in payment of false, fictitious, and fraudulent claims, having forged thereon the signatures of the necessary number of the members of the county board of commissioners.

Each of these breaches was proved by undisputed evidence. It cannot be denied that, in the particulars alleged, the supervisor violated the positive mandate of the statutes. The amount of the claims so paid was proved by production of the warrants and the claims. Under the first cause of action, they amounted to \$1,592.32; under the second, to \$8,793.33; and, under the third, to \$6,044.36. But as the recovery against the surety could not exceed the penalty of each bond, which was only \$5,000, the court directed the verdict for only \$11,592.32, being the full amount proved under the first cause of action and \$5,000 under each of the others.

[3] In this connection, we dispose of the exceptions which complain of two slight errors in adding into the amounts, found to have been improperly paid out under the sec-

ond and third causes of action, the sums of \$34.80 and \$30, respectively. It will be seen, from the figures above stated, that these errors were harmless, because the county was entitled to recover, under each of those causes of action, a much greater amount than the items in question in excess of the amount for which the verdict was directed, which was only \$5,000 in each case.

[4] Section 806, vol. 1, Code 1902, is in part as follows: "No accounts shall be audited and ordered to be paid by the county board of commissioners for any labor performed, fees, services, disbursements, or any other matter, unless it shall be made out in items and accompanied with an affidavit attached thereto, and made by the officer or person presenting or claiming the same, that the said items are correct, and that the labor, fees, disbursements, services or other matters charged therein have been in fact done, made, rendered or are due, and that no part of the same has been paid or satisfied."

Section 814, vol. 1, Code 1902, is as follows: "No member of the county board of commissioners shall vote for an extra allowance to any person who is paid by salary, nor shall the treasurer of said county knowingly pay to any such person any extra allowance." By section 763 the salary of the clerk of the county board of commissioners was fixed at \$500.

Sections 806 and 814, above quoted, are mandatory, and the supervisor was a member of the county board of commissioners, and its chairman. Section 758, vol. 1, Code 1902. The requirement that claims of the kind mentioned shall be itemized and verified is jurisdictional, and payment thereof without compliance with the positive mandate of the statute is void, and an illegal disbursement of the public funds. *Bank v. Goodwin*, 81 S. C. 419, 62 S. E. 1100.

It is perfectly immaterial whether we say that the failure on the part of a public official to obey the positive mandate of the statutes is negligence per se or not. It is that and more; but it is enough to say that it is a violation of the law and misfeasance in office. No officer of the law should be allowed to violate the laws enacted for his guidance, without being held responsible for injurious consequences. Nor can his bondsmen escape, because, on the premise stated, it cannot be said that he has well and truly performed the duties of his office, as required by law. *State v. Moses*, 18 S. C. 372; *State v. Assmann*, 46 S. C. 562, 24 S. E. 673.

[5] Appellants contend that it was error, however, to direct the verdict, because it was the province of the jury to decide whether the supervisor's violation of the law was the proximate cause of the loss to the county. Ordinarily, the question of the proximate cause is for the jury. But, when the evidence is susceptible of only one reasonable inference, it is for the court. In this case, reasonable men could not differ.

[6] But, moreover, when a public officer pays out public funds without compliance with the terms of a mandatory statute, the law will presume that his act is the direct cause of the loss of such funds, and the burden is upon him to rebut the presumption, and prove that, notwithstanding his violation of the law, no loss resulted. Analogous in principle is the holding that, when a statute, requiring signals to be given by railroad engines approaching highway crossings, is violated, and injury results, it will be presumed it was caused by the failure to give the signals. On the first appeal in this case, it was held that, if an officer so negligently discharges the duties of his office that loss results, his bond is liable. 86 S. C. 571, 68 S. E. 753.

[7] The doctrine of an independent intervening cause, in the criminal act of C. M. Douglas, in issuing warrants to pay the forged claims cannot avail the defendants. Where an injury results from concurring causes, he who originates one of them is as responsible as if it had been the sole cause. When the defendant, Owens, left warrants signed in blank with Douglas, he originated one of the concurring causes of the loss by means of the forged claims.

[8] Again, if one of two innocent persons must suffer by the fraud of another, he must bear the loss whose negligence makes the fraud possible. Since the defendant Owens, by his negligence in intrusting Douglas with warrants signed in blank, and his failure thereafter to examine the stubs and scrutinize the claims which were paid with such warrants, enabled Douglas to commit the frauds, his bond is liable for the loss caused thereby. The evidence warrants no other reasonable conclusion than that his negligence was at least a proximate concurring cause of the loss resulting from the forged claims.

This conclusion renders it unnecessary to follow the learned counsel in their discussion of the doctrine of independent intervening causes, and also the question whether Douglas was, under the statute, an agent or subordinate of the supervisor, or an independent officer, for whose acts the defendant Owens should not be held responsible. Those would have been vital questions, if the negligence of Owens and his violation of the mandates of the law had not put it in the power of Douglas to commit the forgeries, which would have been almost, if not quite, impossible, but for the negligence of the supervisor and his disobedience of the law.

[9] We cannot sustain the position taken by counsel for respondent, and sustained in the court below, that, when the statute says, "The supervisor shall draw his warrant," it means that he must, with his own hand, perform the clerical work of writing the whole warrant, or filling up the blank spaces. The word "draw" is used in the sense

of "issue." There was no impropriety or violation of the law in allowing the clerk to write the body of the warrants or fill the blank spaces. But it was the duty of the supervisor, before signing them, to examine the claims and see that they were proper, and that they had been properly itemized and verified, and approved by the county board of commissioners, because the statute requires this to be done before a warrant can be legally issued. This duty the supervisor could not delegate, except at his peril and that of the surety on his official bond. But the error was harmless, because the verdict was rightly directed on other grounds.

[10] Appellants contend that the warrants were accompanied by the claims, which afford some evidence that the amounts paid out were for some services rendered or materials furnished to the county, and therefore the jury should have been allowed to decide how much benefit the county received. As the claims were not itemized and verified, as required by law, they could not be legal evidence, either directly or inferentially, that the county had received any benefit from the money paid out on them. As we have seen, payment of such claims was illegal, and the illegal disbursement of public funds raises a presumption of loss, and not an inference of benefit, to the public.

[11, 12] The decision of the preliminary question whether a witness is qualified to testify as an expert must necessarily be left to the discretion of the trial judge, and this court will not interfere with his decision, unless it is manifestly erroneous. We see no error in allowing Mr. C. H. Barron to testify that, in his opinion, certain claims were forgeries. Besides, he stated the facts upon which his opinion was based, and therefore his testimony would have been admissible, if he had not been an expert in handwriting. Moreover, all the claims of that class for which the verdict was directed were either admitted by defendants' counsel to be forgeries, or proved to be such by undisputed evidence.

Affirmed.

GARY, C. J., and WOODS, WATTS, and FRASER, JJ., concur.

(92 S. C. 371)

CABLE PIANO CO. v. DUNCAN.

(Supreme Court of South Carolina. Sept. 4, 1912.)

1. APPEAL AND ERROR (§ 957*)—REVIEW—DISCRETION OF TRIAL COURT.

Though plaintiff's affidavit, on motion to open default on a counterclaim, tended strongly to explain and excuse his failure to observe and reply to the counterclaim, the order of denial will not be reversed; the showing not so conclusively proving due diligence or excusable

neglect as to warrant holding that there was an abuse of discretion.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3823; Dec. Dig. § 957.*]

2. JUDGMENT (§ 126*)—DEFAULT—PROOF OF CAUSE OF ACTION.

The damages set up in a counterclaim not being liquidated, they depending on proof of a guaranty, of defects, and, if any, of their extent, it is error to grant a judgment thereon, on default, for the amount demanded, without such proof.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 223, 224, 228-230; Dec. Dig. § 126.*]

Appeal from Common Pleas Circuit Court of Richland County; John S. Wilson, Judge.

Action by the Cable Piano Company against John T. Duncan. Judgment for defendant. Plaintiff appeals. Reversed.

James H. Hammond, of Columbia, for appellant. McLaughlin & Smith, of Columbia, for respondent.

WOODS, J. This action of claim and delivery was brought to recover possession of a Kingsbury piano, or \$750, its value, \$150 damages, and \$50 attorney's fees. The allegation of the complaint is that the defendant bought the piano for \$750, giving the plaintiff as part payment another piano, valued at \$250, and executing a mortgage for the remainder of the purchase; that the defendant has paid \$20 on the mortgage, but has defaulted in failing to pay the remainder of the mortgage at maturity. The defendant answered the complaint, alleging that the Kingsbury piano was so defective that he demanded a rescission of the sale and a return of his piano and the \$20 paid on the purchase price, that the plaintiff refused to comply with the demand, and that the plaintiff is indebted to him in the sum of \$270 and interest. The defendant further set up a counterclaim for \$270 and interest, alleging an express guaranty by the plaintiff that the Kingsbury piano was a perfect instrument, and the failure of the guaranty, in that the instrument was defective and unsatisfactory, and was not worth the amount charged, because of its defects and failure to give satisfaction. The defendant further alleges, in stating his counterclaim, that the plaintiff is in possession of both pianos.

[1] The plaintiff having failed to reply to the counterclaim within 20 days, the defendant gave notice that he would move for judgment thereon. Plaintiff's counsel then served a written notice that on the affidavits attached and the proposed reply he would move to open the default, with leave to reply, on the ground of excusable neglect in failing to plead to the counterclaim. Upon hearing the motion the circuit judge refused to open the default, and ordered that judgment be entered in favor of the defendant on his counterclaim for the amount therein demanded, without submitting the matter to the jury or

requiring any proof whatever. The exception alleging an abuse of discretion in refusal to open the default and allow the plaintiff to reply to the counterclaim cannot be sustained. It is true that the affidavits submitted by plaintiff's counsel tended strongly to explain and excuse his failure to observe that a counterclaim was set up and his consequent failure to serve a reply to it; but the showing did not so conclusively prove due diligence or excusable neglect as to warrant this court in holding that there was an abuse of discretion on the part of the circuit judge in refusing the motion.

[2] As to the second point made by the exceptions, we think the circuit judge was clearly in error in granting a judgment on the counterclaim without requiring evidence and the verdict of a jury thereon. The damages set up in the counterclaim were not liquidated, for they depended on proof of a guaranty, set up, of defects in the piano, and the extent of the defects, if they existed. It was therefore necessary for the defendant to make proof before the jury of the guaranty, of the defects, and their extent, and perhaps other facts bearing on the validity and extent of his claim. The precise point has been recently decided in *Gadsden v. Home Fertilizer & Chemical Co.*, 89 S. C. 483, 72 S. E. 15.

The point was made in the argument that the act of 1909 (26 St. 161), providing for counterclaims in actions for the recovery of personal property, does not contemplate a separate judgment on the counterclaim, but that the counterclaim should be considered in the trial of the right to the possession of the property, and that one verdict should embrace and decide all issues. There are strong reasons for this view of the statute; but the exceptions do not cover the point, and we express no opinion on it.

Reversed.

HYDRICK, WATTS, and FRASER, JJ., concur. GARY, C. J., did not sit in this case.

(92 S. C. 361)

DAUGHTY v. NORTHWESTERN R. CO. OF SOUTH CAROLINA.

(Supreme Court of South Carolina. Sept. 2, 1912.)

1. CARRIERS (§ 177*)—CONNECTING CARRIERS—FAILURE TO DELIVER GOODS COVERED BY BILL OF LADING.

Connecting carriers, being by Act May 13, 1903 (24 St. at Large, p. 1), made agents of each other in case of an intrastate shipment, so that the terminal carrier is estopped to deny, as against the consignee, receipt by the initial carrier of all the goods for which it issued a bill of lading, proof that the terminal carrier did not receive part of such goods does not relieve it of liability to the consignee for non-delivery thereof.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 775-789, 791-803; Dec. Dig. § 177.*]

2. APPEAL AND ERROR (§ 110*)—APPEALABLE ORDERS—NEW TRIAL.

Where there was error of law in granting a new trial, as in granting it to allow proof of an immaterial thing, appeal lies from the order; Code Civ. Proc. 1902, § 11 (D), providing that the Supreme Court shall review an order granting or refusing a new trial, but confining its jurisdiction to the correction of errors of law, in conformity to the limitation of its power by Const. art. 5, § 4, giving it jurisdiction for correction of errors at law.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 740-748; Dec. Dig. § 110.*]

3. COURTS (§ 89*)—STARE DECISIS—CONFLICTING DECISIONS.

The doctrine of stare decisis has no application, where there is a conflict in the decisions.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 311, 312; Dec. Dig. § 89.*]

Gary, C. J., and Watts, J., dissenting.

Appeal from Common Pleas Circuit Court of Clarendon County; H. F. Rice, Judge.

"To be officially reported."

Action by Ferdinand Daughty against the Northwestern Railroad Company of South Carolina. An order of a magistrate granting defendant a new trial was affirmed by the circuit court, and plaintiff appeals. Reversed and remanded, with instructions.

J. J. Cantey, of Summerton, for appellant. Purdy & O'Bryan and John Wilson, all of Sumter, for respondent.

HYDRICK, J. On April 30, 1911, the Atlantic Coast Line Railroad Company issued its bill of lading to S. Hirschman & Son, at Charleston, S. C., covering eight sacks of corn consigned to plaintiff at Summerton, S. C. The defendant delivered only seven sacks, and plaintiff filed his claim with defendant's agent at Summerton for \$1.70, the value of the undelivered sack. The claim was not paid within 30 days, and plaintiff sued in magistrate's court and recovered judgment for \$1.70, the value of the missing sack, and for the penalty of \$50 imposed by the act of 1910 (26 Stat. 719) for the failure to pay the claim within 30 days. On defendant's motion, the magistrate granted a new trial, and, in his report to the circuit court, on appeal from his order, stated, as his reason therefor, that he was "impressed with the assurance that the defendant could show that the goods referred to as lost never came in its possession." The circuit court upheld the magistrate's order granting a new trial, and plaintiff appeals to this court.

[1] The statute approved May 13, 1903 (24 Stat. 1), makes connecting carriers the agents of each other. Therefore proof that the defendant never received the undelivered sack could not affect its liability to plaintiff (*Venning v. Railroad Co.*, 78 S. C. 42, 58 S. E. 983, 12 L. R. A. [N. S.] 1217, 125 Am. St. Rep. 768; *Smith v. Railway*, 89 S. C. 415, 71 S. E. 989), and, notwithstanding it should

show on a new trial, "that the goods referred to as lost never came in its possession," the court would, nevertheless, be compelled to give judgment against it, because, under the statute, the Atlantic Coast Line Railroad Company, in issuing the bill of lading, was the agent of defendant, and, in an action by the consignee against defendant for loss of the goods, defendant is concluded by the bill of lading issued by its agent. *Salley v. S. A. L.*, 76 S. C. 173, 56 S. E. 782; *Thomas v. Railroad Co.*, 85 S. C. 537, 64 S. E. 220, 87 S. E. 908, 34 L. R. A. (N. S.) 1177, 21 Ann. Cas. 223. It is clear, therefore, that under the statute law of the state, and the undisputed facts of this case, there can be but one result, and that a judgment for the plaintiff. It necessarily follows that the magistrate committed error of law, when he set aside the only judgment which can be rendered, within the law, and granted a new trial, and it is equally clear that the circuit court erred in sustaining that order.

[2] It is contended, however, that under the statute and decisions of this court the order is not appealable. Section 11 (D) of the Code of Procedure provides: "The Supreme Court shall have appellate jurisdiction for correction of errors of law, in law cases, and *shall* review upon appeal: * * * 2. An order affecting a substantial right made in an action, when such order in effect determines the action and prevents a judgment from which an appeal might be taken, or discontinue the action, and when such order grants or refuses a new trial. * * * Upon any appeal from an order granting a new trial on a case made, or on exceptions taken, if the Supreme Court shall determine that no error was committed in granting the new trial, it shall render judgment absolute upon the right of the appellant; and after the proceedings are remitted to the court from which the appeal was taken, an assessment of damages, or other proceedings to render the judgment effectual, may be then and there had in cases where such subsequent proceedings are requisite." The language of the Code above quoted makes it perfectly clear that this court must entertain appeals from orders which grant new trials, when they are based upon errors of law. The terms of the statute are mandatory—"shall review." It will be observed, however, that the jurisdiction to review such orders is confined to the correction of errors of law, in conformity to the limitation of the power of the court by the Constitution (section 4, art. 5), which confers jurisdiction "for the correction of errors at law, under such regulation as the General Assembly may by law prescribe." The court cannot, therefore, refuse to consider an appeal from an order granting a new trial, when it is based on error of law, without putting itself in the position of ignoring or violating a constitutional statute, which, in plain and unmistakable terms,

makes an order granting a new trial appealable.

As above stated, the statute does not undertake to make an order granting a new trial appealable, when it is based upon questions of fact; and the court has correctly and consistently held, in cases too numerous to mention, that it has no power to review such orders. On the contrary, it has held, in a number of cases, that it can review orders granting new trials, when based upon error of law. *Byrd v. Small*, 2 S. C. 388, was the first case in which the provisions of the Constitution and statute above quoted were considered. In that case it was distinctly held that the power of the circuit court to grant or refuse new trials "is subject to the correction of this court, when his order granting or refusing a new trial involves a question of law." In *Massey v. Adams*, 3 S. C. 263, the appeal was from an order granting a new trial in an action of trespass to try title. The court entertained the appeal, and said: "The only question proper for our consideration is whether there was error of law in the order granting a new trial. If it was founded, either wholly or in part, on a conclusion from the facts contrary to that of the jury, then, according to the well-established principles governing the court in regard to appeals, in which propositions of law do not arise, we cannot interfere." Finding that questions of fact were involved, the order appealed from was sustained, and judgment absolute was given against appellant. In *Caston v. Brooks*, 14 S. C. 104, the appeal was from an order granting a new trial, but it was dismissed, because the appellant did not, in the notice of appeal, give his consent, as then required by the statute, that, if the order should be affirmed, judgment absolute should be rendered against him. The provision requiring such consent, as a condition of the appeal, was afterwards stricken from the statute by amendment. But the opinion distinctly recognizes the right to appeal from orders granting new trials where only questions of law are involved. The court said: "The clear object of demanding the assent of the appellant to a judgment absolute is to discourage appeals from orders granting new trials, *except where the controversy is of such a nature that it may be finally disposed of upon the argument of pure questions of law in the appellate court.* * * * The party allowed to appeal without restrictions from such orders has two chances, he may contend for his verdict, that has been set aside, in the appellate court, and, on being dismissed from that court without relief, may return to the circuit and have a trial de novo of the whole case. The decision of the appellate court may possibly settle nothing of importance to the case, as on a second trial the subject and ground of exception may be entirely eliminated from the case. When, however, the

whole question is one of law, capable of being finally disposed of by the appellate court no such inconvenience arises." (Italics added.) In *Ex parte Williams, In re Campbell v. Charleston*, 7 S. C. 71, the court entertained an appeal from an order setting aside verdicts and granting new trials in certain cases, and reversed the order, because it was granted without notice to the plaintiffs in those cases.

Marshall v. Railway, 57 S. C. 138, 35 S. E. 497, is a case directly in point. That was an appeal from an order setting aside the verdict of a jury and granting a new trial. The order was based on an erroneous construction of the pleadings or for lack of evidence on a point not in issue—questions of law. The court, by Mr. Justice Jones, said (57 S. C. at page 138, 35 S. E. at page 497): "The appeal is from the order granting a new trial. The well-settled rule is that this court cannot review an order granting or refusing a new trial, *except* for error of law, as the court is without jurisdiction to review the judgment of the circuit court on questions of fact." Again (57 S. C. on page 141, 35 S. E. on page 498): "Inasmuch, then, as the circuit court based the granting of the new trial upon an erroneous construction of defendant's pleading, there was error of law. If the court had granted the new trial on his view of the evidence, and had concluded therefrom that the plaintiff had sustained the charge of negligence in the complaint, and that defendant had failed to sustain the defense of contributory negligence, we could not interfere, upon the rule stated at the beginning of this opinion. But this is not the case." The order was reversed and the case was remanded for judgment on the verdict. *Epperson v. Stansill*, 64 S. C. 485, 42 S. E. 426, is another case directly in point. In that case the circuit court granted a new trial on the ground that the jury had been erroneously instructed. On appeal, the order granting the new trial was reversed, because it was based on error of law; this court holding that the instruction given was correct. The authority of *Epperson v. Stansill* was recognized in the later case of *Oil Co. v. Ice Co.*, 68 S. C. 52, 46 S. E. 720. In *Lampley v. Railroad Co.*, 77 S. C. 319, 57 S. E. 1104, it was held that the order granting a new trial was not appealable, because the facts were involved, and the court could not, therefore, give judgment absolute upon the right of the appellant, if it should determine that no error was committed in granting the new trial. But the court distinctly held that such orders, based on error of law, were appealable, in the following language (77 S. C. at page 325, 57 S. E. at page 1106): "Applying this rule [that is, the rule that the act must be construed so that it will not conflict with the Constitution] to the act now under consideration [see 11 (D), subd. 2, above quoted], if we hold that it was intended to apply

only to those cases in which the court has power to render final judgment, that is, cases involving questions of law only, then all difficulty disappears, and the court can easily perform the duty imposed upon it. A practical, as well as a legal, point of view, leads to the conclusion that such was the intention of the Legislature." The same principle was recognized in *Kennedy v. Greenville*, 78 S. C. 128, 58 S. E. 989.

As the granting of new trials is discretionary, unless it appears that the exercise of the discretion was controlled or influenced by error of law, this court held, in *Pace v. Railroad Co.*, 83 S. C. 33, 64 S. E. 915, that an order of the circuit court reversing the judgment of a magistrate's court and granting a new trial, "on the ground that there was no testimony that the goods alleged to have been damaged were injured while in the possession of the defendant," was not appealable. While the circuit court might have rendered judgment against the plaintiff for lack of proof, it exercised the discretion, wisely vested in the court, to order a new trial, perhaps, in order that the plaintiff might have another opportunity to adduce the necessary evidence. In *Des Champs v. Railroad Co.*, 83 S. C. 192, 65 S. E. 176, an order of the circuit court, affirming an order of the magistrate granting a new trial for after-discovered evidence, was held not appealable. The granting of new trials for after-discovered evidence usually involves issues of fact, whether the evidence was newly discovered, and whether due diligence was exercised to procure it, and it also rests in the discretion of the trial court, and the exercise of that discretion will not be reviewed, unless it was abused, or controlled by error of law. *State v. Bradford*, 87 S. C. 549, 70 S. E. 308. The case of *Dixon v. Railway*, 83 S. C. 393, 65 S. E. 351, is the only case which I have found in our Reports which holds that an order granting a new trial upon a purely legal question is not appealable. As that case is in direct conflict with the statute, and the numerous decisions of the court which have been cited above, and those which are cited below, it should be overruled.

[3] The doctrine of *stare decisis* should not stand in the way. That doctrine has no application, where there is a conflict in the decisions of the court. In that event the court is at liberty to adopt those decisions which are sound in principle and in accord with right and justice and the statute law, and overrule those which are contrary thereto. In the *Dixon Case*, the order of the circuit court granting a new trial was so clearly right that it would have been affirmed, on the reasoning of the circuit judge, which is set out in the report of the case, if the merits had been considered, and that fact, no doubt, influenced the members of this court to concur in the opinion dis-

missing the appeal, without giving much consideration to the ground upon which it was dismissed. The opinion merely states that "the order is not appealable," without assigning any reason for that conclusion, and cites the Lampley and Pace Cases, in both of which, as we have seen, the orders involved questions of fact, and, besides, they were orders grantable at the discretion of the trial court.

In *Simmons v. Mason*, 88 S. C. 350, 70 S. E. 898, this court refused to entertain an appeal from an order of the circuit court affirming the order of a magistrate granting a new trial. From a consideration of the opinion of this court, it might be inferred that the motion was made and granted on the ground of newly discovered evidence. But an examination of the record shows that such is not the case. The motion was based on affidavits, but nowhere in the record, either in the notice of the motion, the affidavits, the order of the magistrate granting the new trial, or the order of the circuit court affirming it, is there any intimation or suggestion that the matter set forth in the affidavits was not known to the defendants at the trial. In fact, it was on the affidavits of the defendants themselves, as to matters within their personal knowledge, that the motion was based, and they were both at the trial, but one of the defendants did not testify at the trial. It must have been, therefore, that the magistrate considered the affidavits merely as influencing or determining the exercise of his discretion, and, as it was a matter in his discretion, and also involving questions of fact as to the merits of the case, and as it was affirmed by the circuit court, of course, the order granting a new trial was not reviewable here. But the first intimation to be found in the record about after-discovered evidence is in the appellant's exceptions to this court. The case was, therefore, correctly decided, although the court does say, in broad terms, that it has been held "that an order of the circuit court granting a new trial is not appealable," and "the rule has been applied even when the new trial was granted on the construction of a written instrument—a purely legal question," citing *Dixon v. Railway*. But the following cases, decided after the *Dixon* Case, clearly recognize the right of appeal from orders granting new trials in cases where this court can give judgment absolute. *Jones v. Woodside Mills*, 83 S. C. 505, 65 S. E. 819; *Barker v. Thomas*, 85 S. C. 83, 67 S. E. 1; *McKnight v. Dyson*, 91 S. C. 337, 74 S. E. 753; *Reynolds v. Deaton*, 91 S. C. 454, 74 S. E. 985. Even the opinion of Mr. Justice Watts in this case recognizes the right of appeal in such cases; for he says: "An appeal from an order granting a new trial will not be

entertained, except in a case in which judgment absolute might be rendered by this court." *And this is such a case.* When the law and the evidence in a case admit of but one judgment, the court must pronounce that judgment.

The statute evidently intended to give the right of appeal from *some* orders granting new trials, for it says so in plain and unmistakable language. But the Legislature, having in mind the unnecessary delay and inconvenience that would result from allowing an appeal in every case where a new trial is granted, and in order to discourage appeals from orders in which there was no error, and to penalize, as it were, such appeals, provided that, on appeal from an order granting a new trial, if this court should determine that *no error* was committed, it should give judgment absolute. But what of the case where *error* is committed? Can it be supposed that the Legislature was guilty of the absurdity of allowing an appeal from an order where no error is committed and denying it where error is committed? The statute is plain, and it meant that, when this court should determine that no error was committed, the appellant should have judgment absolute given upon his right by this court; but, if it should determine that error was committed in granting the new trial, it would correct the error by restoring the verdict or judgment set aside, as was done in *Marshall v. Railway and Epperson v. Stansill*.

It appearing that the new trial was granted, not an account of any dissatisfaction with the evidence, or on account of anything that could change the result, but solely through a misconception of the law applicable to the case, and it also appearing, from the facts proved and admitted, that judgment must eventually go against the defendant, the order appealed from is reversed, and the case remanded, with instructions to the circuit court to reverse the order of the magistrate granting a new trial.

WOODS, and FRASER, JJ., concur.

WATTS, J. (dissenting). This is an appeal from an order of Hon. H. F. Rice, Circuit Judge, dismissing an appeal from magistrate court granting a new trial. The appeal will not be considered by this court, because an appeal from an order granting a new trial will not be entertained, except in a case in which judgment absolute might be rendered by this court. *McKnight v. Dyson*, 91 S. C. 337, 74 S. E. 753, April 12, 1912; *Reynolds v. Deaton*, 91 S. C. 454, 74 S. E. 985, May 19, 1912.

For these reasons, I dissent.

GARY, C. J., concurs.

(92 S. C. 336)

OSBORNE v. FULLER.

(Supreme Court of South Carolina. Aug. 26, 1912.)

USURY (§ 28*)—USURIOUS TRANSACTION.

Where defendant agreed to make advances to plaintiff by giving orders to merchants for goods, and, such an order having been filled, defendant paid the merchant the cash price, and charged to and collected of plaintiff the amount so paid and 20 per cent. additional, being the credit price, the transaction was usurious.

[Ed. Note.—For other cases, see Usury, Cent. Dig. § 72; Dec. Dig. § 28.*]

Watts, J., dissenting.

Appeal from Common Pleas Circuit Court of Laurens County; Geo. W. Gage, Judge.

Action by W. R. Osborne against A. P. Fuller. Judgment for plaintiff. Defendant appeals. Affirmed.

F. P. McGowan, of Laurens, for appellant. Irby & Sullivan, of Laurens, for respondent.

WOODS, J. In this action to recover \$952.12, double the amount of alleged usurious interest collected from the plaintiff by the defendant, the jury found a verdict in favor of the plaintiff for \$231.50. The defendant appeals, assigning error in refusing a nonsuit, in giving certain instructions to the jury, and in refusing to order a new trial.

Osborne, the plaintiff, was a tenant of Fuller, the defendant, for the year 1910, cultivating a five-horse farm. Fuller paid the balances on mortgages due by Osborne, and agreed to make advances to him by giving written or verbal orders to merchants for goods. To secure himself, Fuller took a note and mortgage of personal property, including the crop, for \$1,400, which it was supposed would cover the entire indebtedness. Fuller paid the merchants for the goods purchased on his orders, and charged and collected from Osborne the amount due and 20 per cent. additional. He testified that this charge was made in pursuance of his agreement with Osborne; but Osborne denied that he was to pay more than the cash price for the goods and 8 per cent. interest thereon. All other questions as to usury having been eliminated by the evidence, and the only substantial question left for the jury was whether this charge of 20 per cent. was usurious. The circuit judge refused to grant a nonsuit, and in effect instructed the jury that under the evidence the charge of 20 per cent. was usurious. When the transaction is stripped to its substance, the correctness of the instruction is made manifest. It is true that there is no limit to the price an owner of property may place on it, or to the difference he may choose to make between cash and credit. But there never was a moment in the trans-

action when Fuller was the owner of the goods which Osborne got from the merchants. To say that there was first a sale by the merchants to Fuller and a resale by Fuller to Osborne would be to substitute fiction for fact. The merchants did not deliver the goods to Fuller, but to Osborne, for his own use, and to be consumed by him. Fuller did nothing for Osborne but pay out money for his benefit, and Osborne received nothing from Fuller but the use of his money from the date of the advancement.

The case is much stronger against the defendant than *Thompson v. Nesbit*, 2 Rich. 73. There the plaintiff was the owner of the slave sold by him to the defendant, while here Fuller was not a merchant and had no goods to sell. The facts in that case are thus stated by the reporter: "The plaintiff asked \$1,000 for the negro. The defendant was willing to purchase at that price, but could not pay the cash. The plaintiff was willing to give any time that the defendant wanted, if he could have the price increased by the addition to the \$1,000 of 10 per cent. per annum until payment should be made. After consultation with several persons as to the best means of carrying out their bargain so as to steer clear of usury, it was agreed that the defendant should fix the time, and the plaintiff the price. The defendant said he must have three years; the plaintiff said he must then have \$300 more. Whereupon the bill of sale was drawn, expressing the consideration to be \$1,000, and the note was drawn in the following words: 'Three years after date I promise to pay H. Thompson, or bearer, thirteen hundred dollars, to be paid at such times as I please, and to deduct 10 per cent. per annum off of the amount paid at each payment. 11th November, 1839. Samuel Nesbit.' The intention was that 10 per cent. per annum should be added to each payment from the time it was made, until the note became due, so that the defendant should have the right of paying as he pleased within the three years, and upon every payment should have interest calculated in the same manner as it had been done on the \$1,000."

The court, in holding that the transaction was usurious, says: "The effect of the agreement is precisely the same as if the note had been taken for \$1,000, the price of the negro, with usury at 10 per cent. per annum. The artifice, by which the parties attempted to give the transaction the character of a sale at an enhanced price for the credit allowed, is too plain to escape observation. The price of the negro was not enhanced otherwise than by the exaction of usurious interest while it remained unpaid. The true principal of the note was the sum expressed in the bill of sale."

As in that case the true consideration of

the note was the value of the negro, fixed at the time of the sale at \$1,000, so in this case the true and only consideration—the only thing of value—which passed from Fuller to Osborne was the payment of money to another for the goods obtained by Osborne. The law will not permit evasions of the usury law by excessive charge for the use of money under the disguise of an increased price for credit in the sale of property. *Bank v. Jackson*, 43 S. C. 86, 20 S. E. 786; *Milford v. Milford*, 67 S. C. 553, 46 S. E. 479; *Pope v. Marshall*, 78 Ga. 635, 4 S. E. 118. In this case there was not even the disguise of a sale from the defendant to the plaintiff, for the defendant was not the owner of the goods, but merely advanced the money to pay for goods sold by others. Under facts almost exactly the same, involving the sale of a mule, the Supreme Court of Alabama held that the transaction was an advance of the purchase money of \$102.50, and not a purchase by the person paying the price and a resale at \$130, and that it was, therefore, usurious. *Meyer et al. v. Cook*, 85 Ala. 417, 5 South. 147.

The point is made in the exceptions that the circuit judge allowed the action to be enlarged into an action for the adjudgment of all the questions, including interest, arising in the accounts between Fuller and Osborne. We think the point too technical, for it seems clear from the record that the issue of usury could not have been fairly tried without an examination and adjudgment of interest of the entire account.

Affirmed.

GARY, C. J., and HYDRICK and FRASER, JJ., concur.

WATTS, J. (dissenting). I think judgment should be reversed, and new trial granted, for the reason, in my opinion, there was no usury in the transaction. Fuller only charged Osborne the credit price for goods and merchandise, and for this reason I dissent.

(71 W. Va. 1)

STATE v. WALDRON.

(Supreme Court of Appeals of West Virginia.
June 13, 1912.)

(Syllabus by the Court.)

1. HOMICIDE (§ 192*)—EVIDENCE—ADMISSIBILITY—CIRCUMSTANCES PRECEDING ACT.

When self defense is relied on and there is some evidence that deceased was the aggressor, evidence of his recent act or acts of violence even towards third persons though uncommunicated to defendant, and so connected in time, place and circumstance with the homicide as to likely characterize deceased's conduct towards defendant, ought to be admitted to show the *quo animo*, for the question then is what deceased probably did, not what defendant thought he was going to do.

[Ed. Note.—For other cases, see *Homicide*, Cent. Dig. § 415; Dec. Dig. § 192.*]

2. HOMICIDE (§ 308*)—INSTRUCTIONS—DEGREE OF OFFENSE.

Upon principles enunciated in *State v. Gravely*, 66 W. Va. 375, 66 S. E. 503, *State v. Taylor*, 57 W. Va. 228, 50 S. E. 247, and *State v. Clifford*, 59 W. Va. 1, 52 S. E. 981, an instruction that homicide proved or admitted is presumed to be murder in the second degree is not wholly inapplicable, though self defense be relied on and the facts and circumstances shown in evidence tend to justify the killing, and to reduce the offense to one of lower degree.

[Ed. Note.—For other cases, see *Homicide*, Cent. Dig. §§ 642-647; Dec. Dig. § 308.*]

3. CRIMINAL LAW (§ 823*)—TRIAL—INSTRUCTIONS—CONSTRUCTION AS A WHOLE.

The general proposition contained in an instruction that the law of self defense is the law of necessity, not limiting it to apparent necessity, but followed by the statement that unless the prisoner acted in the honest belief that it was then and there necessary to take the life of deceased in order to save his own life or free himself from some great bodily harm, he was not justified therein, and if the jury believed defendant though previously assaulted, used more force than was reasonably necessary to repel the assault or shot or continued to shoot after necessity for so doing had ceased, they could not acquit him, is not erroneous, for as a whole the instruction does limit the law of necessity stated to apparent necessity.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 1992-1995, 3158; Dec. Dig. § 823.*]

4. CRIMINAL LAW (§ 829*)—TRIAL—INSTRUCTIONS—REQUESTS.

An instruction that where there is more than one assailant, the slayer has the right to act upon the hostile demonstration of one or all of them and to kill one or all if it reasonably appears to him that they are present for the purpose of acting together to take his life or do him some serious bodily injury, is not erroneously rejected where the same proposition is substantially covered in another instruction stated in terms more particularly appropriate to the concrete case.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 2011; Dec. Dig. § 829.*]

Robinson and Williams, JJ., dissenting.

Error to Circuit Court, McDowell County.

John M. Waldron was convicted of murder in the second degree, and brings error. Reversed, and new trial granted.

Wm. G. Conley, Lawson Worrell, and Greever & Gillespie, for plaintiff in error. Anderson, Strother & Hughes, Strother, Taylor & Taylor, W. P. Payne, Flanagan & Perry, and Sanders & Crockett, for defendant in error.

MILLER, J. On an indictment for the murder of Ben Tate defendant was acquitted of murder in the first degree, but found guilty of murder in the second degree, and the judgment below was that he be confined in the penitentiary for the period of ten years.

The homicide, admitted, occurred on the night of January —, 1910, a Sunday night, in a brothel in Keystone, McDowell County. Defendant was a deputy United States Mar-

shal, who at the request of White, town sergeant, had gone with him to this house to make an arrest for alleged illicit sales of intoxicating liquors. While waiting the return of White from the Mayor's office with warrants, defendant, who before White left to secure the warrants, had been invited on the outside of the house by Tate and his companion Gillespie, patrons of the house, and had declined, was on their coming out of the room of the mistress of this house, enticed by them into an adjoining room, where, almost instantly, the door being shut by one of them, the difficulty occurred, resulting not only in the death of Tate, but of Gillespie also, from pistol shots fired by defendant.

Defendant was the only living witness as to what actually took place in the room where the homicide occurred. He admitted the killing, but on his trial relied on self defense.

The controversy here is reduced to a few questions relating to the rejection of certain evidence proposed by the prisoner, and to the giving and rejecting of certain instructions to the jury.

[1] First, as to the rejected evidence. On the trial, the prisoner, to establish his theory of self defense, was permitted to and did prove by the testimony of White that after he and White entered the house, and asked for the girl Blackburn, reported to have sold the liquor to Walter Waldron and Trivitts, Madge Murray, the mistress of the house, came out of her room and inquired of them, "Why do you all have me charged with selling whiskey and beer to-day?" and that another woman, Jennie Belcher, interposing said: "Make them show you a United States warrant before you go;" that the Murray woman then walked to a bed in the room, and to where, as he supposed, Tate was sitting on a chair, and sat down on his lap, and said to him: "'Sweetheart, you are not going to let them take me, are you?' or something like that; and he said: 'No, not as long as we are here,' and he raised up and pushed her off of his lap." This witness also says, that when Tate got up he walked around to the foot of the bed and stopped, and that witness said to him, we won't have any trouble, we will get a warrant, that he would go down and see Hale, the mayor, and get him up there and pull the whole house; that Waldron and he then walked out in the dance hall, where he wrote a note, proposing to send Waldron for the warrants, but after writing it concluded to go himself, as he thought he could find the mayor quicker. Continuing this witness says: "Then Mr. Tate walked around on this side, and Gillespie on this side (indicating), and touched him (Waldron) on the shoulder, and said he wanted to see him on the outside. He told him that if they wanted to see him, see him in here, and 'I don't see what busi-

ness you have on the outside.' Gillespie spoke up and said they wanted to see him on the outside." Waldron himself, corroborates White entirely as to what occurred up to the time White left the house to go for the warrants.

As to what occurred immediately afterwards, Waldron further swears, and no fact or witness materially contradicts him: "As soon as Mr. White left they all went over to Madge's room and left me alone in the dance hall. I was standing there and in a short time two fellows came out of Madge's room and come up to me and the big fellow says: 'Come over in the room where you can sit down; it's no use standing up,' and pointed to the room right out across the little hall. There was a light in there and I just walked over, followed him. He walked right on in. I was behind him. I heard the door shut, and just turned my head that way (indicating) and the smallest one had his back to the door and this big fellow struck me. * * * He knocked me down, I guess, the time he struck me. They both jumped on me and I caught on to the bed the best I could on it, then pulled myself up the best I could, trying to get my gun out all the time, shoved myself away from them," when he shot him, thinking he was in danger of being killed, or having great bodily harm done to him, his only reason for shooting.

In connection with this testimony and as further tending to show Tate and Gillespie were the aggressors, and establish his theory of self defense, the prisoner proposed, but was not permitted to prove, by two witnesses, Baxter and Hermanson, that but a few moments before the homicide, both Tate and Gillespie, in connection with two or three other men, were in a violent state of mind towards Hermanson; that but a few moments before White and Waldron entered the house Tate and Gillespie, as Baxter thought from their actions, acting under the influence of liquor, jumped on Hermanson, in aid of their lewd mistresses, and without other cause, beat him, while Hermanson was there waiting for two other women to come down stairs and pay him some money he claimed they owed him.

The attorney general and associate counsel justify the action of the court in excluding this evidence, not on the ground that it might not have influenced the verdict of the jury, but on the grounds, (a) that evidence of a single act of violence is not admissible to establish the turbulent and violent character of deceased; (b) that the conduct of Tate and Gillespie towards Hermanson was unknown to Waldron, and if for no other was inadmissible for this reason; and, (c) because the conduct of Tate and Gillespie constituted no part of the *res gestæ*, had no bearing upon or connection with the homicide, that there was no causal or even ex-

planatory relation between that recent occurrence and the homicide.

In homicide cases, where the general character of the deceased for turbulence and violence is involved, the general rule, established by the weight of authority, no doubt is, that evidence of isolated facts or specific acts forming no part of the *res gestæ*, and in no way connected with defendant, will not be received in evidence. 21 Cyc. 910, and cases cited in notes. But when self defense is relied on, and where as in this case, there is evidence tending to show the deceased was the aggressor, the dangerous character of deceased may be shown by the facts and circumstances attending the homicide, and so connected with it as to constitute a part of the *res gestæ*. 21 Cyc. 909; 1 Wigmore on Ev., section 363; *State v. Morrison*, 49 W. Va. 210, 218, 38 S. E. 481; *Harrison v. Com.*, 79 Va. 374, 52 Am. Rep. 634. Moreover, Mr. Wigmore, 1 Wigmore on Ev., section 198, citing numerous cases, says: "When the turbulent character of the deceased, in a prosecution for homicide, is relevant (under the principle of § 63, ante), there is no substantial reason against evidencing the character by particular instances of violent or quarrelsome conduct. Such instances may be very significant; their number can be controlled by the trial Court's discretion; and the prohibitory considerations applicable to an accused's character, (ante, § 194) have here little or no force." And whether in such cases as the one at bar there is necessity of showing defendant's knowledge of deceased's character, this writer, in section 63, referred to, says: "The reason for the hesitation, once observable in many Courts, in recognizing this sort of evidence, and the source of much confusion upon the subject, was the frequent failure to distinguish this use of the deceased's character from another use, perfectly well-settled, but subject to a peculiar limitation not here necessary,—the use of communicated character to show the fact and the reasonableness of the defendant's apprehension of violence (post, § 246). As the purpose there is to show defendant's state of mind, it is obvious that the deceased's character, as affecting the defendant's apprehensions, must have become known to him; i. e. proof of the character must indispensably be accompanied by proof of its communication to the defendant; else it is irrelevant. In the present use, this additional element of communication is unnecessary; for the question is what the deceased probably did, not what the defendant probably thought the deceased was going to do. The inquiry is one of objective occurrence, not of subjective belief. This distinction, however, was at first not always appreciated by the Courts, nor clearly laid before them by counsel. Hence, a ruling excluding the present use of the evidence cannot always be taken, as a repudiation of the present principle, but is

often merely a ruling that the offer does not satisfy the doctrine of communicated character; and such a Court may in future recognize the present doctrine if the distinction is pressed upon it. Apart from a few such precedents, the principle is now generally accepted." This writer, same volume, section 248, substantially repudiates the doctrine of some decisions, that particular acts of violence if known to defendant ought not to be received in evidence, on the question of defendant's belief of impending danger. "The fact," says he, "that the circumstance creating apprehension is a single act or series of acts, instead of a general character, does not necessarily destroy its capacity to create apprehension. Nor does its distance in time from the moment of the affray necessarily have that effect. * * * Certainly all analogies of the law (apart from the common sense of the situation) favor such evidence; for if particular vicious acts of an animal are relevant to show that its owner was warned of its viciousness (post, § 251), and if particular misconduct of an employee is relevant to show that his employer was warned of his incompetency (post, § 250), then particular deeds of unscrupulous violence may well be deemed relevant to show an apprehension of violence from such a person. The true solution is to exercise a discretion, and to admit such facts when common sense tells us that they could legitimately affect a defendant's apprehensions. The state of the law in more recent times has come on the whole to favor the admissibility of such facts."

We agree with this writer that reason, if not the weight of judicial decision, favors the admissibility in evidence of such facts, when the question is the knowledge or belief of the defendant in the dangerous character of deceased, and the necessity for acting in self defense. And on parity of reasoning where self defense is relied on and there is some evidence that deceased was the aggressor, and the question is what the deceased probably did do, his *quo animo*, as evidenced by his recent acts of turbulence even towards a third person, so connected in time, place and circumstance with the homicide, as to likely characterize the deceased's conduct towards the defendant ought, on the principles stated by this writer in said section 63, to be received in evidence, for the question then is what deceased probably did, not what defendant probably thought deceased was going to do.

The application of this distinction, so often overlooked, and so clearly stated by Mr. Wigmore, we think well recognized by other writers, and in some leading cases, now to be referred to. In 6 Ency. of Ev. 783, the rule we approve is stated thus: "The violent conduct of the deceased shortly preceding the homicide, though in the absence of and unknown to the accused, is admissible to show

his condition of mind and characterize his conduct during the fatal difficulty and by some courts is regarded as part of the *res gestæ*." We do not think the rule of *res gestæ* should be so limited in its scope as counsel for the State would limit it. We find the rule applicable in homicide cases thus comprehensively stated in 21 Cyc. 924: "The *res gestæ* in cases of homicide are the surrounding facts of the transaction, explanatory of the act, showing motive for acting, or standing in a causal relation to the crime. The *res gestæ* consist of circumstances or declarations made admissible in evidence by reason of their connection with the particular fact under investigation, and the test is, whether the fact or circumstance put in evidence is so connected with the main fact under consideration as to illustrate its character, to further its object, or to form in conjunction with it one continuous transaction. They are proper to be submitted to the jury provided they can be established by competent means, sanctioned by the law, and afford any fair presumption or inference as to the question in dispute."

In *People v. Lilly*, 38 Mich. 270, the deceased's behavior on the way to the scene of the homicide was held admissible to corroborate the evidence as to his violent conduct during the conflict. In *State v. Beird*, 118 Iowa, 474, 92 N. W. 694, evidence that the deceased on the night of the homicide, while intoxicated, and going from one saloon to another shortly preceding the homicide, made an assault upon a third person, was held improperly excluded, on the ground that it indicated "a state of mind continuing up to the time of the affray, and which would be likely, in ordinary human experience, to lead to aggression and combativeness at that time." In the Virginia case of *Muscoe v. Commonwealth*, 87 Va. 460, 464, 12 S. E. 790, 792, the trial court admitted a witness to testify that "just before sundown" upon the evening of the day of the homicide, as he was parting with him the person said: "Buster, I feel hot; I feel like I could shoot a man and make him jump so high before he touches the ground" (indicating the height by his hand), and "Don't tell me to take care of myself. Tell the people that I pass by to take care of themselves." The appellate court responding to the point of error made against the admissibility of this evidence, said: "We are of opinion that this testimony was properly admitted. Coming, as it did, almost immediately before the killing, it shed light upon the condition of the prisoner. It may not be admissible strictly as evidence of intention or of threats, but it certainly shows that the prisoner was in a reckless frame of mind and ready to use the weapon with which he was armed upon none or the most trifling provocation." Citing *Whart. Cr. Ev. section 756*; *Hopkins v. Com.*, 50 Pa. 9, 88 Am. Dec. 518, and *Burke v. State*, 71 Ala. 377. In *State v.*

McIver, 125 N. C. 645, 34 S. E. 439, the court said: "The prisoner also proposed to ask the witness if the deceased did not exhibit this violent and vicious temper towards another of his hands that morning, and beat him unmercifully. This was also excluded. In this we think there was error." In our own case of *State v. Abbott*, 8 W. Va. 741, it is said: "It is a great mistake to suppose that the *res gestæ*, in the legal sense, is, in a case of murder, confined to the fact of thrusting the knife into the body, and thereby depriving of life. The *res gestæ* is the murder, and the murder is made up of the homicide and the intent with which it was committed. Actions, therefore, which seem to demonstrate the *quo animo* are a part of the *res gestæ*, and words which are a part of these actions are admissible." A very pertinent case is *Sneed v. Territory*, 16 Okl. 641, 86 Pac. 70, 8 Ann. Cas. 354, in which the court holds, that where, on the trial of an indictment for murder, the defendant claimed to have shot the deceased in self defense and when the latter was intoxicated, and it appeared from the evidence that there was no eye witness to the affray other than the defendant, that the parties were on friendly terms up to the very day of the difficulty, and that, without provocation, one committed an uncalled for and violent attack upon the other, that it was error to exclude testimony that on the evening of the homicide the deceased had a difficulty with another person, which grew out of an invitation on the part of the deceased to drink with him, and that when his invitation was refused, deceased attempted to shoot such person.

Many other cases cited in support of this rule, state and federal, fully support our view. In our case of *State v. Sheppard*, 49 W. Va. 594, 39 S. E. 681, it is said: "All acts and conduct of the deceased previous to the fatal encounter may be shown in evidence, which form a part of the *res gestæ*, or which in any manner tend to shed light upon the question of motive or malice, or of legal provocation, or upon the question whether the defendant committed the homicide." And in *Maier v. People*, 10 Mich. 212, 81 Am. Dec. 781, 789, it is said: "No other cause being shown for the assault, the proposed evidence, if given, could have left no reasonable doubt that it was, in fact, committed in consequence of the alleged provocation, whether sufficient or not; and all the facts constituting the provocation, or which led to the assault, being thus closely connected, and following each other in quick succession, and the assault itself in which they resulted, constituted together but one entire transaction. The circumstances which, in fact, led to the assault, were a part of the *res gestæ*, which the jury were entitled to have before them to show what was the real nature of the act, the *quo animo*, state of mind, and intention with which it was done." In

State v. Bright, 89 S. C. 228, 71 S. E. 821, the first point of the syllabus is: "Acts of decedent done immediately before the homicide to show his mental attitude are admissible on the issue of self-defense." And in *McAnear v. State*, 43 Tex. Cr. R. 518, 522, 67 S. W. 117, 119, that Court says: "We know of no rule of law authorizing the exclusion of any evidence that makes manifest the guilt of a defendant, or that tends in the remotest degree to exculpate him."

It seems quite unnatural and contrary to human experience that a public officer, circumstanced as Waldron was, and so far as the evidence discloses, with no apparent motive other than self defense, or in the heat of passion due to some sudden affray, should have shot down two men. If the former and justifiable, no crime was committed; if the latter, the crime was manslaughter, not murder in the second degree.

On the record now presented we think the evidence of Hermanson and Baxter, excluded, should have been admitted, and that the court below erred in rejecting it, entitling the prisoner to a new trial.

The point is made, that as the prisoner admitted the killing, and as the law presumes all murder to be murder in the second degree, putting the burden of showing justifiable homicide on defendant, if the excluded evidence had been admitted, in connection with all the other evidence, the presumption of guilt would not have been overcome thereby. In answer we may say that there is always a presumption of malice from the use of a deadly weapon; but this rule is applicable only when nothing is offered in explanation, such as self defense and the like. 2 Chamberlayne, Mod. Law of Ev., section 1155, citing among other cases, in note, our case of *State v. Clark*, 51 W. Va. 457, 41 S. E. 204. And "the fact that the alleged self defense was effected by the use of a greatly superior weapon is by no means conclusive of malice." *People v. Barry*, 31 Cal. 357, cited in same note. In *Perkins v. State*, 124 Ga. 6, 52 S. E. 17, it is held that if the accused offers evidence explanatory of the homicide admitted, no presumption of malice arises. The latter proposition, however, according to our cases, would not preclude an instruction on the presumption of murder, the homicide being proven.

[2] Finally, as to the instructions. Exceptions were taken to the giving of all of the State's instructions, and to the rejection of certain of the defendant's instructions. We have considered all these exceptions; but find little merit in any of them. Most of them propound legal principles, applicable to the evidence, many times ruled upon, and we will not undertake to discuss any of them except State's instructions numbered one and three, given, and defendant's instruction numbered five, rejected.

The first criticism of State's instructions

numbered one and three, is that the proposition common to both, that homicide proved, or admitted, is presumed to be murder in the second degree, is inapplicable where self defense is relied on, or where the facts and circumstances shown in evidence tend to justify the killing, or reduce the offense to one of lower degree. There is no merit in this criticism. The point is fully covered by prior decisions, which need only be referred to. *State v. Gravely*, 68 W. Va. 375, 66 S. E. 503; *State v. Taylor*, 57 W. Va. 228, 50 S. E. 247; *State v. Clifford*, 59 W. Va. 1, 52 S. E. 981.

[3] An additional criticism of State's instruction number three is, that it tells the jury that the law of self defense is the law of necessity, not limiting it, as in State's instruction number twelve, given, to apparent necessity. But this instruction does not stop with this general declaration of principle. It precedes a statement of the law of self defense, which tells the jury that unless the prisoner acted on the honest belief that it was then and there necessary to take the life of deceased in order to save his own life, or free himself from some great bodily harm, he was not justified therein, and that if the jury believed that defendant, though previously assaulted, used more force than was reasonably necessary to repel the assault, or shot or continued to shoot after the necessity for so doing had ceased, they could not acquit him. We see nothing in this statement of the law prejudicial to defendant. The instruction as a whole practically limits the law of necessity to apparent necessity, and read in connection with State's instruction number twelve the jury could not possibly have been misled by it.

[4] Lastly as to defendant's instruction number five, rejected. This instruction reads: "The Court instructs the jury that where there is more than one assailant, the slayer has the right to act upon the hostile demonstration of either one or all of them, and to kill either one or both of them, if it reasonably appears to him that they are present for the purpose and acting together to take his life or do him some serious bodily injury."

This instruction was approved in *Carson v. State*, 57 Tex. Cr. R. 394, 123 S. W. 590, 136 Am. St. Rep. 981, and the proposition approved in *Wharton on Hom.* 396, and cases cited by him, and we think states a correct legal proposition. But we do not think the prisoner was prejudiced by its rejection, because the same proposition was covered substantially and in terms more particularly appropriate to the concrete case, in defendant's instruction number one, given.

For the error in rejecting the evidence of Hermanson and Baxter we are of opinion to reverse the judgment below and grant the prisoner a new trial, as already ordered.

ROBINSON, J., dissents.

WILLIAMS, J. (dissenting). In order that one may have a clearer understanding of the error, found by the majority of the court, it is necessary to state more fully than it is stated in the opinion, not only the undisputed facts connected with and surrounding the homicide, but also to state more fully the rejected evidence. One can then see more clearly the relative importance which the opinion gives to the excluded testimony, and will be better prepared to judge of its value as a precedent.

Defendant's presence at Madge Murray's is thus explained by the evidence. It was reported to him that whiskey was being unlawfully sold at her house, and he procured his brother to go there and see if he could buy some whiskey. His brother took with him one Bob Trivetts, went to the house, and bought a half pint of whiskey from one of the inmates by the name of Florence Blackburn, and, about dark on the day of the homicide, informed defendant of the fact. Without procuring a warrant for her arrest, defendant and W. M. White, chief of police of Keystone, went there to arrest Florence Blackburn, and were told by a number of the inmates that there was no girl of that name there. Defendant says he went to the house without a warrant, at the suggestion of the chief of police, who said he would hold them until defendant could get United States warrants. Defendant's brother was not with him, and he was not able to identify the girl. Some of the witnesses testify that he remarked that, if he could not find Florence Blackburn, he would arrest all that were in the house. After writing a note to the mayor, with the view of sending defendant with it to procure warrants, White decided to go himself, giving as his reason that he knew better where to find the mayor than defendant did, and left defendant on guard. Before he returned the tragedy was enacted, and defendant had departed. Defendant testifies that, after White left and while he was standing in the dance hall, two men came out of Madge Murray's room to where he was standing in the dance hall, and the big fellow says: "Come over in the room where you can sit down; it's no use standing up," and that he followed him into the room. There was a light in the room. He further says: "I was behind him. I heard the door shut, and just turned my head that way (indicating) and the smallest one had his back to the door and this big fellow struck me." The larger of the two men was Tate and the smaller one Gillespie. In this lighted room behind closed door the homicide occurred, and defendant is the only living eyewitness to it.

Without usurping the function of the jury, to pass upon the weight of conflicting oral testimony, the court is not warranted by the record to say, as it has done in its

opinion, that defendant was "enticed" into the room by the two men, and that the door was shut "by one of them." That defendant was *enticed* to enter the room, by the simple invitation which I have quoted from his own testimony, is certainly not to be inferred from the language used; whether or not deceased intended to entice defendant into a secret place for an evil purpose was a question which only the jury could determine, and their verdict would seem to indicate that they did not so interpret the invitation. And the other question, Who shut the door after the three men had gone into the room? is a disputed fact. Rose Coleman says defendant shut it himself, and in doing so mashed her finger.

Defendant says he shot in self defense; that when the door closed he turned his head, and Tate, who had entered the room in front of him, struck him and knocked him to his knees and dazed him; that both of the men jumped on him and commenced beating him; that he caught hold of the bed and pulled himself up, pushed away from them, pulled out his pistol and began shooting, and shot five times. But, after hearing defendant's answers to questions on cross-examination, the jury evidently did not believe his story. From the statements in the opinion, to which I have alluded, and the mention therein made of the failure of the state to prove any motive for the killing, and the importance which the opinion gives to such failure, it is apparent that the majority of the court have been strongly influenced by the weight which it has given to the testimony of the accused, who is contradicted by other witnesses who testified for the state, and by the undisputed facts in the case.

I do not think the reasons assigned for reversing this case are sound; and I am convinced, by a careful inspection of the record, that the question of defendant's guilt or innocence was one of fact for the jury, and that it was not error to exclude the testimony of Baxter and Hermanson. The homicide with a deadly weapon having been proven, and admitted, a case of murder in the second degree was established. Motive, other than malice, which may be inferred from the use of the deadly weapon, is no element of the crime; and the state was not required to show a motive, other than legal malice. But defendant pleaded self defense as the motive; and it was incumbent on him to prove it to the satisfaction of the jury, not to the satisfaction of the court. Cross-examination of a witness is the best test known to the law for ascertaining the truth of his testimony. The cross-examination of accused covers about 20 pages of the printed record; and a perusal of it will convince any impartial reader that the jury were justified in not believing his account of the homicide. I here give a few

extracts from it which are fair samples of its character throughout, viz.: "Q. You say that Tate struck you and knocked you down? A. Yes, sir; he knocked me to my knees. Q. Where did he strike you? A. Right on my forehead here (indicating). Q. What did he strike you with? A. I don't know. * * * Q. Where was Tate standing while you were shooting? A. He was beating me all of the time, I guess. Q. On which side of you? A. I don't remember. Q. Where was Gillespie standing while you were shooting? A. They were both beating me all of the time from the time he struck the first lick. Q. Were they beating you while you were shooting? A. Yes, sir. Q. When you raised up didn't you shove yourself back from the bed? A. Yes, sir. Q. When you shoved yourself back from the bed, didn't you shove yourself away from them? A. I don't remember. Q. When you shoved yourself back from the bed, then, you don't remember whether you were away from them or not? A. No, sir. Q. It was when you shoved yourself back from the bed that you commenced shooting? A. I suppose so. Q. When you commenced shooting you don't know whether you were away from them or not? A. No, sir. Q. What were you shooting at? A. I was dazed from the first lick he struck me, and I don't remember. Q. In which direction were you shooting? A. I don't remember. * * * You tell the jury you haven't any idea where you were shooting; is that correct? A. Yes, sir. Q. Did you see these men while you were shooting? A. I don't remember. Q. You tell the jury that you don't remember whether you saw them or not; is that right? A. Yes, sir."

The undisputed facts are that neither Tate nor Gillespie was armed with any kind of weapon, and both were in their shirt sleeves; that defendant was armed with two No. 38 Smith & Wesson revolvers; that he did not know either Tate or Gillespie, and had not heard of the Hermanson difficulty; that he fired five shots, every one of which struck the body of one or the other of his victims, Tate's body having two bullet wounds, one of which entered the back, and Gillespie's body having three, one of which entered the back of his neck; that several minutes after the shooting defendant came out of the room, closed the door, and left the building before it was known by any of the inmates that a homicide had been committed; that the furniture in the room was found to be in orderly arrangement, indicating that no scuffle had taken place; that defendant had a small abrasion on his forehead, "just a little scratch just about an inch long," says Dr. S. A. Daniel, who examined it shortly afterwards, and thought it could not have been caused either by a man's fist, or by a certain poker that was found in the room and exhibited to him.

For the purpose of proving that deceased

was the aggressor, defendant offered to prove by F. J. Baxter and Sam Hermanson that deceased had a difficulty with said Hermanson in the house a short time before defendant and White came. The court refused to admit the evidence, and for that cause the judgment is reversed. The rejected testimony is, in substance, as follows: Baxter was asked if Ben Tate was drinking, and he said he thought he was, and gave as his reason that he saw him in a fight. He said he did not think that "three or four sober men would get on one man." But he admitted that he did not see Tate staggering, and did not smell whiskey on his breath; that he did not see the beginning of the fight, and did not know how it started. When asked, by counsel for defendant, if Tate was in a violent frame of mind, he replied: "I couldn't say what frame of mind he was in;" that all he saw to indicate his frame of mind was that he was fighting with Sam Hermanson. The excluded testimony of Hermanson is that he knew Tate, but did not see him there; that the difficulty started between himself and Madge Murray; that it was on account of an old grudge between them; that "she had it in for [him] several weeks before"; that she ordered him out, and he sat down and refused to go, and she caught hold of his arm to lead him out, and he jerked away; that then "Wade Gillespie hit [him] and threw [him] down on the floor, and this man [Baxter] helped [him] to get out of there."

I respectfully submit that this testimony has no causal relation to the homicide; that it reflects no light upon it whatever, and is, therefore, no part of the *res gestae*. Again, I insist that it does not prove, or even tend to prove, either that Tate was a man of quarrelsome and bellicose temper, or that he was in a violent state of mind at the time of the homicide. The testimony does not prove that Tate attempted to do any violence to Hermanson, or that he was even in fault. According to Baxter's testimony there were three or four men on Hermanson; but who the other two were, besides the two that were killed, or whether they were dressed in buckram suits or not, or whether all were trying to do violence to Hermanson, or whether some of them, including Tate, were simply trying to prevent Hermanson from doing violence to some one else, does not appear. And, according to Hermanson's testimony, Tate was not one of the many men that he says were on him; and it is very reasonable to suppose that he, knowing Tate personally and being the person most seriously affected by the fray, would know it, if he had been one of them. But, even if the testimony showed that Tate was in a violent frame of mind at the time of the Hermanson difficulty, which I insist it does not show, still there was ample time for his anger to cool before defendant came to the house. Neither does it follow that, because a man is

angered toward one man, he will attempt vengeance upon a stranger.

I do not question the right of a person who is on trial for murder, and who claims that he acted in self defense, to prove the character of deceased for violence. He may do so for either of two purposes, viz.: (1) To show that he was prompted to shoot by a reasonable apprehension of death or great bodily harm to himself. But defendant did not know Tate; hence his character, whatever it might have been, could not have aroused his apprehensions. (2) When it is material to know who was the aggressor in an affray, and the evidence is so conflicting as to leave the matter in doubt; and when character evidence is offered for this purpose it is immaterial whether the accused had previous knowledge of it or not. But, on the vital question of who was the aggressor in this case, there is no conflict of testimony. Defendant is the only living witness to it, and he only has spoken concerning it. Therefore, granting, for argument's sake, that the evidence is of a character tending to prove that deceased was a violent man, still nothing would be gained by proving it, because no other witness has denied that defendant killed in self defense. The only denial of it is found in the uncontroverted facts which I have above recited; and these facts could not be changed, or affected, by the most direct proof that deceased was of violent character, which, at most, only tends to prove a probability, not a fact. The law recognizes that a bad man may sometimes be in the right, and that a good man may sometimes be in the wrong; and no one is justified in taking the life of another simply because he has a bad character. Never having known Tate, or heard anything in regard to his character, defendant could not have apprehended danger from him on account of his character. No witness has denied, and, therefore, there is no occasion to corroborate his story by such evidence as tends only to establish a probability in any case, and such as, in this case, could not possibly overcome the undisputed facts. If defendant had not testified, the same verdict which the jury did find would have been inevitable, under the law; but, having testified that he did the killing in self defense, the verdict depended upon whether or not the jury believed him, and not upon whether they believed some other witness' testimony in preference to him, for there was no one who contradicted him on the vital fact of his defense. Therefore, even if I be wrong in my view that the testimony of Baxter and Hermanson is not admissible, still I can clearly see that its exclusion did not prejudice defendant; because, if admitted, it could have produced no effect upon the undisputed and unalterable facts and circumstances on which the verdict rests.

Moreover, I deny that the rules of evidence admit proof of a single isolated difficulty

between deceased and a third person, when unknown to the accused, as evidence of violent character. See, on this subject, the following authorities: Underhill, *Crim. Evi.* § 325; *State v. Roderick*, 77 Ohio St. 301, 82 N. E. 1082, and numerous cases cited in the note to this case reported in 14 L. R. A. (N. S.) 708. See, particularly, the following cases: *State v. Elkins*, 63 Mo. 159; *State v. Ronk*, 91 Minn. 419, 98 N. W. 334; *State v. Mims*, 36 Or. 815, 61 Pac. 888; *State v. Andrews*, 73 S. C. 257, 53 S. E. 423; *People v. Galmari*, 178 N. Y. 84, 68 N. E. 112; *Hardgraves v. State*, 88 Ark. 261; ¹ *Harrison v. Commonwealth*, 79 Va. 374, 52 Am. Rep. 634; *Sturgeon v. Commonwealth (Ky.)* 102 S. W. 812; *Warrick v. State*, 125 Ga. 133, 53 S. E. 1027.

In *Beard v. Insurance Co.*, 65 W. Va. 283, 64 S. E. 119, we held that, where it was sought to establish the fact that, at the time of insured's death, he was intoxicated, evidence was inadmissible to prove a single intoxication at another time, because a single act does not tend to prove character or habit. The application of the rule in the two cases is the same. If the habit of drunkenness cannot be proven by a single act of intoxication, no more can a single difficulty prove general character for violence.

The best proof of character is general reputation; and defendant made no attempt to prove the character of deceased in that way, and presents no excuse for not doing so. I am convinced by the record that defendant had a fair and impartial trial. Whether or not he is guilty of the crime of which he was convicted is not for me to say; but I can, with perfect propriety, say that there is ample evidence, disclosed in the record, to support the verdict, and human experience and observation teach us that juries always resolve their doubts in favor of the accused, and that, when they do err at all, they usually err on the side of mercy. They were the judges of the value of defendant's testimony; they saw him face to face, observed his countenance, and heard his words; and they evidently refused to believe him. This they had a right to do. It was their minds that had to be satisfied, for the law constitutes them the triers of the facts. The location of the wounds on the bodies of the dead men; the orderly arrangement of the furniture in the room; the fact that five shots were fired, every one striking the bodies of one or the other of the victims; the improbability that a man, after being struck and knocked down and dazed, and set upon by two men, one larger than himself, as defendant said he was, could free himself, and afterwards kill both his assailants, and come out of the affray with only a slight abrasion on the forehead—was an account of the killing which seems to have taxed too heavily the credulity of the jury.

The opinion lays stress upon the fact that no motive is shown for the killing. I have

¹ 114 S. W. 218.

answered this, but still I admit that it seems unnatural that one man should slay another for no cause whatever. But the jury only can judge the motive. They have said that it was not self preservation; it follows that they believed it was malicious. It is useless for me to speculate upon what the jury might have thought, for it was their consciences that had to be satisfied. However, I will mention one or two causes that the evidence might have suggested to their minds. It will be remembered that defendant was left to guard the house while White went for the warrants; and there is also testimony that defendant said that, if he did not find Florence Blackburn, he would arrest all that were in the house. The jury may have thought that defendant himself closed the door to the room, and undertook to guard the men in there, and that they attempted to escape, and were shot; or they may have believed that a quarrel arose, and defendant shot because he was angered, 'perhaps on account of what he conceived to be an improper interference with him in the exercise of his official duty.

I think the testimony of Baxter and Hermanson was properly excluded. Rules of evidence are founded on reason and human experience, and are intended to aid courts and juries in arriving at the truth and justice of a case. Such rules are generally established by the courts; few of them have their origin in legislative enactment. I admit that some courts have, in recent years, gone to very great length, in murder trials, in admitting proof of difficulties between the deceased and third persons, as evidence of deceased's character for violence, when the accused relies on self defense; but an examination of the cases cited in the majority opinion, and a comparison of the evidence held by the courts in those cases to be admissible with the evidence in this case which this court holds should have been admitted, and for excluding which the majority have reversed the trial court, will show that this court has gone much further than any of them. If the opinion is to become the law of this state, it does seem to me that it will serve no needful purpose in the administration of justice, but instead will furnish new causes for appeals and prolongations of murder trials; and deferred trials too often result in unjust acquittals. In recent years the courts of this country have been severely criticised by the public, on account of the many delays and uncertainties in the administration of justice. This criticism is not wholly without just cause; and, in recognition of it, all the great political parties have, this year, pledged themselves, by their national platform declarations, to correct the evil by legislation, as far as possible. The growth of the law in England and in this country shows

that many delays, appeals, and reversals have been due to rules of evidence, and rules relating to pleading and practice, which the courts themselves had established, but which Parliament, and the Legislatures of the various states, later either modified or abolished altogether.

It is a fundamental rule of evidence that a fact should be proven by the best evidence, when possible to do so; and the best proof of character is proof of reputation. Why, then, should not one on trial for murder, who wishes to prove the violent character of deceased, be required to do so by proving his general reputation for violence, when he can do so? That is the best method of proving character, and so recognized by all the courts. Why should not the rule be adhered to? Why have some of the courts departed from it in trials for homicide? Defendant did not offer to prove the character of Tate by general reputation.

I quote the following from the report of the Committee on Judicial Administration and Legal Reforms, adopted by the West Virginia Bar Association, at its annual meeting held at Grafton this year, on the question whether or not the death penalty should be inflicted for any cause at the hands of the state, for the purpose of showing that the courts are considered, by the bar, to be largely responsible for the laxity that exists in the administration of criminal justice, viz.: "The percentage of murders throughout this nation exceeds that of any civilized land. The figures are not at hand, but it is notorious that, not only is the proportion of such crimes higher than abroad, but the proportion of convictions are fewer. The trouble with us is, not that the penalty is so severe, but that the guilty so often escape. The contrast between our country and England is very strong, both as to the rareness of crimes of blood and the certainty of the death penalty in murder of first degree."

And, to show the impression made upon the legally trained mind of a highly cultured and closely observant Englishman, after sojourning for some time in the United States, and witnessing the way in which justice is administered in the courts of the various states, and comparing it with the administration of justice by the courts of his own country, I quote the following from James Bryce's "American Commonwealth," in his chapter on "State Judiciary," page 204, viz.: "All crimes, except such as are punishable under some federal statute, are justiciable by the state court; and it is worth remembering that in most states there exist much wider facilities for setting aside the verdict of a jury finding a prisoner guilty, by raising all sorts of points of law, than are permitted by the law and practice of England. Such facilities have been and are abused, to the great detriment of the community."

(11 Ga. App. 231)

TENNESSEE COAL, IRON & R. CO. v. GEORGE. (No. 3,846.)

(Court of Appeals of Georgia. June 5, 1912.)

*(Syllabus by the Court.)***1. COURTS (§ 8*) — JURISDICTION — LAW OF OTHER STATE.**

Section 906 of the Revised Statutes of the United States (U. S. Comp. St. 1901, p. 677), which was enacted to carry into effect article 4, § 1, of the federal Constitution, requires the courts of the several states to enforce any transitory cause of action created by a statute of a sister state, not opposed to the settled policy of the state wherein the cause of action is sought to be enforced. But neither the Constitution of the United States nor any act of Congress passed in pursuance thereof authorizes the Legislature of one state to deny to one having a transitory cause of action originating in that state under one of its statutes the right to appeal to the courts of another state for the enforcement of his cause of action.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 18, 19; Dec. Dig. § 8.*]

2. APPEAL AND ERROR (§ 969*)—REVIEW—DISCRETION OF COURT—POLLING JURY.

In civil cases it is discretionary with the trial judge whether he will permit the jury to be polled; and the reviewing court will interfere only in a clear case of abuse of discretion. There was none such in the present case.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3845-3848; Dec. Dig. § 969.*]

3. APPEAL AND ERROR (§ 1050*)—INJURIES TO SERVANT—ACTIONS—ADMISSIBILITY OF EVIDENCE.

Under the facts of this case, it was not error, requiring the grant of a new trial, to permit the plaintiff to testify that there was nothing he could have done which he did not do to prevent the injuries he received.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4153-4160, 4166; Dec. Dig. § 1050.*]

Error from City Court of Atlanta; H. M. Reid, Judge.

Action by Wiley George against the Tennessee Coal, Iron & Railroad Company. Judgment for plaintiff, and defendant brings error. Affirmed.

The plaintiff brought his action by attachment in the city court of Atlanta, claiming damages for personal injuries, alleged to have been received by him while in the defendant's employ as a locomotive engineer in the state of Alabama. The plaintiff pleaded, as the basis of his right to recover, section 3910 of the Code of Alabama of 1907. That section provides that, when a personal injury is received by a servant in the service of business of his master, the master is liable in damages to the servant as if he were a stranger, and not engaged in the service of the master, in several named cases, among which are the following: (1) When the injury is caused by reason of any defect of the ways, works, machinery, or plant connected with or used in the business of the master; (2) when the injury is caused by reason of the negligence of any person in

the employment of the master, who has any superintendence intrusted to him while in the exercise of such superintendence; (3) when such injury is caused by the negligence of any coemployé of the master to whose orders or directions the injured servant was, at the time of the injury, bound to conform, and did conform, if such injuries resulted from obedience to such orders; (4) when the injury is caused by reason of the act or omission of any servant in the service or employment of the master done or made in obedience to the rules or regulations of the master, or in obedience to particular instructions given by any person delegated with the authority of the master; (5) when the injury is caused by reason of the negligence of any person in the employment of the master, who has charge or control of any signal, locomotive, or other named appliance of the master. It is further provided in the section that the master is not liable, if the servant knew of the defect causing the injury, and failed in a reasonable time to give information thereof to the master, or to some person superior to himself, unless the master or such superior already knew of the defect; nor is the master liable under subdivision 1 of the section, unless the defect arose from, or had not been discovered or remedied owing to, the negligence of the master, or of some person in the service of the master and intrusted by him with the duty of seeing that the ways, works, and other named appliances were in proper condition; provided, that in no event shall it be contributory negligence or an assumption of the risk on the part of a servant to remain in the employment of the master after knowledge of the defect or negligence causing the injury, unless he be a servant whose duty it is to remedy the defect, or who committed the negligent act causing the injury complained of.

The plaintiff was injured while undertaking to repair a locomotive, and on account of certain defects in the locomotive, which are set forth in detail in the petition. In defense to the action, the defendant pleaded, among other things, section 6115 of the Code of Alabama of 1907, which is in the following language: "All actions brought under sections 2486 and 3910 must be brought in a court of competent jurisdiction within the state of Alabama and not elsewhere." Upon motion of the plaintiff, the court struck this plea, and this is the primary error assigned in the record. A verdict in favor of the plaintiff was returned, and the defendant's motion for a new trial was overruled.

In this court the plaintiff in error expressly abandoned those grounds of its motion in which complaint is made that the verdict is not authorized by the evidence and is excessive. The only ground insisted upon here is the overruling of its objection to the following question propounded by the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

plaintiff's attorney to the plaintiff, while testifying in his own behalf: "Was there anything else you could have done to keep the engine still when you were under it?" The objection was that the question called for an expression of an opinion on the part of the witness in reference to a matter which was solely for decision by the jury. The witness answered the question as follows: "Nothing on earth that I know of." There is a further assignment of error in the bill of exceptions as follows: After the verdict of the jury had been announced, and before the jury were dispersed and the verdict had been recorded, defendant's counsel made the following statement and motion: "Having reason to suspect a practice with the juries in this county of arriving at verdicts in illegal ways, such as by agreements in advance to abide by the vote of less than the whole 12 as to whether the finding should be in favor of the plaintiff or the defendant, and by agreements in advance to fix the amount of recoveries as damages as the average arrived at by totaling the amounts expressed by each individual juror and dividing the sum by 12, and thus producing a quotient or speculative verdict, I respectfully request on behalf of the defendant, that this jury be polled, and each juror interrogated as to whether the verdict rendered is his individual verdict, unaffected by any agreement among the jurors in advance of arriving at it, by which it was found to be in favor of the plaintiff, and independent of any agreement with the other jurors in advance of arriving at it, by which the amount of it was fixed by any calculation of averages of the estimates of individual jurors." The court overruled this motion and declined to propound the questions suggested by counsel, though it seems from a statement in the brief of counsel for the plaintiff in error that the court was willing to permit the usual question to be propounded to each of the jurors, "Is this your verdict?"

Smith, Hammond & Smith, of Atlanta, for plaintiff in error. R. R. Arnold and Lamar Hill, both of Atlanta, for defendant in error.

POTTLE, J. (after stating the facts as above). [1] 1. Both in the trial court and in this court, the plaintiff in error, in support of its plea that the action could not be maintained because of the provisions of section 6115 of the Code of Alabama of 1907, invoked article 4, § 1, of the Constitution of the United States, which is in the following language: "Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state; and the Congress may, by general laws, prescribe the manner in which such acts, records, and proceedings shall be proved, and the effects thereof." Section

6115 was adopted, with the Code of 1897 in *solido*, some time after the passage of the act contained in section 3910, and in the argument for the defendant in error some importance is attached to this fact. We prefer, however, to deal with the point as if the restriction of the right to sue to the courts of competent jurisdiction in Alabama had been part and parcel of the statute creating the cause of action. It is broadly contended by counsel for the plaintiff in error that the full faith and credit clause of the federal Constitution would compel courts of Georgia to give effect to the limitation contained in section 6115, and to refuse to take cognizance of a suit based upon the provisions of section 3910. In other words, it is insisted that the state of Alabama has the power to create a right and limit its enforcement to the courts of that state. Counsel for the defendant in error reply that the laws of Alabama can have no extra-territorial effect; that, while any condition or limitation prescribed by the Legislature of that state, which goes merely to the manner in which the right shall be exercised, is binding upon the courts of that state, yet that all conditions or limitations which affect merely the remedy have no force beyond the limits of the state, but are matters as to which the *lex fori* controls.

It is, of course, well settled that the courts of one state will enforce any transitory cause of action arising in another state which is not opposed to the settled policy of the state wherein it is sought to enforce the right. The question therefore presented for our determination is whether or not the Legislature of one state can create a statutory right which gives rise to a transitory cause of action, and at the same time localize the right, so as to prevent its enforcement beyond the limits of the state. In the early history of this country, Congress passed acts in execution of the constitutional grant of power, above quoted, which provided that the acts of Legislatures of the several states should have such faith and credit given to them in every state of the United States as they have by law and usage in the courts of the state in which they were enacted. 1 Stat. at Large, c. 11, p. 122 (U. S. Compilation of Stats. 1901, p. 677). Does the provision of this act of Congress, construed in connection with section 1 of article 4 of the federal Constitution, compel the courts of Georgia to give effect to section 6115 of the Code of Alabama, denying to a person injured in the state of Alabama, on account of negligence of one domiciled in that state the right to maintain an action under the provision of section 3190 of the Code of that state in any court other than the courts of competent jurisdiction of that state?

This court has twice had under consideration the identical question presented by this

assignment of error. In *Sou. Ry. Co. v Decker*, 5 Ga. App. 21, 34, 62 S. E. 678, in referring to section 6115 of the Code of Alabama of 1907, it was said: "Even if this statute had been in force at the time the suit was instituted, it would have been the duty of the courts of this state to disregard it. Our own sense of justice, subject to the guidance of the lawmaking power of this state, determines solely and alone what laws, domestic or foreign, we will enforce; and this discretion is subject to neither limitation nor extension by the Legislature of any other state." This language was quoted approvingly in *Sou. Ry. Co. v. Robertson*, 7 Ga. App. 154, 162, 66 S. E. 535. In neither of the cases just cited was the question directly involved, and we are called upon now for the first time to make an authoritative ruling upon the point presented. Prior to the passage of the act of Congress in execution of the full faith and credit clause of the federal Constitution, the question as to whether laws of a foreign state would be enforced by the courts of another state was determined largely as a matter of comity between the states. As was said by Judge Nisbet, in *Cox v. Adams*, 2 Ga. 164: "The laws of a country, as a general principle, have no binding force beyond its territorial limits. Their authority is admitted in other states, not *ex proprio vigore*, but *ex comitate*; not on account of any inherent force in the law itself beyond the limits of the state which enacts it, but because of the comity of nations. Each state has the unquestioned right to legislate upon the rights and obligations of its own citizens, according to its own views of right and expediency. So, also, every independent state will judge for itself how far it shall or shall not admit the force of foreign laws within its own territory. These principles, as well as those we shall further declare in this opinion, are applicable to the states of our own Union, so far as they are not modified by our peculiar system—so far as the Constitution of the Union does not limit, restrain, or alter them."

Generally speaking, any transitory cause of action authorized by the law of one state would, by comity, be enforced by the courts of another, if not opposed to the settled policy of the latter state. Since the passage of the act of Congress, the question has become one upon which the decisions of the Supreme Court of the United States are binding upon the several states; and the courts of this state are bound to yield respect and obedience to an authoritative ruling of the Supreme Court of the United States upon the question as to what effect should be given to an act of the Legislature of one state when a right thereunder is set up or claimed in the courts of another state. In our opinion, the question is settled authoritatively against the contention of the plain-

tiff in error by the decision of the Supreme Court of the United States, in the case of *Atchison R. Co. v. Sowers*, 213 U. S. 55, 29 Sup. Ct. 397, 53 L. Ed. 695. In that case a statute of the territory of New Mexico was involved. That statute provided, "Whereas, it has become customary for persons claiming damages for personal injuries received in this territory to institute and maintain suits for the recovery thereof in other states and territories, to the increased annoyance and manifest injury and oppression of the business interests of this territory, and the derogation of the dignity of the courts thereof," it was enacted that after the passage of that act no civil liability, under either the common law or any statute of the territory, on the part of any person or corporation, for personal injuries or death caused by such person or corporation in the territory, should be enforced in any court other than the district court of the territory in and for the county of the territory where the claimant or the person against whom the claim was asserted resided, or, if a corporation, in the county in which the corporation had its principal place of business. It was further prescribed by the act that there should be certain conditions precedent to suit, such as service upon the person or corporation against whom the damages were claimed, within 90 days after the injury and 30 days before the commencement of the suit, of an affidavit by the claimant, stating his name and address and the name of the person receiving the injuries, the character and extent of the injuries, the way or manner in which the injuries were caused, and the names and addresses of all the witnesses to the happening of the facts causing the injuries; also that all of the conditions therebefore mentioned, including the bringing of the action within one year in a court within the territory, must be complied with, and "that such right of action is given only on the understanding that the foregoing conditions precedent are made a part of the law under which the right to recover can exist for such injuries," except as otherwise provided in the act.

An action was brought in one of the courts of Texas by a person who had sustained personal injuries in the territory of New Mexico, and the statute of New Mexico, above referred to, was pleaded as a defense to the action. The Court of Civil Appeals of Texas refused to sustain the defense, and held, in substance, that, while all the conditions precedent to suit, as prescribed by the act of New Mexico, in reference to giving of notice, furnishing the list of the witnesses, making an affidavit, etc., would be enforced by the courts of Texas, those courts were not bound to recognize and respect an act of the territory of New Mexico which limited the right to suit to the courts of that ter-

ritory. In the course of the opinion, that court said: "The state of Texas is bound, under section 1, art. 4, of the Constitution of the United States, to give full faith and credit to the public acts, records, and judicial proceedings of every other state; but it is not required to recognize a statute of any state that seeks to fix the jurisdiction of its courts and prevent the citizens of other states from using its courts, if they so desire, in the enforcement of their rights. The jurisdiction of our courts must and will be prescribed by the constitutional and legislative authority of our state, and not by that of any other state. A law attempting such interference is null and void, and, as such, does not come within the constitutional provision aforementioned. There is nothing in the contention that a void statute is binding on the courts of Texas until the territorial courts declare the law invalid. In the very nature of things, the question will probably never be presented to the territorial courts; and in the next place, their decision could not give vitality to a void statute respecting the jurisdiction of the courts of this state. We do not question the authority of the laws of New Mexico, so far as they apply to its own affairs; but we repudiate them when they attempt to regulate the affairs of other states. The right of injured parties to recover damages from the negligent inflicter of the injuries is recognized in New Mexico, although recognition carries with it burdensome and vexatious conditions, of which, however, if its citizenship is willing to endure them, no one is in a position to complain. But the citizens of other states cannot be forced into its courts by a legislative provision that such suits can be instituted and prosecuted in the courts of no other state." *Atchison, T. & S. F. R. Co. v. Sowers*, 99 S. W. 192.

The decision of the Court of Civil Appeals of Texas was carried to the Supreme Court of the United States upon writ of error; and that court held that a federal question was presented by the writ of error, and announced its ruling upon the constitutional question presented, as follows: "The full faith and credit demanded by U. S. Rev. Stat. § 906 (U. S. Comp. Stat. 1901, p. 678) is given by the Texas courts to the New Mexico act of March 11, 1903, providing that an action for personal injuries received in that territory will not lie unless certain requirements as to the making of an affidavit and the bringing of suit within a specified time are observed, where a recovery is permitted in those courts subject to such restrictions, although the statute also undertakes to make the suit maintainable only in the district court of the territory." The view entertained by that court will be seen by an inspection of the opinion of the majority, written by Mr. Justice Day, from which the following excerpts are taken: "It is, then, the set-

tled law of this court that in such statutory actions the law of the place is to govern in enforcing the right in another jurisdiction; but such actions may be sustained in other jurisdictions, when not inconsistent with any local policy of the state where the suit is brought. * * * 'Each state may, subject to the restrictions of the federal Constitution, determine the limits of the jurisdiction of its courts, the character of the controversies which shall be heard in them, and, specifically, how far it will, having jurisdiction of the parties, entertain in its courts transitory actions, where the cause of action has arisen outside its borders.' *St. Louis, I. M. & S. R. Co. v. Taylor*, 210 U. S. 281, 285 [28 Sup. Ct. 616], 52 L. Ed. 1061, 1064. The territory of New Mexico has a right to pass laws regulating recovery for injuries incurred within the territory. *Martin v. Pittsburg & L. E. R. Co.*, 203 U. S. 284 [27 Sup. Ct. 100], 51 L. Ed. 184, 8 Ann. Cas. 87. It has a right, under section 906 of the Revised Statutes, to require other states, when suits are therein brought to recover for an injury incurred within the territory, to observe the conditions imposed upon such causes of action, although otherwise controlled by common-law principles. But, when it is shown that the court in the other jurisdiction observed such conditions, and that a recovery was permitted after such conditions had been complied with, the jurisdiction thus invoked is not defeated because of the provision of the statute referred to." Mr. Justice Holmes, with whom concurred Mr. Justice McKenna, dissented, holding that, inasmuch as the territory of New Mexico could have refused to create the right of action altogether, if it had seen fit, when it adopted the common-law liability upon certain conditions precedent, one of which was that the party injured should sue in the territory, this condition was binding, and no suit could be maintained in the courts of any other state.

Counsel for the plaintiff in error argue that the distinction between the case of *Atchison R. Co. v. Sowers*, supra, and the one now under consideration is that in the former case the substantive cause of action existed at common law, and did not depend upon statute. They contend that, while a state would not have the right to restrict to its own courts the enforcement of a common-law liability, it does have the right to so limit a liability created by its statutes; in other words, that, as the state need not have created the liability, it has a right to prescribe the forum in which the cause of action should be enforced. It seems to us that this distinction cannot be sustained, and that the purpose and intent of the decision of the United States Supreme Court was to hold broadly that the courts of each state have a right to determine for themselves, subject only to the limitations of the federal Constitution and the acts of Con-

gress passed in pursuance thereof, what transitory causes of action they will enforce; and that it is beyond the power of the state creating the cause of action to deny the right to enforce it in the courts of another state. It seems to us inaccurate to say that the limitation sought to be imposed by the Legislature of Alabama is a condition affixed to the right created by the statute. It is really a limitation or restriction which goes merely to the remedy. Remedy for the enforcement of a right embraces not only the procedure for its enforcement, but also the forum in which it shall be enforced. The forum in which a right must be enforced is no part of the right. A right might be created, and no tribunal be erected in which to enforce it. But the right would none the less exist. It would simply be inoperative or remain in abeyance until a tribunal was invested with jurisdiction to enforce it. It is much like the case where an act is prohibited by law, but no penalty is prescribed. One who commits the act violates the law, even though no penalty be attached to the violation. The Constitution of the United States requires a state to deliver up a fugitive from justice from another state. The fact that no method is prescribed for compelling obedience to this mandate does not destroy or affect the right of one state to demand the surrender of the fugitive, or the obligation of the state to which the fugitive has fled to deliver him up. The right will be enforced in the courts of Georgia in strict accordance with the statute of Alabama, and every condition of that statute which relates to the right will be enforced by our courts. In other words, when suit is brought in one of the Georgia courts under the Alabama statute, the Georgia court is substituted for the Alabama tribunal, and will enforce the right in the same way, according to the same principles and to the same effect, as it would be enforced in the state of Alabama.

More than this, we will construe the statute as it is construed by the highest court of the state of Alabama, and we will give due effect to all of the laws of Alabama which affect the right created by the statute. The statute of Alabama is the source of the right on which the jurisdiction acts; but it is not the source of the jurisdiction itself. We look to the act to determine the right; but we refuse to look to the law of Alabama to determine what rights the courts of this state will enforce, or to fix the jurisdiction of its tribunals. Cases are tried in Alabama upon the settled principles of the common law, and they are tried in Georgia upon the same principles and substantially according to the same procedure. While the common law is presumed to be of force in nearly all of the American states, there is no such thing as a common-law liability, except as such liability may be recognized by statute. While the right may be

founded upon the common law, and the origin of the right may be derived from the common law, it is none the less statutory, since the common law has no force and effect in the several states, except as it may have been adopted by statute. Alabama has as much right to withhold its sanction of a right existing at common law as it has to withhold legislative recognition of a new right, not existing at common law. It is true that the right created by the Alabama statute now under consideration did exist at common law, although there are certain statutory incidents and qualifications which were not recognized at common law. But without reference to this, even if the right itself had been one which did not exist at common law, if the statute creates a transitory cause of action, not opposed to the settled policy of this state, the courts of Georgia will not close its doors to one claiming a right under the statute, notwithstanding the amendment to the law, which seeks to confine the right to sue to the courts of competent jurisdiction within the state of Alabama. Our opinion is that the decision of the Supreme Court of the United States, above referred to, is absolutely controlling on the question presented, and that the trial court properly declined to sustain the defense based upon the provisions of section 6115 of the Code of Alabama of 1907.

[2] 2. In criminal cases the defendant has an absolute right to poll the jury; but in civil cases it is discretionary with the court whether the losing party shall be permitted to exercise this privilege. *Bell v. Hutchings*, 86 Ga. 562, 12 S. E. 580; *Black v. Thornton*, 31 Ga. 641; *Smith v. Mitchell*, 6 Ga. 458; *Rutland v. Hathorn*, 36 Ga. 380. Upon authority of these decisions, even if the defendant had requested the presiding judge to permit the polling of the jury in the usual way by simply asking each juror if the verdict returned was his verdict, it would have been discretionary with the judge to permit or refuse the request. It may be seriously doubted if the trial judge had the right to propound to the jury the question suggested by the counsel for the defendant, even if he had been disposed to do so. The request was based upon an *ex parte* statement of counsel that he had reason to suspect that the juries of Fulton county were in the habit of returning what is termed a "quotient verdict" in suits for damages. There was no suggestion that this particular jury had adopted this course in arriving at their verdict, or that there was any irregularity in the manner in which the verdict had been reached.

In addition to this, the practical effect of an answer from the jurors as to the manner in which the verdict had been arrived at would have been to permit them to impeach their own verdict. No juror would have been allowed to disclose to the court that the verdict had been arrived at in an ille-

gal manner; and if he had been permitted to answer that there had been an agreement among the jurors in advance of arriving at the verdict, as to the manner in which it was to be determined, and that the agreement was that the verdict was to be reached by a calculation of the average of the estimates of individual jurors, this would have been in effect to allow the juror to impeach his own verdict. The usual way of polling the jury is to ask each individual juror whether he consented to the verdict, or, as it is usually put, "Is this your verdict?" If he says it is, and that he consented to it, the law closes his mouth as to the manner in which the verdict was arrived at; and its irregularities must be shown to the court by other evidence than that derived from the jurors themselves. If he answers that the verdict is not his, and he did not consent to it, he should not be interrogated as to his reasons for not consenting, and the verdict should not be received. We know no procedure in this state which would have justified the trial judge in granting the request of counsel for the defendant; and certainly it was no abuse of discretion to refuse to do so.

[3] 3. Nor do we think the assignment of error which complains of the admission of testimony of the plaintiff constituted any sufficient reason for granting a new trial. Plaintiff had testified in detail as to his conduct in reference to the transaction under investigation, and it necessarily follows, from his testimony, that there was nothing else he could have done to have kept the engine still while he was under it. All of the circumstances indicated that it was through no fault of his that the engine moved; and, while it was a question for the jury, upon the defense presented, as to whether or not the plaintiff was at fault, and whether or not the moving of the engine was due to his own negligence, still, under the facts testified to by the plaintiff, the jury would have been bound to find that he had done everything which he could have done to prevent the engine from moving. It was altogether harmless, therefore, to permit the plaintiff to testify in the language complained of. We find no error in the record, and the judgment overruling the motion for a new trial must be affirmed.

Judgment affirmed.

(11 Ga. App. 305)

WILLIAMS v. SOUTHERN RY. CO. et al.
(No. 3,873.)

(Court of Appeals of Georgia. July 10, 1912.)

(Syllabus by the Court.)

1. RAILROADS (§ 357*)—OPERATION—INJURIES TO PERSONS ON TRACK—CARE REQUIRED.

It is a sound and wholesome rule of law, conservative of human life and limb, that, without regard to the question whether a person

killed or injured by a railroad train was a trespasser or licensee upon the track, those in charge of the running of the trains are bound to exercise ordinary care and diligence in approaching any point where people may be expected to be upon the track, or where the road-bed is constantly used by pedestrians.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1235; Dec. Dig. § 357.*]

2. RAILROADS (§ 355*)—INJURIES TO PERSONS ON TRACK—CARE REQUIRED.

While a railroad company is entitled to the exclusive use of the tracks in its switchyards, and there can be no implied license to the public to use such tracks, inconsistent with this exclusive right, yet this rule applies to switchyards proper, and has no application to a case where there is only one track, which is the main track of the company, although this track may be partly within the yard limits, and is occasionally used in connection with the switchyard.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1220-1227, 1235; Dec. Dig. § 355.*]

3. RAILROADS (§ 400*)—OPERATION—INJURIES TO PERSONS ON TRACK—QUESTION FOR JURY—CONTRIBUTORY NEGLIGENCE.

Where a railroad company has laid planks across its trestle, or permitted the planks to be laid there, and people have used these planks as a footway across the trestle for years, it is not negligence per se for a pedestrian to use them for that purpose. It is a question for the jury to determine whether or not the extent of the use of the trestle as a footpath, and the length of time such use has continued, have been sufficient to impose upon those operating the trains of the company the duty of anticipating the probable presence of persons on the track, and in approaching that particular point, to exercise ordinary care and watchfulness to avoid injury to them; and it was for the jury to determine whether, under all the facts and circumstances, the plaintiff was guilty of such contributory negligence as would bar his right to recover.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1305-1381; Dec. Dig. § 400.*]

(Syllabus by Pottle, J., dissenting.)

4. CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.

To attempt to walk across a long, high, and narrow railway trestle, without ascertaining that a train is approaching, is so obviously and inherently dangerous as to prevent a recovery for an injury received as a result of a mere omission of the engineer to be on the lookout. Even if an invitation to so use a railway trestle will ever be implied, the mere presence thereon of a narrow plank, upon which a pedestrian can walk across with apparent safety, is not sufficient to authorize the inference that pedestrians are invited to use the plank as a footway, and impose upon the employes on the locomotive the duty of anticipating at a given time the presence of a trespasser upon the trestle.

Error from City Court of Atlanta; H. M. Reid, Judge.

Action by T. L. Williams, by next friend, against the Southern Railway Company and others. Judgment for defendants, and plaintiff brings error. Reversed.

Thomas L. Williams, a minor, by his next friend, sued the Southern Railway Company and W. B. Robinson, an employe of the company, to recover damages for personal in-

juries sustained by him in jumping from a trestle on the railway right of way, within the yard limits of what is known as Armour Station, in Fulton county. He was endeavoring to cross the track over the trestle, and to prevent being run over by a train of the defendant company, the locomotive of which was being operated by Robinson, he jumped from the trestle and received his injuries. The petition alleges, in substance, that Robinson, the engineer, could easily have seen the petitioner on the track of the railway company for 200 yards before reaching the point where he was compelled to jump from the trestle in order to save his life, and that if Robinson had been performing his duties as engineer, in running the engine with proper care and diligence, he would have seen the petitioner in ample time to have stopped the engine before reaching him, or before it became necessary for him to jump from the trestle. It also alleges that Robinson was under the duty at the time to look out for pedestrians on the trestle, and to use ordinary care to prevent running them down or injuring them, and it is charged that the railway company and Robinson were negligent (1) in running the engine at too great a speed across the trestle and within the yard limits of Armour Station; (2) in not looking ahead and discovering the petitioner; (3) in not stopping the engine in time to prevent the necessity of petitioner's jumping from the trestle in order to save his life. By an amendment to the petition it was further alleged (1) that the trestle was constantly used by pedestrians at Armour Station, and that this fact was well known by the railway company and Robinson; (2) that Robinson, individually and as an employé of the railway company, was under the duty, at the time petitioner was run down and compelled to jump off the trestle, in passing over the trestle, to look out for pedestrians thereon, and to use ordinary care to prevent running them down and injuring them; (3) that as a matter of fact Robinson saw petitioner upon the trestle when the engine was 600 yards from him, and that, if he had exercised ordinary care, he could easily have stopped the engine in time to prevent the injury to plaintiff.

A general demurrer to the petition was overruled. Plaintiff's evidence made in substance the following case: Between 2 and 3 o'clock in the afternoon of March 17, 1900, he was walking on the trestle of the railway company, going towards Armour Station, which was south of the trestle. The trestle was from 100 to 300 yards in length, passing over Peachtree creek and the tracks of the Seaboard Air Line Railway. The distance from the trestle to the ground below was from 25 to 100 feet. The trestle was narrow at the southern end. The point where the plaintiff jumped from the trestle was about 30 or 40 feet from the ground. There was

only one track across the trestle, and this was the main track of the railway company. In the middle of the trestle there was a plank walk, extending entirely across the length of the trestle, with the exceptions of a few feet on both ends. This walkway consisted in some places of two planks, 2x10 or 2x12 inches. In some places, however, there was only one of these planks. This plank walkway had been on the trestle for five years before the injury, but has been taken up since that time. Plaintiff was about half-way across the trestle when he first heard and saw the approaching engine, and in his opinion the engine was then about 300 or 400 yards away. The engine was pulling a freight train, and was running about 25 or 30 miles an hour. The engine was a switch engine. The only signal which the plaintiff heard from the approaching train was the blowing of the whistle four or five times in rapid succession when he was about midway the trestle. North of this trestle, and about 75 yards from the end, there was a deep cut. The track over this cut to Armour Station, going south, was practically straight, there being only a slight curve. The curve was on the right-hand side of the engineer going towards Armour Station, and there was an unobstructed view from the cut to the trestle. As soon as the engineer got out of the cut he could see the whole trestle. About 400 or 500 yards north of the trestle is a public road crossing, known as "Mason's Crossing." The only way to get to Armour Station from this crossing is to cross the trestle or go around on this road, a distance of a mile. Plaintiff did not know anything about the latter way of getting to Armour Station. He was a stranger there, and had never been on the trestle before. He did not know that Armour Station was just south of the trestle. At this point it was impossible to cross the creek, except by way of the trestle, for the reason that the ravine traversed by the trestle was deep, rough, and precipitous.

The country on the north side of the trestle was settled to some extent, and, while there were no houses between the trestle and the crossing, there was a small country settlement just beyond the trestle—about eight houses, occupied by workmen. South of the trestle the country was rather thickly settled with fertilizer plants and dwelling houses. This trestle was used frequently and generally, both by the employés of the fertilizer plants and by other people living on both sides of the trestle. There were about 400 employés at the plant, and the people used this plank footway as a path. This pathway was used more frequently in the mornings and at night by the employés of the plant in going to and from their work, and had been so used for some five years. This trestle is within the yard limits of Armour Station. About 10 or 15 steps from

the south end of the trestle there is a switch track running from the main line; and 15 or 20 steps farther on there is another switch track, running parallel with the main track. The switch track proper does not extend across the trestle to the other side; but the railway company, as occasion may require, switches its cars out on and beyond the trestle, and there was a great deal of switching in the yards, the moving of cars being constantly carried on.

At the conclusion of this evidence, counsel for the railway company moved the court for a nonsuit, which, after argument, was granted, and this judgment constitutes the only error to be reviewed.

Anderson, Felder, Rountree & Wilson and Geo. P. Whitman, all of Atlanta, for plaintiff in error. McDaniel & Black, of Atlanta, for defendants in error.

HILL, C. J. (after stating the facts as above). [1] 1. The first legal question arising under the facts is: What relation did the plaintiff occupy to the railway company at the time of the injury, and what corresponding duty did the company owe to him? Was he a trespasser or a licensee? It is insisted by the railway company that he was a trespasser, and by the plaintiff that he was a licensee. The rule of law governing both relations is well settled in this state by repeated decisions of the Supreme Court and of this court. If plaintiff was a trespasser, the only duty which the railway company and its employes operating the train owed to him was not to injure him willfully or wantonly, or by reckless and gross negligence amounting to wantonness; in other words, to observe ordinary care to avoid injuring him after his presence had become known to the employes operating the train. *Georgia Railroad Co. v. Fuller*, 6 Ga. App. 454, 65 S. E. 313; *Atlantic Coast Line R. Co. v. Riley*, 127 Ga. 568, 56 S. E. 635. If, under the facts, he was a licensee—that is, if the evidence showed that the plank pathway across the trestle had been used constantly by pedestrians for such a length of time as to put the railway company on notice of this use—its employes operating the train were charged with the duty of anticipating their presence thereon, and to use ordinary care to avoid injuring them. *Ashworth v. Southern Ry. Co.*, 116 Ga. 635, 43 S. E. 36, 59 L. R. A. 592; *Bullard v. Southern Ry. Co.*, 116 Ga. 647, 43 S. E. 39; *Crawford v. Southern Ry. Co.*, 106 Ga. 870, 33 S. E. 826; *Harden v. Georgia R. Co.*, 3 Ga. App. 344, 59 S. E. 1122; *Georgia R. Co. v. Fuller*, supra; *Shaw v. Georgia R. Co.*, 127 Ga. 8, 55 S. E. 960; *Macon & Birmingham Ry. Co. v. Parker*, 127 Ga. 471, 56 S. E. 616.

It is insisted by counsel for the railway company that a trestle over which a train runs is in itself a place of such great danger

that an implied license to walk on it can never arise by mere user of it by the public, and that, even if such implied license could arise as to the use of the trestle, it did not arise in the present case, because the trestle was in the switchyard at Armour Station, and, under the repeated rulings of this court and the Supreme Court, no implied license can ever arise for the public to use railroad tracks in a switchyard, but, to authorize such use, there must be an express license. We cannot agree to the first proposition without qualification. It is true that a railroad trestle may be a place of such manifest danger as not only to preclude any implied license to use it, but to show the grossest sort of negligence in a pedestrian to use it, as, for instance, where the trestle is long and high, and too narrow to permit one to safely stand on the side while a train is running over it, and there is nothing indicating consent, actual or constructive, by the company, to its use by the public as a walkway. But if the circumstances upon which such implied license is claimed indicate some affirmative action on the part of the company, not only inviting its use by the public, but minimizing the danger of its being used as a pathway, we think such implication might arise. If the company placed planks across the trestle to be used as a pathway, not only by its employes, but by the public generally, or if the company permitted the people in the neighborhood to place the planks across the trestle and to use them as a walkway for a long period of time, could it be said that these acts could not amount to a license to pedestrians to so use the trestle?

Some authorities go to the extent of holding that a license to use the tracks of a railroad company applies only to public crossings, or near depots and stations, where, from the frequency of its use by pedestrians, the company has reason to apprehend their presence. But the Supreme Court of this state extends the rule to pedestrians who may be using the tracks longitudinally, and to any place on the track which is habitually used and frequented by the public with the knowledge of the employes of the railway company and those in charge of the running of the train. In *Western & Atlantic R. Co. v. Meigs*, 74 Ga. 857, it was held that the trial court was right in admitting testimony relating to the habit of the public in walking on the tracks of the railroad at and near the place where the injury happened. And in *Shaw v. Georgia Railroad*, 127 Ga. 8, 55 S. E. 960, where Mr. Justice Atkinson, speaking for the court, reviews the decisions of the Supreme Court on this subject, it is held to be a question of fact, to be submitted to the determination of the jury, as to whether that part of the railroad track which was the locus of the homicide was so frequently used by the public as a pathway,

with the knowledge of the railroad company, as to require the servants of the company engaged in operating the train thereon to anticipate the presence of pedestrians. But, after all, there is little substantial difference in the rule of law applicable to trespassers and licensees. If the employes of the railway company, or those in charge of the running of its trains, have knowledge that the public, either as trespassers or as licensees, may be expected to be upon the track at a particular place, it is their duty to anticipate this presence and to use proper care and diligence to avoid injuring them.

As expressed by Judge Thompson in his most valuable treatise on the Law of Negligence: "It is a sound and wholesome rule of law, humane and conservative of human life, that, without regard to the question whether the person killed or injured in the particular case was or was not a trespasser or a bare licensee upon the track of the railway company, the company is bound to exercise special care and watchfulness at any point upon its track, where people may be expected upon the track in considerable numbers, as, for example, in a city where the population is dense, even between streets where the track has been extensively used for a long time by pedestrians, or where the roadbed is constantly used by pedestrians, or at a bridge in a thickly settled community, which the public, in considerable numbers, have used for many years. At such places the railway company is bound to anticipate the presence of persons on the track, to keep a reasonable lookout for them, to give warning signals, such as will apprise them of the danger of an approaching train, to moderate the speed of its train so as to enable them to escape injury, and a failure of duty in this respect will make the railway company liable to any person thereby injured, subject, of course, to the qualification that his contributory negligence may bar a recovery." 2 Thomp. Neg. § 1726. And in the case of *Western & Atlantic R. Co. v. Meigs*, supra, the Supreme Court says: "While this habit [the habit of walking on the railway track], even if acquiesced in by the railroad company, did not prevent the deceased from being a trespasser, it was a circumstance which the jury might properly consider in determining whether or not the persons in charge of the train showed proper diligence at the time the killing occurred. Railroad engineers should observe more caution in running at places where they know persons are likely to be on the track than elsewhere, even if those persons are trespassers; and especially is this true when the company has at least tacitly consented to this otherwise unauthorized use of its property by the public." This language is quoted with approval in *Bullard v. Southern Ry. Co.*, 116 Ga. 644, 43 S. E. 39, and also in the *Shaw Case*, supra. That eminent jurist and lawyer, to

whom the profession is much indebted, Judge Hopkins, in his work on *Personal Injuries* (section 87), states the rule as follows: "Where no permission is given, but there is a habit on the part of individuals or the public of traveling over the track on foot, and nothing is done to prevent it, that does not modify or change the legal rights or obligations of either the public or the company. By such use the public are not tacitly licensed to go upon the track, and the consent of the company to the use is not implied; but the fact that they do go there enters into the situation as it is known to the company and affects the caution and amount of care required in running the trains."

Let us apply to the facts of this case the rule as thus announced. It is true there was a long and high trestle, and it was narrow, not safely permitting one to stand on its side while a train was passing; but, notwithstanding this dangerous character of the trestle, there were two planks in the middle of the track, used as a pathway by the public. There was no other apparent purpose for which they could have been used. The evidence is silent as to whether they were actually put there by the railway company or by others. But this is immaterial. We are obliged to assume that they were placed there with the knowledge of the railway company, or that they were permitted to remain there and were used with the knowledge of the company, for a period of five years. The evidence does not show that these planks were placed there exclusively for the use of the employes of the company. On the contrary, it does show that they were used as a pathway by the public generally, the people who lived in that neighborhood and the employes of the Armour factory in the mornings and evenings. There was no other way to conveniently cross the ravine and creek. Can it be reasonably denied that these facts did not present a situation where it became the duty of those in charge of the running of the trains to anticipate the presence of pedestrians on the trestle, and consequently to exercise due diligence to avoid injury to them? We conclude that "a sound and wholesome rule of law, humane and conservative of human life," is to impose upon railroad companies the duty of special care where people are to be expected on the tracks, whether as trespassers or licensees. It is the frequency of the use, and not the character of the use, that raises the duty of anticipation and diligence. The evidence relating to this question is not so free from doubt as to demand a legal conclusion. But whether there was such frequent and continual use of the trestle by the public, with the knowledge of the railway company, as to impose upon those who were operating its trains the duty of anticipating the presence of pedes-

trians at that point, and whether, with such notice and resultant duty, ordinary and reasonable care was exercised by them, should have been submitted to the jury for determination. *Bullard v. Southern Ry. Co.*, supra; *Shaw v. Georgia Railroad*, supra; *Maccon & Birmingham Ry. Co. v. Parker*, supra; *Smith v. S., F. & W. Ry. Co.*, 84 Ga. 698, 11 S. E. 455.

[2] 2. The "switchyard doctrine" is invoked by the railway company as a complete bar to the right of recovery. This doctrine is well settled by the decisions of this court and the Supreme Court. There can be no implied license to the public to use switchyards. *Georgia R. Co. v. Fuller*, supra; *Waldrep v. Georgia R. Co.*, 7 Ga. App. 342, 66 S. E. 1030; *Grady v. Georgia R. Co.*, 112 Ga. 668, 37 S. E. 861. This rule is applicable to switchyards in fact; switchyards interlaced with tracks, used constantly for the storing and switching of cars; switchyards where danger signals are manifest and speaking. As to these the companies have the right to the exclusive use, and the public are affirmatively warned to keep out. But a railroad company cannot use its main track for switching purposes as occasion may require, and thus make the one track a part of the switchyard. If so, they could have switchyards extending for miles, with nothing to put the public on notice of their character. In *Grady v. Georgia R. Co.*, supra (the leading case on the subject), it is said: "In a railroad yard, in which there are several tracks in continuous use for the purpose of storing and switching cars and making up trains and the like, and where the dangerous character of the place is manifest and obvious, there can be no implied license to the public to cross the tracks," etc. As thus reasonably defined, the facts of the present case do not bring it within the switchyard rule. Here there was only the one main track across the trestle, used infrequently for switching purposes, never for storing cars, with nothing whatever to indicate that it was a part of the switchyard, or to put a pedestrian on notice of any unusual danger in this respect in using it.

[3] 3. It is insisted by learned counsel for the company that plaintiff was guilty of gross negligence in going upon the trestle, and that this negligence was the efficient cause of his injury. In support of this contention decisions of the Supreme Court are cited, where it is claimed that the act of going upon a railroad trestle was held to be such gross negligence as would prevent recovery in any case. In these cases there was no question made as to the use of the trestle by the public as a pathway, either as trespassers or as licensees. There was no plank walk across the trestle inviting the public to use it. Pedestrians crossed or attempted to cross by stepping from cross-tie to cross-tie, and in each case there were

circumstances emphasizing the negligent use of the trestle. In *Atlanta & Charlotte Air Line Ry. Co. v. Leach*, 91 Ga. 419, 17 S. E. 619, 44 Am. St. Rep. 47, the plaintiff attempted to cross a long, narrow trestle, by stepping on the cross-ties, incumbered with a small boy, and Mr. Justice Lumpkin said: "He had no right to go upon the trestle at all, and in no event could he voluntarily incumber himself in any manner." In *Georgia R. Co. v. Richardson*, 80 Ga. 727, 7 S. E. 119, plaintiff went upon a trestle in the nighttime, about the time he knew a train was due to pass on the trestle. There was no evidence of any plank walkway across the trestle. In *Atlanta & Charlotte Air Line Ry. Co. v. Gravitt*, 93 Ga. 369, 20 S. E. 550, 26 L. R. A. 553, 44 Am. St. Rep. 145, a suit by a mother to recover for the death of her minor son, the negligence of the boy's uncle, who was in charge of him, in taking him on the trestle, when there was a safe and convenient dirt road parallel with the railroad track, was a controlling fact. In that case it was expressly held that there was no license shown from the company to walk upon the trestle. We deduce from a consideration of these cases, and others of like character, that the Supreme Court has never held that the mere act of using a trestle as a cross-way was itself so grossly negligent as to bar recovery. It depends upon the facts of the particular case, and is ordinarily to be determined by the jury.

Unquestionably the plaintiff was guilty of great negligence. He was a stranger, wholly ignorant of the schedule, had no reason to believe that a train would not pass any moment, saw the long, high, narrow trestle, saw the curve only 75 or 100 yards north, hiding the trestle from the view of the engineer, and yet he ventured to cross. Did he not take the chances? But for the plank walkway inviting him to cross, and giving him the right to assume that his presence would be anticipated, and that the engineer in charge would use care in approaching the trestle, so as to avoid injuring him, we would unhesitatingly hold that he did. There is no evidence whatever that the engineer was guilty of willfulness, wantonness, or reckless negligence amounting to wantonness. Whether he failed in the duty of diligence, in view of the facts, and whether such failure was the efficient predominating cause of the injury, or whether it was the negligence of the plaintiff, are questions which we think can only be safely and justly determined by a jury; and, so believing, the judgment awarding a nonsuit is reversed.

Judgment reversed.

POTTLE, J. (dissenting). The gist of the opinion of the majority may be gathered from the following excerpt from the opinion: "Unquestionably the plaintiff was guilty of great negligence. He was a stranger, wholly

ignorant of the schedule, had no reason to believe that a train would not pass any moment, saw the long, high, narrow trestle, saw the curve only 75 or 100 yards north, hiding the trestle from the view of the engineer, and yet he ventured to cross. Did he not take the chances? But for the plank walkway inviting him to cross, and giving him the right to assume that his presence would be anticipated, and that the engineer in charge would use care in approaching the trestle, so as to avoid injuring him, we would unhesitatingly hold that he did. There is no evidence whatever that the engineer was guilty of willfulness, wantonness, or reckless negligence amounting to wantonness." This being the court's view, the discussion in reference to the frequency of the use of the trestle as a footway by others is entirely academic, and the evidence of such use wholly immaterial. I do not challenge the correctness of the principle that, if the employees in charge of a railway train have reason to anticipate the presence of a trespasser on the track at a given time and place, a duty arises, based upon "a sound and wholesome rule of law, humane and conservative of human life," to use ordinary care to prevent injury to such trespasser. This does not change, but is merely an application of, the general rule, repeatedly announced by the Supreme Court and by this court, that the only duty owing a trespasser is not to injure him wantonly or willfully; for, if an engineer has reason to suspect the presence of a trespasser on the track, failure to use ordinary care for his protection would be such gross negligence as to amount to wantonness. The Shaw Case, 127 Ga. 8, 55 S. E. 900, cited by the majority, is authority for the proposition that the frequent use by pedestrians of a railway track longitudinally at a given point "enters into the situation as it is known to the company, and affects the caution and amount of care required in running the trains." That case does not rule that such use of the track raises an implied license or right of user, for the court quotes approvingly from Judge Hopkins as follows: "By such use the public are not tacitly licensed to go upon the track, and the consent of the company to the use is not implied."

The decision in the Shaw Case was placed upon the ground that the defendant company knew of the frequency of the use of the tracks by pedestrians at the place of injury, and with this knowledge was guilty of negligence in failing to keep a lookout for trespassers. In the absence of knowledge by the company of such use of the tracks, manifestly no duty to anticipate the presence of a trespasser can arise. Upon this idea the case of Comer v. Hill, 101 Ga. 340, 28 S. E. 856, was decided. In that case the wife of the defendant's bridgekeeper was killed on a trestle. She had been in the habit of using the trestle as a means of reaching her house.

The court held that the company was not shown to have been under any duty to keep a lookout, because of the absence of proof that the employees connected with the running of the train knew of the habit of the deceased to use the trestle, although it appeared that employees in charge of the roadbed did have such knowledge. The court held: "The plaintiff's wife, therefore, being upon the trestle without authority and without the knowledge of the defendants, the only duty which was owing to her was to use all ordinary care to prevent harm coming to her after her presence upon the trestle was discovered." There being no evidence that the defendant's employees knew of the habit of pedestrians to use the trestle as a footway, the frequency of such use affords no ground for recovery by the plaintiff.

[4] The opinion of the majority is predicated solely upon what it assumes to have been an implied invitation to use the trestle. So far as I am aware, this is the first time any court has held that an invitation to use as a footway a long, high, narrow railway trestle will be implied from the mere presence on the trestle of a means or instrumentality by the use of which passage may be effected with apparent safety. In my opinion, there is no authority in the decisions of the Supreme Court for such a conclusion. The plank was about a foot wide and did not extend across the trestle at either end. On the contrary, there were a few feet of open space at each end of the trestle before the planks were reached. The trestle was 450 to 500 feet long, about 50 feet high, and too narrow to enable a person to remain thereon safely while a train was passing. There was some evidence that a notice was posted warning persons not to go upon the trestle. The plaintiff could read, but says he did not see the notice. He had no right to assume that he had permission to walk across the trestle merely because a plank was there on which he could walk. Doubtless the plank was placed there for use by the road hands in connection with their duties in inspecting and repairing the trestle. The company was under no duty to provide a plank for the plaintiff, and yet, if as the majority hold, the plank was an invitation to walk, the company would have been liable if the plank had broken and the plaintiff had in consequence been injured.

Carried to its logical conclusion, the principle announced by the majority would prevent any master from employing means to make a dangerous instrumentality safe for his servants, for fear some stranger might accept the presence of the means as an invitation to use the instrumentality and be injured thereby. What right had the plaintiff to assume that the planks were put there for his benefit, rather than for use by the railroad employees at a time when their presence there was known and precaution taken

for their safety? In my opinion, the only thing he had a right to assume was that he might be able to cross with less likelihood of falling than if he walked on the ties. In going upon the trestle without ascertaining that a train was approaching, the plaintiff assumed the risk of injury, and is not entitled to hold the company liable for a consequence resulting, not from any breach of duty to him, but solely from his own rash act.

(138 Ga. 558)

GREER v. TURNER COUNTY et al.

TURNER COUNTY et al. v. GREER.

(Supreme Court of Georgia. Aug. 17, 1912.)

(Syllabus by the Court.)

1. COUNTIES (§ 155*)—COLLECTION OF FUNDS—EXECUTION—AUTHORITY TO ISSUE—CHAIRMAN OF BOARD OF ROADS AND REVENUES.

The chairman of the board of roads and revenues of Turner county has authority to issue an execution against any person holding county funds collected by the county for any purpose.

(a) It is not essential to the validity of such an execution that it be set out therein from whom the defendant in *fi. fa.* received the money, what particular money it was, or how it was county money.

[Ed. Note.—For other cases, see Counties, Cent. Dig. §§ 223-225; Dec. Dig. § 155.*]

2. COUNTIES (§ 155*)—COLLECTION OF COUNTY FUNDS—PERSONS SUBJECT TO EXECUTION.

The execution may be issued against any person, whether an official or not, holding county money, and without suit or notice of any kind.

[Ed. Note.—For other cases, see Counties, Cent. Dig. §§ 223-225; Dec. Dig. § 155.*]

3. COUNTIES (§ 75*)—CLAIMS—SUBMISSION—TIME.

Civil Code, § 6001, requires claims in behalf of the officials therein specified, for public services in relation to which existing laws provide no compensation, to "be submitted to the grand juries of the superior courts of the respective counties of the spring term." This means at the spring term immediately succeeding the year during which such public services were rendered. Therefore a grand jury, at a term subsequent to such spring term, has no legal power to pass upon and allow such claims, and to thereby authorize the county treasurer to pay them. Accordingly such a payment would be invalid, and an execution would lie in behalf of the county against the official or person receiving the same.

[Ed. Note.—For other cases, see Counties, Cent. Dig. §§ 116, 117, 134; Dec. Dig. § 75.*]

4. COUNTIES (§ 75*)—CLAIMS OF OFFICIALS—COSTS AND ATTORNEY'S FEES.

As it appears from the face of the account presented to and allowed by the grand jury (there being no other evidence on the subject) that the items for expenses and attorney's fees incurred by the ordinary of Turner county in responding to a rule issued against him by the prison commissioners were not connected with any public service rendered the county by him, the grand jury were not legally authorized to allow such items.

[Ed. Note.—For other cases, see Counties, Cent. Dig. §§ 116, 117, 134; Dec. Dig. § 75.*]

5. COUNTIES (§ 75*)—CLAIMS OF OFFICIALS—ALLOWANCE.

The amount claimed by such ordinary as compensation for services rendered during the year 1908, in performing the duties imposed upon him by the adoption of the alternative road law system for Turner county, was duly allowed by a grand jury as the statute provides, and, under the circumstances of the case, was promptly paid by the county treasurer, and therefore the county commissioners were not authorized to issue an execution against the ordinary for the sum so paid him.

[Ed. Note.—For other cases, see Counties, Cent. Dig. §§ 116, 117, 134; Dec. Dig. § 75.*]

6. STATUTES (§ 76*)—SPECIAL LEGISLATION—COUNTY OFFICERS—PAYMENT FOR SERVICES.

The special act for Turner county, approved August 18, 1906 (Acts 1906, p. 459), in so far as it is thereby attempted to provide a different method from that established by the general law embodied in Civil Code, § 6001, for the compensation of certain officials where no fees are fixed by law, is void, because in conflict with that provision of the Constitution declaring that "no special law shall be enacted in any case for which provision has been made by an existing general law."

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 77½-78½; Dec. Dig. § 76.*]

Error from Superior Court, Turner County; Frank Park, Judge.

Proceeding by W. A. Greer against Turner County. From a judgment denying the recall of a *fi. fa.* issued in favor of the county, petitioner brings error, and the county sued out a separate bill of exceptions, assigning error on so much of the judgment as found that petitioner was entitled to \$500 embraced in his account for services rendered as ordinary between specified dates. Affirmed.

W. A. Greer was the ordinary of Turner County during the years 1907 and 1908, and as such officer performed during those years certain extra public services and incurred certain expenses in behalf of the public, in relation to which the existing laws provided no compensation. He rendered an itemized bill for such services and expenses, properly verified, to the grand jury of such county at the spring term of the superior court, 1909. That grand jury made the following recommendations: "In view of the fact that our county finances are deficient several thousand dollars, we hereby recommend the issuing and selling of \$40,000 of bonds for the following purposes: For public roads, \$5,000.00; for paupers, \$1,200.00; for present indebtedness, \$25,000.00; for jail, \$1,500.00; for bridges, \$3,000.00; for general purposes, \$4,300.00. We also recommend that W. A. Greer, ex-ordinary, be paid the sum of \$1,000 for services rendered in 1907 and 1908 in overseeing roads of this county, and the sum of \$40 for expenses incurred in going to Atlanta in response to rule nisi issued by the prison commission of Georgia, and also the sum of \$50 paid for attorney's fees in connection with said rule nisi. 'Exhibit 1,' hereto attached, contains a statement of these amounts, and we recommend that the

county commissioners pay the same out of the general funds as mentioned above in connection with the issue of bonds." The attached exhibit showed an item of \$500, due December 31, 1907, for one year's service attending to the duties imposed by law upon W. A. Greer, ordinary, by the adoption of the alternative road law system, and a like amount, due December 31, 1908, for similar services rendered during that year; also items of \$40 and \$50 due September 9, 1908, for expenses and attorney's fees in respect to the matter as stated in the foregoing recommendation. Subsequently to such recommendation, it not appearing that the bonds were issued by the county, the board of commissioners of roads and revenues, after levying taxes for all necessary and proper purposes, levied a sufficient amount, under the head, "To pay any other lawful charge against the county," to pay the amount of Greer's claim and all other similar charges; and there was, for the purpose of paying "any other lawful charge against the county," a sufficient amount of taxes collected and paid into the treasury of the county to cover the claim of Greer and all other similar charges. Afterwards Greer presented his claim to the treasurer of the county and demanded payment thereof; and the "treasurer, having the said fund in his hands and being satisfied that [Greer's claim] was a lawful charge against said fund, without further order paid" Greer, on December 27, 1909, the amount of his claim, viz., \$1,090, he giving the treasurer a receipt for the same. On April 5, 1910, an execution was issued by the board of commissioners of roads and revenues of the county against Greer for the sum paid him by the treasurer, with interest thereon from the date of payment, which amounts, the execution recited, "at our court of the board of commissioners of roads and revenues of said county, to wit, on the 5th day of April, 1910, Turner county, as plaintiff, recovered against said W. A. Greer, of said Turner county, as county money in his hands and collected for county purposes, and which sums the said W. A. Greer fails and refuses to pay over, although having been, on the 21st day of March, 1910, notified in writing and commanded to pay the same, and the said W. A. Greer refused to do so."

After the levy of the execution upon property of Greer, he filed a written motion in the office of the clerk of the superior court to quash the execution and to dismiss the levy on various grounds. He also filed an affidavit of illegality, which was demurred to by the plaintiff in *fi. fa.*, which also traversed the grounds of the same. Upon the trial the court overruled the motion to quash the execution and to dismiss the levy, sustained the demurrer to some of the grounds of the affidavit of illegality, and overruled it as to others. By agreement of

counsel the case was submitted to the judge of the superior court without the intervention of a jury, upon an agreed statement of facts, the substance of which is above stated. The court rendered a judgment "that the plaintiff recover of and from the defendant the sum of five hundred and ninety (\$590.00) dollars; that is to say, the \$500.00 allowed for extra services during the year 1907, and the \$40.00 allowed for expenses in going to and from Atlanta and remaining there in response to the rule nisi of the prison commission, and the \$50.00 paid out as attorney's fees in connection with the said rule nisi, together with interest thereon at the rate of 7 per cent. per annum from the date the same was paid to him by the treasurer, and all costs of this case; and the execution levied is ordered to proceed accordingly for these amounts." Greer excepted, assigning error upon the overruling of his motion to quash the *fi. fa.* and to dismiss the levy made thereunder, upon the sustaining of certain grounds of the demurrer to the affidavit of illegality, and upon the judgment of the court ordering the *fi. fa.* to proceed against him for the sum of \$590. The county of Turner sued out a separate bill of exceptions, in which it assigned error upon the sustaining of the illegality to the extent of \$500, and so adjudging that Greer was entitled to that sum as embraced in his account against the county for extraordinary services rendered by him as ordinary from January 1, to December 31, 1908.

W. H. McKenzie, of Cordele, and J. H. Tipton, of Sylvester, for plaintiff in error. A. J. Davis and W. T. Williams, both of Ashburn, and Perry, Foy & Monk, of Sylvester, for defendant in error.

FISH, C. J. (after stating the facts as above). [1] 1. We will first deal with the assignment of error made by Greer upon the overruling of his motion to quash the execution and to dismiss the levy made thereunder. The grounds of this motion were in substance as follows: (1) Because the execution was issued and signed by "D. H. Davis, Chairman of Board of Roads and Revenues of Turner County, Georgia," and no sufficient facts were set forth in the execution to show any authority or jurisdiction either in Davis, as chairman of the board, or in the board itself, to issue the execution, (2) Because the execution fails to set forth sufficient facts to show Greer's liability to Turner county for any portion of the sum for which the execution was issued, in that it does not appear from the execution in what way or on what account the sum of \$1,090 was due by Greer to the county, and that it does not appear from whom Greer received the money, nor what particular money he received, nor that the money was county money, nor for what county purposes he collected it. (3) Because the execution

was illegal upon its face as having no foundation in law nor in fact.

Civil Code, § 522, gives ordinaries authority to compel persons having county money in their hands, collected for any purpose whatever, to pay over the same; and section 523 provides that ordinaries shall issue executions against such persons and their securities, if any, for the full amount appearing to be due, as the comptroller general issues executions against defaulting tax collectors. The act of 1908 creating the board of commissioners of roads and revenues for Turner county (Acts 1908, p. 354) gives to such board jurisdiction over all county matters, vested by law, at the time of the passage of the act, in the ordinaries of the various counties of the state having no board of commissioners of roads and revenues. The act also authorizes the chairman of such board, as such, to issue an execution of the character of the one involved in this case. See, also, *County of Pulaski v. Thompson*, 83 Ga. 270 (3), 9 S. E. 1065. The commissioners had authority to issue an execution against any person holding county funds. Code sections above cited; *Hobbs v. Dougherty County*, 98 Ga. 574, 25 S. E. 579. The execution recited that the sum for which it was issued was due by Greer to Turner county "as county money in his hands and collected for county purposes." It was not necessary that the execution should set out in detail from whom Greer received the money, what particular money it was, or why and how it was county money. There was no merit, therefore, in the motion, and the court did not err in overruling it.

[2] 2. Did the court err in sustaining certain grounds of demurrer to the affidavit of illegality? These grounds were in substance as follows: (1) Defendant had never had his day in court, had never been served with any process or other notice of the pendency of any suit whereon the execution was based, nor did he waive service, nor appear and defend any suit; and, moreover, no suit of any kind has ever been brought against him for the money for which the execution was issued. (2) At the time the execution issued against him, defendant was a private citizen, and was not a county official of Turner county, nor as such the holder of any money belonging to the county. The other grounds of illegality which were stricken involved the same points upon which we have ruled on the motion to quash the execution and dismiss the levy. The court properly sustained the demurrer to the two grounds of the illegality above stated. Under Civil Code, §§ 522, 523, 525, an execution may be issued against any person, whether an official or not, holding county money, and without suit or notice of any kind. *Price v. Douglas County*, 77 Ga. 163, 3 S. E. 240. "Prima facie such an execution is to be taken as expressing and representing a real debt for the county taxes;

and it is not for the county to support it by evidence, but for the defendant or defendants to meet and overcome it by evidence." *Bridges v. Dooly County*, 83 Ga. 275, 9 S. E. 1065. As we have already stated, such an execution may be issued against any person, whether he be an official or not, who has in his hands county money collected by the county for any county purpose. Civil Code, §§ 523, 525. In *Hobbs v. Dougherty County*, supra, it was held that it was not necessary for the person holding such county funds to be an official of the county, to authorize the issuance of an execution against him, and that accordingly, upon the refusal of a banker to pay over money which had been "collected for any county purpose whatever" and deposited with him, either on general or special deposit, by the county treasurer or tax collector, the ordinary or other proper county authorities could, under the Code section cited above, issue an execution against the banker for the purpose of collecting from him the amount so placed in his hands, and he stood upon the same footing as such officers upon refusal to pay the funds to the county when demanded of him.

[3] 3. Did Greer, the defendant in *fi. fa.*, under the facts of the case, have in his hands any county money, collected for any county purpose, which he refused to pay upon demand? The answer to this question depends upon whether, in the circumstances, he was legally entitled to receive from the treasurer the money paid him. Civil Code, § 6001, declares: "The ordinaries of this state, who by law are vested with the management of the county business, and for whom no compensation is provided, and the sheriffs and clerks of the superior courts, for public services in relation to which existing laws provide no compensation, shall be compensated as follows, to wit: Such officers shall state their respective claims in writing and make affidavit of the correctness and justice thereof, which so made out and verified shall be submitted to the grand juries of the superior courts of the respective counties at the spring term, and said grand juries may, in their discretion, require other proof of the justness and correctness of said claims, and, when satisfied that such claims are just and correct, may allow the sum claimed, or so much thereof as they may deem right and proper: and when so allowed, the ordinary of said county, or other authority levying county taxes, shall assess so much with the other county taxes as will pay the same, which, when collected and paid over to the county treasurer of such county, shall be paid by him to the parties entitled thereto, without further order, he taking a proper receipt therefor. The compensation provided for in this section shall be in full of all compensation of said officers for such services." Greer's account against Turner county was for what he claimed to be services rendered by him

for the county during the years 1907 and 1908, in relation to which no existing law provided compensation. He submitted the account in writing and properly verified to the grand jury of the superior court of that county at the 1909 spring term thereof, when such jury recommended the payment of the entire account, but further recommended "that the county commissioners pay the same out of the general funds as mentioned above in connection with the issuance of bonds." This same grand jury had recommended the issuance and sale by the county of bonds to the amount of \$40,000, for certain specified purposes, among which was an item of \$4,800 "for general purposes." In our opinion, the recommendation by the grand jury that Greer's account be paid sufficiently indicated the allowance by them of the sum claimed by him. The first item of his account was as follows: "Dec. 31, 1907. To one year's service attending to duties imposed by law upon said W. A. Greer by adoption of alternative road law system, beginning January 1, 1907, and ending December 31, 1907, \$500.00." The section of the Code quoted above requires claims, in behalf of the officers therein specified, for public services in relation to which existing laws provide no compensation, to "be submitted to the grand juries of the superior courts of the respective counties at the spring term." This evidently means at the spring term immediately succeeding the year during which such public services were rendered, as for various good reasons such claims should not be allowed to accumulate against counties, and such we believe was the intention of the General Assembly in enacting the statute. It follows that the grand jury, at the 1909 spring term of the court, had no power, under the statute, to pass upon and allow the claim for services which were rendered in 1907. It appeared from the face of the account that the grand jury which allowed it had no legal authority to do so; and the treasurer who paid such account was bound to know, when it was presented to him for payment, that the allowance of it by that grand jury was unauthorized. This being true, the payment by the treasurer was illegal, and therefore Greer received \$500 of county money to which he was not legally entitled under the proceedings in accordance with which it was paid him; and the trial court properly held that the execution should proceed for this amount.

[4] 4. Two other items of the account were as follows: Sept. 9, 1908. To expenses incurred in going to and from Atlanta and remaining there in response to rule nisi issued by the prison commissioners of Georgia to show cause why convict camp of Pinson & Conoly should not be abolished, \$40.00." "Sept. 9, 1908. To amount paid to attorney in the matter of rule nisi issued from prison commission of Georgia to show cause why

convict camp of Pinson & Conoly should not be abolished, \$50.00." The record entirely fails to disclose more as to the nature of the proceedings before the prison commission than appears upon the face of these items of the account, and from them it is shown that the proceeding was to abolish a designated convict camp of named individuals, presumptively for some alleged reason affecting the legality or propriety of such camp, and not for the purpose of depriving the county of convicts. It follows that, as the expense and attorney's fees embraced in the account appear not to have been connected with any public service rendered by Greer, as ordinary, for the county, the grand jury was without legal authority to allow them; and the court below properly held, also, that the execution should proceed for the sum of such items.

[5] 5. The remaining item of the account was: "Dec. 31, 1908. To one year's services attending the duties imposed by the adoption of the alternative road law system from January 1, 1908, to December 31, 1908, \$500.00." The grand jury, at the spring, 1909, term of the court, was legally authorized to pass upon this claim, and, if satisfied from the evidence submitted to them that it was just and correct, to allow it. This they did, though they recommended its payment out of the amount "of the general funds" to be raised, together with other amounts for specified purposes, by the issuance and sale by the county of bonds in a given sum. The grand jury went beyond their province and authority in recommending that the account be paid out of any given fund. The statute provides that, after such a claim has been allowed, the county authority whose duty it is to levy county taxes "shall assess so much with the other county taxes as will pay the same, which, when collected and paid over to the county treasurer of such county, shall be paid by him to the parties entitled thereto, without further order, he taking a proper receipt therefor." Civil Code, § 6001. No county bonds were issued, and the county commissioners, after the allowance of Greer's account, and after levying taxes for all necessary and proper purposes, levied a sufficient amount, under the head, "To pay any other lawful charge against the county," to pay the amount of Greer's claim and all other similar charges, and there was, for the purpose of paying "any other lawful charge against the county," a sufficient amount of taxes collected to cover the claim of Greer and all other similar charges. Out of the fund raised for such purpose the treasurer paid Greer's account upon presentation, after it had been allowed by the grand jury, as already stated. We hold that this item of \$500 for services rendered during the year 1908 was properly paid by the treasurer to Greer; and the court below did not err in so ruling in sustaining the illegality as to that sum. Our decision in

this respect does not conflict with anything held in *Lumpkin County v. Williams*, 94 Ga. 657, 21 S. E. 849, or in *White County v. Bell*, 98 Ga. 400, 25 S. E. 558, since, after this claim was passed on and allowed by the grand jury, the county commissioners, after levying taxes for all necessary and proper purposes, levied a sufficient amount, under the head, "To pay any other lawful charge against the county," to pay the amount of this claim of Greer and all other similar charges, and there was a sufficient amount of taxes collected under this head to pay all such claims and charges.

[6] 6. Counsel for the county of Turner contend that the item of \$500, with which we have just been dealing, was paid to Greer without authority of law, for the reason that the act of August 18, 1906 (Acts 1906, p. 459), requires that payment for such services as were embraced in this item should be made by the treasurer of the county on a warrant drawn by the ordinary, and that no such warrant was issued. Civil Code, § 6001, is a general law making provision for the compensation of certain officials where no fees are fixed by existing law. The special law for Turner county, above referred to, in so far as it seeks to provide a different method from that established by such general law for the payment of such compensation, is in conflict with the declaration that "laws of a general nature shall have uniform operation throughout the state, and no special law shall be enacted in any case for which provision has been made by an existing law." Civil Code, § 6391; *Atkinson v. Bailey*, 135 Ga. 336, 69 S. E. 540.

Judgment affirmed in both cases. All the Justices concur.

(138 Ga. 540)

MAYNARD et al. v. ARMOUR FERTILIZER WORKS et al.

(Supreme Court of Georgia. Aug. 17, 1912.)

(Syllabus by the Court.)

1. FRAUDULENT CONVEYANCES (§ 237*) — RIGHT TO SUE—REMEDY AT LAW.

Where creditors obtained judgments against a common debtor, and had executions issued, on which entries of nulla bona were made, they could file an equitable petition against the debtor and grantees to whom the debtor had executed a deed, attacking such conveyance as fraudulent, and made to delay or defraud them and other creditors, and seeking to subject said property. Such a petition, with proper allegations, would not be demurrable on the ground that the plaintiffs had an ample common-law remedy, without invoking equitable relief.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Cent. Dig. §§ 674-680, 684-686; Dec. Dig. § 237.*]

2. FRAUDULENT CONVEYANCES (§ 253*)—PARTIES—JOINDER OF PLAINTIFFS.

Nor would it be demurrable on the ground that there was a misjoinder of plaintiffs, in that

several judgment creditors of the same debtor joined therein.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Cent. Dig. § 740; Dec. Dig. § 253.*]

3. ACTION (§ 50*)—JOINDER OF CAUSES OF ACTION—PARTIES AND INTERESTS INVOLVED.

Nor on the ground that a judgment held by one of the plaintiffs was against the common debtor, and also against her husband, who was alleged to be insolvent.

[Ed. Note.—For other cases, see *Action*, Cent. Dig. §§ 511-547; Dec. Dig. § 50.*]

4. FRAUDULENT CONVEYANCES (§ 263*)—BILL TO SET ASIDE—REQUISITES—DEMURRER.

The petition filed was demurrable. It nowhere alleged that the grantees in the deed attacked participated in a fraudulent plan (if it existed) to prevent the plaintiffs from collecting the amounts due them, or had notice thereof. The deed attacked bore date before the creation of the debts on which the judgments were founded. There was no distinct charge that it was not then executed. There was some suggestion that the valuable consideration recited in the deed was not paid, but there was no direct allegation to that effect.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Cent. Dig. §§ 771-774, 776-779, 781; Dec. Dig. § 263.*]

5. PLEADING (§ 17*)—BILL—ALLEGATIONS—DIRECTNESS AND POSITIVENESS.

If it was intended to charge that the grantees had no means with which to pay the recited consideration, or did not in fact pay it, such allegation should have been directly made, and not by mere inference from pleading collateral facts, which might possibly have an evidential value, and then drawing conclusions therefrom.

(a) Certain specified paragraphs in the petition are held to have been subject to special demurrer.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. §§ 88, 41, 350; Dec. Dig. § 17.*]

Error from Superior Court, Wilcox County; N. V. Whipple, Judge.

Bill by the Armour Fertilizer Works and others against Mrs. L. M. Maynard and others. General and special demurrers to the petition having been overruled, defendants excepted, and bring error. Reversed.

The Armour Fertilizer Works and others filed their equitable petition against Mrs. L. M. Maynard and her two daughters, Myrtle Maynard and Lillie Mae Maynard, alleging in substance as follows: Plaintiffs were creditors of Mrs. Maynard; their debts having been created in 1906 beginning in the early part thereof. One of them held the note of Mrs. Maynard and her husband, but the latter was hopelessly insolvent, and had been so for several years. They reduced their claims to judgment, executions had been issued, and entries of nulla bona made thereon. The earliest of these judgments was dated in May, 1907, and the others bore later dates in that year. J. D. Maynard, the husband of Mrs. Maynard, always managed her business affairs for her, and in the years 1905, 1906 and 1907 he was her general agent. In 1906, when the debts of the plaintiffs were created, she was in possession of a considerable amount of property, including

certain lots in the town of Abbeville and certain farm property, and she returned such property for taxation as her own. Mrs. Maynard lived on a part of the property situated in town, and her two children lived with her. There has never been any apparent change in the possession thereof. She had title to all of the property described in the petition, "except such title as may have passed out of her by the three deeds hereinafter set forth." During the year 1906 she became heavily indebted, and also before and since that time contracted various debts, some of which have been reduced to judgment. She became indebted to the Chickamauga Trust Company in the sum of \$3,000. She made a deed to her farm near Abbeville, for the purpose of securing the debt. She made to her brother, T. L. Shepherd, a deed dated January 3, 1907, for a purported consideration of \$4,000. This was recorded on November 20, 1907. On the same date there was filed for record a deed purporting to have been made on February 21, 1905, for an alleged consideration of natural love and affection and \$500, whereby she undertook to convey all of her property described in the petition, except the farm. She now claims that she has no real estate, and plaintiffs have been unable to find any other property. Various allegations were made in regard to Shepherd, such as that he resided in the city of Savannah and was engaged in no occupation, in so far as plaintiffs were able to ascertain, and made no tax return for the year 1906. There were also some allegations in regard to the estate of his father, made for the purpose of showing what amount of money he probably received from that source. In 1907 the farm was under the control and direction of J. D. Maynard, as it had been for a number of years previously, and this continued during the year 1908, and still continues, so far as plaintiffs are able to ascertain. The deed from Mrs. Maynard to her two daughters purports to have been made for love and affection and a consideration of \$500, although the property therein described is worth from \$3,500 to \$4,000. If \$500 were paid at all, this was an inadequate consideration. The grantees are the only children of Mrs. Maynard, and have all their lives resided with their parents, and still do so. They have been engaged in no business during the past four or five years, "so far as your petitioners are able to ascertain, and therefore have no means for making money." So far as the plaintiffs by diligent inquiry can ascertain, they have not inherited money or property from any source. Unless plaintiffs can subject the real estate described for the payment of their debts, they will not be able to realize thereon. The deed made by Mrs. Maynard to her daughters was not made in good faith, but was made to hinder and delay plaintiffs and other creditors, and so likewise was the deed which was made to Shepherd. Plaintiffs

bring this petition in behalf of themselves and other creditors in like circumstances who may see fit to join in the litigation. The petition then closed with this allegation: "Your petitioners charge that both of said deeds, the one to T. L. Shepherd and the one to Myrtle Maynard and Lillie Mae Maynard, were a part and parcel of a well-laid plan to prevent petitioners from collecting the amount due them as aforesaid, and that, although said deeds are [not?] near each other in apparent date, yet your petitioners charge the fact to be that the said two deeds were executed at one and the same time, or at all events near the same time." The prayers were that the deed from Mrs. Maynard to her two daughters be declared to be fraudulent, and be set aside and canceled as against the rights of the plaintiffs, that it be declared that the property was subject to the plaintiffs' executions, and that process issue. General and special demurrers to the petition were overruled, and the defendants excepted.

Haygood & Cutts, of Fitzgerald, and M. B. Cannon, of Abbeville, for plaintiffs in error. Hal Lawson, of Abbeville, for defendants in error.

LUMPKIN, J. (after stating the facts as above). [1] 1. Creditors, having reduced their claims to judgment, and having had entries of nulla bona made on the executions, filed an equitable petition seeking to subject certain land which had been conveyed by the debtor to her two daughters, and to have the deed canceled. The presiding judge overruled a demurrer to the petition, and the defendants excepted. One of the principal contentions on the part of the plaintiffs in error is that the defendants in error had a complete remedy at law, by levying their executions, and that there was no equity in a petition which sought to set aside a conveyance made by the debtor on the ground that it was fraudulent. This contention is unsound. Where the remedy at law is not as complete as in equity, equitable relief may be had. It has long been a recognized rule that, where judgment creditors cannot obtain payment of their judgments by levy and sale, and it is necessary to set aside fraudulent transactions, they may resort to a court having equitable jurisdiction. Formerly the more frequent contention advanced was that the creditor could not go into equity until after he had reduced his claim to judgment, and sometimes, it was said, not until after he had had an entry of nulla bona made. This was changed by the uniform procedure act of 1887, under which a creditor may at once proceed to obtain judgment on his claim, and to have a decree subjecting property fraudulently conveyed away by his debtor. *De Lacy v. Hurst*, 83 Ga. 223, 9 S. E. 1052. But the enlarging of the right of a cred-

itor without judgment did not operate to destroy the pre-existing right of a creditor with a judgment. The former argument that one without a judgment and execution could obtain no equitable relief as against fraudulent conveyances is now reversed, and the contention is made that plaintiffs who have obtained judgments are entitled to no such relief. I omit reference to lien creditors other than by judgment. The plaintiffs in this case alleged that they had obtained judgments and had caused executions to be issued, and that the proper officer had made an entry of nulla bona thereon. This is sufficient to show that they have obtained an adjudication that they are entitled to payment and have procured executions to issue, but the levying officer can find nothing upon which to levy. They find confronting them a conveyance made by the debtor. Should they levy upon the property, they could not compel the daughters of the debtor (the grantees in the deed) to interpose a claim, or other proceeding, under which the title could be tested and an adjudication had that the property was subject, so that it might be sold free from the cloud cast over it by such deed. Should the grantees see fit to do so, they might let the property be sold for some small amount, and then contest the title with the purchaser. The executions of the plaintiffs amount to a considerable sum, and it is not certain whether, under such conditions, the property would bring enough to pay them, much less other executions outstanding, the holders of which may be made parties under the invitation contained in the petition, and may make a contest for the fund. With proper allegations, these judgment creditors might seek equitable relief, and their petition would not be demurrable on the ground that they had an ample remedy at common law by levy and sale, and were therefore not entitled to institute any equitable proceedings. *Thurmond v. Reese*, 3 Ga. 449, 48 Am. Dec. 440; *Stephens v. Beal*, 4 Ga. 319; *Lathrop v. McBurney*, 71 Ga. 815; *Conley v. Buck*, 100 Ga. 187, 190, 28 S. E. 97.

[2, 3] 2, 3. There was no error in overruling the ground of the demurrer which set up that there was a misjoinder of plaintiffs. All the plaintiffs had a common interest in setting aside the alleged fraudulent conveyance and subjecting the property conveyed by one of the defendants to the others as tenants in common for the payment of their claims. Neither was there any merit in the contention that there was a misjoinder of causes of action, because the petition showed that one of the plaintiffs had a judgment against Mrs. L. M. Maynard and her husband, J. D. Maynard, while the others held judgments against Mrs. Maynard alone. It was alleged that J. D. Maynard was hopelessly insolvent and nothing could be made out of him. His being named as a

defendant in one of the judgments, therefore, did not preclude the plaintiff who held such judgment from joining in the effort to subject property of the other defendant, or render such action a misjoinder of parties plaintiff or of causes of action.

[4] 4. Having held that the plaintiffs in execution might, with proper allegations, maintain an equitable petition for the purpose of subjecting certain property alleged to have been fraudulently conveyed by the defendant in execution to her daughters, and would not be prevented from so doing on the ground that there was an ample common-law remedy, the next question which presents itself is whether the petition contained proper allegations so as to bring it within the ruling thus made. We do not think that it did. It alleged that a conveyance was made by Mrs. Maynard to her two daughters and one to her brother, and charged that these deeds "were part and parcel of a well-laid plan to prevent the petitioners from collecting the amount due them as aforesaid"; but it nowhere alleged directly that the two daughters took any part in such plan, or had any notice of the existence of the fraud, if there was one. It showed that the deed to the daughters was dated about a year before any of the debts held by the plaintiff were contracted, and that the deed to Shepherd bore date after such debts were contracted, but before judgments were obtained. It was alleged that, "although such deeds are [not?] near each other in apparent date, yet your petitioners charge the fact to be that said two deeds were executed at one and the same time, or at all events near the same time." Whether that time was the year before the debts to the plaintiff were created, or afterwards, does not appear. There was some intimation that the plaintiffs doubted whether any consideration was paid by the daughters to the mother, but there was no direct allegation that such payment was not made. It was alleged that the purported consideration of \$500, if paid at all, was very inadequate; but this was not a direct allegation that there was no consideration, or that the deed was in fact a voluntary conveyance. If it was intended to make such a charge, the vagueness of the allegation in regard to the time when the deed was executed becomes all the more subject to demurrer, because there is quite a difference between the making of a voluntary conveyance before a debt is created and after its creation. *First Nat. Bank v. Bayless*, 96 Ga. 684, 23 S. E. 851.

[5] 5. In several paragraphs of the petition the plaintiffs set out collateral evidential facts, which the jury might perhaps believe point in the direction of fraud on the part of the grantees; but it is not good practice to plead evidence, instead of directly alleging an issuable fact. Legitimate infer-

ences may be drawn from evidence in favor of the introducer. Such is not the rule as to pleadings. Thus, in the sixty-seventh paragraph of the petition, it is alleged: "Petitioners show that the said Myrtle and Lillie Mae Maynard have been engaged in no business whatever during the last four or five years, so far as your petitioners are able to ascertain, and therefore have no means for making money." Suppose that the defendants should deny the allegations of this paragraph, what would be put in issue? Would the issue be that the two daughters named had been engaged in no business, or would it be that the plaintiffs had not been able to ascertain that they had been so engaged, or would it be whether, from their inability to so ascertain, they drew a legitimate conclusion that "therefore the two daughters had no means for making money"? If the plaintiffs intended to charge that the two daughters had no means of making money, and had no money, or that they did not in fact pay the \$500 stated as a consideration in the conveyance to them, it should have been alleged directly, and not inferentially; because the plaintiffs had been unable to ascertain that the daughters had been engaged in any business. Several of the other paragraphs are of the same character. Without reciting them in full, it is sufficient to say that paragraphs 51, 52, 67, 68, and 69 of the petition should have been stricken on special demurrer, and the general grounds of the demurrer should have been sustained.

One ground of the demurrer undertakes to attack certain paragraphs in the petition in regard to Shepherd, and to refer to such paragraphs by number, but fails to state the numbers of the paragraphs to which reference is made, leaving them blank, and we therefore give it no further consideration. It cannot be said generally that all references to Shepherd were irrelevant. The other grounds of the special demurrer were without merit.

Judgment reversed. All the Justices concur.

(128 Ga. 555)

SHEPHERD et al. v. ARMOUR FERTILIZER WORKS et al.

(Supreme Court of Georgia. Aug. 17, 1912.)

(Syllabus by the Court.)

1. FRAUDULENT CONVEYANCES (§ 263*)—SUIT BY CREDITORS—BILL.

The decision in *Maynard v. Armour Fertilizer Works*, 75 S. E. 582, decided to-day, in large part controls the present case. Here there is a similar lack of direct allegation of fraud on the part of the grantee in the conveyance attacked, or of notice of fraud, if any existed, as in that case.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Cent. Dig. §§ 771-774, 776-779, 781; Dec. Dig. § 263.*]

2. CREDITORS' SUIT (§ 27*)—REDEMPTION OF LAND CONVEYED—PARTIES—PLEADING.

Where an owner of land made a conveyance for the purpose of securing a debt, and thereafter became indebted to others, and then made a conveyance of the land subject to the security deed, and judgment creditors of such debtor filed an equitable petition to subject the interest conveyed by the latter deed, and to have it decreed that they were entitled to pursue the remedy pointed out by the statute (whereby creditors may redeem property which has been conveyed for the purpose of securing a debt and subject it to their claims), but did not attack the security deed, or the indebtedness secured thereby, or seek to affect the rights of the holder thereof, the petition was not demurrable, at the instance of the debtor and the holder of the deed attacked, on the ground that the grantee in the security deed was not made a party defendant.

[Ed. Note.—For other cases, see *Creditors' Suit*, Cent. Dig. §§ 100-109, 112, 113; Dec. Dig. § 27.*]

3. CREDITORS' SUIT (§ 39*)—REDEMPTION OF LAND CONVEYED AS SECURITY—BILL.

In an equitable petition filed for the purpose indicated in the last headnote, allegations to the effect that the debtor, who was a married woman, conveyed to her two unmarried daughters all of her property except that covered by the last deed, which was made to her brother, and thus conveyed away her property from which creditors could realize payment, were not demurrable as irrelevant.

[Ed. Note.—For other cases, see *Creditors' Suit*, Cent. Dig. §§ 154-164; Dec. Dig. § 39.*]

4. PLEADING (§ 218*)—IMPROPER FACTS—SPECIAL DEMURRER.

Certain paragraphs of the petition, alleging facts not proper to be set out in the pleadings, should have been stricken on special demurrer.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. §§ 549-566; Dec. Dig. § 218.*]

Error from Superior Court, Wilcox County; U. V. Whipple, Judge.

Suit by the Armour Fertilizer Works and others against T. L. Shepherd and others. From a decree overruling a demurrer to the bill, defendants bring error. Reversed.

Haygood & Cutts, of Fitzgerald, and M. B. Cannon, of Abbeville, for plaintiffs in error. Hal Lawson, of Abbeville, for defendants in error.

LUMPKIN, J. [1] 1. This is the companion case to that of *Maynard v. Armour Fertilizer Works*, 75 S. E. 582, this day decided. In that case the plaintiffs sought to subject to the payment of their executions land conveyed by Mrs. Maynard to her two daughters. In this case they are seeking to set aside a deed made by her to her brother, conveying her interest in certain land which she had previously conveyed to a trust company to secure a debt, and to have it decreed that such interest could be subjected to their executions by the creditors upon paying the debt secured by the deed which she had previously made, in accordance with the provisions of the Civil Code, § 6038. What has been said in that case is largely

controlling in this. The plaintiffs alleged certain collateral facts, but did not distinctly allege the main fact, which those facts might perhaps have been admissible in evidence as tending to prove. They did not directly allege, either that Shepherd did not pay for the land, or that the deed to him was not made at the time when it bore date, or that he participated in any fraud, or had notice thereof. They charged that the deed was made, not in good faith and for a valuable consideration, but for the purpose of defrauding, hindering, and delaying them; but they failed to connect Shepherd with such alleged fraud by any proper allegation.

[2] 2. The plaintiffs did not seek to obtain a decree which would affect the rights of the trust company, to which a deed had been made to secure an indebtedness, or the rights of the holder of such indebtedness. They did not attack this indebtedness, or its priority, but sought to set aside a conveyance of the equity or interest remaining in Mrs. Maynard after the making of such deed, and to have a decree rendered which would give them the right, as between Mrs. Maynard, her brother, and themselves, to pursue the remedy pointed out in the statute, whereby creditors may redeem property which has been conveyed for the purpose of securing a debt. Whether or not the trust company would have been a proper party, under the allegations and prayers of this petition, it was not a necessary one.

[3, 4] 3, 4. The contention set up by the demurrer, that the allegations in regard to the conveyance made by Mrs. Maynard to her two daughters were irrelevant, is not sound in its entirety. It was competent for the plaintiffs to allege that she had conveyed to her two daughters all of her property, except the equity or interest remaining in her, which she conveyed to her brother, and which by the petition in this case it is sought to subject to the plaintiffs' execution. Such an allegation was legitimate, to show that she had denuded herself of all of her property, and also that the plaintiffs were without adequate legal remedy, and had a right to invoke equitable aid to subject the interest which had been conveyed by the defendant in *fi. fa.* to her brother. While this is true, as said in the companion case, extended allegations in regard to what the plaintiffs had been able to learn as to whether the daughters had been in business or not, or had inherited money, and the like, were not competent, and should have been stricken on demurrer. Likewise, allegations in regard to the county in which the brother of Mrs. Maynard had lived for many years, the contents of the will of his father, and the details of the settlement of the estate, were not proper to be set forth in *extenso* in this pleading. If it was intended to charge that he did not pay the consideration set out

in the deed to him, and that he had not the means of so doing, it should have been distinctly charged. No discovery was prayed. Under our statute, the cause of action should be plainly, fully, and distinctly set forth. It may not be easy to lay down any fixed rule as to the point where allegations of fact are proper, and where allegations go into the domain of setting out evidence and inferences in detail. But in this case we hold concretely that a number of the plaintiffs' allegations did not raise issues of fact, or make proper statements of fact to elucidate the distinct issue made. Without going into details on this subject, it is sufficient to say that the general grounds of demurrer should have been sustained, and also the special grounds of demurrer to paragraphs 31, 51, 52, 63 to 69, inclusive, and 71, and to so much of paragraph 30 as related to the daughters of Mrs. Maynard. All the other grounds of the demurrer were properly overruled.

Judgment reversed. All the Justices concur.

(138 Ga. 457)

HELMKEN v. MEYER.

(Supreme Court of Georgia. Aug. 13, 1912.)

(Syllabus by the Court.)

1. TENANCY IN COMMON (§ 29*)—IMPROVEMENTS—RIGHT OF COTENANT.

A cotenant, acting in good faith and for the purpose of honestly bettering the property, and not for the purpose of embarrassing his cotenants, or incumbering the estate, or hindering partition, will be entitled to compensation to the extent that his substantial and useful improvements have added to the value of the common property.

[Ed. Note.—For other cases, see Tenancy in Common, Cent. Dig. §§ 89-92, 94; Dec. Dig. § 29.*]

2. TENANCY IN COMMON (§ 29*)—IMPROVEMENTS—CLAIM TO COMPENSATION.

Such claim for compensation is an equitable charge upon the land, and not a title or interest in the land.

[Ed. Note.—For other cases, see Tenancy in Common, Cent. Dig. §§ 89-92, 94; Dec. Dig. § 29.*]

3. DOWER (§ 16*)—IMPROVEMENTS ON COMMON PROPERTY.

In this state a widow is only dowerable in lands of which her husband died seized and possessed. Therefore the widow of an improving cotenant is not entitled to have assigned, in addition to dower in her husband's undivided share in the whole premises, also a dower estate in the improvements placed there by her husband, although in a partition of the premises by sale the husband would be equitably entitled to be compensated for his improvements to the extent they may have enhanced the common property.

[Ed. Note.—For other cases, see Dower, Cent. Dig. § 61; Dec. Dig. § 16.*]

Error from Superior Court, Chatham County; W. G. Charlton, Judge.

Action by Catherine Meyer against Mary Helmken, as guardian, etc., for the assign-

ment of dower. From a judgment for the plaintiff, defendant brings error. Modified and affirmed.

Osborne & Laurence and E. H. Abrahams, all of Savannah, for plaintiff in error. R. R. Richards and E. S. Elliott, both of Savannah, for defendant in error.

EVANS, P. J. Amelia Meyer died seised and possessed of two contiguous lots of land in the city of Savannah. Together the lots measured 69 feet in width and 114.6 feet in depth. At the time of her death the lots were unimproved. These lots passed by inheritance to her husband, George Meyer, and their two children. In the center of these lots George Meyer at his own expense erected a dwelling house 65 feet in width and 50 feet in depth, and in the rear of the lots an outhouse 12 by 69 feet. He married a second wife, from which marriage two children were born. With his wife and children he occupied the house as a family home until his death. His widow applied for dower, claiming that in the assignment of her dower the improvements were to be considered as the sole property of her deceased husband. The two older children, by their guardian, while admitting that the widow was dowable in one-third of the land, contested the widow's claim that the improvements were to be regarded as the sole property of her deceased husband.

[1] The first step in the solution of the legal proposition presented by the foregoing facts is to ascertain whether George Meyer, at the time of his death, on partition proceedings would be entitled to compensation for the value of the improvements erected by him on land owned in common by himself and the two children of the first marriage. Where land owned by several cotenants is capable of division in kind, and valuable improvements are made by one of them, in a partition between the owners, equity will allow the improving cotenant the benefit of his improvement, if it is practicable to do so. In dividing the land the court may take into consideration the improvements, and assign to the improving cotenant that portion of the land on which they are situated; the division being made on the basis of the unimproved value, if the nature of the land and the improvements permit such a division, and it can be done without injury or injustice to his cotenants. *Smith v. Smith*, 133 Ga. 170, 65 S. E. 414. It is said, however, that the rule is different where the land is not susceptible of a division in kind, or is rendered so by the erection of the improvements, and that in such cases the improving tenant will not be compensated for his improvements, though the common property is thereby enhanced in value. The reason of the rule for allowing compensation to the improving tenant in common is that

when his improvements enhance the value of the common estate, and his cotenants are not injured in any way, or hindered from having partition, they should not be permitted to take advantage of improvements which enrich the common property and to which they have contributed nothing.

The original cost of the improvement is not to be allowed, because it might result in the owners being improved out of their property by an extravagant or unbusiness-like cotenant, and the improvement may have depreciated at the time of the partition sale. *Moore v. Williamson*, 10 Rich. Eq. (S. C.) 323, 73 Am. Dec. 93; *Ward v. Ward*, 40 W. Va. 611, 21 S. E. 746, 29 L. R. A. 449, 52 Am. St. Rep. 911. The extent of the improving tenant's right to compensation is the enhanced value of the property, due to the improvement. There can be no difference in principle between allowing the equitable claim of a part owner for his improvement in cases where partition may be had in kind, and where a partition can only be accomplished by a sale of the common property. The right of the improving tenant to compensation is not dependent on the divisibility of the land in kind, but upon that broad principle of equity "that a cotenant, acting in good faith and for the purpose of honestly bettering the property, and not for the purpose of embarrassing his cotenants, or encumbering the estate, or hindering partition, will be entitled to compensation to the extent that his substantial and useful improvements have added to the value of the common property." 6 Pom. Eq. Jur. § 719; *Hall v. Piddock*, 21 N. J. Eq. 314; *Moore v. Thorp*, 16 R. I. 655, 19 Atl. 321, 7 L. R. A. 731.

In determining whether an improving cotenant should be recompensed for his improvements, as reflected in the increased value of the common premises, all the circumstances attending their erection, their nature, and their relation to the estate improved and to the other cotenants are to be considered. Where it appears that the improvements are permanent and useful to the common estate, and the cotenants are not excluded from the enjoyment of their property, nor has their interest in the property been diminished in value, we see no reason why the improving cotenant should not be equitably entitled to the increased value of the estate caused by the improvement. In the instant case the evidence discloses that Mr. Meyer was a man of small means. He was sole owner of one piece of property and joint owner with his two minor children of an unimproved and unproductive city lot. He sold the property which he owned in severalty, and built a family home on the lot owned by himself and children. These children lived with their father, until his death, in this family home. They were not excluded from their property. Under these circumstances we think that at the time of

his death, in an equitable partition of the premises by sale, he would have been entitled to the increased value of the premises due to the improvement.

[2] Is the widow dowerable in this increased value? A widow is entitled to dower in lands held by her deceased husband as a tenant in common, and partition need not precede the setting aside of the dower. *Ross v. Wilson*, 58 Ga. 249. So that the inquiry is whether this right of her husband to the increased value is appurtenant to his ownership of a part of the estate, so as to impress it with all of its legal incidents, or whether it is only an equitable charge upon the land. By improving land held in common, the cotenant does not enlarge his legal title to the land. His fractional interest in the title to the premises remains unchanged. What he acquires is an equitable right to have an accounting for the increased value of the premises caused by his improvement, in a partition between him and his co-owners. Such a claim is rather an equitable charge upon the land improved than a right, title, or interest in or to it. *Curtis v. Poland*, 66 Tex. 512, 2 S. W. 39.

[3] In this state a widow is not dowerable in an equity. She is entitled to a dower only in lands of which her husband died seised and possessed; that is to say, lands to which the husband had legal title, or a perfect equity, which is its legal equivalent. *Harris v. Powers*, 129 Ga. 74, 58 S. E. 1038, 12 Ann. Cas. 475, and cases cited. The widow, therefore, is not dowerable in any equity which her husband might have asserted against his cotenants on a partition of the property. The commissioners assigned to the widow as dower "an undivided one-third of an undivided one-third interest in [the lots described], and also the undivided one-third of the entire improvements upon said lots of land, consisting of the dwelling house and outbuildings thereon, occupied by the said George Meyer as a dwelling at the time of his death." The return of the commissioners was made the judgment of the court. The judgment is erroneous to the extent that the widow should have dower in the improvements as such, and direction is given that so much thereof as allows a dower in the improvements as such be stricken.

Judgment affirmed, with direction. All the Justices concur.

(133 Ga. 473)

HENDRIX et al. v. BAUHARD BROS.
(Supreme Court of Georgia. Aug. 14, 1912.)

(Syllabus by the Court.)

1. **BILLS AND NOTES (§ 330*)—INDORSEMENT—GUARANTY—EFFECT—TRANSFER OF TITLE.**

Where the payees in a promissory note payable to order wrote on the back of it the words, "For value received we hereby warrant the makers of this note financially good on ex-

ecution," and signed their names after such entry, and negotiated and delivered the note for value, such indorsement was sufficient to transfer title to the note, and, if made before maturity to a bona fide purchaser for value without notice of any defense, he would be protected from any defenses which the maker might have except those expressly allowed by statute.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 794-804; Dec. Dig. § 330.*]

2. **PLEADING (§ 354*)—MOTION TO STRIKE.**

Where the holders of such a note so indorsed brought suit upon it against the makers, and alleged that they bought it from the payees for value before due and without notice of any defense, and the defendants made no denial of such allegation, but sought to set up certain defenses which would not be good against a negotiable note in the hands of an indorsee before due for value and without notice of any defense, there was no error in striking the answer and directing a verdict for the plaintiffs, upon the introduction of evidence.

(a) No question was raised as to whether a verdict should have been taken, or a judgment entered without a verdict.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1092-1095; Dec. Dig. § 354.*]

(Additional Syllabus by Editorial Staff.)

3. **BILLS AND NOTES (§ 287*)—"INDORSEMENT."**

Where a payee of a negotiable note writes his name on the back, such writing constitutes an "indorsement."

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 653; Dec. Dig. § 287.*]

For other definitions, see Words and Phrases, vol. 4, pp. 3561-3566; vol. 8, p. 7686.]

Error from Superior Court, Cherokee County; N. A. Morris, Judge.

Action by Bauhard Bros. against L. R. Hendrix and others. Judgment for plaintiff, and defendants bring error. Affirmed.

P. P. Du Pre, of Canton, for plaintiffs in error. E. W. Coleman, of Canton, for defendant in error.

LUMPKIN, J. Bauhard Bros. brought suit against the makers of a promissory note payable to the order of Bridges & Flora, a firm. On the back of it was this entry: "For value received, we hereby warrant the makers of this note financially good on execution. Bridges & Flora." The defendants demurred to the petition on the grounds that it set out no cause of action, that it showed on its face that the plaintiffs had no legal title and were not bona fide holders for value, and that the entry on the note by the payees was not a formal indorsement, but only a guaranty that the makers of the note were good for the amount thereof. The presiding judge overruled the demurrer. The defendants filed an answer to the petition, denying its allegations; but they withdrew the denial to the paragraph in which the plaintiffs alleged that they bought from the payees the note for value before due and without notice of any defense. The presiding judge thereupon, on motion, struck the answer, and, after the introduction of evidence, directed a verdict for the plaintiff. Defendants excepted.

[1] 1. It was not denied that the plaintiffs purchased the note from the payees for value before due and without notice of any defect or defense. The controlling question is whether the entry on the back of the note constituted an indorsement transferring title thereto to the purchasers, with the protection which belongs to bona fide holders for value before due and without notice, or whether it was a mere contract of guaranty, and was insufficient to operate as an indorsement. Let it be assumed that in order to transfer the legal title to a promissory note payable to order, and cut off defenses which the maker would have against the payee, it should be indorsed. *Farris v. Wells*, 68 Ga. 604; *Benson v. Abbott*, 95 Ga. 70, 22 S. E. 127; *Haug v. Riley*, 101 Ga. 372, 375, 29 S. E. 44, 40 L. R. A. 244. On the subject of indorsements like the one here involved there are two conflicting lines of authority. On the one hand, it has been held by the Supreme Court of the United States and some inferior federal courts, and by the courts of two or three states, that an entry of a guaranty, followed by the signature of the payee on the back of a note payable to order, does not amount to such an indorsement as to carry title and cut off defenses existing against the paper. *Central Trust Co. v. First Nat. Bank*, 101 U. S. 68, 25 L. Ed. 876; *Edgerly v. Lawson*, 176 Mass. 551, 57 N. E. 1020, 51 L. R. A. 432 (though some of the earlier decisions in Massachusetts seemed inclined to take a contrary view). The leading case on this side of the question (discussing it with reference to the common law) is the one decided by the Supreme Court of the United States. It cites the *Snevely Case*, 1 Watts & S. (Pa.) 203, and two cases from New York. The reasoning on which this class of cases is based is that the indorsement is not in blank, but is filled up; that it expresses fully the contract, and can raise no implication of another. Opposed to this view are the decisions in a very large number of states. Numerically, the latter class of decisions greatly preponderates, and we think the reasoning on which they are based is sounder than that contained in the class first mentioned.

At common law (though not so under the statute of this state) the general rule was that choses in action were not assignable, so that the assignee could sue in his own name. He acquired only an equitable title, had to sue in the name of the assignor for his use, and was subject to the defenses which could be made against the assignor. Growing out of the necessities of commerce, there was an exception to this rule in favor of negotiable instruments. They were transferable by indorsement and delivery, and the indorsee could sue in his own name. Those payable to bearer required no indorsement. A bona fide indorsee for value before

maturity and without notice of any defense was protected. No particular form was necessary to constitute an indorsement. The mere signing of the name of the person to whose order the note was payable, upon the back of it, was sufficient. In 2 *Parsons on Notes and Bills*, 14, it is said: "Although it is generally true that no particular and precise form of words is necessary to constitute a note or bill, or an indorsement, yet this principle must be regarded as subject to some qualification. So far as the matter of transfer is concerned, the proposition is almost absolutely true. But as to the obligations cast upon the indorser by the act of indorsement, it is clear that these may vary with the form of the indorsement." This recognizes clearly the fact that no particular form is necessary for the transferring of title, although the obligation of the indorser may be varied. In *Dunham v. Peterson*, 5 N. D. 414, 67 N. W. 293, 36 L. R. A. 232, 57 Am. St. Rep. 558, the opinion was well reasoned. It was held that where a person to whose order a note was payable wrote on the back thereof a contract of guaranty of payment, and signed it, he became an indorser with enlarged liability, and that the mere writing of a guaranty above his name did not affect the character of his act as indorser. The indorsement there considered was, "For value received I hereby guaranty the within note, waiving notice of protest and demand," beneath which was signed the name of the payee. In the opinion it was said: "The inquiry is two-fold: (1) Was the note so transferred as to pass the legal title to it at common law? (2) Does the manner of the transfer indicate a purpose to destroy negotiable character of the instrument? The extent of the liability of the payee who indorses the note is not a decisive test. Indeed, it is no test at all. He may incur no liabilities whatever, as indorsing without recourse, and yet in such a case the note has been negotiated to an indorsee within the law merchant, and the latter is protected as a bona fide purchaser if the other elements necessary to such protection exist. Indeed, the payee need not indorse at all to entitle the purchaser to protection if the note be payable to bearer, or to the payee by name or bearer. *Tescher v. Merea*, 118 Ind. 586, 21 N. E. 316. This is also true after it has been indorsed generally by the person who is named as payee. His indorsee may, without himself indorsing it, transfer it, and cut off all defenses. On the other hand, it is elementary that the indorser may enlarge his liability without destroying the right of his indorsee to protection as an innocent purchaser. * * * He may incur more liability, or less liability, or no liability at all; and yet the purchaser may be an indorsee, and protected as such. Nor is the form of the indorsement material. It is an indorsement, although it is in terms

an assignment. This was held at an early time in England. *Richards v. Frankum*, 9 Car. & P. 221. And, with the exception of two states, it appears to be the law in this country." See, also, 2 Randolph on Com. Paper (2d Ed.) § 704; 2 Daniel on Neg. Instr. (5th Ed.) § 1781 et seq.; *Partridge v. Davis*, 20 Vt. 499; *Bissell v. Gowdy*, 31 Conn. 47; *Judson v. Gookwin*, 37 Ill. 286; *Robinson v. Lair*, 31 Iowa, 9; *Kellogg v. Douglas County Bank*, 58 Kan. 43, 48 Pac. 587; *Williams v. Hagar*, 50 Me. 9; *Elgin City Banking Co. v. Zelch*, 57 Minn. 487, 59 N. W. 544; *Buck v. Davenport Sav. Bank*, 29 Neb. 407, 45 N. W. 776, 28 Am. St. Rep. 392; *Heard v. Dubuque County Bank*, 8 Neb. 10, 30 Am. Rep. 811; *Delsman v. Friedlander*, 40 Or. 33, 66 Pac. 297; *Barrett v. May*, 2 Bailey (S. C.) 1; *Donnerberg v. Oppenheimer*, 15 Wash. 290, 46 Pac. 254; *National Exchange Bank v. McElfish Clay Mfg. Co.*, 48 W. Va. 406, 37 S. E. 541; *Walker v. O'Reilly*, 7 U. C. L. J. 300.

[3] We now come to consider more particularly the statute and decisions in this state. By Civil Code, § 4275, it is declared that "any person indorsing or transferring a negotiable instrument may limit his own liability upon such indorsement or transfer, by express restrictions therein." This declares a general rule, and expressly recognizes the right in this state of a person indorsing a negotiable instrument to limit his liability. If there is no limitation, but a mere indorsement in blank, the general liability resulting therefrom applies. No reason appears why an indorser may not enlarge his liability, as well as limit it. The writing of his name upon the back of a negotiable note by the payee thereof constitutes an indorsement. The addition of a limitation or enlargement of liability does not make it cease to be an indorsement sufficient to carry title to the note, although it may restrict or enlarge the liability of the indorser. From an early date it has been recognized in the decisions of this court that no express form of words was necessary to constitute an indorsement which would operate to convey title. There is, strictly speaking, a difference between an indorsement and an assignment; but in *Vanzant v. Arnold*, 31 Ga. 210, it was held that, where defendants negotiated notes with the following entry on the back: "For value received we assign the within notes to A., J. & H., and H. E. D. & Co., waiving demand and notice, and guarantee the payment of the same"—they were liable as indorsers. In *Gelser Mfg. Co. v. Jones*, 90 Ga. 307, 17 S. E. 81, on the back of a note payable to the Gelser Manufacturing Company, or order, Jones & Toole, who were neither makers, nor the payees, made and signed this indorsement, "For a consideration not herein named, we guarantee the payment of this claim to the Gelser Manufacturing Co." and it was held that the making of this entry by such

third parties on the back of the note did not constitute them indorsers, but guarantors. In the opinion, Chief Justice Bleckley said: "By its very nature a contract of indorsement cannot be entered into with the payee of a promissory note as indorsee; but a contract of guaranty may be made with him as well as with any subsequent holder. Nor does the mere indorsement of a contract upon a note render the signer of the contract an indorser, within the legal and proper meaning of the term. It is true that in a physical sense he is an indorser by the mere position of his name upon the paper; but we apprehend that the Constitution intends by the term 'indorser' to refer to a person who has entered into a contract of indorsement as distinguished from contracts of a different class. Had the Gelser Manufacturing Company, the payee of these notes, signed a contract upon them with a third person in the terms of that placed thereon by Jones & Toole, and had then or afterwards negotiated them to such third person, the Gelser Company could, under our law, be sued and made answerable as indorser."

It has been suggested that the last sentence, as to what would have been the effect of signing such a contract on the back of the note by the payees thereof, was obiter dictum. Perhaps it was so; but it was a dictum of a great and learned judge, and correctly states the law of Georgia. Nor do we think that this statement was in conflict with the rest of the decision. The difference between an indorsement on a promissory note by one who is not the payee thereof, who has no title to transfer, and who cannot indorse the note to the promisee of it, in the legal meaning of that term, and a similar indorsement placed on the note by the payee thereof in the progress of negotiating it, is great. In *Patillo v. Alexander*, 96 Ga. 60, 22 S. E. 646, 29 L. R. A. 616, a promissory note was executed and payable in the state of Tennessee to a named payee or order. It was presumed that the common law was in force there, and the case was considered in the light of that law. The payee wrote on the back of the note above his signature these words: "I guarantee attorney's fees up to 10 per cent. If this note has to be collected by law, on [and?] its prompt payment." It was held that this agreement having been made for the purpose and in the course of negotiation, by its terms the payee became an indorser and liable as such, with a superadded liability for such reasonable sums, not exceeding 10 per cent., as might be expended for attorney's fees by the holder in the collection of the note, and, further, that in order to hold such indorser for the payment of the note it was incumbent upon the plaintiff to prove presentation and notice of nonpayment by the maker. If that indorsement in the course of negotiation made the payee liable as an indorser, with a superadded lia-

bility, and imposed upon the purchaser the duty of treating him as an indorser, surely it was a sufficient indorsement to transfer the title to the note, and accordingly to afford to the holder, if he took before maturity for value and without notice, the protection against defenses applicable to such a situation. After an extended discussion for the purposes of establishing the ruling above stated, the case of *Trust Company v. National Bank*, 101 U. S. 68, 25 L. Ed. 876, supra, was cited. Doubtless, in consideration of the high authority of the Supreme Court of the United States, some effort was made to differentiate the case then under consideration from the one cited. But, whether this was successfully done or not, the whole trend of the opinion establishes the principle which has been above announced. There were also some suggestions as to possibilities in cases of a different character. These were not authoritative rulings, and we need not discuss them.

In connection with the decision of the Supreme Court of the United States in the case mentioned, attention may be called to the case of *Snevily v. Ekel*, 1 Watts & S. (Pa.) 203, supra, which was there cited as authority. In that case a promissory note was made by John Smull, payable to John Snevily or order. On the back of it were written the words, "I transfer the within note to John Ekel and guarantee the payment of the same," after which was signed the name of John Snevily, and below it the name of John Ekel. It was held that this was a special guaranty of payment, and could not be treated as a blank indorsement, so as to enable any holder to sue the guarantor in his own name. If this ruling was based on the ground that it was a transfer, and contained a guaranty of payment, it was directly in conflict with the ruling of this court in *Vanzant v. Arnold*, supra. Note, also, *Dunning v. Heller*, 103 Pa. 269, 272. In *Baldwin Fertilizer Co. v. Carmichael*, 116 Ga. 762, 42 S. E. 1002, an entry was made on the back of a note by the payee thereof, or his attorney, in these words: "For value received, I transfer the within note to Baldwin Fertilizer Co., and guarantee it as free from any defense that could be made under section 2785 of the Code of Georgia, and also guarantee payment in full on the day it is due." It was held that this was a contract of indorsement. In the opinion, Mr. Justice Cobb said: "Under the former decisions of this court, the contract sued on seems to be one of indorsement. It was made, according to the allegations of the petition, for the purpose of transferring the note to the plaintiff in satisfaction of a claim held by it against the defendant, and the mere use of the word 'guarantee' will not make the contract one of guaranty. The case of *Patillo v. Alexander*, 96 Ga. 60, 22

S. E. 646, 29 L. R. A. 616, seems to be controlling in principle on the question."

It has been suggested that an indorsement of the character of the one now under consideration, accompanied by a physical transfer of the paper, may operate to pass title to the instrument, and give the holder the right to treat the payee as an indorser, with a prescribed liability, but that such an indorsement, without express words of transfer or assignment, does not constitute the holder such a purchaser for value as to protect him from defenses already accrued to the maker against the original payee. In this distinction we cannot concur. An entry on the back of a note payable to order, signed by the payee, is either an indorsement, or it is not an indorsement, in the legal sense of the term. Of course, an entry may be physically indorsed or written on the back of a note, without being in the legal sense an indorsement; but we are unable to accede to the proposition that it may be both an indorsement and not an indorsement. If it is such an indorsement of a negotiable note as will pass the legal title to it upon delivery, and will place on the indorsee the duty of recognizing the indorser as such and of treating him as an indorser under the law merchant, it would be peculiar if it were an indorsement to the holder for burdens, but not for benefits. We cannot concur in the argument that the indorsement under consideration is an indorsement sufficient to carry legal title upon delivery, but not sufficient to give the corresponding benefit to him who thus acquires it, arising from being a bona fide taker before due and for value. In some of the cases before this court, and other courts, the question has been, not whether the addition of words of transfer or assignment and warranty to the indorsement aided it, but whether they prevented its being an indorsement in the legal sense, on the ground that they were not words strictly descriptive of that relation. Of course, there must be delivery of the instrument in order to carry title, even with the most formal or general indorsement.

The note now under consideration was payable to the order of the payees. When they wrote upon the back of it that for value received they warranted the makers of the note financially good on execution, and sold and delivered it for value to a third person with no other indorsement (save an entry of a credit), it must be assumed that they intended to accomplish something by so doing. They did not intend to warrant to themselves the financial standing of the makers, nor did they mean that they had received value from themselves for so doing. If not to themselves, then to whom did they make such warranty? Clearly to some other person, who should be the owner of the note. Moreover, the statement that the financial status of the makers was warranted "good

on execution" indicates the expectation that execution would issue in favor of some person other than themselves against the makers. But, unless this indorsement and delivery for value carried the legal title to the note to the person to whom it was so delivered, it would remain in the payees, and no execution could issue in favor of another person. Nor can we agree with the statement made in *Lamourieux v. Hewitt*, 5 Wend. (N. Y.) 308, which is cited by the Supreme Court of the United States in the *Trust Company Case*, to which reference has already been made, that the payee making such an indorsement on a note would be liable upon his guaranty, not as an indorser of negotiable paper, but as a party to a special contract, "which might have been written on a separate piece of paper as well as on the back of the note." In that clause adheres the fallacy of the argument. There is a wide difference between writing on a separate piece of paper and a payee's writing something over his name on the back of a promissory note. If he should simply write his name on a separate sheet of blank paper, it would bind him to nothing; but if he writes his name on the back of a promissory note payable to his order, he becomes an indorser. So, if he should write an assignment, or a guaranty, or some other agreement, on a separate sheet of paper, and sign it, that would be a distinct contract; but when he writes his name upon the back of a note payable to his order, the addition of words which either limit or enlarge the usual liability on his part which would arise from a blank indorsement does not destroy the fact that the entry is an indorsement upon a negotiable paper, or prevent its efficacy as a method of passing the legal title upon negotiation, at least unless there is something in the indorsement to show an intention to destroy the negotiable character of the paper.

[2] 2. What has been said above practically controls the entire case. The plaintiffs alleged that they bought the note from the payees for value before due and without notice of any defense. The defendants first denied this in their answer, but they withdrew their denial. This left it to be taken as true, and they evidently placed their reliance upon the question of the sufficiency of the indorsement to pass the legal title, so as to cut them off from certain defenses which they claimed to have as against the original payees. These defenses were not of a character which, under the statute, could be set up against a bona fide holder for value before maturity and without notice. It follows from what has been said that the legal title to the note passed to the plaintiffs, and that there was no error in striking the answer and directing a verdict in their favor, under the evidence. No question was

raised as to whether a verdict or a judgment without a verdict was proper.

Judgment affirmed. All the Justices concur.

(133 Ga. 576)

JEWELL v. FRANKLIN LIFE INS. CO.
(Supreme Court of Georgia. Aug. 17, 1912.)

(Syllabus by the Court.)

1. DISCOVERY (§ 96*)—BOOKS AND PAPERS—DUTY TO PRODUCE—DEFENSES.

Where a notice to produce books and papers served on a nonresident defendant is too extensive in range, necessarily including a great mass of irrelevant matter, and it appears that their production will be at great expense and inconvenience, and to the serious injury of the party's business, and he offers in open court to accord the opposite party the right to inspect and make copies of such parts as is desired, and shows that some of the papers demanded are beyond his power to produce, it is not error for the court to refuse a peremptory order requiring their production on penalty of dismissing the party's plea to the action.

[Ed. Note.—For other cases, see *Discovery*, Cent. Dig. § 123; Dec. Dig. § 96.*]

2. VERDICT—EVIDENCE.

A verdict for the defendant was demanded by the evidence.

Error from Superior Court, Hall County; J. B. Jones, Judge.

Suit by M. T. Jewell against the Franklin Life Insurance Company. From an order denying a motion to compel defendant to produce books and papers, plaintiff brings error. Affirmed.

H. H. Dean, of Gainesville, for plaintiff in error. Jones, Jones, Hocker & Davis, of St. Louis, Mo., and W. A. Charters, of Gainesville, for defendant in error.

EVANS, P. J. This is a suit by M. T. Jewell against the Franklin Life Insurance Company, of Springfield, Ill., on three insurance policies, similar in form and provisions, on the life of the plaintiff's husband. The company pleaded that the policies had lapsed from nonpayment of premiums at the time of the death of the insured. The plaintiff served the defendant with a notice to produce its charter, by-laws, resolutions showing dividends earned and not paid out, all the company's books since its incorporation, including minute books, cashbooks, journals, day-books, and all books of original and final entry, showing the disbursements and earnings of the company, books containing an entry of all the company's property and its appraised value, and of all its assets, books containing a list of its policy holders, and also all notes, mortgages, bonds, choses in action, and all other assets of the company. The defendant answered that it would produce its charter and by-laws, but to comply with the demands of the notice to transport all of its records would be destructive of its business, and would expose all of its records

to the possibility of loss in transportation; that the books were daily needed at the home office, and to comply with the notice to produce all of its books and records since its incorporation would work irreparable injury to the company; that the books were open to inspection of the plaintiff or her counsel, or any agent she might appoint, at the home office of the company, and copies could be made of such as the plaintiff wished; that it was unable to comply with the notice as to the resolutions as to dividends, because no such resolutions existed; and that it was unable to comply with the notice to produce all of its notes, mortgages, etc., as the greater part of them were held in trust by the superintendent of the insurance department of the state of Illinois. The defendant also demurred *ore tenus* to the sufficiency of the notice, on the ground that it was too vague and indefinite. The plaintiff's counsel stated in his place that he expected to prove, by the documentary evidence referred to in the notice to produce, that the defendant company was a mutual company, and that sufficient profits had been earned to extend the policy of the insured beyond his death, and moved for a peremptory order requiring the production of the documents within a reasonable time, or, in default thereof, that the defendant's plea be dismissed. The court denied the motion. The case proceeded to trial, and a verdict for the defendant was directed. The plaintiff sued out a bill of exceptions, complaining of these two rulings.

[1] 1. The form of the policy was similar to that construed in the case of *Black v. Franklin Insurance Company*, 133 Ga. 859, 67 S. E. 79. The insured did not advance the cash to pay the full premium provided by the policy, but only three-fourths of it; the remaining fourth being paid out of a loan made to him by the company. In the *Black Case* it was held that this loan was an indebtedness on account of the policy, and fell within the provision of the policy that, "should there be any indebtedness on account of this policy at the time of default in the payment of any premium, the value of the several options of settlement stated in the foregoing table will be correspondingly reduced." The option applicable to the present case relates to continued insurance. In the instant case the plaintiff's purpose was to show that the amount due on each policy as dividends earned at the time of the default of the insured in paying his premiums was more than sufficient to extend the policies beyond the date of the death of the insured, after deducting all indebtedness on account of the policy. In order to prove this conten-

tion, it was asserted that all the books and papers of the plaintiff company were necessary. Now, it is manifest that in this immense mass of documentary evidence there must be much that is irrelevant and immaterial. The notice calls for every book and record since the organization of the company. The description of them is most vague and indefinite. All minute books, all books of original and final entry, showing the disbursements and earnings of the company, are called for. It was not stated by counsel that the books would show that a dividend had been declared which was sufficient to extend the insurance policy, but that a dividend had been earned and should have been allotted to these policies, and which would have been large enough to extend the policies beyond the date of the insured's death. In other words, an accounting of the internal affairs of a foreign corporation is desired; and in order to accomplish this result the entire books and papers must be brought from a distant state, at great risk of loss, at great expense, and with the result of a temporary suspension of the company's business. The answer also developed that some of the papers demanded were in the custody of the insurance commissioner of the state of Illinois and beyond the power of the party to produce. No traverse was made to the response to the notice. Where a notice to produce books and papers, served on a nonresident defendant, is too extensive in range, necessarily including a great mass of irrelevant matter, and it appears that their production will be a great expense and inconvenience, and to the serious injury of the party's business, and he offers in open court to accord the opposite party the right to inspect and make copies of such parts as is desired, and shows that some of the papers demanded are beyond his power to produce, it is not error for the court to refuse a peremptory order requiring their production on penalty of dismissing the party's plea to the action. See, in this connection, *Parish v. Weed*, 79 Ga. 682, 7 S. E. 138; *Georgia Iron Company v. Etowah Iron Company*, 104 Ga. 395, 30 S. E. 878; *Condon v. Mutual Reserve etc., Association*, 89 Md. 99, 42 Atl. 944, 44 L. R. A. 149, 73 Am. St. Rep. 169; *Clark v. Association*, 14 App. D. C. 154, 43 L. R. A. 390.

[2] 2. The only deduction to be legally drawn from the evidence is that the policies had lapsed prior to the death of the insured, and there was no error in directing a verdict for the defendant.

Judgment affirmed. All the Justices concur.

(138 Ga. 465)

TOMPKINS v. STATE.

(Supreme Court of Georgia, Aug. 13, 1912.)

*(Syllabus by the Court.)***1. CRIMINAL LAW (§ 278*)—GRAND JURY (§ 17*)—QUALIFICATIONS.**

By Penal Code, § 824, grand jurors who have served at one regular term of the superior court are declared ineligible for jury duty at the next succeeding regular term.

(a) In such a case a challenge to the array of the grand jury, made before the indictment is found, should be sustained by the trial judge.

(b) Likewise a plea in abatement, filed after the indictment is found and before arraignment of the defendant, based on substantially the same ground, should be sustained.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 638-642; Dec. Dig. § 278;* Grand Jury, Cent. Dig. §§ 42-47, 52; Dec. Dig. § 17.*]

*(Additional Syllabus by Editorial Staff.)***2. GRAND JURY (§ 5*) — GRAND JURORS — SERVICE—ELIGIBILITY.**

Pen. Code 1910, § 824, provides that any juror who has served as a grand or traverse juror at any session of the superior court shall be ineligible for duty as a juror at the next succeeding term of the superior court, providing that nothing contained therein should prevent any traverse juror from serving as a grand juror at the next term of the superior court of his county. Section 822 declares that at the close of each term the judge shall draw the grand jurors; but this was changed by Act Aug. 15, 1911 (Laws 1911, p. 81), creating the Dublin circuit, which, after stating the times for holding court in each of the counties of the circuit, declares that the grand juries of the counties of that circuit shall not be convened, except for the spring and fall terms of the court, unless in the discretion of the presiding judge it shall be deemed expedient to call a special session of the grand jury at some other term. *Held* that, in order to make such latter provision conform to section 824, it should be construed only to authorize the judge to call a special session of the grand jury at some other term at which under the general law it is competent to call in the same grand jury, and did not authorize the same jurors to serve at the succeeding regular term.

[Ed. Note.—For other cases, see Grand Jury, Cent. Dig. §§ 8-13, 15; Dec. Dig. § 5.*]

Error from Superior Court, Laurens County; K. J. Hawkins, Judge.

Steve Tompkins was convicted of murder, and he brings error. *Reversed.*

S. P. New, Geo. B. Davis, and Fred Kea, all of Dublin, for plaintiff in error. E. D. Graham, Sol. Gen., of McRae, and T. S. Felder, Atty. Gen., for the State.

HILL, J. Steve Tompkins was indicted on the charge of murder, and was found guilty by the jury, without recommendation. Before the indictment was found true, the defendant challenged the array of the grand jury, on the ground that the same grand jury had served at the regular term of the superior court next preceding that at which the jury was impaneled. The court overruled the challenge. After the indictment

was returned, the defendant filed a plea in abatement on various grounds, but substantially on the same grounds as the challenge to the array. This plea was also overruled by the court. After verdict, a motion for a new trial was overruled, and the defendant excepted.

[1] Under the system as it existed before the Dublin circuit was created, Laurens county was in the Oconee circuit, and the terms of its superior court were in January and July. Acts 1910, p. 1332. In July, 1911, a grand jury was drawn, which normally would be impaneled at the following January term, 1912. On August 18, 1911, the act was approved which created the Dublin circuit. It did not expressly provide at what term the grand jury which had been previously drawn should be impaneled. It created quarterly sessions for the courts in the Dublin circuit. In Laurens county the sessions were to begin on the fourth Mondays in January, April, July, and October. Acts 1911, p. 81. If nothing more was said, the grand jury would naturally stand for the January term, 1912, at which next following term the grand and traverse jurors would be impaneled according to the general law. Penal Code, § 822, declares that at the close of each term the judge shall draw grand jurors; but the act creating the Dublin circuit undertook to change this general law. After stating the times for holding court in each of the counties of the circuit, it then contained this clause: "Provided, however, that the grand juries of the counties of this circuit shall not be convened except for the spring and fall terms of the court, unless in the discretion of the presiding judge it shall be deemed expedient to call a special session of the grand jury at some other term." Acts 1911, p. 81, § 6. It appears that the grand jury which had been previously drawn was actually impaneled and charged, and served at the January term, 1912, of Laurens superior court. For the April term, 1912, no new grand jury was drawn, but in vacation preceding that term the presiding judge ordered the grand jury which had served at the January term to return and serve at the April term. They were not resworn, or reimpaneled, or recharged, but all served, with the same foreman, except that, there being two vacancies, two talesmen were sworn to fill up the jury.

[2] What possible constructions can be placed upon the proviso of the act of August 18, 1911, as applicable to the grand jury drawn in July of that year? The act not expressly stating at what term they should be impaneled, and they having been drawn for the January term before the new circuit was created, it may be held that they were properly impaneled and sworn, and served at that term, which was the next after they were drawn; or, under the terms of the act, in-

asmuch as it is declared that the grand juries of the counties of the circuit shall not be convened except for the spring and fall terms of the court, unless under certain contingencies, it is possible to construe this as meaning the grand jury which had been previously drawn, the grand jury for the spring term. If by virtue of the fact that the grand jury had been drawn in July for the next succeeding term, and by reason of the fact that the act makes no special provision for the session of the previously drawn grand jury, it would take the usual course and be the grand jury for the term succeeding its drawing, then it was the grand jury for the January term and was regularly impaneled at that term. If this be so, and they were legally impaneled and served at that term, then Penal Code, § 824, declares that "any juror who has served as a grand or traverse juror at any session of the superior courts, county courts, or city courts in this state shall be ineligible for duty as a juror at the next succeeding term of said superior court, county court, or city court, in which he has previously served: Provided, nothing herein contained shall prevent any traverse juror from serving as a grand juror at the next term of the superior court of his county." So that, if the grand jury were legally impaneled at the January term of Laurens superior court (which seems to be the more probable construction), it was directly in the teeth of the statute if they served at the next succeeding regular term, unless the general law is to be treated as overridden by the last clause in the proviso of the act of August 18, 1911, above quoted. Section 796 of the Penal Code of 1910 does not help the situation. It only make provisions for *adjourned* and *special* terms; and the April term of Laurens superior court was neither, but was a *regular* term, held at the time fixed by law.

If it should be held that the Legislature contemplated that the grand jury which was drawn in July, 1911, were not to be impaneled at the January term, or then serve, but that the precepts were to be returnable to the April term, then their whole session in January was unlawful, and the impaneling and service were without authority of law; and inasmuch as they were not reimpaneled and sworn at the April term, they were never lawfully impaneled, sworn, or authorized to serve and find indictments. The proviso, which says that the grand jury shall not be convened, except for "the spring and fall terms of the court," unless upon a contingency, we take to mean the April and October terms, because these are the only two terms which are held in the spring and fall, respectively, and the act evidently contemplates that something is excluded by the limitation to the spring and fall terms. Thus

we arrive at the conclusion, either that the grand jury was not lawfully impaneled at the January term, or that it was. If it was not lawfully impaneled, then it has never been impaneled, because there is no claim that the jurors were reimpaneled, or resworn, at the April term, and grand jurors who have not been lawfully impaneled or sworn have no more authority to find bills of indictment than the same number of citizens outside of the courthouse. They are not a grand jury in law. Or else, if they were lawfully impaneled and lawfully served at the January term, under the express provisions of the general law they could not serve at the next succeeding term. The proviso of the act of August 18, 1911, says: "Unless in the discretion of the presiding judge it shall be deemed expedient to call a special session of the grand jury at some other term." What does this mean? Does it mean that, after the grand jury has been lawfully impaneled at the spring and fall term, the judge may call a special session of them at some other term of the same character? Or does it mean that he may call a session of the same grand jury at some other term? Or does it mean that he can summon a grand jury in the regular way at another term, and what terms are meant? Does it mean that in the face of the general law he can, in the Dublin superior courts, have the same grand jury to sit at successive terms? Or does it mean that he can call them at some special or adjourned term, in harmony with the general law?

The Constitution declares that, so far as regulated by law, the practice in all courts of the same grade or class shall be uniform. Civil Code, § 6527. We do not see how it can possibly be held to be uniformity of practice to prohibit by general law every superior court in the state from allowing the same grand jury to sit at successive regular terms of the court, and yet by the act creating the Dublin circuit to establish that the judge thereof, in his discretion, may have the same grand jury to sit at successive terms of court. The general law says it shall not be done; and if we give that construction to this law, it says it shall be done. It is not easy to harmonize this proviso with the general law in any manner; but it is a well-established rule of construction that if an act of the Legislature can properly be given one construction which upholds its constitutionality, and another which would render it unconstitutional, the former is rather to prevail. Perhaps this should be carried a step farther, so as to give the act as near a constitutional construction as possible. At any rate, it more nearly approximates the general law to hold that the provision that the judge can call a special session of the grand jury "at some other term" means some other term at which, under the general law, it is competent to call

in the same grand jury. At least, to hold that under this law the same grand jury can serve at successive regular terms of court, when this is positively forbidden by the general law, would be to give to this provision in the act creating the Dublin circuit a construction which would render it clearly unconstitutional. So that, whatever construction may be given it, it seems to us that the indictment found by the grand jury in the present case was unlawful, and that the judge erred in not sustaining the challenge to the grand jury, and, after overruling it, likewise erred in overruling the plea in abatement.

This decision is not based upon a mere technicality, but upon a substantial violation of the plain terms of the statute, which declares that no grand juror shall serve the next succeeding term of court to that at which he has already served as a grand juror. In *McFarlin v. State*, 121 Ga. 329, 330, 331, 49 S. E. 267, this court, speaking through Justice Lamar (now Associate Justice of the Supreme Court of the United States), in reference to the provision of law that grand jurors shall not render consecutive service, said: "The language of the statute and the public policy to be subserved apply as well to grand as to petit jurors. It is intended as a relief, and to equalize jury duty. But it is also intended to prevent the same persons from constantly serving, whether they wish to or not. One grand jury may return no bill. Grand juries are charged with many important public duties. The same facts in both classes of subjects may come before the succeeding body, and the public is entitled to a complete change of membership from term to term. Such is the language of the law; and where the objection is seasonably made, advantage can be taken of the fact that the body has not been duly constituted." And in *Finnegan v. State*, 57 Ga. 427, where the judgment was reversed because the court sustained the demurrer filed to a plea in abatement based on an alleged illegal drawing of the grand jury, Chief Justice Warner (at page 430) said: "Whenever the state undertakes to deprive one of its citizens of his life or liberty, it is the duty of the courts to see that it is done in accordance with the laws of the land, and not otherwise. In the administration of criminal law, judicial discretion should not be tolerated. The law, as it is prescribed by the supreme power of the state, should be the rule of conduct for the courts as well as for the citizens." It follows, from what has been said above, that the court erred in overruling the challenge to the array of the grand jury and the plea in abatement.

The ruling here made makes it unnecessary to consider the other assignments of error, inasmuch as it renders the whole proceeding in the court below nugatory.

Judgment reversed. All the Justices concur.

ATKINSON, J. I concur in the result, but not in all that is said in the opinion.

(133 Ga. 443)

ADAMS EXPRESS CO. v. MELLICHAMP.
(Supreme Court of Georgia. Aug. 13, 1912.)

(Syllabus by the Court.)

1. CARRIERS (§ 153*)—EXPRESS COMPANIES—LOSS OF GOODS—LIMITED LIABILITY.

Under the facts hypothetically stated in the first question propounded by the Court of Appeals to this court, the plaintiff was entitled to recover from the express company on account of the negligent loss of a diamond ring while in transportation. The measure of his recovery would be the value of the property lost, and would not be limited to \$50 by reason of the fact that the prepared form of express receipt contained a clause which provided that, "in consideration of the rate charged for carrying said property, which is regulated by the value thereof and is based upon a valuation not exceeding \$50 unless a greater value is declared, the shipper agrees that the value of said property is not more than \$50, unless a greater value is stated herein, and that the company shall not be liable in any event for more than the value so stated, nor for more than \$50 if no value is stated herein."

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 687-690; Dec. Dig. § 153.*]

2. EXPRESS COMPANIES—LIMITED LIABILITY—PRIOR DECISION—STARE DECISIS.

Substantially this case is covered by the decision in *Southern Express Co. v. Hanaw*, 134 Ga. 445, 67 S. E. 944, 137 Am. St. Rep. 227, and there is no valid distinction between that case and the one at bar, because in the latter the shipper, as the agent of the consignee, himself filled out the express receipt and failed to disclose to the carrier the actual value and contents of the package consigned; nor does this fact, in connection with the other facts hypothetically stated by the Court of Appeals, differentiate the case at bar from that above stated.

3. CARRIERS (§ 148*)—EXPRESS COMPANIES—LIMITED LIABILITY—NEGLIGENCE—INTERSTATE COMMERCE AND ELKINS ACTS.

So far as it concerns the right of the plaintiff to recover of the common carrier and the extent of such recovery, the case at bar is neither controlled nor affected by the Interstate Commerce Act (Act Feb. 4, 1887, c. 104, 24 Stat. 379 [U. S. Comp. St. 1901, p. 3154]), as amended June 29, 1906 (Act June 29, 1906, c. 3591, 34 Stat. 584 [U. S. Comp. St. Supp. 1911, p. 1288]), "and especially section 10 thereof," or by the act of Congress known as the "Elkins Act" (Act Feb. 19, 1903, c. 708, 32 Stat. 847 [U. S. Comp. St. Supp. 1911, p. 1309]), as amended June 29, 1906 (Act June 29, 1906, c. 3591, 34 Stat. 584 [U. S. Comp. St. Supp. 1911, p. 1288]). Nor, in view of the provisions of those acts of Congress, does any reason appear why the decision of this court in *Southern Express Co. v. Hanaw*, supra, should be overruled or modified.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 660, 686; Dec. Dig. § 143.*]

Certified Questions from Court of Appeals.

Action by A. P. Mellichamp against the Adams Express Company. On certified questions by the Court of Appeals.

The Court of Appeals certified the following questions:

"1. Upon the facts hereinafter stated, is the plaintiff entitled to recover; and, if so, should his recovery be limited to \$50, or can he recover the actual value of the goods lost? The Adams Express Company issued, in the city of New York, an express receipt for a small package about 1½ by 2 inches in size, and sealed at the time it was delivered to the carrier. The package contained a diamond ring worth \$175 to \$300. The shipper was a jeweler in New York, and for many years had been in the habit of making shipments by express through the defendant in the same manner this shipment was made, to wit: The shipping clerk would fill out an express receipt containing the following clause: 'In consideration of the rate charged for carrying said property, which is regulated by the value thereof and is based upon a valuation of not exceeding \$50 unless a greater value is declared, the shipper agrees that the value of said property is not more than \$50, unless a greater value is stated herein, and that the company shall not be liable in any event for more than the value so stated, nor for more than \$50 if no value is stated herein.' On the receipt was a blank space for the value of the article to be written. The clerk had general instructions not to value an article shipped unless expressly authorized to do so by his employer. On the occasion in question the value was not declared; but the carrier's agent called at the jeweler's place of business, as was the custom, and received from the clerk the package and the receipt, with all the blanks filled in except that for the value of the article, which was left open. The receipt was stamped by the carrier's agent, 'Value asked and not given.' But in point of fact the carrier's agent did not in the particular instance in question ask the clerk to declare the value of the article, and was not informed as to the contents of the package. The shipper knew that the express charges were based on the value of the article shipped, and that an article of the value of \$50 would be carried for about one-third the rate of an article of the same size and weight worth \$300, and for about one-half of the rate of such an article worth \$175. The shipper had sent several thousand packages of jewelry over the lines of the defendant company during the last 25 or 30 years. Sometimes he would declare the value of the packages, and sometimes he would not. Sometimes the carrier would ask that the value and the contents of the package be disclosed, and sometimes it would make no inquiry as to these matters. The package in question contained a diamond ring that had been previously sent to the jeweler in New York by the plaintiff's husband to be repaired, and it was consigned by the New York jeweler to the plaintiff's husband. The husband knew that under the

published authorized rates the express charges would be greater upon an article worth from \$175 to \$300 than upon one of the same size and weight worth \$50. The article was lost in transit, and no express charges were ever paid by or demanded from either the shipper or the consignee by the carrier. The owner has sued the carrier for the value of the goods lost.

"2. Is there any valid distinction between the case in hand and that of *Southern Express Co. v. Hanaw*, 134 Ga. 445, 67 S. E. 944, 137 Am. St. Rep. 227, because in that [this?] case the shipper, as the agent of the consignee, himself filled out the express receipt and failed to disclose to the carrier the actual value and contents of the package consigned; and does this fact, in connection with the other facts above stated, differentiate the case at bar from the case just referred to?

"3. To what extent is the case in hand controlled and affected by the Interstate Commerce Act as amended June 29, 1906, and especially section 10 thereof, and by the act of Congress known as the 'Elkins Act,' as amended June 29, 1906; and in view of the provisions of these acts of Congress, should the decision of the Supreme Court in the case above referred to be overruled or modified?"

McDaniel, Alston & Black and E. A. Neely, all of Atlanta, for plaintiff in error. Moore & Pomeroy, of Atlanta, for defendant in error.

LUMPKIN, J. [1] 1. The answers to the questions propounded by the Court of Appeals in this case are in large part controlled by the decision in *Southern Express Co. v. Hanaw*, 134 Ga. 445, 67 S. E. 944, 137 Am. St. Rep. 227. In some states the delivery by a common carrier and acceptance by a shipper of a receipt containing a limitation on the liability of the carrier, such as that here involved, is sufficient to make a valid contract. Under the statute and decisions of this state, it is not. It is permissible to make a bona fide valuation of goods. But even the most express contract to arbitrarily limit the liability of a common carrier for the results of negligence, which is but another form of contracting against liability in part for negligence, is prohibited as against public policy. The provision in the receipt under consideration is not a valuation of the particular article to be shipped, but an effort to limit liability in case no valuation is made. It attempts, by means of a printed form of receipt prepared by it in advance, not to arrive at the actual value of any article, but to say that, in the absence of this, "the shipper agrees that the value of said property is not more than \$50, * * * and that the company shall not be liable in any event for more than * * * \$50 if no value is stated herein." It is not even stat-

ed that, in the absence of valuation, the value shall be fixed at \$50, if that would do, but only that it is agreed that the value is "not more than" that amount—whether that sum or less is left open. Likewise it states that the company shall not be liable "for more than \$50"—whether for that sum or less is not stated. How can it be said that an agreement which undertakes to fix neither the value nor the amount of the liability, but merely to put a limit upon them, is a bona fide valuation? It is plainly an agreement to limit liability, not to definitely fix value, and it is that which our statute and decisions declare cannot be done, as to the negligence of the carrier.

In the Hanaw Case, above cited, we dealt with the effect of goods having been shipped in New York for transportation into and delivery in Georgia, of the construction placed by the courts of that state on the effect of such a receipt, and of the right of this state to uphold its own public policy, and prohibition of an attempt to contract against the liability of a common carrier for the results of negligence. In the opinion attention was called to the expression in Civil Code 1895, § 2290, that "the carrier may require the nature and value of the goods delivered to him to be made known," as tending to show that the right of a carrier to require disclosure did not indicate a universal duty to disclose on the part of the shipper, in the absence of such requirement, on pain of being declared guilty of fraud for that reason alone, and relieved from all liability. We do not hold that a shipper might not use such artifices or be guilty of such conduct as to amount to a fraud on the carrier, although no inquiry was made by the latter. If the shipper practice any artifice to give a box containing things of value, such as costly jewels, a mean appearance, and thereby to induce the carrier to think it of little or no value, and so prevent him from making inquiries, or deceive him, it may constitute a fraud, although no inquiry is made. So, where a diamond breastpin was put in a paper box, tied with a cotton string, and unsealed, addressed to a young woman at a college for girls, and was sent to the express company's office by a little negro boy 10 or 12 years of age, who did not know the contents of the box, and no information was given as to its contents, and only the sum of 25 cents was paid for the carriage, these facts were held to be for submission to the jury on the question of fraud, though no inquiry was made. *Southern Express Co. v. Everett*, 37 Ga. 688. In *Walker v. Jackson*, 10 Mees. & Wels. 160, 168, Parke, B., said: "I take it now to be perfectly well understood, according to the majority of opinions on the subject, that, if anything is delivered to a person to be carried, it is the duty of the person receiving it to ask such questions about it as may be necessary. If he ask no

questions, and there be no fraud to give the case a false complexion, on the delivery of the parcel, he is bound to carry the parcel as it is." Story, *Bailments* (9th Ed.) § 567.

In the *Matter of Express Rates, Practices, Accounts, and Revenues*, recently under consideration, the Interstate Commerce Commission were discussing a rule, not of the Commission, but of the express company, which provided that a receipt should be given in a prescribed form, that the shipper should be required to state the value of the shipment, which must be inserted in the receipt, and that, if he declined to state the value of the shipment, the agent should write or stamp on the receipt, "Value asked and not given." It was said: "The use of the rubber stamp, although it appears not to have been intentionally provided for that purpose, has resulted in the careless habit on the part of some of the carriers' agents of neglecting to notify the shipper of the necessity for declaring valuation in order to protect his rights, and in the failure to collect the proper charges." It would seem from this that the Interstate Commerce Commission considered that the duty of giving such notice or making inquiry as to the value rested upon the carrier, rather than that a duty of volunteering information as to value in all events rested upon the shipper. In the case at bar it is stated that the carrier's agent stamped upon the receipt, "Value asked and not given," though in point of fact he did not ask the value. It may be pertinently inquired why did the carrier provide such a stamp, and why did its agent stamp upon the receipt that value had been asked and not given, when this was not the fact, if it thought there was no necessity whatever for inquiry on its part, and that, without this, a failure to state the value would constitute a fraud on the part of the shipper, which would relieve it from liability entirely, or limit its liability so as not to exceed \$50?

Counsel for plaintiff in error seem to think that the ruling in the case of *Magnin v. Dinsmore*, 70 N. Y. 410, 28 Am. Rep. 608, was overlooked by this court in deciding the case of *Southern Express Co. v. Hanaw*, because of a remark made in the opinion that in some jurisdictions a delivery and acceptance of a receipt containing printed words like that under consideration would be held to create a contract, but that we had found no case in which it had been held to constitute a fraud by the shipper. An inspection of 134 Ga. 455, 456, 67 S. E. 944, 137 Am. St. Rep. 227, will show that reference was made to the much-litigated case of *Magnin v. Dinsmore*, as reported both in 62 N. Y. 35, 20 Am. Rep. 442, and 70 N. Y. 410, 28 Am. Rep. 608, and that the reference to the latter decision was accompanied by a criticism upon it. In that case it was not held that there was a fraud releasing the company from liability, but that from the

receipt arose a contract to some extent, and beyond that an estoppel by silence. We cannot agree with that decision, or others like it. If a carrier had no notice of the nature or value of goods shipped, and a shipper made representations on the faith of which the carrier acted in fixing its charges, it might be that the shipper would be estopped, or held to be guilty of fraud, if the representations were untrue. But this makes a very different case from merely not filling a blank in the carrier's receipt by the insertion of a value. If there were other facts showing fraud on the part of the shipper, the omission to fill the blank, or not giving information, might be a circumstance admissible in evidence. But merely omitting to fill the blank left for a statement of value is neither sufficient to prove fraud nor to raise an estoppel against the shipper. If the shipper knew that the charge for carriage was affected by increase in valuation, did not the carrier know it also? Did its agent not know that the value was not written in the receipt? Shall the shipper or consignee be precluded from recovery, because of not filling the blank, but the carrier, knowingly receiving the goods to be carried for hire, escape liability by not making inquiry? In addition to the authorities cited in the Hanaw Case, 134 Ga. 445, 67 S. E. 944, 137 Am. St. Rep. 227, see *Adams Express Co. v. Green*, 112 Va. 527, 72 S. E. 102 (6), and *Stringfield v. So. Ry. Co.*, 152 N. C. 125, 67 S. E. 333.

In the case now before us there was no misrepresentation on the part of the shipper, no artifice to conceal the character of the shipment, or to give it a mean appearance, or throw the carrier off its guard, or tend to prevent inquiry. The shipper was known to the carrier to be a jeweler in New York, who had shipped thousands of parcels during a series of years. The carrier sent its agent to his place of business on this occasion in order to receive the package for shipment, as had been its custom. A diamond ring was shipped in a small package, which was sealed. The carrier's agent thus either knew or was put on notice that the package probably contained jewelry. He made no inquiry as to its value though the place for inserting the value was left blank. To hold that the facts stated in the question relieved the carrier, under the name of a contract or of an estoppel, from liability beyond \$50, or that it would prevent the shipper from recovering at all on the ground that he was guilty of fraud, would be in one breath to lay down the rule that the carrier could not by notice in receipts, or even by express contracts, relieve itself from liability for loss arising from negligence, and in the next to practically destroy the effect of the rule.

The loss in transit is stated, and it does not appear that there was any evidence to exculpate the carrier from negligence. The effect of the Interstate Commerce Law will

be more particularly referred to in a later division of this opinion. In answer to the first question propounded by the Court of Appeals, we hold that, under the facts therein hypothetically stated, the plaintiff is entitled to recover in a proper form of action, and that his recovery should not be limited to \$50, but he can recover the actual value of the goods lost.

[2] 2. From what has been said above, it follows that, in answer to the second question propounded by the Court of Appeals, we hold that there is no valid distinction between the case in hand and that of *So. Express Co. v. Hanaw*, 134 Ga. 445, 67 S. E. 944, 137 Am. St. Rep. 227, on the ground that in the case at bar the shipper as the agent of the consignee, filled out the express receipt, except as to the blank left for stating the value of the article shipped, and failed to disclose to the carrier the actual value and contents of the package consigned; and we further hold that this fact, in connection with the other facts stated in the first question propounded, does not differentiate the case at bar from the case cited, so as to produce a different result.

[3] 3. The third question propounded inquires as to the extent to which the case in hand is controlled or affected by the Interstate Commerce Act as amended in 1906, and especially by what is known as the "Elkins Act," as amended in 1906, and whether, in view of the provisions of those acts of Congress, the decision of this court in the case of *Southern Express Co. v. Hanaw*, *supra*, should be overruled or modified. To this question we respond that there is nothing in the acts of Congress mentioned in the question propounded which controls or affects the case in hand, or which requires a modification or overruling of the decision cited. In *Pennsylvania Railroad Co. v. Hughes*, 191 U. S. 477, 24 Sup. Ct. 132, 48 L. Ed. 268 (decided in 1903), it was held that, "while Congress under its power may provide for contracts for interstate commerce, permitting the carrier to limit its liability to a stipulated valuation, it does not appear that Congress has, up to the present time, sanctioned contracts of this nature; and, in the absence of congressional legislation on the subject, a state may require common carriers, although in the execution of interstate business, to be liable for the whole loss resulting from their own negligence, a contract to the contrary notwithstanding. There is no difference in the application of a principle based on the manner in which a state requires a degree of care and responsibility, whether enacted in a statute or resulting from the rules of law enforced in its courts." In that case a horse was shipped from Albany, N. Y., to a point in Pennsylvania. The bill of lading contained a limitation of liability to a valuation of \$100, which it was conceded would have been held valid in New York, but not in Penn-

sylvania. Suit was brought in the latter state, a recovery was had for \$10,000, and this was sustained. We may assume, therefore, that the Interstate Commerce Law, as it then stood, did not prevent the application of the state law to the validity of such agreements or to the right of recovery in spite of them.

The act of Congress regulating interstate commerce was passed February 4, 1887. 24 Stat. 379; 1 Supp. to Rev. Stat. 529. By the second section thereof it was declared that if any common carrier subject to the provisions of the act should, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons greater or less compensation for transportation of passengers or property than from any other person or persons for a like service, the carrier should be deemed guilty of unjust discrimination, which was prohibited and declared unlawful. By section 3 it was declared unlawful for any common carrier subject to the provisions of the act to give any undue or unreasonable preference or advantage. Section 10 prescribed the penalty for a violation of the act. By the act of March 2, 1889, the original act was amended. Act March 2, 1889, c. 382, 25 Stat. 855, 1 Supp. to Rev. Stat. 684 (U. S. Comp. St. Supp. 1911, p. 1292). The tenth section of the original act was so amended as to declare that the willful causing to be done, or suffering or permitting to be done, anything in the act prohibited or declared unlawful, or aiding or abetting therein, or willfully omitting or failing to do any act, matter, or thing in the act required to be done, or causing or willfully suffering or permitting anything so directed or required by the act to be done not to be done, or aiding or abetting any such omission or failure, should be a misdemeanor. It was further amended by declaring that if any common carrier, or any officer or agent thereof, if a corporation, by means of false billing, false classification, false weighing, or false report of weight, or by any other device or means, should knowingly or willfully assist, or willingly suffer or permit, any person or persons to obtain transportation for property at less than the regular rates, such carrier, officer, or agent should be guilty of a misdemeanor. The amendment further declared that any person and any officer or agent of any corporation or company, who should deliver property for transportation to any common carrier subject to the provisions of the act, or for whom as consignor or consignee any such carrier should transport property, who should knowingly and willfully, by false billing, false classification, false weighing, false representation of the contents of the package, or false report of weight, "or by any other device or means, whether with or without the consent or connivance of the carrier, its agent or agents,

obtain transportation for such property at less than the regular rates then established and in force on the line of transportation, shall be deemed guilty of fraud, which is hereby declared a misdemeanor." It further declared that inducing a common carrier or its officer or agent to unjustly discriminate in rates, or aiding or abetting the common carrier in unjust discrimination, should be a misdemeanor. With these provisions in the law, the decision in *Pennsylvania Railroad v. Hughes*, supra, was rendered, and it was declared that they did not interfere with the administration of the state law in regard to prohibiting limitations of liability for losses arising from negligence.

What is commonly known as the Elkins Act of February 19, 1908 (32 Stat. 847), had also been enacted before the decision mentioned above was rendered, though after the case arose. That act and the amendment of 1906 to the Interstate Commerce Act, to which the Court of Appeals calls attention (84 Stat. 584), did not serve to change the law in respect to contracts limiting liability, as declared in the decision above cited. They extended the provisions of the law. By the act of 1906 express companies were included as common carriers within the meaning of the law. It was declared that it should be unlawful for any person, persons, or corporation to offer, grant, or give, or to solicit, accept, or receive, any rebate, concession, or discrimination in respect to the transportation of any property in interstate or foreign commerce by any common carrier subject to the act, whereby any such property should by any device whatever be transported at a less rate than the tariffs published and filed. This amendment was somewhat broader than the original act and the amendment of 1889, but dealt with the prohibition of unjust discrimination. It did not permit a limitation by contract of the liability of a common carrier. On the contrary, so far as any intimation might be drawn from its terms, such intimation would be in opposition to permitting such contracts. They could easily be made devices for the avoidance of the prohibitions made by Congress. It was argued that if the shipper, who failed to fill the blank in an express receipt left for the statement of the value, were permitted to recover the actual value of the property lost, it might be used as a means of avoiding the terms of the act. We think there would be much more danger of this, if shippers and carriers were permitted to make contracts limiting liability without regard to actual value, or if carriers could accomplish the same result because of a printed form of receipt and the leaving unfilled of a blank for the insertion of the value, regardless of actual value. But whether or not the shipper or the company, or both, may be subject to the penalties provided by the act, this does not prevent the shipper from recovering the value of his

property lost by reason of the negligence of the carrier.

By section 7 of the act of 1906 (84 Stat. 595) a common carrier receiving property for interstate transportation is required to issue a receipt or bill of lading therefor, and it is declared that the initial carrier shall be liable to the lawful holder thereof "for any loss, damage, or injury to such property caused by it, or by any common carrier, railroad or transportation company to which such property may be delivered or over whose line or lines such property may pass, and no contract, receipt, rule or regulation shall exempt such common carrier, railroad, or transportation company from the liability hereby imposed: Provided, that nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under existing law." It can hardly be contended that this provision authorized any limitation of liability by the initial carrier which it did not previously have a right to make. It has been contended that the declaration that the initial carrier shall be liable for "any loss or damage" caused by it or a connecting carrier cut off any pre-existing right, if there were any, to make a contract for the limitation of liability. But the majority of courts which have passed upon this question have held that the purpose of the act was to require the issuance of through bills of lading and to prevent the limitation of liability of the initial carrier to a loss occurring on its own line. Congress was doubtless aware of the conflicting decisions which had been made in regard to the right to limit liability of a common carrier by contract, especially for a loss occurring by a carrier's own negligence, and of the fact that there were different statutes on the subject. Apparently, lest there might be a claim that this section interfered with the pre-existing state laws, the last clause was added, distinctly providing that "nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under existing laws." Considering the act of 1906 as a whole, we are of the opinion that it did not confer upon a common carrier any right to limit its liability by contract; nor did it interfere with the status of the state laws and the right of recovery under them, as announced in *Pennsylvania R. Co. v. Hughes*, supra.

It was contended that the use of the word "fraud" in the act of Congress of 1889 was in conflict with the ruling of this court in the *Hanaw Case*. But this is clearly negatived by the fact that the acts declared unlawful by Congress and punishable as a fraud were stated to be so, whether they were done with or without the consent or connivance of the carrier. It was a fraud

relatively to the public to evade the requirements of the law, and was a public offense. But between the shipper and the carrier it was not intended to declare that an act was a fraud on the part of the former, releasing the latter from liability for damages, whether done with or without its connivance and consent. This legislation was dealing with rates and charges of common carriers, and fraudulent efforts to evade the law in regard to them. It did not set up a new rule by which a carrier could claim to be released from its liability to a shipper. See *Chicago, etc., Ry. Co. v. Solan*, 169 U. S. 133, 18 Sup. Ct. 289, 42 L. Ed. 688. In the *Matter of Released Rates*, 18 I. C. C. 550; *Merchants' Cotton Press, etc., Co. v. Insurance Co. of North America*, 151 U. S. 368, 14 Sup. Ct. 367, 38 L. Ed. 195; *Latta v. Chicago, etc., Ry. Co.*, 172 Fed. 850, 97 C. C. A. 198; *Hughes v. Atlanta Steel Co.*, 136 Ga. 511, 71 S. E. 728, 36 L. R. A. (N. S.) 547; *L. & N. R. Co. v. Warfield & Lee*, 6 Ga. App. 550, 553, 65 S. E. 308. The amendment of 1910 was enacted after this case began, and was not mentioned in the questions propounded by the Court of Appeals. But what has been said would doubtless apply also to it.

It appears in the statement of facts made in connection with the first question propounded by the Court of Appeals that no express charge had been paid or demanded. It may be that the carrier is not precluded from collecting a proper charge. But this would not affect the question of the liability under consideration. All the Justices concur.

(123 Ga. 455)

ADAMS EXPRESS CO. v. CHAMBERLIN-JOHNSON-DU BOSE CO.

(Supreme Court of Georgia. Aug. 13, 1912.)

(Syllabus by the Court.)

1. CARRIERS (§ 129*)—INTERSTATE COMMERCE ACT—VIOLATION—LOSS OF GOODS—OFFENSES.

The provisions contained in section 10 of the Interstate Commerce Act approved February 4, 1887 (Act Feb. 4, 1887, c. 104, 24 Stat. 382, 8 Fed. Stat. Ann. 835 [U. S. Comp. St. 1901, p. 3160]), declare it to be a fraud and make it a penal offense for any person, delivering property for transportation to any common carrier subject to the provisions of that act, knowingly and willfully, by "false billing, false classification, false weighing, false representation of the contents of the package, or false report of weight, or by any other device or means, whether with or without the consent or connivance of the carrier," to obtain transportation for such property at less than the regular rates then established and in force on a line of transportation. It also makes it a penal offense for any person to induce any common carrier subject to the provisions of the act, or any of its officers or agents, to discriminate unjustly in his favor as against any consignor or consignee in the transportation of such property. By the amendment of the Interstate Commerce Law (Act June 29, 1906, c. 3591, 34 Stat. 584, Fed. Stat. Ann. 1909, Supp. 262 [U. S. Comp. St. Supp. 1911,

p. 1288) it is made a misdemeanor for any person to offer, grant, or give, or to solicit, accept, or receive, any rebate, concession, or discrimination in respect to the transportation of any property in interstate or foreign commerce by any common carrier subject to the act regulating interstate commerce and acts amendatory thereof, whereby any such property shall, by any device whatever, be transported at a less rate than that named in the tariffs published and filed by the carrier, as required by the act to regulate commerce and acts amendatory thereof, or whereby any advantage is given or discrimination practiced. *Held*, although such practices upon the part of consignors of freight to be moved by a carrier from one state into another are made penal, that fact will not prevent a consignator from recovering damages on the common-law liability of the carrier for loss of freight resulting from a violation of its duties as a carrier. 2 Hutchinson on Carriers, § 547; Moore on Carriers, § 13; Insurance Co. v. Delaware Mutual, etc., Co., 91 Tenn. 537, 19 S. W. 555; Merchants' Cotton, etc., Co. v. Insurance Co., 151 U. S. 368, 14 Sup. Ct. 367, 38 L. Ed. 195; Pon-Decker Lumber Co. v. Spencer, 86 Fed. 846, 30 C. C. A. 430. In re T. H. Bunch Co. (C. C.) 180 Fed. 519; In the Matter of Released Rates, 13 Interst. Com. R. 550. See, also, Hughes v. Atlanta Steel Co., 136 Ga. 511, 71 S. E. 728, 36 L. R. A. (N. S.) 547; Southern Express Co. v. Hanaw, 134 Ga. 446 (8), 459, 67 S. E. 944, 137 Am. St. Rep. 227.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 545-551; Dec. Dig. § 129.*]

2. CARRIERS (§§ 148, 153, 158*)—TRANSPORTATION OF MERCHANDISE—EXPRESS COMPANIES—RECEIPT—VALUATION—PUBLIC POLICY—WHAT LAW GOVERNS.

Where no value is put upon goods shipped by an express company, and no effort is made to arrive at a valuation, the mere fact that in the prepared form of receipt issued by the carrier to the shipper there is contained the statement that, "in consideration of the rate charged for carrying said property, which is regulated by the value thereof, and is based upon a valuation of not exceeding \$50 unless a greater value is declared, the shipper agrees that the value of said property is not more than \$50, unless a greater value is stated therein, and that the company shall not be liable in any event for more than the value so stated, nor for more than \$50 if no value is stated herein," will not suffice to limit the liability of the company to \$50, regardless of the value of the property shipped. Such a statement in the receipt is not a valuation, but an arbitrary limitation sought to be placed upon the liability of the carrier.

(a) If such a statement should be held to constitute an agreement between the parties fixing an arbitrary valuation of the property, and should be a valid contract under the laws of New York, where executed, it would be contrary to the public policy of this state, and unenforceable in Georgia.

(b) Inasmuch as an express contract of the character mentioned would be unenforceable in Georgia by reason of its being contrary to the public policy of this state, the mere fact that at the time the property was delivered to the carrier for transportation the consignor presented a form of receipt filled out, the same being so tendered for the purpose of having it signed by a representative of the carrier, and it was signed by him, would not render the agreement enforceable in Georgia.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 650, 663-667, 686, 687-690, 699-703½, 708-710, 718, 718½; Dec. Dig. §§ 148, 153, 158.*]

3. FORMER DECISIONS—APPLICATION TO REVIEW AND OVERRULE.

The rulings announced in the second head-note result from an application of the decision rendered in *Southern Express Co. v. Hanaw*, 134 Ga. 445, 67 S. E. 944, 137 Am. St. Rep. 227. The motion to review and overrule that case is denied. All of the rulings are supported and elaborated in *Adams Express Co. v. Mellichamp*, 75 S. E. 596.

4. ANSWER—DISALLOWANCE OF AMENDMENTS.

In view of the rulings above announced, the court below did not err in striking certain portions of the answer filed by the express company, and in disallowing certain amendments offered to the answer.

Error from Superior Court, Fulton County; Geo. L. Bell, Judge.

Action by the Chamberlin-Johnson-Du Bose Company against the Adams Express Company. From an order striking certain portions of defendant's answer, and disallowing certain amendments offered thereto, plaintiff brings error. Affirmed.

Robert C. & P. H. Alston and E. A. Nealy, all of Atlanta, for plaintiff in error. Smith, Hammond & Smith, of Atlanta, for defendant in error.

ATKINSON, J. Judgment affirmed. All the Justices concur, except HILL, J., disqualified.

(138 Ga. 583)

RICHARDS et al. v. SHIELDS et al.
(Supreme Court of Georgia. Aug. 17, 1912.)

(Syllabus by the Court.)

1. PLEADING (§§ 199, 210*) — PETITION—MOTION TO DISMISS — SPECIAL DEMURRER — TIME.

The motion, made upon the trial of the case, by the defendant below, to dismiss the petition, was in the nature of a special demurrer, and therefore came too late. Moreover, it was largely speaking in its character.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 464-469; Dec. Dig. §§ 199, 210.*]

2. APPEAL AND ERROR (§ 518*) — RECORD—PLEADING—ANSWER—AMENDMENT.

An amendment offered to an answer, which was disallowed by the court, cannot be brought to this court as part of the record in the case, but must be brought up as a part of the bill of exceptions, either set out therein, or attached thereto as an exhibit, properly identified, and made a part of the bill of exceptions. *McGarry v. Seiz*, 129 Ga. 296, 58 S. E. 856; *Id.*, 136 Ga. 849, 72 S. E. 243; *Bowen v. Neal*, 136 Ga. 859, 72 S. E. 340. The mere fact that such an amendment was filed in the office of the clerk of the court, without an order of the judge allowing it to be so filed, and prior to its disallowance by the judge, does not alter the rule. *Branan v. Baxter*, 122 Ga. 224, 50 S. E. 45.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2342-2355; Dec. Dig. § 518.*]

3. BANKRUPTCY (§ 421*) — DISCHARGE—EXEMPT PROPERTY—LIABILITY FOR DISCHARGEABLE DEBT.

After a debtor has been discharged in bankruptcy, a debt unsecured by lien, provable in bankruptcy, and not falling within any of the exceptions specified in the bankruptcy act, can-

not be enforced in equity by a proceeding in rem against an exemption set apart to the bankrupt in the bankruptcy proceedings, where he pleads his discharge in bankruptcy, and that plaintiff was given due notice of the bankruptcy proceeding, and where there is proof sustaining such plea. *Bowen v. Keller*, 130 Ga. 31, 60 S. E. 174, 124 Am. St. Rep. 164.

(a) This case was of the nature just above indicated. The defendant pleaded his discharge in bankruptcy after due notice to the plaintiff. The plaintiff's debt was evidenced by promissory notes, and was unsecured by any sort of lien. There was nothing to indicate that the debt was not provable and dischargeable in bankruptcy. The plaintiffs, on the trial, put in evidence the defendant's answer. It follows that the trial judge erred in rendering a judgment in rem against the property exempted to the defendant in bankruptcy proceedings.

[Ed. Note.—For other cases, see *Bankruptcy*, Cent. Dig. §§ 772-774, 776, 777, 779-781, 783-786, 788-790; Dec. Dig. § 421.*]

Error from Superior Court, Douglas County; Price Edwards, Judge.

Action by J. S. Shields and others against W. J. Richards and others. Judgment for plaintiffs, and defendants bring error. Reversed.

J. S. James, of Atlanta, for plaintiffs in error. James Beall and B. F. Boykin, both of Carrollton, for defendants in error.

FISH, C. J. Judgment reversed. All the Justices concur.

(138 Ga. 531)

GREEN v. GREEN.

(Supreme Court of Georgia. Aug. 17, 1912.)

(Syllabus by the Court.)

1. CONTINUANCE—DISCRETION—ABUSE.

There was no abuse of discretion in overruling the motion to continue the case.

2. TRIAL (§ 169*)—DIRECTION OF VERDICT—REFUSAL TO PROCEED TO TRIAL—DISMISSAL.

When the plaintiff failed or refused to proceed with the trial after the overruling of the motion to continue, and offered no evidence, it was error to direct a verdict against them. The proper judgment was one of dismissal.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 341, 381-387, 389; Dec. Dig. § 169.*]

3. APPEAL AND ERROR (§ 1175*)—COSTS (§ 231*)—REVERSAL—DISPOSITION OF CASE.

This will not require a reinstatement of the case, or a new trial. But direction is given that the verdict and judgment thereon be vacated, and that in lieu thereof a judgment dismissing the case, with costs against the plaintiffs, be entered.

(a) The plaintiff in error, having obtained a substantial modification of the judgment, is entitled to have judgment for the costs of bringing the case to this court and those accruing in this court.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4573-4587; Dec. Dig. § 1175.* Costs, Cent. Dig. §§ 847, 852, 853, 855, 872-875; Dec. Dig. § 231.*]

Error from Superior Court, Gordon County; A. W. Flite, Judge.

Action by T. C. Green against J. M. Green. From a judgment for defendant, plaintiff brings error. Affirmed.

T. W. Skelly, of Calhoun, and Maddox, McCamy & Shumate, of Dalton, for plaintiff in error. O. N. Starr, of Calhoun, and J. M. Neel, of Cartersville, for defendant in error.

LUMPKIN, J. Judgment affirmed, with direction. All the Justices concur.

(138 Ga. 607)

TARVER et al. v. BARBER et al.

(Supreme Court of Georgia. Aug. 19, 1912.)

(Syllabus by the Court.)

1. EXECUTORS AND ADMINISTRATORS (§ 349*)

—ORDER OF SALE—CONCLUSIVENESS—ERRONEOUS DESCRIPTION OF LAND.

Where an administratrix applied to the court of ordinary for leave to sell all the real estate of the intestate lying in a certain county, and the order of the ordinary recited such petition and granted leave to sell all of the lands of the deceased in the county named, except the dower estate of the widow, and under this order the administratrix sold and conveyed the lands, in a subsequent attack upon the title claimed under the sale, the order for sale was admissible, although, after the general grant of authority, it undertook to describe the lands of the deceased, and did not do so accurately. *Clements v. Henderson*, 4 Ga. 148, 152; *Davie v. McDaniel*, 47 Ga. 195; *Coggins v. Griswold*, 64 Ga. 323.

(a) Both sides claimed under the deceased, and neither attacked his title to the land in controversy, lying in the named county.

[Ed. Note.—For other cases, see *Executors and Administrators*, Dec. Dig. § 349.*]

2. EXECUTORS AND ADMINISTRATORS (§ 346*)

—SALE OF LAND—ORDER—SIGNATURE.

Although the ordinary may not sign an order granting an administrator leave to sell land, yet if it be entered on the minutes, and they be signed by him, the order will not be held void for want of signature. *Smith v. Ross*, 108 Ga. 198, 33 S. E. 953.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 1444, 1447; Dec. Dig. § 346.*]

3. INSTRUCTIONS.

Though some of the charges complained of may not have been perfectly accurate, there was nothing which required the grant of a new trial. The verdict was authorized by the evidence.

Error from Superior Court, Screven County; B. T. Rawlings, Judge.

Action between Mrs. J. B. Tarver and others and B. B. Barber and others. Judgment for the latter, and the former bring error. Affirmed.

H. B. Strange, of Statesboro, White & Lovett, of Sylvania, and Brannen & Booth, of Statesboro, for plaintiffs in error. H. A. Boykin, of Sylvania, for defendants in error.

LUMPKIN, J. Judgment affirmed. All the Justices concur.

(138 Ga. 444)

EMBRY v. STATE.

(Supreme Court of Georgia. Aug. 13, 1912.)

*(Syllabus by the Court.)***1. JURY (§ 110*)—QUALIFICATIONS—OBJECTIONS—TIME.**

That a juror's name is not on the jury list or in the jury box is not cause for a new trial, when the point is raised for the first time after verdict. Being an objection proper defectum, it should be discovered and urged before verdict. *Somers v. State*, 118 Ga. 535 (2), 42 S. E. 779; *Jordan v. State*, 119 Ga. 443, 46 S. E. 679.

[Ed. Note.—For other cases, see *Jury*, Cent. Dig. §§ 502-513, 515-523; Dec. Dig. § 110.*]

2. CRIMINAL LAW (§ 1152*)—APPEAL—DENIAL OF NEW TRIAL—DISCRETION.

Where, after verdict, in a motion for a new trial the impartiality of two of the jurors was attacked, and there was a showing and a countershooting on the subject, and the presiding judge passed on the conflicting evidence, his finding will not be reversed, unless he has abused his discretion. *Jefferson v. State*, 137 Ga. 382 (1), 73 S. E. 499.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 3053-3057; Dec. Dig. § 1152.*]

3. HOMICIDE (§ 340*)—INSTRUCTIONS—REVIEW—MUTUAL COMBAT.

If the charge on the subject of mutual combat, of which complaint was made, was not altogether as clear and exact as it might have been, under the evidence it does not require a reversal on the ground that it was "too vague and uncertain, and because the court failed to give the jury the law, if any, which distinguishes between mutual combat; that is to say, that the court failed to charge the jury, when death results from a mutual combat between two parties, when it is manslaughter, and when it is murder." *Cargile v. State*, 137 Ga. 775 (6), 74 S. E. 621; *Freeman v. State*, 70 Ga. 376 (3).

[Ed. Note.—For other cases, see *Homicide*, Cent. Dig. §§ 715-717, 720; Dec. Dig. § 340.*]

4. CONVICTION—VERDICT—EVIDENCE.

The verdict was supported by the evidence, and there was no error in overruling the motion for a new trial.

Error from Superior Court, Madison County; D. W. Meadow, Judge.

Mack Embry was convicted of an offense, and he brings error. Affirmed.

Geo. C. Thomas, of Athens, R. L. J. & S. J. Smith, of Commerce, and J. F. L. Bond, of Danielsville, for plaintiff in error. Thos. J. Brown, Sol. Gen., of Elberton, and T. S. Felder, Atty. Gen., for the State.

LUMPKIN, J. Judgment affirmed. All the Justices concur.

(138 Ga. 470)

MILLEDGEVILLE COTTON CO. v. BACON.
(Supreme Court of Georgia. Aug. 14, 1912.)

*(Syllabus by the Court.)***1. MASTER AND SERVANT (§ 40*)—CONTRACT OF EMPLOYMENT—BREACH—EVIDENCE.**

The action was for breach of contract, it being alleged that the plaintiff was employed by the defendants to represent them as a cotton buyer in a named town for a stated period at a given salary, and his expenses when out

of town on defendants' business. Defendants' answer admitted the contract of employment and the amount of salary alleged by plaintiff, but denied any agreement to pay expenses as claimed. The answer further admitted that defendants discharged plaintiff from their service about the time alleged by plaintiff, but pleaded justification in so doing, because plaintiff had been derelict in the discharge of his duties, was incompetent, and had violated the trust reposed in him; the particulars being set forth. There was a further plea to the effect that plaintiff was short in his accounts with defendants in a stated sum, for which judgment was prayed against him. There was a verdict for the plaintiff, and the defendants excepted to the refusal of a new trial. *Held*, the verdict was supported by evidence.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 47-49; Dec. Dig. § 40.*]

2. INSTRUCTIONS—EVIDENCE.

There was evidence to authorize the instruction excepted to, in reference to ratification by defendants as to the expenses claimed by plaintiff.

3. MASTER AND SERVANT (§ 40*)—CONTRACT OF EMPLOYMENT—BREACH—DEFENSES—JUSTIFICATION OF DISCHARGE—BURDEN OF PROOF.

The court did not err in instructing the jury to the effect that the burden of proof was on the defendants to establish, to the satisfaction of the jury, by a preponderance of evidence, their plea of justification in the discharge of plaintiff. The burden of proof generally lies upon the party asserting or affirming a fact, and to the existence of whose case or defense the proof of such fact is essential." Civil Code, § 5746. The defense referred to was certainly affirmative, and was, moreover, somewhat in the nature of confession and avoidance; and it is well settled that the burden in such cases is upon the defendant to sustain his plea. See *Stewart v. Mynatt*, 135 Ga. 637, 70 S. E. 325; *Widincamp v. Widincamp*, 135 Ga. 644, 70 S. E. 566. This ruling is not in conflict with what was held in *Mobley v. Lyon*, 134 Ga. 125, 67 S. E. 668, 137 Am. St. Rep. 213, 9 Ann. Cas. 1004, relied on by plaintiffs in error. There the issue was whether the alleged testatrix signed the instrument purporting to be her will; the propounders contending that she did, and the caveators contending that she did not. As the propounders held the affirmative of the issue, the burden was on them to sustain it.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 47-49; Dec. Dig. § 40.*]

4. NEW TRIAL (§ 39*)—INSTRUCTIONS—REPETITION.

The fact that the court, subsequently in his charge, repeated in substance the instruction referred to in the next preceding headnote, was not cause for a new trial.

[Ed. Note.—For other cases, see *New Trial*, Cent. Dig. §§ 57-61; Dec. Dig. § 39.*]

Error from Superior Court, Baldwin County; James B. Park, Judge.

Action by B. W. Bacon against the Milledgeville Cotton Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Hines & Vinson, of Milledgeville, for plaintiff in error. M. E. Evans, of Warrenton, and Allen & Pottle, of Milledgeville, for defendant in error.

FISH, C. J. Judgment affirmed. All the Justices concur.

(128 Ga. 521)

SMALL v. JONES.

(Supreme Court of Georgia. Aug. 15, 1912.)

(Syllabus by the Court.)

1. LIMITATION OF ACTIONS (§ 175*)—AGREEMENT TO WAIVE—CONSIDERATION.

An agreement to waive any defense under the statute of limitations, made without consideration after the bar of the statute had attached, is not binding upon the party making the agreement, and will not prevent the debtor, when sued, from setting up the bar of the statute.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 662; Dec. Dig. § 175.*]

2. LIMITATION OF ACTIONS (§ 180*)—DEFENSE—GENERAL DEMURRER.

It appearing upon the face of the pleadings in this case that the debt sued on was barred by the statute of limitations, a general demurrer based upon that ground should have been sustained.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 670-675, 681; Dec. Dig. § 180.*]

(Additional Syllabus by Editorial Staff.)

3. LIMITATION OF ACTIONS (§ 24*)—STATUTE APPLICABLE—WRITTEN CONTRACTS.

Plaintiff, having purchased an interest in a business enterprise which never materialized, sued for the return of the money, and attached to the petition a receipt, signed by defendant, evidencing the receipt from plaintiff of \$800, "being part payment for one forty-fourth interest" in a certain patent, and that a note due in four months for \$200 completed the payment. Held, that the receipt was not a contract to deliver such interest, binding defendant to repay the money in case of default, and hence plaintiff could not treat the failure to repay the money as a breach of a written contract, subject to the limitations applicable to actions on such contracts.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 112-117; Dec. Dig. § 24.*]

4. LIMITATION OF ACTIONS (§ 28*)—ORAL CONTRACT—BREACH.

Where plaintiff orally contracted to purchase an interest in a business from defendant, and such interest was never delivered, plaintiff's action to recover the amount paid was barred by the four-year statute of limitations.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 134, 135, 142; Dec. Dig. § 28.*]

Error from Superior Court, Bibb County; W. H. Felton, Judge.

Action by J. S. Jones against W. E. Small. From an order overruling defendant's demurrer to plaintiff's amended petition, he brings error. Reversed.

On January 17, 1911, J. S. Jones filed suit against W. E. Small to recover the sum of \$800, with interest from July 29, 1904, alleging that on the last-named date he paid to the defendant \$800 on account of the purchase price of a forty-fourth ($\frac{1}{44}$) interest in a business enterprise known as the "Rosevelt Putty Patent"; that said enterprise, for some reason unknown to plaintiff, never materialized; and that plaintiff had made frequent demands upon defendant for the re-

turn of his money. Attached to his petition was a copy of a receipt as follows: "July 29, '04. Received of J. S. Jones eight hundred dollars, being part payment for one forty-fourth interest in the Rosevelt Putty Patent. A note payable in four months for two hundred dollars completes the payment. W. E. Small."

The defendant filed a general demurrer, setting up, among other grounds, that the alleged cause of action was barred by the statute of limitations. When the demurrer was called for hearing, the plaintiff offered an amendment, in which he alleged: "That complainant's right of action as set out in his original petition, though arising more than six years prior to the bringing of said suit, was not in fact at the time of the bringing of said suit, and is not now, barred by the statute of limitations, for the reason that on the 23d day of July, 1910, the defendant, W. E. Small, executed and delivered to your petitioner a written waiver"—a copy of which is as follows: "Georgia, Bibb County. I, W. E. Small, having been notified by the attorneys representing J. S. Jones of their intention to file suit against me on July 23, 1910, upon an alleged claim growing out of the sale of a one forty-fourth interest in a certain putty patent; and whereas, it appearing that, if said contemplated suit is not filed by the 29th day of July, 1910, the same will be barred by the statute of limitations, and I, the said W. E. Small, desiring time to investigate the merits of said alleged claim, do hereby agree, in the event the said suit is not filed against me within the statutory period, to waive all rights of defense to said suit that I may have by reason of the statute of limitations having run against the same. This 23d day of July, 1910. W. E. Small."

Objection to the allowance of this amendment was overruled, and a demurrer to the petition as amended was also overruled. The defendant excepted.

W. E. Martin, Jr., and J. E. Hall, both of Macon, for plaintiff in error. Ryals, Grace & Anderson, of Macon, and Anderson, Felder, Rountree & Wilson, of Atlanta, for defendant in error.

BECK, J. (after stating the facts as above). [3] We do not think that the plaintiff could treat the failure to repay the money as a breach of a written contract. The receipt was not a contract for the delivery of an interest in the contemplated enterprise, binding the party executing the receipt to repay the money in default of delivery of the specified interest in the enterprise, so as to make this action analogous to the suit in the case of Hill v. Hackett, 80 Ga. 54, 4 S. E. 856. A comparison of the written instrument sued on there with the receipt given by the defendant in the present case will show the

radical difference between the two writings. The writing relied upon in the action of *Hill v. Hackett*, while acknowledging the receipt of certain tickets, also contained a promise to return the tickets, "or to account for" them, if used. In the present case, the receipt evidencing the payment contains no promise to repay the money in case of failure "to deliver the interest" in the contemplated enterprise. There is no breach, in the instant case, of any express written undertaking, but a failure to perform an implied undertaking—that is, the repayment of the money, or rather the payment of it as money had and received in case the contemplated enterprise was abandoned and the defendant should put himself in a position where he was unable to turn over to the plaintiff the consideration for the money paid by the latter.

[4] It follows, from what we have said above, that the plaintiff's cause of action was barred by the statute of limitations within four years from the time when it first came into existence against the defendant. In the petition it is stated that plaintiff's right of action as set out in his petition "arose more than six years prior to the bringing of the suit" (though it is not determinable from the facts alleged in the petition when the cause of action actually arose); and as there was less than a year between the time of the execution of the instrument which the plaintiff insists was a valid waiver of the defendant's right of any defense under the statute of limitations and the actual filing of the suit in the case, the bar of the statute had attached at the time of the execution of the instrument relied upon as such waiver.

[1] That being true, in the absence of some showing that the waiver was made for a valuable consideration, it was not binding. Had the instrument containing the waiver contained also a new promise to pay the debt, a new point from which the statute would run would have been created. But the writing relied upon as a waiver contains neither a new promise nor an acknowledgment of the debt, nor does it show that it was based upon any consideration other than the postponement of the bringing of a suit upon the alleged debt; and this postponement could not amount to a consideration, inasmuch as the bar of the statute had already attached, and mere delay in bringing suit did not benefit the defendant nor put the plaintiff in a worse position than that in which he was before. The relation of the parties as debtor and creditor could not be affected by delay in bringing the suit. Under these circumstances the bar of the statute, which had attached, was not removed. See, in this connection, *Trask v. Weeks*, 81 Me. 325, 17 Atl. 162, *Warren v. Walker*, 23 Me. 453, and *Stockett v. Sasscer*, 8 Md. 374.

[2] As the debt sued on was barred by the statute of limitations, the defendant's demurrer based upon that ground should have been sustained, and it was error to overrule it.

Judgment reversed. All the Justices concur.

(138 Ga. 460)

ANTHONY SHOALS POWER CO. et al. v. FORTSON.

(Supreme Court of Georgia. Aug. 13, 1912.)

(Syllabus by the Court.)

1. LANDLORD AND TENANT (§ 38*)—ORAL LEASE—TERM—TENANCY AT WILL.

An oral lease, not naming any term, but limited to endure until the happening of a contingency, creates a tenancy at will.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. § 100; Dec. Dig. § 38.*]

2. LANDLORD AND TENANT (§ 39*)—ORAL LEASE—SUBSEQUENT WRITTEN AGREEMENT.

If, subsequently, the landlord accepts from the tenant the latter's rent note for a definite term, containing a complete and certain agreement for the rent of the same land, and embracing covenants not included in the oral lease, the prior oral contract will be presumed to have been superseded and merged into the writing.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 101-103; Dec. Dig. § 39.*]

3. LANDLORD AND TENANT (§ 18*)—RECOVERY OF PROPERTY—EVIDENCE.

There was evidence authorizing an inference that the landlord had contracted for the rent of the land for the year 1912.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 45-48; Dec. Dig. § 18.*]

4. LANDLORD AND TENANT (§ 132*)—POSSESSION—INTERFERENCE—REMEDY—INJUNCTION.

Injunction is an available remedy to restrain a landlord from interfering with the possession of his tenant pending the tenancy, where the damages are of such a nature as to be incapable of accurate computation.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 460-464, 467-469; Dec. Dig. § 132.*]

(Additional Syllabus by Editorial Staff.)

5. EVIDENCE (§ 441*)—WRITTEN CONTRACT—PAROL PROOF.

Where a tenant gave a rent note to his landlord, embracing and reciting a complete and certain agreement of the terms of the lease, it will be conclusively presumed that the writing contained the entire contract, in the absence of proof of fraud or mistake.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 1719-1845, 2030-2047; Dec. Dig. § 441.*]

Error from Superior Court, Wilkes County; B. F. Walker, Judge.

Suit by C. J. Fortson against the Anthony Shoals Power Company and others. Decree for complainant, and defendants bring error. Affirmed.

Thos. J. Brown, of Elberton, and W. A. Slaton, of Washington, Ga., for plaintiffs in

error. S. H. Sibley, of Union Point, and I. T. Irvin, of Washington, Ga., for defendant in error.

EVANS, P. J. The plaintiff, C. J. Fortson, brought his petition against the Anthony Shoals Power Company and certain other defendants, praying an injunction against interfering with his possession of certain lands. He alleged that the power company owned a large tract of land, on which was an undeveloped water power; that in October, 1909, the power company agreed with him that he should rent the entire land, as long as the same was not flooded by the erection of a dam, at a price of 34,000 pounds of lint cotton per year for each year that he was suffered by the nonerection of the dam to occupy the land, the company having a right at any time to erect the dam and flood the land; that he was to have the right to make such improvements thereon as he wished, at his own risk of loss thereof by the erection at any time of the dam, and to sublet the premises; that in pursuance of this contract he entered upon the land, and for each of the years 1910 and 1911 he gave his rent notes, which have been paid; that on October 10, 1911, in pursuance of his contract, he gave to the power company his note, for the year 1912, for 34,000 pounds of lint cotton; that on the faith of his contract he erected valuable improvements; that the defendants had denied him the right to rent the lands for the next year (1912), had informed his tenants that he had no right to the possession of the farms for the next year, and that they would not be permitted to occupy them, and had stopped his tenants from erecting improvements which they had contracted with him to construct. The power company denied the alleged contract of 1909, averred that it had rented the land to the plaintiff in 1910 and again in 1911, and denied having rented the land for the year 1912. It averred that the plaintiff had cut timber during the years 1910 and 1911 in violation of his contract, and that, unless the plaintiff vacated the premises on the expiration of his term, it would be compelled to take proper proceedings to evict him. On the interlocutory hearing the defendants were temporarily restrained as prayed, provided the plaintiff deposited with the clerk rent notes taken by him for the year 1912 to the extent of 35,000 pounds of lint cotton. Exception is taken to this order.

[1] The tenant's contention is that the landlord made a parol lease of the land to him, to continue until it was flooded, and that in successive years he gave his rent notes in pursuance of the parol contract. The duration of the tenancy, by the express terms of the parol agreement, depended on a contingency. Such a lease, not naming any term, but limited to endure until the happening of a contingency, cannot properly be regarded as a lease for years. 1 Tiffany on

Landlord and Tenant, § 12. And, even if it could be construed as a lease longer than a year, the contract, being in parol, had only the effect to create a tenancy at will. Civil Code, § 3693. As the term is indefinite, and cannot extend beyond a year solely by vigor of the parol agreement, the plaintiff sustained the relation of a tenant at will. The statute provides for notice to terminate a tenancy at will, and the stipulation that the tenant should rent the land as long as it was not flooded assured to the landlord the right to terminate the tenancy by flooding the land without giving the statutory notice.

[2] The subsequent execution by the tenant to the landlord of a rent note, wherein the contract of tenancy appears to be fully integrated, and which contained additional covenants to those included in the parol contract, impels a conclusion that the prior parol agreement was merged into the writing. The rent note for the year 1911 contained full specifications of a lease contract. It specified that the note was given for the rent of the Anthony Shoals land, and contained covenants by the tenant to pay rent, to keep the premises in repair, to cultivate the land in a farmlike manner, to permit no waste, or cutting of timber, save for the ordinary requirements of the farm; a liability for waste to the value of the depreciation to be collected as rent. It was stipulated that the payee was not to be liable for repairs; that if he or his principal determined to go forward with the construction of a reservoir, he or they might go upon the land and remove any timber, earth, or other thing, without becoming liable for damages or a reduction in rent; and that the crops should be removed by the tenant not later than November 15th of that year, at the direction of the payee or his principal. No copy of the rent note for 1910 is found in the record, but the parol testimony indicates that it was substantially of the same nature.

[5] Ordinarily a promissory note contains only the maker's obligation to pay. If the note does not purport to express the contract in pursuance of which it is executed, and that contract rests in parol, its terms may be proved by parol. *Pryor v. Ludden & Bates*, 134 Ga. 238, 87 S. E. 654, 28 L. R. A. (N. S.) 267. But where a tenant gives a rent note to his landlord, embracing and reciting a complete and certain agreement of the terms of the lease contract, it will, in the absence of fraud, accident, or mistake, be conclusively presumed that the writing contains the entire contract. *Bullard v. Brewer*, 118 Ga. 918. Having reduced their contract to writing, all prior oral negotiations and agreements pertaining to the same subject-matter are merged into the writing and superseded by the writing. *Weaver v. Stoner*, 114 Ga. 167, 39 S. E. 874. It follows, therefore, that the written contract as embraced in the rent

note of 1911 superseded the alleged oral contract made in 1909.

[3] In the fall of 1911 Fortson executed to the power company a rent note for the year 1912, and delivered it to the president of the power company. There is a dispute concerning the circumstances under which this note was delivered. The power company insists that the note was left with its president until it could be submitted to its general manager for approval; that it was submitted, and the general manager declined to renew the rent contract, and the note was returned to Fortson on November 10th by mail. Fortson immediately sent the note back to the president. Fortson contends that the general manager approved the rent contract for the year 1912, and afterwards attempted to repudiate it because of some disagreement about the collection of the rent of 1911. The evidence was sufficient to authorize the judge to find that there existed a contract of rental for the year 1912.

[4] This brings us to the question of the remedy of injunction. If a landlord enters into a valid contract to rent his land, with the right to sublet it, and afterwards, in an attempt to repudiate his contract, he interferes with the tenant's possession, so as to prevent him from exercising his privileges under the contract, and the tenant's damages are incapable of ascertainment, equity will enjoin the landlord from so doing. There was evidence to authorize a finding of these facts, and accordingly there was no abuse of discretion in granting an interlocutory injunction.

The CHIEF JUSTICE and Mr. Justice ATKINSON concur in the judgment as based on the last three headnotes.

Judgment affirmed. All the Justices concur.

(128 Ga. 521)

WATSON & STRICKLAND v. PARIAN PAINT CO.

(Supreme Court of Georgia. Aug. 19, 1912.)

(Syllabus by the Court.)

1. PLEADING (§ 199*)—DEMURRER—FILING—TIME.

A demurrer to an action brought in the superior court on an open account, on the

ground that the items of the account are not sufficiently specific, should be filed at the first term.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 464-469; Dec. Dig. § 199.*]

2. DISMISSAL AND NONSUIT (§ 58*)—DEFECTIVE PLEADING.

The open account involved in this case had certain headings, such as "Articles," "Size Package," "Price," and "Amount." Under each head were written certain letters and figures, such as "30 gals., #39, blk., 1.05, \$1.50." Accompanying these items were dates. In some cases there were added words descriptive of the articles, such as "stucco," "Pekin br.," and "raw oil." Held, that the suit was not so fatally defective that a defendant, who failed to demur or plead at the first term, after entry of default, could, at the trial term, without moving to open the default, have the case dismissed on motion, on the ground that no itemized account was attached to the suit "that is sufficiently legible and intelligible as to put defendant upon notice of what the suit is intended to cover," and that "the statement of account was so vague and indefinite as that no valid judgment could be rendered on the suit."

(a) Such a motion was properly overruled. Central Ry. Co. v. Motz, 130 Ga. 414, 61 S. E. 1.

[Ed. Note.—For other cases, see Dismissal and Nonsuit, Cent. Dig. §§ 134-139; Dec. Dig. § 58.*]

3. APPEAL AND ERROR (§ 914*)—TRIAL (§ 170*)—DIRECTING VERDICT—SERVICE—REVIEW.

At the trial, no defense having been filed, and the case being in default, there was no error in directing a verdict in favor of the plaintiff for the amount due on the account. Civil Code, § 5682.

(a) No question having been raised as to the service, and the entry of service not having been brought to this court, it will be presumed that due service was made.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3693-3698; Dec. Dig. § 914.* Trial, Cent. Dig. §§ 390-394; Dec. Dig. § 170.*]

Error from Superior Court, Haralson County; Price Edwards, Judge.

Action by the Parian Paint Company against Watson & Strickland on open account. Judgment for plaintiff, and defendants bring error. Affirmed.

G. R. Hutchens, of Rome, for plaintiffs in error. B. F. Boykin, of Carrollton, for defendant in error.

LUMPKIN, J. Judgment affirmed. All the Justices concur.

(133 Ga. 573)

WESTERN & A. R. CO. v. CASTEEL.
(Supreme Court of Georgia. Aug. 17, 1912.)

(Syllabus by the Court.)

1. TRIAL (§ 191*)—INSTRUCTIONS—PROVINCE OF JURY—NEGLECT.

It is error to instruct a jury that certain enumerated facts constitute negligence, where the law does not declare such to be negligence.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 420-431, 435; Dec. Dig. § 191.*]

2. NEGLIGENCE (§ 122*)—ACTIONS—BURDEN OF PROOF.

In a suit for a personal injury arising from a negligent tort (where the doctrine known as the master and servant rule does not apply), the burden does not rest on the plaintiff, as part of his case, to show his freedom from negligence, but contributory negligence is matter of defense. It may, however, appear from the evidence introduced by either party.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 221-223, 229-234; Dec. Dig. § 122.*]

Error from Superior Court, Cobb County; N. A. Morris, Judge.

Action by A. J. Casteel, by next friend, against the Western & Atlantic Railroad Company. Judgment for plaintiff, and defendant brings error. Reversed.

Tye, Peeples & Jordan, of Atlanta, and D. W. Blair, of Marietta, for plaintiff in error. Clay & Morris, of Marietta, for defendant in error.

EVANS, P. J. [1] The plaintiff, a youth of 13 years, with three companions, was playing on a turntable of the defendant railroad company, when he was injured. In a suit for the injury he alleged that the railroad company was negligent in maintaining upon its premises, without guard or adequate protection, the turntable, which was dangerous to life and limb, and of a nature to invite the intrusion of children. The defendant denied any negligence in this particular. The court charged the jury: "I give you this rule: Where a railroad company leaves a dangerous machine, such as a turntable, if you believe that the table was a dangerous machine, unfastened in a city on a lot which is not securely inclosed, and where people and children are wont to visit it and pass through it, this is negligence on the part of said company." This instruction contained an expression of opinion that certain acts constituted negligence. The court may not so instruct the jury, unless such acts are declared by law to be negligence. *L. & N. R. Co. v. Arp*, 136 Ga. 489, 71 S. E. 867.

[2] The court also charged that "the degree or measure of care which the child was required to exercise was that which is ordinarily exercised, and which is to be reasonably expected from a child of his years and experience, under the circumstances he was in, as shown by the evidence; and before the jury can find him guilty of contributory negligence, or lack of due care, you must find

that he failed to exercise such care and caution as reasonably might be expected of a child of his years and experience under the circumstances, and the burden of proving such lack of due care is upon the defendant; still that proof may come either from the evidence introduced by the plaintiff, or that introduced by the defendant, or from the evidence of both." In its connection, this instruction was not erroneous. Whenever the defendant's negligence as the cause of the injury is made to appear, the plaintiff's contributory negligence becomes a matter of defense. *City Council of Augusta v. Hudson*, 88 Ga. 599 (3), 600, 15 S. E. 673. Unless the plaintiff, in making out his case, submits proof of his own negligence, as the contributory cause of his injury, the burden is on the defendant to prove the plaintiff's negligence, if such defense is made to the action. Judgment reversed. All the Justices concur.

(133 Ga. 496)

B. B. FORD & CO. et al. v. ATLANTIC COMPRESS CO.

(Supreme Court of Georgia. Aug. 15, 1912.)

(Syllabus by the Court.)

ACTION (§ 28*)—ASSIGNMENTS (§ 117*)—CONTRACT—BREACH—WAIVER OF TORT—SUIT IN ASSUMPSIT—SUIT FOR USE OF ANOTHER.

Where a contractual relation exists between the parties, such as that of bailor and bailee, so that the latter rightfully obtains possession of the property, a tort arising out of a breach of the bailee's duty imposed by his relation, or by his express contract, may be waived by the bailor and assumpsit maintained.

(a) The action in this case was *ex contractu*, based upon an alleged refusal of the defendant compress company to deliver cotton upon demand and presentation of its receipts given therefor.

(b) Under the facts alleged, the plaintiff had the right to sue for the benefit of the user named.

(c) The petition was not subject to the demurrers.

[Ed. Note.—For other cases, see Action, Cent. Dig. §§ 196-215; Dec. Dig. § 23.* Assignments, Cent. Dig. §§ 189-191; Dec. Dig. § 117.*]

Error from Superior Court, Sumter County; Z. A. Littlejohn, Judge.

Action by B. B. Ford & Co., and another, for the use of the Standard Marine Insurance Company, Limited, of Liverpool, against the Atlantic Compress Company. Judgment for defendant, and plaintiffs bring error. Reversed.

Claude Estes, of Macon, and R. L. Maynard, of Americus, for plaintiffs in error. King, Spalding & Underwood, of Atlanta, and E. A. Hawkins, of Americus, for defendant in error.

FISH, C. J. B. B. Ford & Co. and the Standard Marine Insurance Company, Limited, of Liverpool, suing for the use of the last-named company, brought an action

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep't Indexes

against the Atlantic Compress Company. The substance of the petition, now material, is as follows: Ford & Co., between September 17, 1907, and January 30, 1908, delivered to the defendant 234 bales of cotton, taking its warehouse receipts for the same, wherein the defendant obligated itself to deliver the cotton upon the return of the receipts properly indorsed, and the payment of such charges as may have accrued thereon under the current tariff of the defendant company. On February 3, 1908, the receipts were presented to the defendant by Ford & Co. and the delivery of the cotton demanded. Defendant failed and refused to deliver. Continuing tender of the receipts, demand for delivery, and refusal to deliver were alleged. Ford & Co. held a policy of fire insurance on the cotton, issued to them by the Standard Marine Insurance Company, Limited, of Liverpool. On February 12 and 16, 1908, the insurance company paid to Ford & Co. a stated amount of money as the value of the cotton, taking from the latter the receipts for the cotton issued by the defendant, "as well as a subrogation transfer of all the rights of B. B. Ford & Co. as owner of said cotton." The petition further alleged that the defendant, "by reason of its failure and refusal to deliver said cotton on demand, or to pay the value thereof, has become liable to pay petitioners the value of the same, to wit," a stated amount, with interest thereon from February 2, 1908, such amount being the same which it was alleged the insurance company had paid Ford & Co., as above stated.

The petition was demurred to on several grounds, to the effect: (1) It appears from the petition that at the time it was filed neither of the plaintiffs had any right to demand the cotton of the defendant, nor to recover for its refusal to deliver on demand, and that no liability was shown on the part of defendant for the value of the cotton. (2) The action is founded upon an alleged breach of duty to deliver the cotton to Ford & Co., and the petition shows that when it was filed Ford & Co. had no right, title, nor interest in the cotton, having parted with the same to the insurance company, and no right is shown in the insurance company to demand the delivery of the cotton, and sue for refusal to deliver or to pay its value. (3) The suit is not maintainable by Ford & Co. for the use of the insurance company, because the petition shows that, at the time of bringing the suit, Ford & Co. "had parted with said cotton for full value, and had transferred all of its right of every nature therein to the" insurance company. (4) No cause of action is set forth in behalf of the insurance company, as the suit is for tort in the failure to deliver the cotton, and neither demand by it nor failure to deliver to said company is alleged, and no right of action for the alleged tort to Ford & Co. was

assignable to the insurance company. (5) So much of the petition as sets forth that the insurance company took from Ford & Co. "a subrogation transfer of all the rights of said B. B. Ford & Co. as owner of said cotton" is demurrable, because the "subrogation transfer" and its terms are not set forth, and because no facts are alleged showing any rights of subrogation in the insurance company. (6) No cause of action is set forth in favor of either of the plaintiffs. The court sustained the demurrer and dismissed the petition. The plaintiffs excepted and brought the case here.

Counsel for defendant in error contend that the action is for a tort in the conversion of the cotton, and we assume that the trial judge entertained the same view of the case in sustaining the demurrer. If the action were in tort, the judgment should be affirmed. In our opinion, however, the action was *ex contractu*. When the cotton was delivered to the defendant by Ford & Co., it gave its receipt for the same, in which the defendant expressly obligated itself to deliver the cotton upon the return of the receipts, properly indorsed. Ford & Co. subsequently presented the receipts to the defendant and demanded of it the cotton, which demand was refused. Clearly then accrued a right of action in favor of Ford & Co. against the defendant for a distinct breach of its express contract. As was said in *Bates v. Bigby*, 123 Ga. 727, 729, 51 S. E. 717, 718: "Where * * * a contractual relation exists between the parties, such as that of bailor and bailee, so that the latter rightfully obtains possession of the property, a tort arising out of a breach of the bailee's duty imposed by his relation may be waived by the bailor, and assumpsit maintained; the reason being that the relation of the parties, out of which the duty violated grew, had its inception in the contract." To the same effect is *De Loach, etc., Co. v. Standard, etc., Co.*, 125 Ga. 377, 54 S. E. 157. If this right of action for breach of contract continue in Ford & Co. up to the institution of the suit, then they could sue in their name for the use of any person they might designate to take the proceeds of the action, provided, in so doing, they did not cut the defendant off from any defense which it would otherwise have. *Fidelity & Deposit Co. v. Nisbet*, 119 Ga. 316, 46 S. E. 444, and cases cited.

The right of action was in Ford & Co. when the suit was brought, unless they had been deprived of it by the allegations in the seventh paragraph of the petition, which were as follows: "Petitioners show that petitioner, Standard Marine Insurance Company, Limited, of Liverpool, a fire insurance company, carried a policy of insurance against fire on said 234 bales of cotton, issued to B. B. Ford & Co., and that on February 12, 1909 [1908 (?)], and February 16,

1908, said petitioner insurance company paid to the said B. B. Ford & Co. the aggregate sum of \$13,591.58, the value of said cotton, taking the receipts of said B. B. Ford & Co. therefor, as well as a subrogation transfer of all the rights of said B. B. Ford & Co. as owner of said cotton." There is no allegation in the petition that the cotton was burned and that the insurance company paid to Ford & Co. the amount stated for the loss, although there appears on the copy of the receipt attached to the petition (which is alleged to be the same in form as all of the other receipts, except as to date, number, number of bales, and marks) a certificate, appearing to have been made by the defendant, that the cotton for which the receipt was given was destroyed by fire February 2, 1908. We do not agree with counsel for plaintiffs in error that such certificate, taken in connection with the allegations of the petition quoted above, shows that the cotton was burned, as the certificate is not referred to in the petition. We do not think, however, that the right of Ford & Co. to bring the action for the use of the insurance company was terminated by the facts alleged, to the effect that, prior to the bringing of the suit, the insurance company had paid them "the value of said cotton, taking the receipts of said B. B. Ford & Co. therefor." Although the insurance company had paid Ford & Co. the value of the cotton, and had taken the receipts which the defendant had issued, it does not appear that the receipts had been indorsed by Ford & Co., and it was expressly stipulated in each receipt that the cotton referred to would "be delivered only upon the return of this receipt properly indorsed," etc. In the absence of an indorsement, the defendant was not bound to deliver the cotton to the insurance company, had it presented the receipts and demanded it of defendant; and this is true, notwithstanding the "subrogation transfer" (whatever it may have been) to the insurance company of all the rights of Ford & Co. as the owner of the cotton.

Under the circumstances, the action was properly brought by Ford & Co. for the use of the insurance company, and the court erred in dismissing the petition on demurrer. Judgment reversed. All the Justices concur.

(138 Ga. 536)

SEABOARD AIR LINE RY. v. GNANN & DE LOACH.

(Supreme Court of Georgia. Aug. 16, 1912.)

(Syllabus by the Court.)

TRIAL (§§ 251, 260*)—REQUEST TO CHARGE—INSTRUCTIONS GIVEN—RAILROADS—FIRES—INSTRUCTIONS—APPLICABILITY TO ISSUES.

The testimony to which objection was made, when connected with other testimony, as required by the court in his ruling on its admissibility, tended to support the case as laid

in the petition, and was not irrelevant. The requests to charge, in so far as they contained accurate statements of law, were covered by the general charge, which in the main applied the rules of law respecting the liability of a railroad company for damages to property proximately caused by a fire negligently set out by the running of its trains, as is clearly and fully defined in *Southern Railway Co. v. Thompson*, 129 Ga. 367, 58 S. E. 1044. The judgment is reversed, on the exceptions to the charge, that "the measure of diligence which the law places upon the railroad company is ordinary care and diligence in respect to carrying and keeping in repair spark arresters to prevent fire, and the same ordinary care and diligence in keeping the same in good order." The failure to have or maintain in good order spark arresters was not charged in the petition as an act of negligence, and the court erred in charging upon the subject. The charge was harmful, inasmuch as the jury might have found that the sparks would not have been emitted if the engine had been equipped with a spark arrester, and that ordinary care would require such equipment.

[Ed. Note.—For other cases, see Trial. Cent. Dig. §§ 587-595, 651-659; Dec. Dig. §§ 251, 260.*]

Error from Superior Court, Effingham County; W. W. Sheppard, Judge.

Action by Gnann & De Loach against the Seaboard Air Line Railway. Judgment for plaintiffs, and defendant brings error. Reversed.

Anderson, Cann & Cann and Thos. F. Walsh, Jr., all of Savannah, for plaintiff in error. Hitch & Denmark and Wm. M. Farr, all of Savannah, for defendants in error.

EVANS, P. J. Judgment reversed. All the Justices concur.

(188 Ga. 504)

SOUTHERN COTTON MILLS v. RAGAN
et al.

(Supreme Court of Georgia. Aug. 15, 1912.)

(Syllabus by the Court.)

1. RECEIVERS (§ 142*)—SALES—"JUDICIAL SALE"—CAVEAT EMPTOR.

A sale by a receiver appointed by a court is a "judicial sale," and the maxim "caveat emptor" applies to such sale.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. §§ 248-251; Dec. Dig. § 142.*]

For other definitions, see Words and Phrases, vol. 4, pp. 3867-3870.]

2. RECEIVERS (§ 142*)—SALES—VACATION—GROUNDS.

Where such a sale is made, equity will not set it aside at the instance of the purchaser, in the absence of fraud or mutual mistake, and where the purchaser is guilty of laches in complaining, and fails to show an ability and offer to restore the status.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. §§ 248-251; Dec. Dig. § 142.*]

3. RECEIVERS (§ 142*)—SALES—VACATION.

Under the principles announced in the preceding headnotes, the petition was properly dismissed on demurrer.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. §§ 248-251; Dec. Dig. § 142.*]

Error from Superior Court, Pulaski County; J. H. Martin, Judge.

Petition by the Southern Cotton Mills against Ragan and Lovejoy, receivers of the Hawkinsville Cotton Mill, to set aside a judicial sale of the plant of the Hawkinsville Cotton Mill. From a decree dismissing the petition on demurrer, plaintiff brings error. Affirmed.

In the case of Planters' Bank, Trustee, etc., v. Hawkinsville Cotton Mill, a corporation, Ragan and Lovejoy were appointed receivers for the manufacturing plant of the Hawkinsville Cotton Mill. The Southern Cotton Mills, a corporation, brought its petition against such receivers. The substance of the petition, so far as is here material, is as follows:

"3. That in connection with the said Hawkinsville Cotton Mill Corporation, and attached thereto, was an electric plant of the value of \$12,000 or more, consisting of all the machinery and apparatus, together with poles and wires, necessary for the operation of the electric plant, and in connection therewith was a franchise, or what was purported and represented to be a franchise, granted by the city of Hawkinsville, and under a contract with said city of Hawkinsville the said Hawkinsville Cotton Mill was to furnish said city and its inhabitants with electric lights for a term of 10 years.

"4. That the said receivers were authorized and ordered by your honor to dispose of said property by public sale; that they were unable to make a fair disposition of the same by public sale, but your petitioner, through J. C. Cooper, of the county of Fulton, negotiated for the purchase of said property, including the franchise and the contract of the city of Hawkinsville for the lighting of the same; that negotiations proceeded and were consummated by a proposition to purchase on the part of J. C. Cooper, and an acceptance of the same by the said receivers, at private sale; that a report of said proposition and acceptance was submitted by the receivers to your honor, and your honor, in the exercise of your powers as chancellor, authorized the acceptance of the same and confirmed said sale. The order authorizing and confirming the said sale is a matter of record, and the petitioner prays leave to refer thereto as often as necessary.

"5. That in pursuance of said sale, on the 1st day of March, 1909, the said receivers made and executed and delivered to petitioner a deed, a copy of which is hereto attached, marked 'Exhibit A,' to which leave of reference is prayed, by which the said receivers purport to convey all of said property, including the 'franchise granted by the said city' to said mills, for the sum of \$10,000 in cash and a promissory note for \$5,000, dated January 1, 1909, bearing interest at 8 per cent. and \$2,000 of the stock of

petitioner, and in addition thereto petitioner was to assume payment of fifty 6 per cent. bonds of the Hawkinsville Cotton Mill, each of the value of \$1,000, held by said trustee.

"6. That your petitioner paid through J. C. Cooper the said \$10,000 in cash, and took possession of said property. * * *

"10. Your petitioner, upon investigation, ascertained that there was no such thing as an electric franchise granted by the city of Hawkinsville to the said mill, which the deed purported to convey; and he also ascertained that under its terms the deed did not really convey the poles and wires which are located along the streets and highways in the city of Hawkinsville and adjacent thereto.

"11. Said electric plant was of the value of \$12,000 or more, as shown by the representation of the receivers who offered the same for sale in connection with the manufacturing plant, the said sum being an amount required to construct the said plant; and in addition thereto there was the value of the franchise or contract for the lighting of the city of Hawkinsville. * * *

"13. Petitioner was informed that the money paid by Cooper for it in the purchase of said property is now in the hands of the receivers, with the exception of a small amount which had been paid out; but the said receivers are paying out, and will continue to do so unless enjoined. Petitioner does not undertake to say how it happened that, in the making of the deed, the electric plant and the franchise, with the valuable contract with the city of Hawkinsville, was not conveyed in the deed; but he presents the facts as they exist to your honor, exercising chancery powers in the supervision of the estate in the hands of the receivers appointed by the court.

"14. But petitioner does charge that said deed was not made in conformity with the negotiations, and the same should be canceled and the sale set aside, for the following reasons: (1) Because the receivers never had the franchise which they offered to sell, and which constituted a large element of value in the property purchased by petitioner. (2) That petitioner, in the purchase of said property from the receivers, was largely induced to buy it by the fact that the franchise and electric plant was a part of the property, and he has utterly failed to get a title thereto. (3) The sale is absolutely void, for the reason that the receivers had no title to the property which they purported to convey.

"15. Petitioner shows that by his failure to obtain the property that he purchased he had been injured and damaged in the sum of \$20,000. * * *

"17. Petitioner stands ready to account for the earnings of the mill and the electric plant during the operation of the same from the time that it took charge of said plant until it was closed.

"18. The premises considered, petitioner prays: (1) That the receivers be enjoined from disposing of any money paid by petitioner, or J. C. Cooper for petitioner, in the purchase of said property, until further orders of the court. (2) That the deed purporting to convey to petitioner the said manufacturing plant and franchise be canceled, and that petitioner be repaid the money which he has paid for same, or whatever amount be due it upon an accounting of the operations of the plant during its possession of the same. (3) That in any event petitioner should be repaid the value of the franchises and the electric plant, and the contract purporting to be existing between said Hawkinsville Cotton Mill and the city of Hawkinsville for the lighting of said city and the furnishing of light to its inhabitants, to wit, the sum of \$12,000. (4) That inasmuch as the manufacturing plant is not now in operation, and the title to the same is involved, and the former receivers in charge of the same are parties defendant to the petition, ask that receivers be appointed to take charge of said property and hold it during the disposition of the issues raised by the petition."

The petition was filed December 22, 1909. It was demurred to, both generally and specially, by the receivers. The demurrers were sustained, and petitioner excepted.

R. L. Berner and J. R. Cooper, both of Macon, for plaintiff in error. W. L. & Warren Grice, of Hawkinsville, and Hardeman, Jones, Callaway & Johnston, of Macon, for defendants in error.

ATKINSON, J. [1, 2] A sale by a receiver appointed by a court is a typical judicial sale, and the maxim "caveat emptor" applies to such a sale. The purchaser must look for himself as to the title and soundness of the property sold. Civil Code, § 6054; *Campbell v. Parker*, 59 N. J. Eq. 342, 45 Atl. 116. Such sales are by the court, and there is no one to go back on it if the buyer takes nothing. Fraud will vitiate such a sale; and where it is made to appear, it will authorize the court to set it aside. *Folsom v. Howell*, 94 Ga. 112, 21 S. E. 186. But in the petition under consideration no fraud or misrepresentation on the part of the receivers in relation to the sale by them was alleged. It is true that the petition alleges that an electric lighting plant was connected with the Hawkinsville Cotton Mill, "and in connection therewith was a franchise which was purported and represented to be a franchise granted by the city of Hawkinsville, and under a contract with said city of Hawkinsville the said Hawkinsville Cotton Mill was to furnish said city and its inhabitants with electric lights for a term of 10 years"; but it does not appear from the petition how this was pur-

ported, and who represented it, to be true. The petition further alleges that the petitioner, through Cooper, negotiated with the receivers for the purchase of the property of the Hawkinsville Cotton Mill, "including the franchise and the contract with the city of Hawkinsville for the lighting of the same," and that the proposition made by the petitioner to purchase all of such property was accepted by the receivers under the authorization of the judge, and that the sale made in pursuance thereof was subsequently confirmed. There is nothing, however, in such allegations which shows that the receivers did not in good faith believe that the Hawkinsville Cotton Mill had a franchise for the operation of the lighting plant and a contract with the city of Hawkinsville for the lighting of its streets.

While a court of equity would doubtless relieve a purchaser at a receiver's sale, where it was made to appear, before completion of the sale and purchase, that he had acted in good faith and in the exercise of ordinary diligence, and the relief granted to him would not prejudicially affect the rights of any one, yet a strong case must be presented before such a purchaser would be granted relief, where a sale has been made and confirmed, and the conveyance of the property executed and delivered, and the purchaser put in possession. The petition here presented no such case. The sale was made and confirmed, the conveyance was executed and delivered, and the purchaser was placed in possession of the manufacturing plant of the Hawkinsville Cotton Mill and the electric lighting plant connected therewith, and operated both the manufacturing and the electric plant until November, 1909, being a term of several months' duration. So far as appears from the petition, the purchaser exercised no diligence in ascertaining whether the city of Hawkinsville had granted a franchise to the Hawkinsville Cotton Mill for operating the electric lighting plant, or whether the city had entered into a contract with the Hawkinsville Mill for the lighting of its streets for a given term. An inquiry of the clerk of the city council or an examination of its minutes, either of which could have readily been made, would certainly have developed whether such franchise and contract existed. Furthermore, no reason is alleged for the long delay after the consummation of the sale before the purchaser ascertained that there was no such franchise and contract. Absolutely no excuse is alleged why the purchaser failed to ascertain why the conveyance executed by the receivers did not cover the electric plant, the franchise for operating the same, and the contract with the city of Hawkinsville. A mere reading of that instrument would have disclosed the property conveyed therein, and that it did not convey the electric plant, the franchise for conducting it, and the contract with the city. In

this connection, see *Wylly v. Gazan*, 69 Ga. 506 (5), and citations.

There is not even an offer on the part of the purchaser to return the property purchased to the receivers; but the appointment of other receivers is prayed, which this court, when the case was formerly here, decided that the purchaser was not entitled to. And even if such a prayer could be considered tantamount to an offer to return the property to the court or the receivers it had already appointed, there is nothing in the petition to show that the property was in the same condition or of equal value at the time of the filing of the petition as it was when the sale was consummated and the petitioner put in possession thereof. The petition, on the other hand, discloses the fact that the manufacturing plant had been closed and was not in operation at the time of the filing of the petition. For what cause it was not suggested. While an accounting is prayed between the receivers and the petitioner, the latter merely offers "to account for the earnings of the mill and the electric plant during the operation of the same from the time that [the petitioner] took charge of said plant until it was closed." Certainly the mere earnings made by the purchaser from the property during that time were not what it was bound to account for, even if an accounting such as prayed for could be had. The earnings may have been little or nothing, and solely because of the fault of the purchaser in operating the property. Furthermore, it is not made to appear from the petition that the rights of the bondholders of the Hawkinsville Cotton Mill and its other creditors would not be injuriously affected upon the cancellation of the conveyance made by the receivers. The petition shows that some of the purchase money paid to the receivers has been paid out by them. How much is not alleged.

[3] From what we have said, we find no difficulty in coming to the conclusion that the court did not err in dismissing the petition on demurrer.

Judgment affirmed. All the Justices concur.

(138 Ga. 509)

SOUTHERN COTTON MILLS et al. v. PARSONS et al.

(Supreme Court of Georgia. Aug. 15, 1912.)

(*Syllabus by the Court.*)

APPEAL AND ERROR (§ 1194*)—DECISION ON FORMER APPEAL—LAW OF THE CASE.

This case was before the Supreme Court on a former occasion, on exception to a judgment rendered at an interlocutory hearing. *Cooper v. Parsons*, 136 Ga. 789, 72 S. E. 158. It was then decided: "3. A corporation issued bonds and executed a mortgage to secure them. Under an equitable petition, filed by the trustee named in the mortgage, the property of the mortgagor was placed in the hands of receivers, and a decree of foreclosure was entered.

The receivers sold at private sale the property covered by the mortgage, and, upon confirmation by the court, made a deed and delivered the property; the grantee paying an amount in cash, giving a certain note to the receivers for another amount, and assuming the payment of the bonds and buying subject to the mortgage. *Held*, that the directors of the mortgagor had no such title or interest as authorized them to file, in their own names as directors, a petition to enforce the contract of purchase from the original receivers, or to seek to foreclose the mortgage, and to have new receivers appointed to take charge of the property sold." Before this decision was rendered by the Supreme Court, the demurrer was heard and overruled by the trial court, and the defendants excepted. *Held*, that the decision above mentioned extended to the right of the plaintiffs to maintain the action; and, the petition showing upon its face substantially the facts upon which the ruling was predicated, the ruling announced is applicable also to the case on demurrer. Accordingly, the judgment overruling the demurrer will be reversed.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4648-4660; Dec. Dig. § 1194.*]

Error from Superior Court, Pulaski County; J. H. Martin, Judge.

Action between the Southern Cotton Mills and others and W. N. Parsons and others. From an order overruling a demurrer on the ground that plaintiffs had no capacity to sue, they bring error. Reversed.

R. L. Berner and John R. Cooper, both of Macon, for plaintiffs in error. W. L. & Warren Grice, of Hawkinsville, and Hardeman, Jones, Callaway & Johnston, of Macon, for defendants in error.

ATKINSON, J. Judgment reversed. All the Justices concur.

(138 Ga. 434)

CENTRAL OF GEORGIA RY. CO. v. MILLEDGEVILLE RY. CO.

(Supreme Court of Georgia. Aug. 13, 1912.)

(*Syllabus by the Court.*)

CARRIERS (§ 179*)—TERMINAL COMPANY—DESTRUCTION OF FREIGHT CARS—CARRIER OR BAILEE.

Under the facts of this case, the defendant railroad company, at the time the cars were burned, did not hold them as a common carrier; and, as the defendant was not negligent in respect to the fire, it was not liable for the injury to or destruction of the cars.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 813, 814; Dec. Dig. § 179.*]

Error from Superior Court, Baldwin County; James B. Park, Judge.

Action by the Central of Georgia Railway Company against the Milledgeville Railway Company. Judgment for defendant, and plaintiff brings error. Affirmed.

The Central of Georgia Railway Company brought suit against the Milledgeville Railway Company for damages to two freight cars by fire. By consent of the parties the case was tried before the judge, without the intervention of a jury, upon the following

agreed statement of facts, with the right by either party to except to the decision of the judge:

"1. The Milledgeville Railway Company is chartered as a railroad corporation. It has no freight cars of its own, but it operates over its own railroad tracks in and around the city of Milledgeville, Ga., connecting with the Central of Georgia Railway and the Georgia Railroad. It transports, with its own engines and employes, empty freight cars and cars loaded with freight between its junction with the Central of Georgia Railway and stores, warehouses, industries, and other places of business of consignees, located upon or adjacent to its tracks in and around Milledgeville. It charges and collects from the consignees or shippers, as the case may be, the sum of \$2.50 per car for each loaded car transported by it in either direction. When loaded cars are received by it from its connection, or from shippers on its line, it makes no charge for the movement of the empty car in the opposite direction; the revenue derived by it from the transportation of the loaded car covering its compensation for the service in moving the empty car.

"2. At the date of the transaction referred to in the petition, and for many years prior thereto, the following custom or understanding existed between the plaintiff and defendant as to the receipt of cars from the Central Railway at Milledgeville, and their return, either empty or loaded, to wit: (a) At the time these cars were burned, defendant had no specific agreement, written or otherwise, with either the Central Railway or the Georgia Railroad. The actual practice was as follows: When the defendant had prospective loading for either line, and also had empty cars in its possession, whether Central's, Georgia's, or belonging to a foreign line, defendant held them and loaded them back to the line from which they had been received. (b) All Central of Georgia Railway system cars which are delivered by it loaded to the Milledgeville Railway, consigned to some point on the defendant's line, to be promptly returned by it when unloaded, except that such cars may be held by the Milledgeville Railway for immediate reloading of freight from some industry or place of business on its line, to be shipped via the Central of Georgia Railway, or if the Milledgeville Railway is advised by one or more of the places of business or industries on its line that in the next day or so a car, or cars, will be needed, to be loaded with freight for shipment to some point on or via the Central of Georgia Railway, the Milledgeville Railway retains or holds such Central Railway cars as are in its possession necessary for this purpose, until it has positive orders from shippers on its line for placing the cars; this being done in order to save both railroads unnecessary work in the switching or movement of empty freight

cars. (c) When the Milledgeville Railway had no empty cars of the Central Railway in its possession as above, and such empty cars were desired by shippers or industries on its line (the Milledgeville Railway Company's) for shipment of freight via the Central of Georgia Railway, the Milledgeville Railway would call upon the Central Railway for empty cars, which would be delivered by the plaintiff to the defendant, transported by the latter on its tracks to the place of business of the shipper, and returned by the Milledgeville Railway to the Central Railway when loaded.

"3. The cars referred to in the petition and in this statement of facts were received by the Milledgeville Railway from the Central Railway in pursuance of the foregoing custom or understanding.

"4. On March 28, 1907, the Central Railway delivered its system car No. 25440, loaded with lime, to the Milledgeville Railway, at the junction of the tracks of the plaintiff and defendant, for transportation and delivery to the Cook Lumber Company, on the defendant's line at Milledgeville. The loaded car was transported by the defendant and placed at the Cook Lumber Company's lime house on April 6, 1907. Defendant was notified by the consignee that the car was empty April 9, 1907. Defendant thereafter held said empty car in its possession, intending to place it at the clay pit in Milledgeville, a point on its line, on April 10, 1907, to be loaded by a shipper, and thereafter transported and redelivered by defendant to the Central of Georgia Railway. Plaintiff was not advised of the defendant's intended use of the car, and had no knowledge of defendant's intention. There was no agreement or custom requiring such notice.

"5. On March 18, 1907, the Central of Georgia Railway Company placed a foreign car (C., N. O. & T. P. car No. 12251) at the junction of the tracks of plaintiff and defendant, loaded with flour for A. J. Carr Company, whose place of business was on the defendant's line in Milledgeville, Ga. The car was placed by the defendant at the consignee's warehouse on March 20, 1907. It was unloaded by the consignee, and was, on March 21, 1907, moved empty from the said warehouse by the defendant to the Oconee River Mills, a point on defendant's line in Milledgeville, Ga. It was there loaded by the Oconee River Mills with meal, consigned to Athens, Ga., via the Georgia Railroad. It was moved by the defendant from the Oconee River Mills on March 26, 1907, and delivered by the defendant to the Georgia Railroad for transportation to Athens, Ga. It was not known to defendant, at the time the car was placed at the Oconee River Mills, that it was to be loaded for a station on the Georgia Railroad; but the fact that it was so loaded became known to defendant when the car was switched by it to the Georgia Railroad depot to be transported to Athens. Defend-

ant could have ascertained this fact, however, before the car was loaded, if it had inquired of the shipper. Said car was made empty at its destination in Athens, Ga., and was returned empty by the Georgia Railroad to Milledgeville, April 7, 1907. The defendant thereafter held said car in its possession, intending to place it at the Oconee River Mills, a point on its line, on the morning of April 10, 1907, for loading with meal to be routed via the Central of Georgia Railway from Milledgeville. Plaintiff was not advised of defendant's use of the car, and had no knowledge thereof. There was no agreement or custom requiring such notice.

"6. Central of Georgia system car No. 25440 was entirely destroyed by fire, and the foreign car (C., N. O. & T. P. No. 12251) was damaged by fire, while in the possession of the Milledgeville Railway, under the foregoing circumstances, on April 10, 1907; the amount of said loss and damage aggregating the sum of \$619, of which sum \$444 was for the destruction of Central of Georgia car No. 25440, and \$175 for damage to C., N. O. & T. P. car No. 12251."

It further appears from the record that the defendant, prior to the suit, agreed in writing with the plaintiff that the claim for damages to the C., N. O. & T. P. car No. 12251, delivered by the plaintiff to the defendant, might be joined in the action for damages to the car belonging to the plaintiff. Judgment was rendered for the defendant, and the plaintiff excepted.

H. W. Johnson, of Savannah, for plaintiff in error. Joseph B. & Bryan Cumming, of Augusta, for defendant in error.

FISH, O. J. (after stating the facts as above). As will be seen from the foregoing agreed statement of facts, the only question in this case is whether the Milledgeville Railway Company (hereinafter referred to as the defendant), at the time of the fire, held the cars as a common carrier, and was therefore liable as such for their injury or destruction. We are aware of no decision of this court which throws any light upon the point. It has been held in other jurisdictions that railroad companies are bound to transport the cars of other companies, and, while so transporting and in complete control of them, are liable as common carriers for any injuries to them. *New Jersey R., etc., Co. v. Penn. R. Co.*, 27 N. J. Law, 100; *Mallory v. Tloga R. Co.*, 39 Barb. (N. Y.) 488; *Vermont, etc., R. Co. v. Fitchburg R. Co.*, 14 Allen (Mass.) 462, 92 Am. Dec. 785; *Missouri Pacific Ry. Co. v. Chicago & Alton Ry. Co.* (C. C.) 25 Fed. 317; *Peoria, etc., Ry. Co. v. Chicago, etc., Ry. Co.*, 109 Ill. 135, 50 Am. Rep. 605; *East St. Louis, etc., Ry. Co. v. Wabash, etc., Ry. Co.*, 123 Ill. 594, 15 N. E. 45; *Peoria, etc., Ry. Co. v. United States Rolling Stock Co.*, 136 Ill. 643, 27 N. E. 59, 29 Am. St. Rep. 348; *Pittsburg, etc., Ry.*

Co. v. City of Chicago, 242 Ill. 178, 89 N. E. 1022, 134 Am. St. Rep. 316. In some of these cases it appears that the owner of the cars was liable for the charges for transporting them; and we think it fair to assume that such was a fact in all of them, except in *Peoria, etc., Ry. v. Chicago, etc., Ry. Co.*, 109 Ill. 135, 50 Am. Rep. 605, where it is stated in the opinion: "The car in question was delivered to defendant [the switching company], to be carried over its road to the warehouse of the consignees of the freight it contained. A charge for the service to be rendered was made, and was paid by the consignees." In *St. Paul, etc., R. Co. v. Minneapolis, etc., Ry. Co.*, 26 Minn. 243, 2 N. W. 700, 37 Am. Rep. 404, it appears that, by agreement between the parties (connecting railroad companies), the defendant was to receive the plaintiff's cars for delivery on a point on the defendant's line, and to return them in as good condition as when received, ordinary wear and tear by use excepted. Both parties were to share the profits of the freight so carried, and defendant was to pay the plaintiff a fixed sum for the use of its cars. Without fault on the defendant's part, certain of the plaintiff's cars were destroyed by fire on the defendant's line, while being thus transported. It was held that the defendant was not liable. The court said: "It [the defendant] neither contracted nor undertook to perform any service as a carrier in transporting them [the cars] from one place to another, nor was it entitled to receive any compensation whatever for what it agreed to do in the way of taking and using them upon its road, and redelivering them to the plaintiff at Merriam Junction. It did not receive the cars so transported for hire, but for use on its line of road in doing a business of transportation which was common to both roads, and in the profits of which both companies were to share. The compensation agreed upon was to be paid by the defendant to the plaintiff for such use, and not by the latter to the former as a reward for transportation. These facts alone show that the defendant's liability, if any, was not that of a common carrier. * * *

As the bailment was reciprocally beneficial to both parties, no liability could attach to the defendant by reason of the destruction of the property intrusted to it as bailee, unless it occurred through some negligence on defendant's part, amounting to want of ordinary care." In the case at bar the defendant was to receive no compensation from the Central of Georgia Railway Company (hereinafter referred to as the plaintiff) for the transportation of cars delivered by it to the defendant. Nor was the defendant to pay the plaintiff anything for the use of such cars. Whatever may have been the reason for such custom or understanding in this respect between the parties, we may presume that it was reciprocally beneficial to both.

Under our law the plaintiff was bound to deliver to the defendant the loaded cars, and the defendant was bound to receive and transport them to their destination. Civil Code, §§ 2655, 2756. The charge for their transportation was to be fixed by the Railroad Commissioners of the state. Id. § 2631. If a railroad corporation doing business in this state "shall charge, collect, demand or receive more than a fair and reasonable rate of toll or compensation * * * for the use and transportation of any railroad car upon its track, * * * the same shall be deemed guilty of extortion" (Id. § 2628); and any unjust discrimination in its rates or charges of toll, or any compensation by such railroad corporation for the use and transportation of any such car, is forbidden (Id. § 2629).

As we have already stated, the only point for decision in this case is whether the defendant was a common carrier in respect to the cars in question at the time they were burned. In the view we take of the case, it is unnecessary to decide whether, under the agreed statement of facts, the defendant was a common carrier as to the cars while engaged in transporting them from the junction of the lines of the parties to Milledgeville, or in returning them to the junction. We leave this point open, as, in our opinion, the defendant did not, under the facts of the case, hold the cars as a common carrier at the time they were burned. The responsibility of a common carrier for goods received for transportation "ceases with their delivery at destination according to the direction of the person sending, or according to the custom of the trade." Civil Code, § 2730. If the defendant, when it received the loaded car of the plaintiff at the junction of the tracks of the plaintiff and defendant, for transportation and delivery to the Cook Lumber Company, on the defendant's line at Milledgeville, became, under the facts of the case, a common carrier both as to the car and the freight contained therein, when the car with its freight was delivered to the consignee to be unloaded by it, the defendant's relation as a common carrier to the car and its freight ceased and was suspended until defendant retook possession of the car after it was unloaded. *Missouri Pacific Ry. Co. v. Chicago & Alton R. Co.* (C. C.) 25 Fed. 317; *East St. Louis, etc., Ry. Co. v. Wabash, etc., Ry. Co.*, 123 Ill. 594, 15 N. E. 45; *Peoria, etc., Ry. Co. v. United States Rolling Stock Co.*, 136 Ill. 643, 27 N. E. 59, 29 Am. St. Rep. 348. According to these decisions, if the defendant was a common carrier of the car while being transported, if the car had been destroyed by fire while in possession and control of the consignee, the defendant would not have been liable, for the reason that the car would not then have been in the exclusive possession and control of the defendant. Plainly, for the same reason, if the car, after

being unloaded by the consignee, had been redelivered to the defendant as a common carrier, and, in accordance with the custom and understanding between the plaintiff and the defendant then existing it had been placed in the custody and control of another industry upon the defendant's line, to be there unloaded by such industry and then delivered to the defendant for transportation to the defendant's line, and the car had been burned, without fault on the part of the defendant, while being loaded by such shipping industry, or after being loaded by it and before it was returned to the defendant, then the defendant would not have been liable for its destruction. After the car had been unloaded by the consignee and returned to the defendant, to be held by it under the custom and understanding between the parties—that is, that the car should be held by the defendant for a day or so, when the defendant had been advised that the car would be needed by an industry on its line, to be loaded with freight for shipment to some point on the plaintiff's line—our opinion is that, in such circumstances, the defendant held the car as a bailee to await the time when, in accordance with the custom or understanding existing between the plaintiff and defendant, the latter should again receive the car to transport it to the shipper on defendant's line to be loaded by the shipper. So holding it by the defendant, in accordance with the custom or understanding existing between the parties, was for the benefit of both parties, as the defendant would be paid \$2.50 by the shipper for the transportation of the freight by defendant to the plaintiff's line, and the plaintiff would receive its charges for transporting the freight over its own line. It is true that, while awaiting a shipment to be made the next day, the defendant had the exclusive possession and control of the empty car; but this fact of itself, in our opinion, did not make the defendant a common carrier as to the car while it was thus in the possession and control of the defendant, if the relation of the defendant as to the car was ever that of a common carrier. Generally, all bailees have the exclusive possession and control of the goods or property bailed; yet they are not, as a rule, for that reason, held to be insurers of the goods or property so held. Suppose, under a custom or understanding existing between the plaintiff and defendant, the latter had the right to hold an empty car of the plaintiff, after its return by the consignee, for an additional time of say 30 or 60 days, or for an indefinite time, to await an order for it from a shipper on the defendant's line, could it be reasonably contended that the defendant, during all the time it held the car for such purpose, sustained the relation of a common carrier as to it, and was therefore to be held for such time as an insurer of the car? We think not.

The fact that the car was to be held for such purpose for the short time of a day or so certainly can make no difference in principle. The car was received by the defendant from the consignee on the 9th of a given month, and the defendant was advised that a shipper on its line would need the car on the next day, to be loaded for shipment over the plaintiff's line, and the defendant intended to deliver it to the shipper for such purpose. The car, however, was destroyed by fire before the time for such delivery, without fault on the defendant's part. As we have already said, the defendant, in our opinion, was not liable in the circumstances for damages for the destruction of the car. Of course, we do not mean to hold that the mere fact that the car was stationary, or not being actually transported by the defendant, at the time it was burned, would release the defendant from liability if it were a common carrier as to the car. If the car, while being transported with freight to the consignee, or while being returned loaded or empty to the plaintiff, had been stopped in the customary way, and had been destroyed while so stopped, the defendant, if a common carrier as to the car, would have been liable as an insurer.

What was the defendant's relation as to the C., N. O. & T. P. car? On March 18, 1907, the plaintiff placed this car at the junction of the tracks of the plaintiff and defendant, loaded with flour for Carr & Co., whose place of business was on the defendant's line in Milledgeville. The car was placed by defendant at the consignee's warehouse two days thereafter, and was unloaded that day or the next, by the consignee. On March 21st it was moved empty from the consignee's warehouse by the defendant to the Oconee River Mills, a point on the defendant's line in Milledgeville, where it was loaded with meal by the Oconee Mills, consigned to Athens, Ga., and was delivered by the defendant to the Georgia Railroad, to be transported to its destination. It was so transported, unloaded, and returned empty over the Georgia Railroad to the defendant on April 7th. The defendant was holding it from the last-named date in accordance with the agreement or understanding between it and the plaintiff, and in the regular course of business, to be loaded by the Oconee River Mills with meal on April 10th, and then to be transported by the defendant over its line to the plaintiff's line, and then to be transported to its destination over the latter's line. It was damaged by fire, without fault on the part of the defendant, on April 10th, at the same time the other car was burned. If this foreign car had been damaged during the continuance of what we may term the Athens incident, the defendant's liability for such damage would have presented a different question from the one actually involved in the case. We are not

here concerned with any redress, if any, the plaintiff may have against the defendant for its unauthorized use of its car during the Athens incident. When the car came back into the possession of the defendant, the customary relations as to it were resumed, and we think that the defendant's relation to it was the same as that of the defendant to the plaintiff's own car, while this foreign car was held from the 7th to the 10th of April, to be loaded on the latter date by the Oconee Mills, and then to be returned by the defendant to the plaintiff to be transported over the latter's line.

It follows, from what we have said, that the court did not err in finding for the defendant as to both cars. In reaching our conclusion we have not failed to consider the decision made in *Peoria, etc., Ry. Co. v. Chicago, etc., Ry. Co.*, 109 Ill. 135, 50 Am. Rep. 605, which is strongly relied upon by counsel for plaintiff in error in the case at bar. In that case the defendant railroad company's principal business was switching cars for other railroad companies. Its tracks were connected with those of other railroad companies by a transfer switch, and with mills, elevators, and manufactories in and around the city where its business was transacted. The plaintiff corporation brought a car loaded with freight to the city, and placed the same on the transfer track, with orders to the defendant to ship the same to a certain distillery, to which place it was taken and unloaded, the consignees to pay the transfer charges. When unloaded it was taken by the defendant, without orders from the plaintiff, to a sugar refinery, to be loaded and then switched to the transfer track for shipment. On the same day the sugar refinery was burned, and also the car, which was standing in close proximity. No negligence as to the fire was attributed to the defendant. There was evidence tending to show that it was the common understanding among the companies doing business at this point, if other shippers desired cars, that the defendant, without any specific orders to that effect, was at liberty to place them at other places of business to be loaded, and, when loaded, they would be returned to the company owning such cars to be shipped. It was held that the defendant was liable, as a common carrier, to the plaintiff for the value of the cars so destroyed. We cannot agree to the conclusion reached by that learned court under the facts stated. Moreover, that court in two later cases (*East St. Louis Ry. Co. v. Wabash, etc., Ry. Co.*, 123 Ill. 594, 15 N. E. 45; *Peoria, etc., Ry. Co. v. United States Rolling Stock Co.*, 136 Ill. 643, 27 N. E. 59, 29 Am. St. Rep. 348) seems to us to have made rulings which in principle conflict with what was held in the former case, though the former case was not expressly overruled.

Judgment affirmed. All the Justices concur.

(133 Ga. 439)

WILSON v. STATE.

(Supreme Court of Georgia. Oct. 14, 1912.)

*(Syllabus by the Court.)***1. MASTER AND SERVANT (§ 67*)—CONTRACT FOR SERVICES—VIOLATION—ATTEMPT TO DEFRAUD—OFFENSES—STATUTES—CONSTRUCTION.**

Section 1 of the act of August 15, 1903 (Acts 1903, p. 90; Penal Code 1910, § 715), provides: "If any person shall contract with another to perform for him services of any kind, with intent to procure money or other thing of value thereby, and not to perform the service contracted for, to the loss and damage of the hirer, or, after having so contracted, shall procure from the hirer money, or other thing of value, with intent not to perform such service, to the loss and damage of the hirer, he shall be deemed a common cheat and swindler, and upon conviction shall be punished as for a misdemeanor." Section 2 of the same act (Penal Code 1910, § 716) provides: "Satisfactory proof of the contract, the procuring thereon of money or other thing of value, the failure to perform the services so contracted for, or failure to return the money so advanced with interest thereon at the time said labor was to be performed, without good and sufficient cause, and loss or damage to the hirer, shall be deemed presumptive evidence of the intent referred to in the preceding section." *Held*, section 1 is to be construed as denouncing as fraudulent practices of the character therein described, and providing for the punishment of persons violating its terms; the legislative purpose being, not to punish for a mere failure to comply with the obligation, but for the procurement of money or other thing of value with the fraudulent intent not to perform the service.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 75; Dec. Dig. § 67.*]

2. MASTER AND SERVANT (§ 67*)—VIOLATION OF CONTRACT—EVIDENCE—FRAUD—INTENT—STATUTES.

Section 2 is merely a rule of evidence.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 75; Dec. Dig. § 67.*]

3. STATUTES (§ 64*)—PARTIAL INVALIDITY—CONTRACT OF SERVICE—FRAUDULENT BREACH.

The two sections are severable, and the first may exist independently of the latter.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 58-66, 195; Dec. Dig. § 64.*]

4. CONSTITUTIONAL LAW (§ 83*)—MASTER AND SERVANT (§ 67*)—INVOLUNTARY SERVITUDE—CONTRACT OF EMPLOYMENT—ADVANCEMENT—FRAUDULENT INTENT.

Under the construction above given, no part of the legislation mentioned offends against the prohibition of the thirteenth amendment of the federal Constitution against involuntary servitude except as punishment for crime whereof the party shall have been duly convicted, or against the provisions forbidding peonage, found in Rev. St. U. S. §§ 1990, 5526 (U. S. Comp. St. 1901, pp. 1266, 3715), enacted to secure the enforcement of such amendment.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 150-151½; Dec. Dig. § 83.* Master and Servant, Cent. Dig. § 75; Dec. Dig. § 67.*]

5. CRIMINAL LAW (§ 554*)—WITNESSES (§ 83*)—COMPETENCY—PERSON CHARGED WITH CRIME—STATEMENT BY ACCUSED.

A person on trial, charged with such an offense, is incompetent as a witness; but he

may make such a statement before the jury as he desires, to which the jury may give such credit as in their opinion its truth entitles it to receive, even to the extent of believing it in preference to the sworn testimony.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1255, 1256; Dec. Dig. § 554.* Witnesses, Cent. Dig. §§ 243, 244; Dec. Dig. § 88.*]

6. MASTER AND SERVANT (§ 67*)—CONTRACT OF EMPLOYMENT—FRAUDULENT BREACH.

The fact that one on trial, charged with the offense provided for in this statute, cannot be heard to testify as a witness in his own behalf, does not affect the validity of either section of the statute.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 75; Dec. Dig. § 67.*]

7. FORMER DECISION DISTINGUISHED.

The case of *Bailey v. Alabama*, 219 U. S. 219, 31 Sup. Ct. 145, 55 L. Ed. 191, distinguished.

Certified Question from Court of Appeals.

Tim Wilson was convicted of violating the labor law, and he appealed to the Court of Appeals, by which a question was certified to the Supreme Court.

The Court of Appeals certified for decision the following:

"The plaintiff in error was convicted of a violation of the act of August 15, 1903 (Acts 1903, p. 90), codified in sections 715 and 716 of the Penal Code of 1910. The second section of said act, codified in section 716 of the Penal Code, is as follows: 'Satisfactory proof of the contract, the procuring thereon of money or other thing of value, the failure to perform the services so contracted for, or failure to return the money, so advanced with interest thereon at the time said labor was to be performed, without good and sufficient cause, and loss and damage to the hirer, shall be deemed presumptive evidence of the intent referred to' in the first section of the act, codified in section 715 of the Penal Code of 1910. The presumption raised by the second section of the act in question was used against the plaintiff in error on his trial.

"Does the legislation above referred to offend against the prohibition of the thirteenth amendment to the federal Constitution against involuntary servitude except as punishment for crime whereof the party shall have been duly convicted, and against the provision forbidding peonage, found in Rev. St. U. S. §§ 1990, 5526 (U. S. Comp. St. 1901, pp. 1266, 3715), enacted to secure the enforcement of such amendment, especially since under the laws of this state the accused cannot testify for the purpose of rebutting the statutory presumption against him thus raised?"

The caption of the act is: "An act to make it illegal for any person to procure money, or other thing of value, on a contract to perform services, with intent to defraud, and to fix punishment therefor, and for other purposes." Section 1 is: "Be it en-

acted by the General Assembly, and it is hereby enacted by authority of the same, that from and after the passage of this act, if any person shall contract with another to perform for him services of any kind with intent to procure money, or other thing of value thereby, and not to perform the service contracted for, to the loss and damage of the hirer, or, after having so contracted, shall procure from the hirer money, or other thing of value, with intent not to perform such service, to the loss and damage of the hirer, he shall be deemed a common cheat and swindler, and upon conviction shall be punished as prescribed in section 1039 of the Code." Section 2 is the same as copied in the question propounded by the Court of Appeals. The only remaining part of the act is section 3, which repeals conflicting laws.

C. H. Beazley and D. J. Ragan, for plaintiff in error. W. G. Martin, Sol., for the State.

ATKINSON, J. [1-3] The construction of a state statute is a matter for the state courts, and the federal courts will accept the construction so made by the state courts. *Cargill v. Minnesota*, 180 U. S. 452, 21 Sup. Ct. 423, 45 L. Ed. 619. Whether the statute is violative of some provision of the Constitution of the United States furnishes ground for jurisdiction in the Supreme Court of the United States. The question propounded by the Court of Appeals covers both section 715 and section 716 of the Penal Code. These two sections were codified from different sections of the act of 1903 (Acts 1903, p. 90). Section 715 provides that certain things shall constitute a misdemeanor. Section 716 provides that proof of certain things, comprehended by the preceding section, shall be deemed "presumptive evidence of the intent" therein mentioned. The first specified section deals with a substantive offense; the second deals with a rule of evidence in proving the commission of the offense. It is a well-settled rule of constitutional law that if two parts of an act, or two laws or sections of the Code in regard to the same subject-matter, are severable in character, so that one may exist and carry out the legislative intent independently of the other, the holding of one to be invalid will not necessarily result in declaring the other invalid. The two designated sections are severable, and the former can stand independently of the latter; and hence the offense declared by section 715 may exist, and that section be a constitutional and valid law, whether or not section 716 is constitutional. *Latson v. Wells*, 136 Ga. 681, 71 S. E. 1052.

[4] This court has several times construed section 715. It has uniformly been held that the offense therein declared was not for failure to perform service or pay debts, but

was for fraudulently procuring money, or other thing of value; that the fraudulent conduct of the defendant was the gist of the crime, not merely his failure to perform his contract. *Lamar v. State*, 120 Ga. 312, 47 S. E. 958; *Lamar v. Prosser*, 121 Ga. 153 (7), 48 S. E. 977; *Vinson v. State*, 124 Ga. 19 (2), 52 S. E. 79; *Townsend v. State*, 124 Ga. 69 (1), 52 S. E. 293; *Banks v. State*, 124 Ga. 15 (4), 52 S. E. 74, 2 L. R. A. (N. S.) 1007; *Sterling v. State*, 126 Ga. 92, 54 S. E. 921; *Vance v. State*, 128 Ga. 661, 57 S. E. 889; *Dyas v. State*, 126 Ga. 557, 55 S. E. 488; *Latson v. Wells*, 136 Ga. 681, 71 S. E. 1052. Substantially the same distinction is well recognized as existing between merely buying on a credit and failing to pay, and fraudulently procuring goods, which constitutes the person doing it a common cheat and swindler. In order to convict a defendant of an offense described in section 715, the defendant must not only make a contract for service and violate it, but it must be with the fraudulent intent to procure money or other thing of value thereby, and not to perform the service contracted for, to the loss and damage of the hirer; or after having so contracted, to be guilty he must procure from the hirer money, or other thing of value, with the fraudulent intent not to perform such service, to the loss and damage of the hirer. Thus it will be seen that mere breach of contract or failure to perform the service does not render the defendant guilty of the offense, but there must be added the fraudulent intent to procure money, or other thing of value, or the fraudulent procurement of it with intent not to perform the service, to the loss and damage of the hirer. It may be said that it makes no difference to the defendant whether he is imprisoned for breach of contract or for fraud. Perhaps not, but where his transaction partakes of fraud the state may condemn it. *Lamar v. Prosser*, supra. Construing as above indicated section 715 of the Penal Code, and that portion of the act from which it was codified, they are not violative of the thirteenth amendment to the Constitution of the United States (*Latson v. Wells*, 136 Ga. 681, 71 S. E. 1052), or in conflict with the provisions of the Revised Statutes of the United States, §§ 1990, 5526, forbidding peonage (*Townsend v. State*, 124 Ga. 69, 52 S. E. 293).

[5] The right of the accused to make a statement will be further mentioned while discussing the next section. It is sufficient at this time to say that the mere fact that a person accused of crime is not allowed to testify as a witness in this state does not prevent him from being convicted of crime. See *Vance v. State*, 128 Ga. 661, 57 S. E. 889. If it did, the whole Penal Code might as well be declared unconstitutional. At common law the accused could not testify, but it could not be contended that his conviction

would on that account be violative of the guarantee of due process of law contained in Magna Charta. To attempt by penal law to compel a person to render service to another involuntarily may constitute peonage; but it is not peonage for the state to punish one by compelling him to serve the state as a punishment for his crime committed by defrauding his employer of money or other thing of value. The two are as wide apart as crime and debt.

We now come to consider section 716 of the Penal Code. This provides that satisfactory proof of the contract, the procuring thereon of money, or other thing of value, the failure to perform the service so contracted for, or failure to return the money so advanced with interest thereon, at the time the labor was to be performed, without good and sufficient cause, and loss and damage to the hirer, "shall be deemed presumptive evidence of the intent referred to in the preceding section." There are many cases recognized in the law in which presumptions arise from proof of certain facts, or where proof of certain facts constitutes presumptive evidence of criminal intent. Proof of possession of stolen property shortly after the theft, if unexplained, may authorize a finding of guilty intent on the part of the possessor. Proof of the killing of a human being, without any evidence tending to show justification or mitigation, will authorize a presumption of malice. At common law, evidence that a passenger was injured by the breaking of the vehicle of the hirer, or defect in his road, was sufficient to authorize a presumption of negligence. Under statutes, proof of injury by a carrier is sometimes declared sufficient to raise a presumption of negligence. Numerous illustrations might be given where the Legislature has declared that proof of certain facts is sufficient to raise a presumption of guilty intent or like element of crime. See instances cited in *Banks v. State*, 124 Ga. 15 (5, 6), 52 S. E. 74, 2 L. R. A. (N. S.) 1007. If such legislative provisions are not "purely arbitrary, and there is a rational relation between the two facts, and the accused is not deprived of proper opportunity to submit all of the facts bearing upon the issue, it has been held that such statutes do not violate the requirements of due process of law." *Bailey v. Alabama*, 219 U. S. 238, 31 Sup. Ct. 145, 55 L. Ed. 191, and citations. See, also, *Banks v. State*, 124 Ga. 15 (5), 52 S. E. 74, 2 L. R. A. (N. S.) 1007. In the case of *Bailey v. Alabama*, supra, a law of the state of Alabama was under consideration. As it originally stood in the Code, the section provided that any person who, with intent to injure or defraud his employer, entered into a written contract for service, and thereby obtained from his employer money, or other personal property, and with like intent, and without just cause, and without refunding the money or paying for the prop-

erty, refused to perform the service, should be punished as if he had stolen it. This section was so amended as to make the refusal or failure to perform the service, or to refund the money, or pay for the property, without just cause, prima facie evidence of an intent to injure or defraud.

[8] While peonage and enforced performance of labor contracts were discussed at length, the actual ruling, as shown both by the syllabus and the opinion, was that the section of the Code of Alabama, as amended, "in so far as it makes the refusal or failure to perform labor contracted for, without refunding the money or paying for property received, prima facie evidence of the commission of the crime defined by such section, and when read in connection with the rule of evidence of that state, that the accused cannot testify in regard to uncommunicated motives, is unconstitutional as in conflict with the thirteenth amendment of the legislation authorized by it and enacted by Congress." 219 U. S. 220, 228, 245, 31 Sup. Ct. 145, 55 L. Ed. 191. There are several material differences between the law of Alabama, then under consideration, and the law of this state, as heretofore construed by this court. In the first place, the Alabama statute provided that "any person who with intent to injure or defraud his employer," etc. We do not stop to discuss whether the mere intent to injure may be different from the intent to defraud. Under that statute one-half of the fine went to the employer, thus compensating or benefiting him by convicting the accused, so that the punishment in part operated to reimburse or repay the debt of the employer and reduce his loss. The ruling did not rest entirely upon the statute, but also upon the rule of evidence that the accused could not testify in his own behalf explanatory of his uncommunicated intent. The statute of this state does not contain such a provision, and the prisoner has greater latitude in regard to proving the intent with which he acted. Under the statute of this state (Penal Code, § 716), in order to constitute "presumptive evidence of the intent," satisfactory proof of the contract, the procuring thereon of money, or other thing of value, the failure to perform the service so contracted for, or failure to return the money so advanced, with interest thereon, at the time the labor was to be performed, without good and sufficient cause, and loss or damage to the hirer, is necessary. The accused may show that there was good and sufficient cause, as well as negative the other things in that section. He cannot testify as a witness in this state (Penal Code, § 1037, par. 2); but he has the right to make to the court and jury such statement, not under oath, as he may deem proper in his defense, and, though not compelled to answer any questions on cross-examination, should he think proper to decline to do so, his statement shall have such force as the

jury may think right to give it, and "they may believe it in preference to the sworn testimony in the case." Penal Code, § 1036.

[7] In this state, therefore, the accused may state what was his real intent, may deny the evidence introduced, and explain or rebut the presumptive evidence of his intent, if it is raised under the statute. True, the jury are not obliged to believe his statement, or give it any more credit than in their opinion its truth entitles it to receive. But, for that matter, they would not be obliged to believe him if he could be sworn as a witness. His interest would go to his credit, and the jury would not be bound to credit his testimony merely because he gave it under oath. Thus it appears that the statute in this state differs in material particulars from that of Alabama, which was under consideration by the Supreme Court of the United States in the Bailey Case, and also that the rule of evidence which was read into the Alabama statute is different from the rule in this state. The variance is of such character that the ruling in the case cited could not be properly applied as authority for holding section 716 of the Penal Code of Georgia invalid. This statute has heretofore been held not to be violative of the thirteenth amendment of the Constitution of the United States, nor invalid as being in conflict with sections 1990, 5526, of the Revised Statutes, forbidding peonage. *Townsend v. State*, 124 Ga. 69, 52 S. E. 293. In that case no separate attack was made on section 2 of the act (which is Penal Code, § 716), but the attack was on the act in its entirety, which included section 2.

Having already held that section 715 was not invalid, and now holding that section 716 is not invalid, the two rulings together answer in the negative the question propounded by the Court of Appeals. All the Justices concur.

(138 Ga. 539)

MOSS v. STRICKLAND.

(Supreme Court of Georgia. Aug. 16, 1912.)

(Syllabus by the Court.)

1. ATTORNEY AND CLIENT (§ 192*)—PROCESS (§ 20*)—LIEN FORECLOSURE—NATURE OF PROCEEDING—ISSUANCE.

An attorney's lien is foreclosed by petition and rule issued by the court as in cases of mortgage foreclosure on land. Where a petition to foreclose an attorney's lien on land, wherein it is alleged that the defendant is a resident of another county, is filed, and, instead of a rule being issued thereon in terms of the statute by the court, process is attached by the clerk, directed to all and singular the sheriffs of this state, commanding the appearance of the defendant at the next term, which petition and process are personally served on the defendant by the sheriff of the county of the defendant's residence, such process is void, because issued by one unauthorized to issue it. A judgment at a subsequent term, based on

such process, where there is neither appearance nor waiver of process, is void.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 425-427; Dec. Dig. § 192; Process, Dec. Dig. § 20.*]

2. VENUE (§ 5*)—ATTORNEY'S LIEN—FORECLOSURE.

A proceeding to foreclose an attorney's lien upon real property is to be brought as a proceeding to foreclose a mortgage on land, and the venue of such proceeding is the county wherein the land lies. It is not such a civil case as must be brought in the county of the defendant's residence.

[Ed. Note.—For other cases, see Venue, Cent. Dig. §§ 4-11; Dec. Dig. § 5.*]

Error from Superior Court, Rabun County; J. B. Jones, Judge.

Petition by J. J. Strickland against R. L. Moss and others to foreclose an attorney's lien on certain land. Judgement for petitioner, and defendant Moss brings error. Reversed.

T. S. Mell, of Athens, for plaintiff in error. H. H. Dean, of Gainesville, and Cobb & Erwin, of Athens, for defendant in error.

EVANS, P. J. J. J. Strickland filed a petition in the superior court of Rabun county to foreclose his lien as an attorney at law upon a tract of land in that county. In his petition he alleged, *inter alia*, that he was employed as an attorney at law by R. L. Moss and A. K. Childs to recover the land. That the suit was successful, that he recorded his lien as provided by the statute, that A. K. Childs had died, and that W. L. Childs and D. C. Barrow had been appointed his executors. The prayer was for the foreclosure of the lien, and for process against Moss and the executors of Childs, alleged to be residents of Clarke county. Process was issued by the clerk, and the defendants were personally served with copies of the suit. A judgment was entered foreclosing the lien, and *fi. fa.* issued thereon. To the levy of the *fi. fa.* Moss, one of the defendants, interposed an affidavit of illegality. This was dismissed on demurrer, and Moss excepted.

[1] 1. The affidavit of illegality attacks the validity of the judgment, on the ground that the process was void, and that the defendants neither appeared nor otherwise waived process. Jurisdiction is dependent on the form and nature of the process, to the extent that it can only arise from a proper service of a notice substantially sufficient to apprise the party of everything which he is then entitled to know. 1 Black on Judgments, § 223. If the process attached is in substantial compliance with the law, and the defendant is properly served, the failure to literally comply with the statute will be treated as an irregularity, and a judgment rendered on such process and service will not be void. Civil Code, § 5572. But a process issued by any other person than one qualified to issue it cannot be the foundation of a valid judgment. *Stephenson v. Campbell*, 30

Ga. 159. So, also, if the process be not in substantial conformity to the statutes relating to the issuance of process, such defect will vitiate the whole proceeding, and is not a mere irregularity. *Little v. Ingram*, 16 Ga. 194. Let us apply these principles to the case in hand. The petition was filed to the February term, 1908, of the superior court of Rabun county, to foreclose an attorney's lien against land located in that county, owned by the defendants, who were alleged to be residents of Clarke county. The petition prayed for process, and the clerk issued process in the usual form, directed to all and singular the sheriffs of the state, requiring defendants to appear at the ensuing February term. The petition and process were served personally on the defendants by the sheriff of Clarke county, sixteen days before the February term. There was no appearance for the defendants, and judgment was rendered at the next August term of the court, foreclosing the lien of the attorney against the land.

[2] A proceeding to foreclose an attorney's lien upon real property is to be brought as is a proceeding to foreclose a mortgage upon land. Civil Code, § 3364, par. 3; *McCalla v. Nichols*, 102 Ga. 28, 28 S. E. 988. Statutory foreclosure of a mortgage on land is by petition to the superior court of the county wherein the land lies. Upon filing the petition the court shall grant a rule directing the amount due on the mortgage to be paid into court on or before the first day of the next term immediately succeeding the one at which such rule is granted, which rule must be published once a month for four months, or served personally on the mortgagor, his special agent, or attorney, at least three months previous to the time at which the money is directed to be paid into court. Civil Code, § 3276. In proceedings to foreclose an attorney's lien, the process is a rule nisi issued by the court, and not a process issued by the clerk as in ordinary cases. The clerk was without authority to issue the process he issued in this case. In the first place, the statute prescribes that the defendant is to be brought into court by a process issued by the judge. That process is essentially different from the process which the clerk is authorized to attach to petitions. It issues in term time, and the defendant is directed to pay the money into court on or before the first day of the succeeding term, and must be served by publication once a month for four months, or by personal service at least three months before that time. The ordinary process which a clerk is authorized to attach to a petition is one directed to the sheriff, requiring the appearance of the defendant to the return or appearance term of the court (Civil Code, § 5552), at which term the defendant may demur or plead, and final judgment on the merits is taken at the next term. Then, again, the process issued by the clerk

is directed to the sheriff of the county where the suit is pending (Civil Code, § 5552), except in cases where the law provides for the service of the process on a defendant who resides in a different county, by the issuance of a second original, and in this instance the process is directed to the sheriff of the county of the nonresident defendant. Civil Code, § 5587; *Powell v. Perry*, 63 Ga. 417. The process issued by the clerk in this case is void, because there existed no authority for him to issue it. A void process is equivalent to no process; and, where process has not been waived, the failure to annex process to the petition is fatal to the jurisdiction of the court in the cause, and no valid judgment can be made therein. *Brady v. Hardeman*, 17 Ga. 67.

2. The other ground of the affidavit of illegality assails the constitutionality of the statute providing for the foreclosure of attorney's liens. The Constitution of this state declares that divorce cases shall be brought in the county where the defendant resides, if a resident of this state; that equity cases shall be tried in the county of the residence of a defendant against whom substantial relief is prayed; suits against joint obligors or joint trespassers residing in different counties may be tried in either county; suits against the maker and indorser of promissory notes, or drawer, acceptor, and indorser of bills of exchange, residing in different counties, shall be brought in the county where the maker or acceptor resides; cases respecting the title to land shall be tried in the county where the land lies. Civil Code, §§ 6538, 6539, 6540, 6542. It is further declared that "all other civil cases shall be tried in the county where the defendant resides." Civil Code, § 6543. The point is made that paragraph 3 of Civil Code, § 3364, which prescribes that attorney's liens may be enforced as liens on personal and real estate, by mortgage and foreclosure, contravenes the foregoing provisions of the Constitution relating to the venue of actions, in that it permits a foreclosure of an attorney's lien on land in the county where the land lies, irrespective of the residence of the owner against whose land the lien foreclosure is had. This statute prescribes that an attorney's lien on land shall be foreclosed as a mortgage on land, and that the venue of such proceeding is the county wherein the land lies. *McCalla v. Nichols*, supra. Is the statute opposed to the Constitution? It will be observed that in all the specific actions for which a venue is fixed a personal judgment may be recovered. If an action for land be instituted, there may be a recovery of mesne profits. In divorce cases, alimony may be recovered. The constitutional scheme seems to be that the venue of every action not respecting title to land, wherein a personal judgment may be recovered, shall be the county of the

residence of the defendant in the action, or, if there be more than one, then in the county of one of them. The general provision that all other civil cases shall be tried in the county where the defendant resides comprehends cases of like character; that is, cases in which a judgment in personam may be recovered.

This construction is inevitable from the application of the rule of *ejusdem generis*, as well as from the clear import of the words themselves in the connection in which they are employed. None of these constitutional mandates as to the venue prevent the General Assembly from fixing the venue of a proceeding to foreclose an attorney's lien. A proceeding to foreclose an attorney's lien is not an action within the purview of these constitutional requirements. It is a proceeding to enforce a lien arising by operation of law. It is not an action in personam, because no personal judgment is recovered. Strictly speaking, it is not an action in rem, because it does not adjudicate that the title is in the attorney's client as against persons not parties to the suit wherein the recovery is had. *Stroupper v. McCauly*, 45 Ga. 74. It may be characterized as a proceeding quasi in rem, having for its purpose the adjudication of the amount due and the existence of the lien, and that the property subject to the lien shall be sold to pay the sum alleged to be due. The judgment does not conclude a stranger as to subsequently asserting title to the property; but it binds parties and privies. *Wallace v. Holly*, 13 Ga. 393, 58 Am. Dec. 518. A possessory warrant may be had in any county where the property to be recovered is found; and this is not such a civil case as must be brought in the county of the residence of the defendant. *Jordan v. Owens*, 87 Ga. 616. Notwithstanding the Constitutions of 1861 and 1868 contain similar provisions as the present Constitution, no one has ever questioned the constitutionality of the statutory method of foreclosing mortgages on realty by a procedure in the county where the land lies. Since the judiciary act of 1799, it has been provided by statute that a proceeding to partition land may be located in the county where the land is situated; and the constitutionality of this statute has never been assailed. These instances are marshaled for the purpose of showing the contemporaneous construction of the Constitution and long acquiescence therein—that these kinds of proceedings were never considered as coming within the operation of the constitutional provisions respecting the venue of actions. The enumeration of instances in the Constitution is not exhaustive of the venue in every legal proceeding, and the statute assailed does not clash with the constitutional provisions for the venue of actions.

Judgment reversed. All the Justices concur.

(128 Ga. 537;

HOWARD v. CENTRAL OF GEORGIA RY. CO.

(Supreme Court of Georgia. Aug. 16, 1912.)

(Syllabus by the Court.)

1. MASTER AND SERVANT (§ 150*)—NEGLIGENCE—FAILURE TO INSTRUCT.

"The failure of the master to instruct the servant how to perform work which any person of ordinary intelligence can perform without instructions, and the performance of which is unattended by extraordinary hazard or danger, is not such a breach of his duty to instruct as will give a servant injured while performing the work a right of action for damages."

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 297, 299-301, 305-307; Dec. Dig. § 150.*]

2. MASTER AND SERVANT (§ 150*)—MASTER'S DUTY TO WARN—PERFORMANCE OF SERVICE—IMPROPER METHOD.

The duty of a master to warn his servant of dangers incident to his employment does not embrace an obligation of the master to anticipate that the servant may perform his task improperly, and to warn him of an obvious danger resultant from such improper method of performing his task.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 297, 299-301, 305-307; Dec. Dig. § 150.*]

3. MASTER AND SERVANT (§ 219*)—ASSUMED RISK.

Obvious risks incident to an employment are assumed by the servant in his contract of employment.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 610-624; Dec. Dig. § 219.*]

Error from Superior Court, Bibb County; W. H. Felton, Judge.

Action by Henry Howard against the Central of Georgia Railway Company. Judgment for defendant, and plaintiff brings error. Affirmed.

Robt. L. Berner, of Macon, for plaintiff in error. Ellis & Jordan, of Macon, for defendant in error.

EVANS, P. J. The plaintiff's petition was dismissed on general demurrer. He alleged as follows: He was employed by the Central of Georgia Railway Company as a helper in its machine shops at Macon, and it was his duty to do anything in the shop that he was told to do by any one. Among other duties that he was required to perform was to assist in the management of what is known as the boring machine. "A part of said machine was made of a chain, with a hook attached to the end thereof, and said hook was used for the purpose of hooking to said chain a large iron weight, 150 pounds or more, and which was used for the purpose of balancing the machinery connected with said boring machine. When this weight was lifted off by the derrick or other machinery to a certain height, it became the duty of petitioner, in connection with another employé of the defendant company.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

to lift the iron weight and unhook it from the chain and rehook it in a lower link of said chain." Prior to his employment he had never worked in a machine shop, and on the day he was injured he was called for the first time to perform this task. He was ignorant of how it was to be done, and no one informed him how to do it; but he was called upon by the employé in charge of the chain and weight to assist him at once, without being warned of any danger connected with the performance of the undertaking. His coemployé in charge of the machine had raised the weight to a height about even with his shoulders, when he was called upon immediately to take it off the hook and rehook it in a link of the chain lower down. Under the instructions of his coemployé, who had charge of and was operating the machine, he lifted it off without any knowledge of its weight, or that there was any danger attached to the removal of the weight at that height. Immediately upon detaching the weight from the hook, it fell and struck him on his right side, inflicting certain injuries. He alleged that it was the duty of his boss to assist him in this work, who failed to do so, and, acting under the instructions of the "boss employé," he undertook to perform it himself; that it was the duty of the defendant to have instructed him how to perform his task, and to warn him of the danger of attempting to lift so great a weight at that height, and to have had some one to assist him in taking the weight off of the hook; and that the defendant was negligent in failing to discharge these duties.

[1] The plaintiff was a green hand, but he does not pretend that he was not endowed with ordinary intelligence. It would be ridiculous to assert that a man of ordinary intelligence, in order to unhook a weight from one link in a chain to another, should be instructed as to the process. Nor does it appear that such performance would be attended by any extraordinary hazard or danger. Indeed, the statement in the petition that the weight was raised above the usual height carries the explanation of the cause of the accident. "The failure of the master to instruct the servant how to perform work which any person of ordinary intelligence can perform without instructions, and the performance of which is unattended by extraordinary hazard or danger, is not such a breach of his duty to instruct as will give a servant injured while performing the work a right of action for damages." *Sims v. E. & W. Railroad Co.*, 84 Ga. 152, 10 S. E. 543, 20 Am. St. Rep. 352. The plaintiff's charge that the master was negligent "in failing to warn him of the danger connected with the performance of the task when he undertook to take the weight off of the hook, when it was at an improper height,

and when it was not even with his breast, so that when it was taken off it would not drop upon his person, as it did in the present instance," carries its own refutation in the statement. If the weight was at an improper height, the servant should not have attempted to take it off the hook. The danger of such attempt would be obvious.

[2] It is the duty of a master to warn his servant of danger incident to his employment. This obligation of duty does not require a master to anticipate that his servant may improperly perform his task in a particular manner, and warn him of an obvious danger resultant from such improper method of performing his task. *Commercial Guano Co. v. Neather*, 114 Ga. 416, 40 S. E. 299; *Banks v. Schofield*, 126 Ga. 667, 55 S. E. 939.

[3] With respect to the charge of negligence in not having some one present to assist him in the performance of his task, the plaintiff knew this, and in undertaking to work alone he assumed the danger of such an obvious risk. The petition was properly held bad on demurrer.

Judgment affirmed. All the Justices concur.

(128 Ga. 544)

KIRBY v. THOMPSON.

(Supreme Court of Georgia. Aug. 16, 1912.)

(Syllabus by the Court.)

1. ASSAULT AND BATTERY (§ 40*)—JUSTIFICATION—DAMAGES.

Where an action was brought to recover damages for an assault and battery, and a plea of justification was filed, under the ruling in *Conley v. Arnold*, 93 Ga. 823, 20 S. E. 762, a verdict in favor of the plaintiff for only \$5 was contrary to law, and should have been set aside on a motion for a new trial made by him.

[Ed. Note.—For other cases, see *Assault and Battery*, Cent. Dig. § 55; Dec. Dig. § 40.*]

2. EVIDENCE (§ 116*)—EVIDENCE ADMISSIBLE BY REASON OF THE ADMISSION OF OTHER EVIDENCE.

Upon the trial of an action to recover damages for an assault and battery, it might not have been proper for the defendant to introduce evidence that he had been tried and convicted in a mayor's court for the offense against the municipal law growing out of his conduct in the transaction, and had paid his fine; but where the plaintiff introduced evidence of the conviction, and imposition of the fine, and the amount thereof, it would not cause a new trial at his instance that the defendant was permitted to testify that he paid the fine so imposed.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 134, 135; Dec. Dig. § 116.*]

3. MOTION FOR NEW TRIAL—GROUNDS.

The other grounds of the motion for a new trial do not require a reversal.

Error from Superior Court, Douglas County; Price Edwards, Judge.

Action for assault and battery between J. Kirby and R. A. Thompson. Verdict for plaintiff for less than the relief demanded, and he brings error. Reversed.

J. S. James, of Atlanta, for plaintiff in error. W. T. Roberts and J. R. Hutcheson, both of Douglasville, for defendant in error.

LUMPKIN, J. Judgment reversed. All the Justices concur.

(138 Ga. 534)

SIMMONS v. DE FOE.

(Supreme Court of Georgia. Aug. 16, 1912.)

(Syllabus by the Court.)

EXECUTORS AND ADMINISTRATORS (§ 338*)—REAL PROPERTY—LEAVE TO SELL—RIGHTS OF HUSBAND OF INTESTATE'S WIDOW.

An administrator applied for leave to sell land of his intestate. Pending the application a claim was interposed and returned to the superior court. On the trial the undisputed evidence showed that the intestate purchased the land in controversy, gave to his vendor a series of notes for the purchase price, took from him a bond for title, went into possession, thereafter paid some of the notes, and died in possession of the land, leaving a widow, who, with two minor grandchildren, continued to reside on the premises. It further showed that, some two years after the death of the intestate, the claimant married his widow and occupied the premises with her for some five years prior to the trial. The claimant, who was the only witness in his behalf, testified that "I married his [intestate's] widow about two years after his death, and moved into the house by reason of becoming her husband, and that was the only reason for going into possession of the property at that time." *Held*, that under such evidence the trial judge erred in granting a "nonsuit" against the administrator, on the ground that he had "failed to carry the burden, it appearing from the testimony that the claimant * * * is in possession of the property in dispute."

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 1410-1416; Dec. Dig. § 338.*]

Error from Superior Court, Fulton County; Geo. L. Bell, Judge.

Proceeding by C. J. Simmons, as administrator, etc., for the sale of certain land, to which Thomas De Foe filed objections. From an order granting a nonsuit, the administrator brings error. Reversed.

Simmons & Simmons, of Atlanta, for plaintiff in error. Virlyn B. Moore, of Atlanta, for defendant in error.

FISH, C. J. Judgment reversed. All the Justices concur.

(138 Ga. 515)

BANDY BROS. v. NORTON FRIERSON'S SONS (two cases).

(Supreme Court of Georgia. Aug. 15, 1912.)

(Syllabus by the Court.)

1. APPEAL AND ERROR (§§ 102, 105*)—INTERLOCUTORY PROCEEDINGS—WRIT OF ERROR—SUBSEQUENT TRIAL—EFFECT.

Where a suit was commenced by attachment, and after levy the property seized was replevied by the defendants, but subsequently the attachment was dismissed on motion, and thereupon the defendants made a motion to dis-

miss the declaration in attachment, and also filed a demurrer thereto containing general grounds, upon the overruling of the motion to dismiss and of the demurrer, the defendants could bring the case to the Supreme Court by bill of exceptions; and the writ of error was not subject to be dismissed on the ground that after the rulings thus complained of were made the case proceeded to trial, a verdict was rendered against the defendants, and they made a motion for a new trial, which was pending when the bill of exceptions was tendered.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 688-698, 717-723; Dec. Dig. §§ 102, 105.*]

2. CONTRACTS (§ 332*)—DECLARATION—SUFFICIENCY.

The declaration in attachment was not subject to general demurrer.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 1615-1639; Dec. Dig. § 332.*]

3. APPEAL AND ERROR (§ 843*)—MOOT QUESTIONS.

The question of whether, after the issuance of an attachment and the replevying of the property seized under the writ, the declaration in attachment could include an effort to foreclose a materialman's and contractor's lien on realty, was rendered merely academic by the action of the court in directing the jury that, under the evidence, no such foreclosure could be had, and limiting their consideration to the question of whether or not the plaintiffs were entitled to recover a general judgment against the defendants. However ruled, this point would not require a reversal under the facts of the case.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3331-3342; Dec. Dig. § 843.*]

4. DEMURRER—MOTION TO DISMISS—GROUNDS.

None of the other grounds of the demurrer or motion to dismiss the declaration in attachment require a reversal.

5. APPEAL AND ERROR (§ 273*)—ADMISSION OF EVIDENCE—EXCEPTIONS—SUFFICIENCY.

In some instances exceptions were taken to the admission of evidence, without showing that any objection was made when the evidence was offered, or what such objections were. Such grounds raise no question for determination by this court.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 1620-1630, 1764; Dec. Dig. § 273.*]

6. APPEAL AND ERROR (§ 1064*)—TRIAL (§ 296*)—INSTRUCTIONS—ERROR CURED BY OTHER INSTRUCTIONS.

The presiding judge having charged that, if the contract was an entire one, it was necessary for the plaintiffs to show a substantial compliance therewith in order to recover a verdict, there was no error against the defendants in charging that, if the work as delivered to them was not in substantial compliance with the contract, they could have declined to have received it, and have held the plaintiffs in damages for any loss which could have been traced naturally to the breach, and of which it was the proximate cause, and which was avowedly or naturally within the contemplation of the parties, or that they could have taken the work as delivered, supplied the defects, if any, and collected the costs thereof from the plaintiffs, or that they could have taken the work as delivered, and have deducted from the payment to the plaintiffs the cost of that portion which did not meet the conditions prescribed by the contract.

(a) Nor was there error as against the defendants in charging that if avowedly, or by their conduct, they received the work (includ-

ing material) and kept it and used it, they could not be heard to contend that they could hold and enjoy the results and withhold payment, and that if they received and enjoyed the work, and on discovering defects called the attention of the plaintiffs to them, and such defects were remedied by the plaintiffs, and the work kept after such correction was made, the defendants could not then complain of the defects so remedied.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4219, 4221-4224; Dec. Dig. § 1064;* Trial, Cent. Dig. §§ 705-713, 715, 716, 718; Dec. Dig. § 296.*]

7. CONTRACTS (§ 290*)—PERFORMANCE OF WORK—INSPECTION—WAIVER.

Where a contract for installing electrical appliances in a theater provided that a final test should be made by the contractors at least six days before the opening of the theater, in the presence of the architect, the owners, and the inspector "having jurisdiction," and that notice should be given in writing by the contractors to each of such parties, if time was of the essence of such contract, yet if the persons having the work done, knowing that no inspection had been made as required, received and used the work without protest or objection, they would be held to have waived the requirement as to the time of the test.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 1317; Dec. Dig. § 290.*]

8. GROUNDS OF NEW TRIAL—REVERSAL.

None of the other grounds of the motion for a new trial were such as to require a reversal.

Error from Superior Court, Chatham County; W. G. Charlton, Judge.

Action by Norton Frierson's Sons against Bandy Bros. Judgment for plaintiffs, and defendants bring error. Affirmed.

Oliver & Oliver, of Savannah, for plaintiffs in error. Anderson, Cann & Cann, of Savannah, for defendants in error.

LUMPKIN, J. Norton Frierson's Sons sued out an attachment against Bandy Bros. for \$1,165.69 principal, besides interest, alleged to be due for the price of certain materials and for services performed. At the first term the plaintiffs filed a declaration in attachment, alleging in substance as follows: About May 1, 1910, the plaintiffs contracted with the defendants, as owners, to furnish the material and do the work of wiring and otherwise equipping with electrical appliances a theater located on a described lot in the city of Savannah, and thereby to improve the real estate and improvements erected thereon. The contract price was \$1,540. The plaintiffs complied with the contract and completely performed their duties thereunder, and thereupon filed and had recorded a claim of lien, as contractors and materialmen, upon the land and improvements. In addition to the amount already named, the defendants are indebted to the plaintiffs for supplies and materials furnished for the improvement of the real estate described, to the amount of \$215.69. The defendants are entitled to credits for the amount of \$590, leaving a balance of \$1,165.69, besides interest.

(A bill of particulars was attached to the declaration.) On September 27, 1910, plaintiffs sued out an attachment to enforce the collection of the indebtedness, and it was levied on certain described personal property. The defendants replevied the property. The plaintiffs prayed that they might have a general judgment for the amount of the indebtedness, a special judgment as against the property levied on under the attachment, and a judgment foreclosing their lien and declaring a special lien upon the real estate described. The defendants made a motion to dismiss the attachment, which was granted. They also moved to dismiss the declaration, and filed a demurrer thereto. The motion and demurrer were overruled, and the defendants excepted. After this the case proceeded to trial. Under the evidence and charge of the court, the jury found a general verdict for the amount claimed in the declaration, and without any foreclosure of lien. The defendants moved for a new trial, which was denied, and they excepted.

[1] 1. A motion was made to dismiss the writ of error in the first case, on the ground that the case was still pending in the trial court when the bill of exceptions was tendered and signed. Section 6138 of the Civil Code declares: "No cause shall be carried to the Supreme Court upon any bill of exceptions, so long as the same is pending in the court below, unless the decision or judgment complained of, if it had been rendered as claimed by the plaintiff in error, would have been a final disposition of the cause, or final as to some material party thereto." From this it will be seen that, in regard to ordinary bills of exceptions, the general rule is that the case cannot be brought to the Supreme Court so long as it is pending in the trial court; but this is subject to the exception that it can be so brought if the decision or judgment complained of would have been a final disposition of the cause, or final as to some material party thereto, if it had been rendered as the plaintiff in error claims that it should have been. After the attachment had been dismissed, a motion to dismiss the declaration and a general demurrer thereto were filed. Had this motion or demurrer been sustained, the result would have been a final disposition of the cause; hence overruling them furnished a basis for bringing the case to this court by bill of exceptions, and the writ of error was not subject to be dismissed on the ground that the case was still pending in the court below. Had the writ of error been predicated upon rulings made in regard to evidence, charges, or the verdict, and it had appeared that a motion for a new trial was still pending, the case would have been very different. If a general demurrer or motion to dismiss a case is overruled, and the ruling is brought by bill of exceptions to this court, this does not per-

se operate as a supersedeas; but the case may proceed to trial in the court below, subject to the ruling which may be made in this court. *Montgomery v. King*, 125 Ga. 388, 54 S. E. 135. The motion to dismiss the writ of error is overruled.

[2-4] 2-4. The two cases were argued together. In the first bill of exceptions error was assigned upon the refusal to dismiss the declaration in attachment, and upon the overruling of the demurrer thereto. Certain property had been levied on under the attachment, and had been replevied. There was enough in the declaration to authorize the recovery of a general judgment, at least. Whether the effort to foreclose a materialman's and contractor's lien could be joined in the declaration became a purely academic question, under the rulings of the presiding judge during the trial. By his charge he eliminated from the consideration of the jury every question except whether the plaintiffs were entitled to recover a general judgment against the defendants. It is useless, therefore, to deal at length with questions which thus played no real part in the trial, and could have no effect upon the final result. Under the facts of the case, without discussing its merits, the point stated will not require a reversal. Nor are the other grounds of the motion and demurrer such as to furnish cause for reversal.

[5] 5. The second bill of exceptions assigned error on the overruling of a motion for a new trial. Some of the grounds practically sought to raise the same points which have been considered in connection with the motion to dismiss and the general demurrer. What we have said in regard to them disposes of such grounds. In several instances exceptions were taken to the admission of evidence, without showing that any objection was made to it when offered, or what such objection was. These grounds raised no question for determination by this court.

[6] 6. The presiding judge charged as follows: "These courses were open to the defendants, if they considered the contract had not been complied with substantially: If the work as delivered to them was not in substantial compliance with the contract, they could have declined to have received it, and held the plaintiffs in damages for any loss which could have been traced naturally to the breach, and of which the breach was the proximate cause, and which was avowedly or naturally within the contemplation of the parties. Again, they could have taken the work as delivered, and themselves supplied the defects, if any, and charged the cost, and collected it from the plaintiffs; or they could have taken the work as delivered, and deducted from the payment to the plaintiffs the cost of that portion which did not meet the conditions prescribed by the contract." And also: "If avowedly, or by their conduct, they received the work (and

by this term I include material), and kept it and used it, then they cannot be heard to contend that they can hold and enjoy the material and the work—the result—and withhold the pay. If they received and enjoyed the work, and on discovering defects called the attention of the plaintiffs to them, and they were remedied by the plaintiffs, and the work kept after being remedied, the defendants cannot now complain of the defects so remedied." In the same connection he charged that it was necessary for the plaintiffs to show that they had substantially complied with their contract. We do not see how these charges constituted error harmful to the defendants. Having stated that substantial compliance on the part of the plaintiffs was necessary, the judge then stated certain courses which were open to the defendants, if they did not believe that the plaintiffs had so complied. It was urged that these charges removed from the jury all circumstances which may have compelled the defendants at that time to accept and use the plaintiffs' work and material without a waiver on their part of such defect. It appeared that it was necessary to hurry the work in order to get it done so that the theater might be opened; but the fact that time was pressing, and that for this reason the defendants might be willing to accept the work and use the electrical equipment installed by the plaintiffs, instead of rejecting them, would not authorize such an acceptance and use, reserving the right to entirely refuse payment. If there were defects or deficiencies not waived by them, they might have a reduction on that account. But they could not get the benefit of the plaintiff's work and material for nothing, because they were hurried in an effort to open the theater for entertainments. See *Harden v. Lang*, 110 Ga. 392, 36 S. E. 100.

[7] 7. The judge charged: "But I charge you that, even if time was of the essence of this contract, as it was originally written and understood, if the defendants, knowing that no inspection had been made as required, received and used the work of the plaintiffs, without protest, they would be held to waive that requirement as to the time of the test being imperative." The contract provided that a final test should be made by the contractors at least six days before the opening of the theater, in the presence of the architect, the owners, and "inspector having jurisdiction," and that notice must be given in writing by the contractors to each of these parties. There was evidence which tended to show that such inspection was not made before the opening of the theater, but that the work was somewhat hurried in order to be completed in time for the theatrical performance, and that the defendants received the work without requiring any such inspection or making any protest on account of its omission. There

was no error in the charge on this subject. 29 Am. & Eng. Enc. Law, 1104.

[8] 8. None of the other grounds of the motion for a new trial were such as to require a reversal. In one or two instances there may have been slight inaccuracies in the charge; but, in view of the verdict, they were evidently harmless. The presiding judge also eliminated from the consideration of the jury the effort to foreclose the lien and to obtain a special judgment against the property attached, and confined them to the question of whether or not the plaintiffs were entitled to a general judgment, and, if so, for what amount. This ruling he based upon the evidence. As the question was brought to this court by two bills of exceptions, one complaining of rulings in regard to the declaration in attachment, and the other complaining of the overruling of the motion for a new trial, we have dealt with the entire subject; but it appeared in fact that finally nothing was left to the jury but to determine whether the plaintiffs were entitled to a common-law judgment. This issue was determined in favor of the plaintiffs. The evidence authorized the finding, and we see no reason to disturb it.

Judgment affirmed in both cases. All the Justices concur.

(128 Ga. 499)

MIZE et al. v. BANK OF WHIGHAM.
(Supreme Court of Georgia. Aug. 15, 1912.)

(Syllabus by the Court.)

1. PLEADING (§ 225*)—AMENDMENT—AFFIDAVIT.

In a statutory partition proceeding, it was erroneous, at the first term, after argument upon a demurrer to the defendant's answer, and after the judge had announced his determination to sustain the demurrer to certain paragraphs of the answer, but before any order to that effect was taken, to disallow an appropriate amendment to the answer, on the ground that it was not attended by an affidavit in accordance with the provisions of Civil Code, § 5640.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 575-582; Dec. Dig. § 225.*]

2. PARTITION (§ 26*)—RIGHT TO RELIEF—DEFENSES.

The answer as so amended would have set up a valid defense to the petition for partition.

[Ed. Note.—For other cases, see Partition, Cent. Dig. §§ 68-71, 75; Dec. Dig. § 26.*]

3. PLEADING (§ 8*)—FRAUD—NOTICE—CONCLUSIONS.

The allegations of the answer, relied upon as charging notice to the plaintiff of the defendant's equities, were insufficient.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 12-28½; Dec. Dig. § 8.*]

Error from Superior Court, Decatur County: Frank Park, Judge.

Statutory partition proceeding by the Bank of Whigham against F. A. Mize and another. Decree for complainant, and defendants bring error. Reversed.

The Bank of Whigham, a corporation, instituted proceedings against F. A. Mize individually, and G. W. White, as custodian in bankruptcy of Oliver & Mize (a firm of which F. A. Mize was a member), for the partition of certain described land. It was alleged that F. A. Mize and petitioner were tenants in common of the land, as evidenced by deeds from F. A. Mize to A. D. Oliver, and from A. D. Oliver to plaintiff. White, as trustee in bankruptcy of the firm of Oliver & Mize, was custodian of the interest in the land belonging to Mize, and, owing to the peculiar character of the land, it was incapable of division in kind. The prayer was for partition, and to that end that a sale of the property be had and the proceeds divided. Mize answered, denying that plaintiff was a cotenant, and as such entitled to the relief prayed, and by paragraphs setting up the following:

"(3) The defendant admits that he made and executed a deed to A. D. Oliver to the property in controversy, and that A. D. Oliver made and executed a deed to the same property to the Bank of Whigham, the plaintiff in this case; and this defendant says that the deed into the said Oliver is void, and does not convey title to him, and, further, that the deed from Oliver to the Bank of Whigham is void, and does not convey title into the said bank, for the following reasons:

"(4) The said A. D. Oliver was the manager and proprietor of a private bank in the town of Climax, known as the Bank of Climax.

"(5) The said Oliver approached this defendant and negotiated with him for the sale of the property in controversy, and the defendant did finally agree with the said Oliver for the sale of the said property for the sum of \$14,325.

"(6) Defendant had a deposit account in Oliver's bank, and Oliver delivered to defendant a check on his bank in payment for said property, and the defendant deposited it in the said bank; it being distinctly understood between this defendant and the said Oliver that they were jointly to improve the said property.

"(7) On the same day this defendant made and executed his deed to Oliver, the said Oliver, being largely indebted to the Bank of Whigham, made a deed to said bank as security for his debt to said bank.

"(8) Though the deed was absolute upon its face, it was in fact only executed as security for the debt, and the bank gave the said Oliver a paper to this effect.

"(9) At the time Oliver delivered his check to the defendant he did not have the money in said bank to pay the same, which was unknown to this defendant, and Oliver, at the time he delivered the check and thereafter, had no intention whatever to pay this

defendant for said property, but it was a 'skin game' pure and simple.

"(10) About a week after the execution of the said deed, Oliver tried to escape from Climax, but was arrested and held in custody, and it was learned that he was an escaped convict from the state of Mississippi.

"(11) At the time the Bank of Whigham received the said deed from Oliver, it knew or had reasonable cause to believe that the title in fact was not into Oliver, but that it was his intention to defraud this defendant of his property.

"(12) This defendant says that the facts herein stated show that the title into Oliver and into the Bank of Whigham is void as to the defendant; and the defendant prays that both of said deeds be set aside, and that the prayer of the Bank of Whigham be not granted.

"(13) The defendant denies the fourth and fifth paragraphs of plaintiff's petition, except as herein stated."

A demurrer was filed to the answer as a whole, on the ground that it failed to set forth any reason why the prayer for partition should not be granted, and to each separate paragraph of the answer on various grounds. The court sustained the demurrer to paragraphs 3, 6, 9, 10, 11, and 12. Time was allowed to amend; but, no amendment being offered, these paragraphs were stricken. The next day, and before any order was taken, the defendant offered an amendment, but on objection the proposed amendment was disallowed, and the entire plea stricken, after which final judgment was rendered in accordance with the prayer. The defendant excepted, assigning error on each of the rulings stated.

The grounds of demurrer that were sustained were: (a) To the third paragraph, on the ground that it failed to show any reason why the deed from Mize to Oliver was void, or why the deed from Oliver to the Bank of Whigham was void, or why title was not conveyed thereby; (b) to the sixth paragraph, because it was irrelevant, and did not show any notice to the Bank of Whigham of any agreement between Oliver and Mize to improve the property, and did not show that the Bank of Whigham would not have improved it, and was an attempt to vary a deed by parol agreement made prior to the execution thereof; (c) to the ninth paragraph, on the grounds that it was irrelevant, and that it did not show notice to the Bank of Whigham; (d) to the tenth paragraph, on the grounds that it was irrelevant, and that it showed no reason why the petition should not be granted; (e) to the eleventh paragraph, on the ground that it was a mere conclusion of the pleader, and set forth no reason for the assertion of the charge made; (f) to the twelfth paragraph, on the grounds that it was irrelevant, and that it was a mere conclusion of the pleader, and was an attempt to set up a cross-ac-

tion for the purpose of canceling a deed, which could not be injected into a suit for partition.

Russell & Custer, of Bainbridge, for plaintiffs in error. Hawes & Pottle, of Blakely, and R. R. Terrell, for defendant in error.

ATKINSON, J. [1] 1. This was a statutory proceeding for partition under Civil Code, § 5358 et seq. The notice filed with the petition called upon the defendants to show cause before the judge at chambers on the 30th day of March, 1911, etc. On that day the original answer was filed, and also the plaintiff's demurrer. The judge thereupon entered an order reciting the facts and setting the case to be heard at the May term of court. The case came on to be heard at that term, and on the 9th day of May, after consideration, the judge stated that he would sustain the demurrer to certain paragraphs of the answer, but did not enter any order to that effect. On the next succeeding day, before such an order was taken, the defendant Mize offered to amend by alleging: "Now at this term of the court comes F. A. Mize, the defendant in the above-stated case, and he amends his answer heretofore filed by adding thereto the following, to wit: The check given to defendant by said Oliver was never paid; and at the time same was given the said Oliver had no funds to pay the same, and was absolutely and thoroughly insolvent. Defendant shows that, shortly after said check was given, the said Oliver was adjudicated a bankrupt, and, unless defendant can set aside the deed obtained from him by fraud on the part of Oliver, he is without remedy." This amendment was disallowed, on the ground that it was not accompanied by an affidavit to the effect that at the time of filing the original answer the defendant did not omit the new facts set out in the amendment for the purpose of delay, and that the amendment was not now offered for such purpose. The objections to the allowance of the amendment were not meritorious (Civil Code, § 5363), and the court erred in sustaining it.

[2] 2. Save as announced in the third division of the opinion, none of the several grounds of demurrer to the separate paragraphs of the answer would be meritorious, unless the answer as a whole was subject to the ground of general demurrer that it failed to set forth a valid defense. Properly construed, the plea set up such matters as would have authorized Mize, in a contest directly with Oliver, to repudiate the sale. The worthless check, which Oliver, the insolvent, but sole, owner of the Bank of Climax imposed upon Mize was immediately deposited in that bank, and thereby in effect returned to Oliver. The new result of the transaction, in which credit was not intended to enter, was that Oliver obtained both the deed and check. Under these cir-

cumstances he could not in equity hold the deed. Nor did the plaintiff, the Bank of Whigham, stand in any better position. Taking the allegations of the plea as true, which must be done on demurrer, the deed which the Bank of Whigham received from Oliver was merely as security for Oliver's pre-existing debt; the bank not parting with anything, nor changing its status in any respect. It did not, therefore, stand in the position of a bona fide purchaser for value, and as such protected from the equities of Mize against Oliver. Civil Code, § 4307; *Mashburn v. Massenberg*, 117 Ga. 567 (5), 568, 44 S. E. 97, and citations; *Harris v. Evans*, 134 Ga. 161, 67 S. E. 880. A sale of real estate does not stand on the same footing as a sale of negotiable paper, where the rule is different from that above expressed. *Harrell v. National Bank of Commerce*, 128 Ga. 504, 57 S. E. 869, and citations.

[3] 3. So much of the answer as sought to set up that the Bank of Whigham knew, or ought to have known by the exercise of reasonable prudence, of the alleged fraud on the part of Oliver in procuring the deed from Mize, was insufficient as a charge of notice, and should be so held, if on another hearing it should become material.

Judgment reversed. All the Justices concur.

(128 Ga. 528)

ROGERS v. PETTIGREW.

(Supreme Court of Georgia. Aug. 15, 1912.)

(*Syllabus by the Court.*)

ATTORNEY AND CLIENT (§ 153*)—RIGHT TO COMPENSATION — MISCONDUCT — ILLEGAL COMPROMISE.

An attorney, who compromises his client's case against the latter's express direction, is not entitled to any compensation.

[Ed. Note.—For other cases, see *Attorney and Client*, Cent. Dig. §§ 299, 300; Dec. Dig. § 153.*]

Atkinson, J., dissenting.

Error from Superior Court, Gwinnett County; J. B. Jones, Judge.

Proceeding by C. L. Pettigrew against L. L. Rogers to foreclose an attorney's lien. Judgment for petitioner, and defendant brings error. Reversed.

Alonzo Field, of Atlanta, for plaintiff in error. J. A. Perry, of Lawrenceville, and C. L. Pettigrew, for defendant in error.

EVANS, P. J. The point in the case is whether an attorney is entitled to collect his fee by foreclosure of his lien under these facts: The client was the administratrix of an estate, and employed the attorney to enjoin the enforcement of certain *fi. fas.*, because of alleged illegalities, against the estate, and to cancel the sale of 250 acres of land made under these *fi. fas.* The case was stubbornly litigated through several years. On the last trial, while the jury were de-

liberating on the case, a compromise agreement was reached by the attorneys, whereby the title to 100 acres of the land was confirmed in the purchaser (who was the transferee of the *fi. fa.*), and the remainder of the tract (150 acres) was declared to be the property of the estate of the defendant in *fi. fa.*, free of lien. A verdict was taken and a decree was entered according to the agreement. The client promptly disaffirmed the compromise settlement, and moved the court to vacate it. The motion was denied. The attorney then filed his petition to foreclose his lien for fees upon the 150 acres of land awarded in the decree to his client. She resisted the foreclosure, on the ground that the settlement was made by her attorney against her express instructions. On the trial the attorney testified that there had been several propositions of settlement made by the holder of the *fi. fas.*, submitted to his client, all of which were refused. About 12 months before the compromise settlement the client told the attorney not to compromise the case. The compromise settlement was made pending the last trial, after the case had been submitted to the jury. The attorney had informed his client that she could go to her home, which was in the country, and that he expected to win her case. After his client left he became apprehensive of a mistrial, or an adverse verdict, or his ability to sustain a favorable verdict, inasmuch as the issues of law and fact were both doubtful. Overtures for a settlement between the attorneys culminated in the compromise settlement, which was expressed in the consent verdict. He acted in the best of faith for the interest of his client, and believed that he made a good settlement of her case. The client testified that she had repeatedly informed her attorney that she would not make any compromise settlement, and that she left the courtroom after the case was submitted to the jury upon the assurance of her attorney that her presence was no longer necessary and that he was confident of winning her case. Other evidence related to the value of the services and the good faith of the attorney. The court instructed the jury that if the attorney, in making the compromise settlement, acted contrary to express instructions of his client, he was not entitled to recover his fees. The jury found for the attorney. In her motion for new trial the client contends that the verdict is contrary to the charge of the court, and without evidence to support it.

The validity of the judgment based on the compromise settlement had been adjudicated adversely to the client; but the issue in that case did not include the right of the attorney to collect his fee, if he settled the case against the client's express instructions. The authorities differ as to the power of an attorney to compromise his client's case

without special authority. Weeks on Attorneys, § 228. The prevailing opinion of the English courts is that an attorney has power to make bona fide compromises of his client's case; but it has been held by the Court of Queen's Bench that, if the attorney enters into a compromise against the express direction of his client, he is liable in an action of damages, and it is no defense that associate counsel advised the settlement. *Fray v. Voules*, 1 El. & E. 839, 5 Jur. N. S. 1253. A litigant has the right to insist that his case be adjudicated according to the established rules of law and procedure. When he instructs his attorney not to compromise his case, the attorney is bound by such instructions, and is not at liberty to violate them, even though the attorney honestly believes a compromise settlement would be to the best interest of his client. If he violates his instruction in this respect, he forfeits all right to compensation. Says Simmons, J., in *Larey v. Baker*, 86 Ga. 468, 475, 12 S. E. 684: "We think the law is that where an agent or attorney is unfaithful to his trust, or violates his instructions, he is not entitled to any compensation." We do not think there is any serious conflict between the attorney and his client. Both agree that the client had firmly set her mind against a compromise of her suit, and that the attorney was directed not to compromise it. The attorney's testimony is that this instruction was 12 months prior to the actual compromise. The interval of time does not serve to revoke the instruction, especially as the client neither said nor did anything which would imply a change of instruction. We are satisfied that the attorney, in the compromise settlement, was actuated by the best of motives to efficiently serve his client, but his zeal and desire to recover something for his client is no excuse for violating her positive instructions.

Judgment reversed. All the Justices concur, except ATKINSON, J., dissenting.

(138 Ga. 536)

POPE et al. v. LEE.

(Supreme Court of Georgia. Aug. 16, 1912.)

(Syllabus by the Court.)

APPEAL AND ERROR (§ 20*)—COURTS (§ 200¼*)—JURISDICTION—COURT OF ORDINARY—ABATEMENT OF NUISANCE.

A proceeding under Civil Code, §§ 5333, 5334, to abate a mill nuisance, is not a matter falling within the jurisdiction of the court of ordinary as such court, and from a decision of that court in regard to such a matter an appeal will not lie to the superior court. *Harrell v. Pickett*, 43 Ga. 271; *Cunningham v. U. S. Loan Co.*, 109 Ga. 616, 34 S. E. 1024; *Rigell v. Sirmans*, 123 Ga. 455, 51 S. E. 381; *Fontano v. Mozeley & Co.*, 121 Ga. 46, 48 S. E. 707.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 81-87; Dec. Dig. § 20;* Courts, Cent. Dig. §§ 476, 477; Dec. Dig. § 200¼.*]

Error from Superior Court, Clayton County; L. S. Roan, Judge.

Action between J. E. Pope and others and W. J. Lee. From a decree in favor of the latter, the former bring error. Affirmed.

A. H. Davis, of Atlanta, for plaintiffs in error. J. F. Golightly, of Atlanta, and W. T. Kimsey, of Jonesboro, for defendant in error.

ATKINSON, J. Judgment affirmed. All the Justices concur.

(138 Ga. 510)

DELANEY v. SHEEHAN et al.

SHEEHAN et al. v. DELANEY.

(Supreme Court of Georgia. Aug. 15, 1912.)

(Syllabus by the Court.)

1. REPLEVIN (§ 52*)—INTERVENTION—ADVERSE CLAIMANTS.

Where an action of trover, with an affidavit to require bail, was brought to recover a piano, it was error, over objection, to allow a third party to file an intervention in the case, alleging that he, or any one under whom he claimed as transferee, had purchased the piano from the defendant on the installment plan, had paid all of the purchase money except an amount stated, and was entitled to have the property upon paying the balance, and that the trover suit was collusive, and praying equitable relief.

[Ed. Note.—For other cases, see Replevin, Cent. Dig. § 193; Dec. Dig. § 52.*]

2. DECISIONS—LAW OF THE CASE—DISMISSAL OF EXCEPTIONS.

The ruling just stated as to the first of the cases here decided applies to the second case, which being controlled finally by the decision of the question raised therein by the cross-bill of exceptions, the main bill of exceptions is dismissed.

Error from Superior Court, Richmond County; H. C. Hammond, Judge.

Action by John Delaney against the Thomas & Barton Company, in which Edward Sheehan and Jennie T. Sheehan filed interventions. From a judgment in favor of Edward Sheehan, plaintiff and Jennie T. Sheehan filed bills of exceptions on error, and Mamie Delaney also filed a cross-bill of exceptions to the refusal to strike the intervention of Jennie T. Sheehan. Judgment reversed, and main bill of exceptions dismissed.

John Delaney brought an action of trover against the Thomas & Barton Company to recover a piano. Affidavit was made to require bail, and the sheriff seized the property. The defendant answered, denying all the allegations of the petition, and also pleaded that it had delivered the piano to the deputy sheriff, and on his order to the plaintiff. James Delaney died, and Mamie Delaney, his widow and sole heir, was by consent made the party plaintiff in his stead.

Edward Sheehan filed an equitable intervention, alleging in substance as follows: Jennie T. Sheehan purchased the piano from

the Thomas & Barton Company for \$800, and paid \$720 of the purchase price, leaving a balance of only \$80 due. Intending to leave Augusta for a time, she placed the piano with the company from which she purchased it, to be held by it on storage, subject to her further order. Subsequently she sold and transferred the piano to this intervenor for a valuable consideration. The plaintiff in the action of trover had no lien on, claim upon, or interest of any sort in the piano, and the defendant company had no interest in it, except to the extent of the balance of \$80 unpaid purchase money. Jennie T. Sheehan was indebted on a general commercial claim to James Delaney. He and the defendant company entered into a collusive arrangement to place the piano in his custody and control, and in pursuance of such arrangement he paid to the company the balance of \$80 due on the purchase money, and, without any further right in law, filed this trover suit against the company, claiming title to the property. It was seized by the deputy sheriff under bail process, and was left by him in the possession of the defendant under a written receipt. On the same day the deputy sheriff gave his order on the defendant for the delivery of the piano to Delaney, which was made, and it was held by him to the date of his death, and afterwards remained in the possession of his wife and sole heir, who was made the plaintiff in his stead. The former plaintiff and the present plaintiff have had continual use of the piano. The rental value was much in excess of the \$80 balance due for the purchase price. If it should not be so found, then this intervenor is willing to pay to the plaintiff the whole of the \$80, or whatever portion thereof may remain due, after deducting the rental value, as the court may determine; and he tenders into court \$85 to cover the balance and interest, if any. He contends, however, that the rental value is more than the balance due on the purchase money, and prays judgment for the excess thereof. He agrees to abide the decisions of the court as if he had been served with process, and prays "that he be made a party to said case, and that this court of equity will now take complete control of the same in all of its phases, and will determine how much rent the plaintiff shall pay for said piano, and how much money, if any, is due by this intervenor on the balance of the purchase money, and that the court will render such judgment and decree as will protect this intervenor in his right to said piano, and to compensation for the use thereof, and as will do justice to all parties concerned." By amendment he added, to the averment that the piano had been sold and transferred to him, the further allegation that the sale and transfer was made under a mortgage originally made by Jennie T. Sheehan to the Irish-American Bank for \$3,000, which indebtedness this intervenor "took up," and

the note and mortgage were paid by him, and the papers delivered to him by the bank.

Jennie T. Sheehan filed an intervention, in which she prayed to "be made a party to said case," and offered to abide the decision of the court in whatever manner it might affect the rights of herself or others as though she had been served with process. She alleged that all of the facts set out in the intervention of Edward Sheehan were true, and she joined in the prayers thereof. She further alleged that the piano was legally transferred to Edward Sheehan, and he had the right to file his intervention; but, if there could be any question of the completeness of the transfer of title from her to him, the title must be vested either in him or in her, or in both of them together, and in no event could Delaney, by paying the balance of the purchase money due by her to Thomas & Barton Company, acquire any legal right to seize and appropriate the piano, which was worth \$800, and on the purchase money of which she had paid \$720.

The plaintiff in the trover suit moved to strike each of these interventions, on the ground, among others, that there was no authority of law for the intervenors to file such interventions in a bail trover case. He also demurred to the interventions. The presiding judge overruled the motions and the demurrers. In the progress of the trial certain evidence was introduced, which, in the opinion of the judge, rendered it impossible for Jennie T. Sheehan to have a recovery. The bill of exceptions recites that thereupon, upon motion of the plaintiff, the court granted an order "eliminating" that intervenor from the case. The jury found a verdict in favor of Edward Sheehan, and a judgment was entered directing the piano to be delivered by the sheriff to him, upon the payment by him of \$95.15, with interest, and judgment for costs was rendered against the plaintiff in the trover suit. The plaintiff moved for a new trial, which motion was overruled. She excepted, and assigned error on the refusal of a new trial, and also on the overruling of the motion to strike the intervention of Edward Sheehan. Jennie T. Sheehan filed a bill of exceptions, assigning error upon the judge's action in "eliminating" her from the case under the evidence. Mamie Delaney filed a cross-bill of exceptions, assigning error upon the refusal to strike the intervention of Jennie T. Sheehan.

C. E. Dunbar, of Augusta, for plaintiffs in error. Samuel H. Myers, W. H. Fleming, and C. H. & R. S. Cohen, all of Augusta, for defendant in error.

LUMPKIN, J. (after stating the facts as above). [1] The action to recover personal property, which goes by the name of trover in this state, is statutory, and can be employed when replevin, detinue, or trover lay at common law. Where title is claimed, it must be

legal, not equitable, title. *Mitchell v. Georgia & Ala. Ry.*, 111 Ga. 760, 771, 36 S. E. 971, 51 L. R. A. 622. In that case there was a dissent, but it was not so much as to the rule as in regard to its application, the dissenting justice holding that the prior possession with claim of interest there shown constituted such a title as the plaintiff could protect. By section 5406 of the Civil Code it is declared: "The superior courts of this state, on the trial of any civil case, shall give effect to all the rights of the parties, legal or equitable, or both, in favor of either party, such as the nature of the case may allow or require." This and kindred legislation was intended to afford a party the opportunity to have all his rights in regard to the subject-matter tried in one action in the superior court, without the necessity of having two distinct suits to settle his legal rights and his equitable rights against the adverse party. Sometimes equitable pleadings by one of the parties may require the making of additional parties, in order that full relief may be granted. But we know of no law by which a third person can, over objection, enter a common-law suit between two parties, by which one seeks to recover personal property from the other, file an equitable intervention asserting that neither of the parties is entitled in equity to the property, but that he is so entitled upon paying a balance of purchase money, and praying relief accordingly. To permit such a proceeding would create endless confusion. The question of whether the plaintiff has a legal right to recover in his suit against the defendant would be lost in the question of whether a third person, who was neither plaintiff nor defendant, had equitable rights against the plaintiff or defendant, or both. The interveners had been guilty of no conversion, and the plaintiff did not so claim. Interveners *pro interesse suo* are not known in ordinary common-law suits. In a suit on a note or account, it would not be contended that a third person, who was neither plaintiff nor defendant, could force himself into the case and set up that neither the plaintiff nor the defendant should have a verdict determining the issues between them, but he should have a verdict establishing some equity in himself.

It is declared by Civil Code, § 5683, that "no amendment adding a new and distinct cause of action or new and distinct parties shall be allowed unless expressly provided for by law." If this cannot be done by the parties to the cause, much less can it be done at the instance of an outsider, a new and distinct party, who wishes to enter the common-law action, in spite of the parties to it, and set up a new and distinct equitable cause of action in himself. A case sounding in trover, like that here involved, bears no analogy to petitions in the nature of

creditors' bills, or like equitable proceedings, or proceedings properly called in rem, in which a person interested in the subject-matter may intervene. Here the parties did not enter the forum of equitable proceedings. They stood on their common-law rights. The interveners alone sought to change the nature of the case.

Counsel for the interveners quoted and relied on a sentence in the opinion in *Central Bank v. Georgia Grocery Co.*, 120 Ga. 883, 885, 48 S. E. 325. In that case an action of trover was brought, and an affidavit made, in accordance with the statute, to require bail. The sheriff accordingly seized the property. A third party filed an affidavit and bond, in the usual form appropriate to making a statutory claim to property seized under a levy. The trial judge dismissed the claim, on the ground that it could not be filed by a third person to property seized by a sheriff under proceedings to require bail in a trover suit. This judgment was affirmed, and the point thus raised was the only one before the court for decision. Near the close of the opinion occurs this sentence: "A third person, claiming title to the property which is the subject-matter of a trover suit, may become a party defendant, or, in a proper case, file an intervention, and have his title adjudicated." As it does not appear that there was any motion to make the claimant a party defendant in that case, or effort to file an intervention, what was said on that subject was *obiter dictum*. Even if it were taken as a ruling, it would not help the interveners in this case. They did not propose to become parties defendant, nor was it "a proper case" in which they could file equitable interventions. It is unnecessary to decide whether there may be any conceivable case in which a third party may, of his own motion and over objection, be made a party to a trover case, or file an intervention therein. If so, this is not such a case. Nor is it necessary to consider the demurrers to the interventions. Such interventions could not properly be filed at all, without reference to whether their allegations showed grounds for equitable relief. If the interveners have any legal or equitable rights against one or both of the parties to the trover case, they may assert them in a proper proceeding. But the refusal to strike their interventions was erroneous.

[2] As in the case of *Mamle Delaney* this point is raised by the cross-bill of exceptions, and as the ruling finally controls the case, under the practice heretofore established, the original bill of exceptions in that case will be dismissed, without passing on its merits.

In the first case, judgment reversed. In second case, judgment reversed on cross-bill of exceptions. Main bill of exceptions dismissed. All the Justices concur.

(138 Ga. 471)

SMITH, Tax Collector, et al. v. WHIDDON.
(Supreme Court of Georgia. Aug. 14, 1912.)

(Syllabus by the Court.)

1. HAWKERS AND PEDDLERS (§ 4*)—PATENT MEDICINE VENDER—TAX.

Under the provisions of section 946 of the Civil Code, one who actually travels as a hawker or vender of patent medicine is liable for the payment of the tax provided for under that section, although he may not be the proprietor of the articles sold, or of the animals and vehicles by means of which the articles are transported from place to place, and be acting only as the agent and employé of a disabled or indigent Confederate soldier, who, under the provisions of section 1888 of the Civil Code, is authorized to peddle without paying license for the privilege of so doing.

[Ed. Note.—For other cases, see *Hawkers and Peddlers*, Cent. Dig. §§ 7-9; Dec. Dig. § 4.*]

(Additional Syllabus by Editorial Staff.)

2. HAWKERS AND PEDDLERS (§ 3*)—"ITINERANT TRADER."

An "itinerant trader" is a person who actually travels or passes from place to place for the purpose of trading by sample or otherwise.

[Ed. Note.—For other cases, see *Hawkers and Peddlers*, Cent. Dig. §§ 3-6; Dec. Dig. § 3.*]

Error from Superior Court, Tattnall County; W. W. Sheppard, Judge.

Suit by J. E. Whiddon against S. P. Smith, Tax Collector, and another. Judgment for plaintiff, and defendants bring error. Reversed.

E. C. Collins, of Reidsville, for plaintiffs in error. Mann & Milner, of Albany, for defendant in error.

BECK, J. J. E. Whiddon, a peddler and traveling vender of patent medicine, filed a petition seeking to enjoin the officers of the county from collecting from him the occupation tax prescribed in section 946 of the Civil Code for peddlers and traveling vendors of patent medicine, alleging that he was not subject to the tax sought to be collected, for the reason that he had no interest whatever in the business, and was acting only as the agent and employé of a certain named indigent Confederate soldier, who was exempt from the payment of such tax under the law of this state, and held certificates from the ordinaries of two other counties to that effect. At the hearing, after the introduction of the pleadings of both parties, the original certificates of the ordinaries, and an affidavit of the Confederate soldier referred to, confirming the allegations of fact set forth in Whiddon's petition, the court passed an order permanently restraining and enjoining the sheriff and tax collector as prayed, to which order they excepted.

[1] Section 533 of the Code of 1873 contained the following provision: "If any person, except a disabled soldier of this state, peddles without first obtaining such license in counties where the ordinaries take no action regulating peddling, he forfeits to the

county one hundred dollars for the first act of peddling, and for each month thereafter twenty-five dollars more." And under section 536 of that Code it was made the duty of the several ordinaries of this state to issue process against persons incurring the penalty provided for under the section first quoted. Construing these two sections of the Code of 1873, this court said: "Section 533 is, if any person, except a disabled soldier of this state, peddles without first obtaining license, etc., he forfeits to the county \$100 for the first act of peddling, and for each month thereafter \$25; and then section 536 declares that the ordinary may issue process against such person. Now, against whom is the process to issue? Surely against him who should obtain the license, and who peddles without it. It cannot go against A. by simply alleging that B. peddled for A., and that A. had no license, or that A. peddled by his agent without first having obtained a license. If the license is to issue to the peddler, and if the process is to be against him who peddles without license, then it must be against the person who does the act of peddling." *Howard & Soule v. Reid*, 51 Ga. 328, 331.

[2] In the case of *Wrought Iron Range Co. v. Johnson*, 84 Ga. 756, 11 S. E. 234, 8 L. R. A. 273, it was said: "The provisions of the Code under which the ordinary proceeded furnish no warranty or authority for issuing an execution against the owner of goods because they are peddled or sold by sample through an itinerant agent. This question was virtually ruled in *Howard v. Reid*, supra. In that case it was held that the person to whom the license to peddle is to be granted is he who travels and vends the goods, and that a process issued under section 536 of the Code against others on the ground that they, by their agent, peddled, etc., without a license, is upon its face illegal and void. That case governs this, in so far as the nonresident corporation is concerned. A corporation cannot be a peddler, or obtain license to peddle, under the laws of this state. No one can obtain such license who cannot be sworn; for every peddler has to take an oath. Civil Code, § 1634. Every itinerant trader by sample is treated as a peddler. Civil Code, § 1631. The itinerant trader is the person who actually travels or passes from place to place for the purpose of trading by sample or otherwise."

Section 946 of the Civil Code provides that: "Upon every peddler and traveling vender of any patent or proprietary medicine, remedies, or appliances of any kind, or of special nostrums, or jewelry, or stationery, or drugs, or soap, or of any other kind of merchandise or commodity whatsoever (whether herein enumerated or not), peddling or selling any such goods, wares, medicines, nostrums, remedies, appliances,

jewelry, stationery, soap, drugs, or other merchandise, fifty dollars in each county where the same or any of them are peddled, sold, or offered for sale." Comparing the language embodied in the section just quoted with the statute under construction in the two cases which we have quoted above, it follows necessarily that the person liable for the specific tax provided for under section 946 of the Code of 1910 is the person who actually travels or passes from place to place, actually hawking and vending the goods, and not the person who owns the property and the goods to be peddled, or the wagons or other vehicles employed for carrying the goods to be peddled from place to place. The defendant in error in this case, against whom the execution issued, was "a peddler and traveling vender," and the enforcement of the execution against him should not have been enjoined.

Judgment reversed. All the Justices concur.

(138 Ga. 544)

KINARD et al. v. CLAY.

(Supreme Court of Georgia. Aug. 16, 1912.)

(Syllabus by the Court.)

EXECUTORS AND ADMINISTRATORS (§§ 184, 186*)—WILLS (§§ 728, 782*)—WIDOW'S ALLOWANCE—EFFECT OF WILL—RENTS—RIGHTS OF WIDOW—ELECTION.

A widow is entitled to a 12 months' support out of the estate of her deceased husband, notwithstanding the fact that he left to her by will, which was probated over her caveat filed thereto, a life estate in all his property real and personal.

(a) In such a case, where the caveat filed to the probate of the will and other litigation was pending for a period of 3 years, and the widow during that time remained in possession of all the real estate left to her for life by the will, and collected and used the rents from the same, she cannot be held to account to the executors for the rents so collected and used by her.

(b) The rent so collected and used by the widow was hers as a matter of right, and as a part of her life estate devised under the terms of the will of her deceased husband, and does not bar her from having 12 months' support set aside to her out of the realty so devised.

(c) In such a case a widow cannot be required to elect as between the life estate in the entire property devised (together with the proceeds of the real estate she had collected and used pending a caveat filed by her to the probate of the will) and a 12 months' support, in the absence of a manifest intention of the testator by the will to bequeath certain property in lieu of a 12 months' support.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 694, 696, 702, 704; Dec. Dig. §§ 184, 186; * *Wills*, Cent. Dig. §§ 1759-1780, 2018-2033; Dec. Dig. §§ 728, 782.*]

Error from Superior Court, Jasper County; James B. Park, Judge.

Application by Mrs. Emily Clay for a year's support out of the estate of her deceased husband, to which J. M. Kinard and others, as executors, filed objections. From

an order granting the relief prayed, the executors bring error. Affirmed.

W. S. Florence, of Monticello, for plaintiffs in error. Greene F. Johnson, of Monticello, for defendant in error.

HILL, J. Mrs. Emily Clay made application to the ordinary of Jasper county for a year's support out of the estate of her deceased husband, Jesse Clay. To this application a caveat was filed by the executors of the will of Jesse Clay. Appraisers were appointed, who set apart 100 acres of land to the applicant as a year's support. A caveat was filed by the executors to the award of the appraisers, and pending the hearing on the same in the court of ordinary the case was appealed to the superior court by consent. The issue coming on to be heard in the superior court, a verdict was directed in favor of the applicant. A motion for a new trial, made by the executors, was overruled, and they excepted.

The third and fourth items of the will of Jesse Clay are as follows:

"Item 3. I will to my beloved wife, Emily Clay, a life interest in and to all my property of every nature whatsoever; that is to say: She is entitled to the rents, profits, and issues of my farm consisting of 200 acres more or less, known as the 'Clay place,' adjoining the lands of Geo. Oxford, W. H. Middlebrook's place, the Jeff Smith place, C. L. Bartlett's and Jesse Kinard's Digby place, and the Off Pye place, in Gladesville Dist. G. M., Jasper county, Ga. I will that my wife have in and by her life interest in said lands the profits the rents, issues, and profits from all my property yearly, and that she is to in no wise incur the same for a period longer than 12 months; that is to say, that if the necessity arises she might hypothecate the rent notes for one year only. I do this in order to insure that my wife have a sufficient support all during her life, and that she shall in no wise transfer or sell the interest here willed her.

"Item 4. After the death of my wife Emily Clay, I will that the title in fee in and to the real estate hereinbefore described to go one-half to the heirs of my sister, Mary Kinard, and one-half to the heirs of my brother Frank Clay. I want my personal property divided in the same manner as the real estate in this item bequeathed."

The caveat to the award of the appraisers was as follows:

"(1) That said Emily Clay is not entitled to 12 months' support out of the estate of the intestate, for that she has had an ample provision in the will of Jesse Clay.

"(2) Because the said Emily Clay has elected and accepted the provisions of the will, and is estopped from further claim on the estate.

"(3) Because said Emily Clay has the en-

tire estate for life of the said Jesse J. Clay under and through his will, and the title to the land is vested in remaindermen, which said issue has been fought through the superior court of Jasper county, Ga., the record of which is of file in the honorable court of ordinary, in which her application for 12 months' support is pending, and that under the caveat and issue against the probate of the will of Jesse Clay the issue on the 12 months' support is *res judicata*, on all of which the applicant is bound.

"(4) That the applicant by three years' possession of the property under the will is bound to election, and thereby estopped from electing another and different remedy. That there is no title in the intestate to the lands set apart, but under the will is vested in remaindermen, and the return of commissioners is void which sets aside the land. The original caveat as of file in this case is hereby adopted and made a part of this caveat as fully as if herein recited, and this caveat is filed without prejudice to rights thereunder.

"This March 14, 1910."

It appears from the record that Mrs. Clay, the applicant for the 12 months' support, also filed a caveat to the probating of the will of her late husband, and that the caveat was not sustained. The will was probated and admitted to record.

The issue to be determined is whether a widow, who is given a life estate in land under her husband's will, and who takes the proceeds of the land for three years, and uses the rents pending the trial of a caveat filed to the probate of the will in court, is put under election to take the life interest in the land under the will, or the proceeds of the land in lieu of a 12 months' support. It is insisted that by accepting the proceeds of the realty for 3 years the widow is not estopped from applying for her 12 months' support; that she has elected to take the rents from the place left by the will, in lieu of 12 months' support. And the case of *Speer v. Speer*, 67 Ga. 748, is cited by the plaintiffs in error to the effect that the widow has accepted her annuity for three years. In the *Speer* Case the court thought that the intention of the testator to give the widow an "annuity" in lieu of dower put her upon election to take the one or the other. "A testator may by his will make provision in lieu of this support for 12 months, in which case the widow may elect, under the same rules as regulated her election in dower." Civ. Code, § 4045. But the will here does not make any provision in lieu of 12 months' support, or call for any election on the part of the widow. It is true she filed a caveat to the will, and the caveat was decided against her; but it did not deprive her of the right to the life estate under the will. On the contrary, the judgment probating the will over her objection adjudicated, whether

she so willed or not, that the land was hers during her lifetime. When this was done, it adjudicated that the income from the life estate was hers, and not that of the estate. So she was not exercising a right of election in taking the rents, but receiving them in her own right. The will gave her a life estate in certain lands. She filed no application for dower, as in the *Speer* Case, *supra*. Indeed, the will gave her a life estate in *all* the lands. After the court had probated the will, which adjudicated that she was entitled to the lands for life, the widow could have demanded and collected the rents for the time the caveat was pending, had they been collected by others than herself. The court had adjudicated that the land was hers for life. If the executors had collected the rents, she could have recovered the amount of them from the date of the testator's death, not as a 12 months' support, but as a part of her life estate in the lands bequeathed to her. The lesser estate was merged in the greater.

Is the widow, then, as contended, bound to account to the executors for the rents arising from her legacy—arising from property which the court has adjudicated was hers? To state the proposition is to answer it. If, then, the widow is not accountable for rents from the life estate in the lands, can she have a 12 months' support set aside to her out of the real estate itself? Our Civ. Code, § 4041, provides: "Among the necessary expenses of administration, and to be preferred before all other debts, except as otherwise specially provided, is the provision for the support of the family, to be ascertained as follows: Upon the death of any person, testate or intestate, leaving an estate solvent or insolvent, and leaving a widow, or a widow and minor child or children, or minor child or children only, it shall be the duty of the ordinary, on the application of the widow, or the guardian of the child or children, or any other person in their behalf, on notice to the representative of the estate (if there is one, and if none, without notice), to appoint five discreet appraisers; and it shall be the duty of such appraisers, or a majority of them, to set apart and assign to such widow and children, or children only, either in property or money, a sufficiency from the estate for their support and maintenance for the space of twelve months from the date of administration, in case there be administration on the estate, to be estimated according to the circumstances and standing of the family previously to the death of the testator or intestate, and keeping in view also the solvency of the estate. If there be a widow, the appraisers shall also set apart, for the use of herself and children, a sufficient amount of household furniture. The provision set apart for the family shall in no event be less than the sum of one hundred dollars; and if it shall appear upon

a just appraisalment of the estate that it does not exceed in value the sum of five hundred dollars, it shall be the duty of the appraisers to set apart the whole of said estate for the support and maintenance of such widow and child or children, or, if no surviving widow, to the lawful guardian of the child or children, for their benefit." See, also, section 4042 et seq. A year's support proceeds on the theory that a widow is entitled to it, regardless of everything else. We hold that receiving her legacy of the life estate in the property bequeathed by the testator does not bar the widow from applying for and having set apart to her a 12 months' support out of any portion of the estate left by the testator.

While this construction of the will and the law relative to a 12 months' support apparently gives the widow an advantage, by giving her a fee to part of the land and a life estate in the remainder, it is necessarily the logic of the law as applied to the facts of this case. Under this view of the case, the alleged errors of the court as to rulings made on questions of evidence are immaterial, though it may be stated that the rulings complained of are in accord with the views above expressed.

Judgment affirmed. All the Justices concur.

(138 Ga. 530)

BELL v. CARTER.

(Supreme Court of Georgia. Aug. 15, 1912.)

(Syllabus by the Court.)

1. HOMESTEAD (§ 144*) — EXEMPTION—TERMINATION—DEPENDENT DAUGHTER.

A homestead set apart in 1885, under the Constitution of 1877, to a mother as head of a family for the benefit of herself and her dependent daughter, then 42 years of age, ceases to be a homestead on the death of the mother.

(a) In such a case, the dependency is upon the mother, and not upon the property so set apart, and upon the death of the mother the dependent female has no further right in the homestead property as such.

[Ed. Note.—For other cases, see Homestead, Cent. Dig. § 281; Dec. Dig. § 144.*]

2. HOMESTEAD (§ 153*) — EXEMPT LANDS—TERMINATION.

In 1884 a fl. fa. was issued in favor of B. against C. In 1885 the mother of C. had set apart to her and her dependent daughter, under the Constitution of 1877, a homestead in lands belonging to the mother. The latter died in 1909 intestate, leaving six children and the homestead lands. The one-sixth undivided interest of C. in the homestead lands was levied on under the fl. fa., and a claim interposed by the dependent daughter under the homestead. On the trial of the case the court directed a verdict for the claimant. Held: (a) That the direction of the verdict for claimant was error; (b) that C. inherited an undivided one-sixth interest in the estate of his mother as heir at law, and that the interest of C. levied on was subject to the fl. fa. as against the claim sought to be set up under the homestead.

[Ed. Note.—For other cases, see Homestead, Cent. Dig. § 306; Dec. Dig. § 153.*]

3. VERDICT—DIRECTION.

The court erred in directing the jury to find a verdict for the claimant.

Error from Superior Court, Morgan County; James B. Park, Judge.

Proceeding by A. K. Bell, as executor, etc., to enforce a fl. fa. against certain real property on a judgment against James T. Carter, deceased, in which Laura E. Carter filed a claim by reason of an alleged homestead. A verdict was directed in favor of the claimant, and plaintiff brings error. Reversed.

Willford & Lambert, of Madison, for plaintiff in error. E. W. Butler, of Madison, for defendant in error.

HILL, J. In 1884 A. A. Bell obtained a fl. fa. against James T. Carter. Mrs. Mary A. Carter, the mother of defendant in fl. fa., died intestate in 1909, leaving six children, all of age and under no legal disability, among them the defendant in fl. fa. At the time of her death Mrs. Carter owned the title to 152 acres of land, in which she had taken a homestead in 1885 for the benefit of herself and her dependent and infirm daughter, Miss Laura E. Carter, then about 42 years old. After the death of Mrs. Carter in 1909, there being no administration on her estate, the executor of Bell, the plaintiff in fl. fa., caused the execution to be levied upon an undivided one-sixth interest in the homestead lands as the property of the defendant in fl. fa., James T. Carter. Miss Laura E. Carter filed her claim "solely by reason of and because of said homestead set apart in 1885." The court below held that the homestead still remained in force after the death of Mrs. Carter, for the benefit of the claimant, and directed a verdict accordingly. To this judgment the plaintiff in fl. fa. excepted, and brought the cause to this court for review.

[1] The sole question is whether the homestead set apart to Mrs. Carter and her dependent daughter terminated on the death of Mrs. Carter. We think the homestead did terminate at her death. In the case of Towns v. Mathews, 91 Ga. 546, 17 S. E. 955, it was held: "A homestead set apart in 1873, by the head of a family, for the benefit of his wife and a minor granddaughter, terminated on arrival at majority of the granddaughter; the family having been previously dissolved by the death of both the other members. The condition of the granddaughter as a dependent female would not extend the duration of the homestead; the person on whom she was dependent being no longer in life." And see Haynes v. Schaefer, 96 Ga. 743, 22 S. E. 327. In the case of Jones v. McCrary, 123 Ga. 282, 51 S. E. 349, this court held: "An applicant took a homestead in 1869 as the 'head of a family,' consisting of himself and eleven

children—four sons and seven daughters. The applicant died in 1885, after all of the children had reached majority. Four of the daughters were living on the place with him at the time of his death, and have continued to live on it and support themselves out of its proceeds. Held, that the only claim of the four daughters as beneficiaries of the homestead was as dependent relatives of the applicant, and when he died their dependence ceased and the homestead estate was at an end." And on page 285 of 123 Ga., on page 351 of 51 S. E., Mr. Justice Candler, in discussing the question now before the court, said: "Homesteads for the benefit of families of minors have uniformly been held to terminate with the arrival at majority of the beneficiary; and by parity of reasoning, a homestead for the benefit of a family of dependent females must terminate when dependence terminates. But dependence upon what—the property, or the applicant for homestead? We confess that it seems more logical and consistent with former rulings of this court to hold that the dependence should be upon the property, rather than the applicant. But the question has been positively answered in the case of *Towns v. Mathews*, supra, where it was said: 'The general fact of dependency alone would not be sufficient to keep the homestead in existence, because it has to be a dependency upon some person in life entitled, because of such dependency, to take a homestead.' Tested by this rule, then, the homestead in the present case expired with the death of Ezra McCrary in 1885, and the court below erred in holding that it was still in existence." See *Vornberg v. Owens*, 88 Ga. 237, 14 S. E. 562. In *Neal v. Brockhan*, 87 Ga. 130, 132, 13 S. E. 283, it was said: "When, therefore, the mother died and the children became of age, according to the repeated rulings of this court, the homestead estate ceased and the land became subject to the liens of the creditors. We do not think the fact that one of the minors became imbecile and dependent after the homestead was set apart, but before he became of age, would change this rule and keep the homestead estate alive. When the head of the family, to whom the homestead was set apart, died, the land descended to her children as her heirs at law; and after they became of age the homestead ceased. And if there had been no creditors, the children would have had the right to have the property sold or divided. There being a judgment creditor in this case, his lien, which had been inactive and held off since the homestead was set apart, became active and was leviable when the homestead estate ceased." And see the case of *Sutton v. Rosser*, 109 Ga. 205 (3), 207, 34 S. E. 346, 77 Am. St. Rep. 367, where it was held: "A homestead allowed to a widow out of her husband's estate for the benefit of herself and minor

beneficiaries ceases when the widow dies and the minors arrive at majority."

But it is insisted by the defendant in error that the dependence here was upon the property, and not upon the life of the applicant for homestead; and we are asked to review the cases of *Towns v. Mathews* and *Haynes v. Schaefer*, supra, and to overrule the same, if they conflict with the decision of the court below and with the view taken of this case by the defendant in error. We think they undoubtedly conflict. We have considered the present case carefully, and also the cases asked to be reviewed, and, after doing so, decline to overrule them, and adhere to the rulings made in those cases. It is insisted by the defendant in error that there is a vast difference between the Constitutions of 1868 and 1877 as to the homestead rights of certain beneficiaries, that the Constitution of 1868 allowed a homestead to "each head of the family * * * of minor children" (Code of 1873, § 5135), and that the Constitution of 1877 extended the class of beneficiaries and included "dependent females" (Civil Code, § 6582). It is ingeniously argued that, if the dependent female under the Constitution of 1877 acquired no individual right to the homestead in her own name, it was needless for the head of the family to take out a homestead as having females dependent upon her, but could have it set apart to herself simply as the head of a family, and that would suffice. But the reply is that under the provisions of the Constitution she can only avail herself of the benefits of the homestead because she is the head of a family of minor children, or there are females dependent upon her, and it is necessary to allege and show that fact in order to be entitled to the homestead, which is conditioned upon this fact being made to appear. It is argued, further, that if a dependent female received no individual right to the homestead property after the death of the head of the family, the law would abandon and desert her at a time when she stood most in need of its beneficent influence and support. The reply again is that, in the present case at least, the dependent female is not left helpless and penniless. As an heir at law of her deceased mother, out of whose property the homestead was set apart, she is entitled to an absolute fee in an undivided one-sixth interest in her estate, and not merely the usufruct of the homestead property. Nor can it be supposed that the other heirs at law of the deceased mother will be less kind and generous in their help and support of this dependent female, who is related to them by blood, than the law itself was, if her share of the estate should prove insufficient for that purpose. At any rate, the law seems well settled in this state that the homestead estate ceases upon the death of the head of the family in a case like the present, wheth-

the homestead be under the Constitution of 1868 or that of 1877.

[2] The rule insisted upon in this case would prevent, or at least postpone, heirs at law from coming into possession of their inheritance. Both the claimant and the defendant in *fi. fa.* were heirs at law of the deceased mother, and each inherited an undivided one-sixth interest in the lands left by her. It follows, from what has been said, that the undivided one-sixth interest of the defendant in *fi. fa.* in the land levied upon is subject to the *fi. fa.* as against the claim of the daughter, who enjoyed the benefits of the homestead estate as a dependent female during the life of her mother, but who has no further interest in it as such since her death. The court erred in directing a verdict for the claimant.

Judgment reversed. All the Justices concur.

(188 Ga. 482)

S. J. WINKLES & CO. v. SIMPSON GROCERY CO.

(Supreme Court of Georgia. Aug. 14, 1912.)

(Syllabus by the Court.)

1. HOMESTEAD (§ 170*)—PARTNERSHIP (§§ 139, 146*)—GENERAL MANAGER—AUTHORITY TO SIGN NOTES—WAIVER.

One who is clerk and general manager of a mercantile firm may, if authorized by the firm, sign notes to creditors of the firm in the firm name, binding the latter to pay the sum of money specified therein.

(a) But where such notes contain a waiver of homestead, such waiver is not binding upon the partnership, or the individual members composing the same, unless such clerk or general manager has express authority to make such waiver. The right of homestead is personal to the debtor, and no one can waive the right for him without his consent.

(b) Such a waiver of homestead, even if authorized by the firm, or by the individual members thereof, is not good as a matter of contract merely, or per se, as against a claim filed under a homestead to realty set apart to one of the members of the partnership by the United States court of bankruptcy.

(c) Partners in a mercantile firm are mutual agents for each other with reference to the conduct of the mercantile business in which they are engaged, and by virtue of this relation can give a firm note for the firm debts.

(d) Each partner can waive the homestead for himself and for his partner as to personal property belonging to the firm.

(e) But one partner cannot, by signing a note given to a creditor for a firm debt, waive the homestead as to real estate belonging to another partner, or authorize any one else to do so, without express authority from the other partner.

[Ed. Note.—For other cases, see Homestead, Cent. Dig. §§ 336, 337; Dec. Dig. § 170; Partnership, Cent. Dig. §§ 203-211, 213, 240, 242-255; Dec. Dig. §§ 139, 146.*]

2. JUDGMENT (§§ 710, 713, 715*)—INDIVIDUAL PROPERTY—HOMESTEAD—EXEMPTION—ESTOPPEL—JUDGMENT—RES JUDICATA.

One member of a partnership, against which, and against each member individually composing the firm, an execution has been issued in favor of a judgment creditor, and levied upon land belonging to one of the members of the firm individually, is not estopped from

setting up a claim under a homestead in said land, as the head of a family, where it does not appear that on the trial of the case in which the judgment was rendered the question of waiver of homestead in the notes sued on was adjudicated.

(a) Nor would such claimant be estopped from setting up such claim because of a former verdict and judgment of the superior court finding the same property subject to the same *fi. fa.*, in a case where the claimant's wife had filed a claim thereto, to which case he was not a party.

(b) Where a former adjudication of the superior court is relied upon to work an estoppel against one who claims real estate, as head of a family, as being exempt from levy and sale under the homestead law of this state, the former judgment must relate to the same question as the one on the subsequent trial, and must clearly decide it, and cannot be collaterally or incidentally considered for that purpose.

(c) A note purporting to be signed by a firm to a creditor, to cover an amount due by the former to the latter, stated the sum to be paid, and contained a waiver of homestead. Suit was brought on the note, and each member of the firm was served with a copy of the suit, including a copy of the note containing the homestead waiver. Neither partner filed any defense to the suit. No reference to the waiver of homestead was made in the pleadings, other than that the copy of the note attached to the petition contained the clause as to the homestead waiver. The judgment of the court made no reference to the waiver. It simply adjudged the amount due the plaintiff by the defendant firm. *Held*, that that judgment adjudicated only the sum due by the defendant to the plaintiff.

(d) The judgment did not adjudicate that the firm, or either member of it, had waived individually homestead to realty owned by the firm, as against the payment of the firm debt.

(e) Such judgment would not estop one member of the firm from setting up a claim, under a homestead set apart to him as head of a family, to land levied upon by virtue of a *fi. fa.* issued in pursuance of such judgment.

(f) The court erred in refusing to grant a new trial.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1063, 1234-1241, 1244-1247; Dec. Dig. §§ 710, 713, 715.*]

Error from Superior Court, Polk County; Price Edwards, Judge.

Action by the Thomas-Hiles Company against S. J. Winkles & Co. Judgment having been rendered in favor of plaintiff, and assigned to the Simpson Grocery Company, a *fi. fa.* was levied on certain land, which Winkles claimed as a homestead. The property having been found subject to the *fi. fa.*, and claimant's motion for a new trial overruled, he brings error. Reversed.

Bunn & Bunn, of Cedartown, for plaintiff in error. T. W. Lipscomb, of Rome, and John K. Davis and W. W. Mundy, both of Cedartown, for defendant in error.

HILL, J. The claim was filed by S. J. Winkles as the head of a family, by virtue of an exemption set apart to him by the United States court of bankruptcy. The record discloses substantially the following: The Thompson-Hiles Company brought suit

against S. J. Winkles & Co., a firm composed of S. J. Winkles and Mrs. M. E. Moore, on a promissory note containing a waiver of homestead. The note was ostensibly signed by S. J. Winkles & Co. This latter firm conducted a retail mercantile business in Cedartown. Mr. Tom Moore, the husband of Mrs. M. E. Moore, one of the members of the firm of S. J. Winkles & Co., was an employé of the latter firm, and as general manager of the business did the buying and selling, and there was evidence tending to show that he signed contracts for the firm. Winkles testified that he did not expressly authorize Moore to sign the notes sued on, or to waive the homestead. According to the evidence of Moore, on cross-examination, "the notes were signed by me as manager, and Mr. Winkles was not present when I signed them. The form of note was not discussed between me and Mr. Winkles at all." When suit was brought on the notes, a copy was served on S. J. Winkles. On the trial of the case, Winkles filed no defense to the suit and did not attend court. Judgment was rendered on the notes against the firm and each member thereof individually for the amount sued for. In neither the pleadings nor in the judgment of the court was any reference made to the fact that the notes contained a waiver of homestead, except that copies of the notes were attached to the petition. The *fi. fa.* issued upon the judgment was purchased by and transferred to the Simpson Grocery Company, and was levied, at the instance of that company, on the land in controversy here, which was claimed by Mrs. C. A. Winkles, the wife of S. J. Winkles. On the trial of the claim case the property was found subject to the *fi. fa.* S. J. Winkles filed his petition in bankruptcy in the United States court, and in that court the property was set apart to him, as the head of a family, as a homestead. The property having been readvertised for sale under the *fi. fa.* above referred to, S. J. Winkles filed a claim as the head of a family. Upon the trial of this case the court directed the jury, at the conclusion of the evidence, to find the property subject to the *fi. fa.* The claimant's motion for a new trial was overruled, and he excepted.

[1] 1. The partners were mutual agents for each other, and each by virtue of this relation could give the firm note for the firm debt. Civil Code, § 3180. Each could waive homestead for himself and for his partner so far as personalty belonging to the firm was concerned. *Hahn v. Allen*, 98 Ga. 612, 616, 20 S. E. 74. But the waiver of homestead on realty, while not a lien, by analogy is held not to fall within the purview of partnership agency. One partner cannot execute a note for the mercantile partnership, creating a lien on the individual real estate belonging to another partner; and such lien would not bind the other partner, if so given.

If, then, one partner cannot create a lien on real estate belonging to the other partner, we think he cannot waive the individual right to homestead and exemption, under the law, in real estate belonging to the other partner, for partnership debts. For, as Judge Jackson well said in the case of *Cleghorn v. Greeson*, 77 Ga. 345: "The homestead right is a right in property, and to waive it in favor of a creditor is substantially the same thing as to give it away." But, assuming that the agent had authority generally to sign the firm name to the notes for the partnership debt, and that the members of the partnership were concluded by the judgment from denying his authority to sign the note so far as the amount due and the waiver of homestead as to personalty belonging to the firm was concerned, we hold that the agent could do no more than a partner could in signing the note; and one partner cannot waive the homestead and exemption rights of another partner to his individual real property without an express authority from the other partner to do so.

Is the waiver of homestead contained in the notes available as against Winkles' claim, merely as a matter of contract, or per se? We think not; and this answer is based upon the proposition that the homestead waiver, under the facts of this case, was not adjudicated by the judgment of the superior court, merely finding that the defendants owed the plaintiffs a certain sum of money. That is all that the judgment adjudicated. There were no pleadings putting the waiver of homestead in issue, or as to whether the claimant authorized any one to waive it for him, or, if he did, whether he was bound by it per se, individually or as a partner. The evidence shows that Mr. Moore, who signed the notes as manager for the firm of S. J. Winkles & Co., was not a member of that firm, but simply represented as agent the partnership of which his wife was a member. He could not waive the homestead to realty belonging to an individual member of the firm, in a note executed for a partnership debt, without express authority to do so by those competent to confer that authority. It has been held in this state that "the right to homestead or exemption is personal to the debtor, the owner of the property, and its exercise, or nonexercise, is subject to his decision." *Broach v. Powell*, 79 Ga. 81, 3 S. E. 763. One partner may waive the right of homestead of the other partner, so far, at least, as personal property of the firm is concerned. *Hahn v. Allen*, supra. One partner cannot waive the right of another partner to the benefit of a homestead out of the latter's individual property. *Giles v. Vandiver*, 91 Ga. 193 (5), 17 S. E. 115; *Perry v. Britt-Carson Shoe Co.*, 129 Ga. 500, 59 S. E. 216, 121 Am. St. Rep. 232.

If, therefore, one partner cannot bind the individual real property of another partner

by a contract including a homestead waiver, the principle would apply with greater force to the case of one who signed a contract containing such a waiver for a firm merely as manager or agent for such firm, of which he was not a member. The claimant testified that he did not authorize the execution of the note by the manager, nor the waiver of homestead, and that he did not ratify the same. There is some slight conflict of evidence as to the authority of the manager generally to sign notes for the firm. It appeared from the evidence of the manager, on cross-examination, that "the form of the contract was not discussed between me and Mr. Winkles at all." We do not see, therefore, how the claimant is bound as a matter of contract by the waiver of homestead contained in the notes.

[2] 2. It is insisted on the part of the defendant in error that the judgment of the superior court, based upon a note containing a waiver of homestead clause, adjudicated that the defendant firm owed the plaintiff a certain sum, and that the waiver of homestead was good as against the firm debt; that the judgment concludes the defendant S. J. Winkles from asserting his claim, as the head of a family, under the homestead set apart to him by the United States court of bankruptcy. It is contended that the judgment adjudicated the entire contract, including the homestead waiver; that the defendant Winkles (now claimant) has no right to question any part of it; that he will not be heard to say that the waiver is not binding upon him, since he filed no defense to the suit upon the notes containing the homestead waiver; and that he cannot avail himself of the homestead set apart to him because of the former adjudication.

It is further insisted that the former judgment in the case of Simpson Grocery Co., plaintiff in *fi. fa.*, against S. J. Winkles & Co., defendant in *fi. fa.*, and Mrs. C. A. Winkles, claimant, in which the property here claimed by S. J. Winkles was found subject to the *fi. fa.*, estops the present claimant, S. J. Winkles, from setting up his claim under the homestead subsequently obtained. Is the plaintiff in error estopped by the former adjudication in the superior court, finding the property subject as against the claim of his wife, Mrs. C. A. Winkles, who had filed a claim thereto? The present claimant, S. J. Winkles, was not a party to that suit and judgment; and while it adjudicated that the property was subject to the *fi. fa.* levied upon it, relatively to the wife's claim, it did not adjudicate that the property was subject to the *fi. fa.* after the setting apart of the homestead, which was obtained by the husband after the rendition of the judgment in the wife's case. Does the former judgment, based on the notes, adjudicate everything contained in the note, as contended, including the

waiver of the right to a homestead? From the record it appears that the trial of the former suit put in issue the question whether the defendant partners owed a certain sum of money to the plaintiffs; and that was the only issue, and to that extent the judgment was conclusive on the defendants. But the question of waiver of homestead was not put in issue, and the defendants are not concluded merely because the waiver was contained in the notes sued on. If a mortgage note was sued on simply to obtain a common-law judgment for a certain sum, which was rendered, that judgment would not be held to adjudicate anything with reference to the mortgage lien. It would only adjudicate the sum due by the defendant to the plaintiff. See *Drake v. Bush*, 57 Ga. 180.

Nothing herein held is at variance with the ruling in the case of *Evans v. Rounsaville*, 115 Ga. 684, 42 S. E. 100, where it was held: "An exemption assigned and set apart by the bankrupt court under the homestead laws of this state is no more subject to levy and sale than if it had been set aside by the ordinary of a county having proper jurisdiction. No reason appears in the record why the exemption set apart was not good as against the lien of the plaintiff in execution in the present case." In that case nothing appeared going to show that the right of exemption was waived, or that the question of waiver was adjudicated at all. Nor is there anything in the case of *Johnson v. Davis*, 97 Ga. 282, 22 S. E. 911, in conflict with the ruling here made. For a judgment to act as an estoppel, it must decide the same question of which subsequent adjudication between the same parties is sought. It was held in *Evans v. Birge*, 11 Ga. 265, that "a fact which has been directly tried, and decided by a court of competent jurisdiction, cannot be contested again between the same parties or their privies, in the same or any other court. A judgment of a court of law, or a decree in chancery, is an estoppel to the parties thereto and their privies, if it relates to the same subject-matter and decides the question now in issue; but if that question came collaterally before the court, and was only incidentally concerned, the judgment or decree has no estoppel. Whether the question now in issue was embraced in the judgment or decree cannot be ascertained by inference, or by arguing from the judgment or decree." And see *Woods v. Jones*, 56 Ga. 520 (2); *Missouri States Life Ins. Co. v. Lovelace*, 1 Ga. App. 446, 58 S. E. 93; *Ashley v. Cook*, 109 Ga. 653 (3), 659, 35 S. E. 89. In 23 Cyc. 1300, it is said: "The true test is identity of issues. If a particular point or question is in issue in the second action, and the judgment will depend upon its determination, a former judgment between the same parties will be final and conclusive in the second, if that same point

or question was in issue and adjudicated in the first suit; otherwise, not." On page 1304 of same volume it is said: "The great preponderance of authority sustains the rule that the estoppel of the judgment covers all points which were actually litigated and which actually determined the verdict or finding, whether or not they were technically in issue on the face of the pleadings. But a matter is not in issue in the suit which was neither pleaded nor brought into contest therein, although within the general scope of the litigation, and although it might have determined the judgment if set up and tried." See Civil Code, § 4336; *Henderson v. Fox*, 80 Ga. 479, 6 S. E. 164; *Draper v. Medlock*, 122 Ga. 234, 50 S. E. 113, 69 L. R. A. 483, 2 Ann. Cas. 650.

In so far as the record discloses, no reference was made to the waiver of homestead in the petition, judgment, or otherwise, except that copies of the notes containing the waiver of homestead were attached to the petition, and the claimant, then one of the defendants in the suit, was served with a copy of the petition, notes, waiver, etc. Defendants filed no answer putting the waiver of homestead in issue, and no judgment was rendered adjudicating the question of homestead waiver, but it only adjudicated the amount due by the defendant firm. In directing a verdict, therefore, for the plaintiff, the court must have done so on the idea that the claimant, S. J. Winkles, was estopped by the former judgment of the court from claiming an exemption. No question was raised in the present case as to the method of procedure, nor otherwise than as to whether the exemption was subject.

Judgment reversed. All the Justices concur.

(128 Ga. 525)

CARROLL v. F. W. COOK BREWING CO.
F. W. COOK BREWING CO. v. CARROLL.
(Supreme Court of Georgia. Aug. 16, 1912.)

(Syllabus by the Court.)

1. APPEAL AND ERROR (§ 1078*) — ASSIGNMENTS OF ERROR—WAIVER.

On April 16, 1910, the F. W. Cook Brewing Company, a corporation, instituted suit in attachment against E. H. Carroll. The defendant answered, and among other things set up a cross-demand for damages as from breach of contract, and also as from tort, on the ground that in August, 1909, the plaintiff maliciously and without probable cause filed a petition in bankruptcy in the United States court against the defendant, which remained pending until April 18, 1910, when it was tried and a verdict returned finding that defendant was not insolvent at the date the proceedings were instituted; the result of the finding of such proceedings being to injure defendant's credit and commercial standing, and by reason thereof destroy his business. A motion was made to strike so much of the answer as set up the cross-action; but it was overruled, and the plaintiff excepted pendente lite. At the conclusion of the evidence offered by both sides at

the trial, the judge held that a recovery by the defendant for any amount on his cross-demand was not authorized, and as to such demand entered an order in the nature of a nonsuit. Then, on motion, a verdict was directed in favor of the plaintiff for the full amount of its demand. The defendant, by direct bill of exceptions, assigned error upon each of the rulings just stated. The plaintiff, by cross-bill of exceptions, assigned error upon the ruling excepted to pendente lite. The only assignment of error insisted upon in the briefs of counsel for plaintiff in error is that which refers to the ruling with reference to the defendant's cross-demand. Held, assignments of error which are not insisted upon in the briefs of counsel for plaintiff in error will be treated as abandoned.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4256-4261; Dec. Dig. § 1078.*]

2. MALICIOUS PROSECUTION — BANKRUPTCY PROCEEDINGS—EVIDENCE—DAMAGES.

The evidence was insufficient to authorize a recovery by the defendant on his cross-demand.

3. APPEAL AND ERROR —CROSS-BILL OF EXCEPTIONS—DISMISSAL.

The judgment on the main bill of exceptions being affirmed, the cross-bill of exceptions will be dismissed.

Error from Superior Court, Fulton County; Geo. L. Bell, Judge.

Action by the F. W. Cook Brewing Company against E. H. Carroll. From a judgment dismissing defendant's cross-complaint, he brings error, and plaintiff assigns cross-error. Affirmed.

Walter R. Brown and McDaniel & Black, all of Atlanta, for plaintiff in error. Shepard Bryan and J. D. Kilpatrick, both of Atlanta, for defendant in error.

ATKINSON, J. Judgment affirmed. All the Justices concur.

(128 Ga. 606)

THIGPEN, Ordinary, v. TANNER.
(Supreme Court of Georgia. Aug. 19, 1912.)

(Syllabus by the Court.)

1. INJUNCTION (§ 107*)—RIGHT TO RELIEF—PECUNIARY INTEREST.

Where one was convicted of the offense of bastardy, for which a fine in a given amount was imposed upon him by the court, which fine was paid over to the ordinary of the county as required by law, "to be by him improved and applied from time to time, as occasion [might] require, for the maintenance and education of [the bastard] child and for the payment of the expense of lying-in with such child, boarding, nursing, and maintenance while the mother [should] be confined by reason thereof," and, after the payment of such last-named expenses for the mother, the child died when only five months old, the person so convicted of bastardy under Penal Code, § 682, had no interest in the fine, and therefore could not maintain an action to enjoin the ordinary from disposing of the balance of the same. Under the section of the Code cited, such person was found guilty of a misdemeanor, for which he was, in the discretion of the court, punished by the imposition of a fine in accordance with Penal Code, § 1065.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 181-183; Dec. Dig. § 107.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

2. DEMURRER OVERRULED—ERROR.

The point dealt with in the preceding note is the only one involved in the case. The trial judge erred in overruling the general demurrer to the petition, brought by the person convicted of bastardy, to enjoin the ordinary from disposing of the fine involved.

Error from Superior Court, Washington County; B. T. Rawlings, Judge.

Action by L. E. Tanner against C. D. Thigpen, as Ordinary. Judgment for plaintiff, and defendant brings error. Reversed.

Hardwick & Wright, of Sandersville, for plaintiff in error. Evans & Evans, of Sandersville, for defendant in error.

FISH, C. J. Judgment reversed. All the Justices concur.

(138 Ga. 622)

CITY OF TALLAPOOSA v. BROCK.

(Supreme Court of Georgia. Aug. 19, 1912.)

(*Syllabus by the Court.*)

1. MUNICIPAL CORPORATIONS (§ 816*)—ACTIONS—PLEADING—NOTICE OF CLAIM FOR INJURY.

In bringing suit against a municipal corporation for damages on account of a personal injury, it is necessary to allege a substantial compliance with Civil Code 1910, § 910, which requires a presentation in writing of such claim to the governing authority of the municipality for adjustment, stating the time, place, etc., before bringing suit, and allows the municipal authorities 30 days in which to act on the claim. A petition which fails to do this is demurrable. *Saunders v. City of Fitzgerald*, 113 Ga. 619, 38 S. E. 978; *City of Columbus v. McDaniel*, 117 Ga. 823, 45 S. E. 59; *Langley v. City Council of Augusta*, 118 Ga. 590, 45 S. E. 486, 98 Am. St. Rep. 133.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1711-1724; Dec. Dig. § 816.*]

2. MUNICIPAL CORPORATIONS (§ 812*)—ACTIONS—NOTICE OF CLAIM FOR INJURY—SUFFICIENCY.

A petition alleged a personal injury resulting from a defect in a sidewalk of a city, and that on a named date a notice was served, a copy of which was set out. It was directed to the mayor and served on him, and merely notified him that the injured person would file suit against the city for the injury (describing it and the time, place, and cause of its occurrence) to a term of the superior court which would convene several months after the date of the notice. *Held*, that such a notice merely of an intention to sue the city, directed to the mayor, was not such a presentation of the claim or demand to the governing authorities for adjustment as to meet the requirements of the statute.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1696-1707; Dec. Dig. § 812.*]

3. DEMURRER OVERRULED—NO ERROR.

There was no error in overruling the demurrer on the other grounds thereof.

Error from Superior Court, Haralson County; Price Edwards, Judge.

Action by Jennette Brock against the City of Tallapoosa. Judgment for plaintiff, and defendant brings error. Reversed.

Lloyd Thomas and M. J. Head, both of Tallapoosa, for plaintiff in error. U. G. Brock, of Tallapoosa, for defendant in error.

LUMPKIN, J. Judgment reversed. All the Justices concur.

(138 Ga. 622)

HUNT et al. v. DAVENPORT.

(Supreme Court of Georgia. Aug. 19, 1912.)

(*Syllabus by the Court.*)

1. BILLS AND NOTES (§ 375*)—ACTIONS—PLEADING—AMENDMENT.

An amendment to an answer was properly disallowed which set up that the note, the foundation of the action, was void for the reason that it was given for a patent right, though not expressing upon its face its consideration. *Parr v. Erickson*, 115 Ga. 873, 42 S. E. 240.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 971-981; Dec. Dig. § 375.*]

2. VERDICT DEMANDED FOR PLAINTIFF.

Under the evidence and the law applicable thereto, a verdict was demanded in behalf of the plaintiff, and the trial judge did not err in so directing.

Error from Superior Court, Haralson County; Price Edwards, Judge.

Action by B. J. Davenport against R. C. Hunt and others. Judgment for plaintiff, and defendants bring error. Affirmed.

James Beall and B. F. Boykin, both of Carrollton, for plaintiffs in error. Griffith & Matthews, of Buchanan, for defendant in error.

FISH, C. J. Judgment affirmed. All the Justices concur.

(138 Ga. 606)

CONE v. CONE.

(Supreme Court of Georgia. Aug. 19, 1912.)

(*Syllabus by the Court.*)

1. EXCEPTIONS TO CHARGE WITHOUT MERIT.

The exceptions to the charge, wherein the judge stated the respective contentions of the parties, were without merit, especially when considered in view of the whole charge.

2. GROUNDS FOR NEW TRIAL—REMARKS OF COUNSEL.

Nor, when considered in connection with the judge's explanation thereof, was there any merit in the ground of the motion for new trial complaining that the defendant's counsel in his argument to the jury made remarks which were not authorized by the evidence.

3. NEW TRIAL (§ 105*)—GROUNDS—NEWLY DISCOVERED EVIDENCE.

The alleged newly discovered evidence was merely cumulative and impeaching in character, and, moreover, in all probability, would not change the result on another trial.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 183, 221-223, 229; Dec. Dig. § 105.*]

4. SUFFICIENCY OF EVIDENCE—NEW TRIAL REFUSED—NO ERROR.

There was evidence to support the verdict, and the refusal of a new trial was not error.

Error from Superior Court, Bulloch County; B. T. Rawlings, Judge.

Action between R. H. Cone and C. H. Cone. From the judgment, R. H. Cone brings error. Affirmed.

John F. Brannen, of Statesboro, and Jas. K. Hines, of Atlanta, for plaintiff in error. Deal & Renfroe and Johnston & Cone, all of Statesboro, for defendant in error.

FISH, C. J. Judgment affirmed. All the Justices concur.

(138 Ga. 569)

ATLANTA, B. & A. R. CO. v. BARNWELL.
(Supreme Court of Georgia. Aug. 17, 1912.)

(Syllabus by the Court.)

1. APPEAL AND ERROR (§§ 637, 656, 907, 938*)—
SIGNATURE BY COUNSEL—CLERICAL ERROR—
PRESUMPTIONS.

The Atlanta, Birmingham & Atlantic Railroad Company, being the defendant in the trial court, which lost its case, made a motion for a new trial, and it was overruled. A paper was tendered to the judge, and it was duly certified as a bill of exceptions. In the paper so tendered the Atlanta, Birmingham & Atlantic Railroad Company was named as plaintiff in error and as the party excepting. The paper was signed, "Bolling Whitfield, Attorney for the Seaboard Air Line Railroad Co.," the last-named company not being a party to the suit. The record discloses that among the counsel representing the defendant in the court below, in filing its pleas, trying the case, moving for a new trial, and making motions to continue, were "Crovatt & Whitfield." *Held*:

(a) The name of "Crovatt & Whitfield" imports a firm, and will be presumed to be such.

(b) It will also be presumed that Bolling Whitfield, who signed the bill of exceptions, was the Whitfield of that firm.

(c) Construing the bill of exceptions in the light of the record, the words above quoted following the signature of Bolling Whitfield are to be considered as having been entered by mere clerical error.

(d) The statute requires that bills of exceptions shall be signed by the plaintiff in error or his attorney or counsel. Civ. Code, 1910, § 6139.

(e) In the light of the presumptions above mentioned, and in view of the record in the case, the bill of exceptions was amendable in the Supreme Court by striking the words "Attorney for the Seaboard Air Line Railroad Co.," and inserting in lieu thereof the words "Attorney for the Atlanta, Birmingham & Atlantic Railroad Co."

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2784, 2826-2829, 2911-2915, 2916, 3673, 3674, 3676, 3678, 3795-3803; Dec. Dig. §§ 637, 656, 907, 938.*]

2. FORMER DECISION DISTINGUISHED.

The case differs from O'Connell Bros. v. Friedman, 117 Ga. 948, 43 S. E. 1001, Sumner v. Sumner, 116 Ga. 798, 43 S. E. 57, and other similar cases, in which there was no compliance with the statute in regard to signing a bill of exceptions; the paper in such cases purporting to be bills of exceptions not having been signed in fact by any one.

3. NEW TRIAL (§ 41*)—RECEPTION OF EVIDENCE.

The admission of the opinion of a witness for the plaintiff as to the existence of a fact

is not cause for a new trial on behalf of the defendant, where the latter introduces evidence sustaining the opinion of such witness.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 67-71; Dec. Dig. § 41.*]

4. RAILROADS (§ 260*)—INJURIES—COMPANIES
LIABLE—RELATION OF PARTIES.

There was evidence which authorized the jury to find the facts of the case to be, in effect, as follows: Plaintiff was an employe of the North American Dredging Company, and while engaged in work for that company he was injured by the negligent operation of an engine being run on the tracks of the Atlanta, Birmingham & Atlantic Railroad Company, the defendant, and at the time of his injuries the Brunswick Steamship Company was operating the engine in its business, having hired the engine and its crew from the defendant company. *Held*, that the defendant company was liable to the plaintiff for his injuries, and the instructions of the court to this effect, and its rulings upon the admissibility of evidence in accordance with this principle, were not erroneous.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 817-823; Dec. Dig. § 260.*]

5. TRIAL (§ 255*)—INSTRUCTIONS—IGNORING
ISSUES.

Damages were alleged on account of injury to plaintiff by causing physical and mental suffering, permanent impairment of capacity to work, actual loss of time, and cost of medicine and physicians' bills. There was evidence tending to prove these several elements of damage, but there was conflict as to the nature and extent of the injury, and as to no one or more of the elements mentioned was the evidence of such character as to demand a verdict for the amount returned by the jury or more. *Held*, that it was error requiring the grant of a new trial, even in the absence of a request, for the judge to omit to give in charge to the jury any rule for estimating the damages claimed. Southern Ry. Co. v. O'Bryan, 112 Ga. 127, 37 S. E. 161; 13 Cyc. 236 (b).

(a) The case differs on its facts from that of Boswell v. Barnhart, 96 Ga. 521, 23 S. E. 414, and the rule of harmless error will not apply.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 627-641; Dec. Dig. § 255.*]

Error from Superior Court, Glynn County; C. B. Conyers, Judge.

Action by Aaron Barnwell against the Atlanta, Birmingham & Atlantic Railroad Company. Judgment for plaintiff, and defendant brings error. Reversed.

Bolling Whitfield, of Brunswick, for plaintiff in error. Max Isaac, of Brunswick, for defendant in error.

ATKINSON, J. Judgment reversed. All the Justices concur.

(138 Ga. 581)

McWILLIAMS et al. v. CITY OF ROME.
(Supreme Court of Georgia. Aug. 17, 1912.)

(Syllabus by the Court.)

1. MUNICIPAL CORPORATIONS (§ 747*)—TORTS
—ACTS OF OFFICERS.

Where a municipal charter authorized the mayor and council to elect three building inspectors to discharge certain duties, and, instead of so doing, the mayor and council pass-

ed an ordinance declaring that the superintendent of public works should be the building inspector, that no building or repairs should be done without leave from him, and that, he should have direct supervision over all such buildings and repairs, and see that the ordinances of the city relative thereto were complied with, if the city was otherwise liable for the conduct of the building inspector in tearing down a wall belonging to a property owner, it would not be relieved from such liability by reason of the irregularity in the election of such officer. City Council of Sheffield v. Harris, 101 Ala. 564, 14 South. 357.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1570-1577; Dec. Dig. § 747.*]

2. APPEAL AND ERROR (§ 1061*)—TRIAL (§ 160*)—CONDUCT OF JUDGE—HARMLESS ERROR.

In a suit against a municipality on account of the alleged wrongful tearing down of a wall by its building inspector under its authority, the plaintiffs' counsel was proceeding, regularly and without unnecessary consumption of time, or the offering of irrelevant testimony, so far as the record discloses, to introduce evidence for the purpose of proving the allegations of his petition. The presiding judge interrupted counsel by stating that he did not wish to interfere with the management of the case, but in order to save time he desired to know what the mayor and council had to do with the transaction. Counsel proceeded to examine a witness who was on the stand. The court again interrupted him with the statement: "I want you to show by what authority this wall was torn down before we proceed with the other. You are suing for damages to a wall that was torn down. You charge that, under the supervision and the authority of the mayor and council, so and so was done. I want you to show what that authority was." And again: "The mayor and council speak by record. I want to know what the mayor and council have done." Another colloquy ensued. In this he remarked that any evidence would be admitted which showed corporate action, though not reduced to writing and entered on the minutes. Other evidence was offered, touching the application to council for a permit to repair the building, the tearing down of the wall, etc.; but the plaintiffs' counsel had not announced the evidence closed. Defendant's counsel objected that the evidence offered was not admissible, according to the court's ruling. Finally the judge passed the following order: "Plaintiffs having offered evidence to support other elements of the petition, and the court, upon objection of the defendant, having ruled that no other evidence was admissible without further proof of the corporate action, and counsel for plaintiffs admitting that they could not further prove action by the mayor and council by record," the other evidence was rejected, and a nonsuit was granted. Held that, in view of the evidence already introduced and the announcement of counsel as to their desire to offer further evidence, this was error. Counsel for the plaintiffs should have been allowed to introduce his evidence, competent and relevant to make out the case alleged by him, and not have been stopped and a nonsuit granted. Whether, after he has been allowed a full opportunity to introduce all relevant evidence bearing on the issue, he will have made out a case, is a question which will then properly arise.

(a) Under the facts in the present case, it cannot be held that the ruling of the court was harmless error. The order granting a nonsuit was expressly based upon the admission of counsel for plaintiffs that they could not further prove action by the mayor and council "by record." While communications to and from a

municipal council are presumed to be in writing until the contrary is shown, in a case of this kind the absence of a writing is not conclusive evidence of the absence of action. Baker v. Scofield, 58 Ga. 182.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4137, 4209-4211; Dec. Dig. § 1061; Trial, Cent. Dig. § 368; Dec. Dig. § 160.*]

Error from Superior Court, Floyd County; J. W. Maddox, Judge.

Action by E. R. McWilliams and others against the City of Rome. Judgment for defendant, and plaintiffs bring error. Reversed.

Sharp & Sharp and W. M. Henry, all of Rome, for plaintiffs in error. Max Meyerhardt, of Rome, for defendant in error.

LUMPKIN, J. Judgment reversed. All the Justices concur.

(128 Ga. 618)

ARTESIAN LITHIA WATER CO. v. CENTRAL BANK & TRUST CORPORATION.

(Supreme Court of Georgia. Aug. 19, 1912.)

(Syllabus by the Court.)

1. APPEAL AND ERROR (§ 692*)—EXCLUSION OF EVIDENCE—REVIEW.

Where counsel for a party propounds a question to a witness called by that party, and the court sustains an objection to the question, the ruling of the court cannot be successfully attacked, without showing what answer was expected and that the court was at the time advised as to what the witness was expected to testify.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2905-2909; Dec. Dig. § 692.*]

2. TRIAL (§ 168*)—DIRECTING VERDICT.

The court properly directed a verdict for the plaintiff in the case, as no other verdict than that directed could have been rendered under the evidence.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 376-380; Dec. Dig. § 168.*]

Error from Superior Court, Cobb County; N. A. Morris, Judge.

Action by the Central Bank & Trust Corporation against the Artesian Lithia Water Company. Judgment for plaintiff, and defendant brings error. Affirmed.

The Central Bank & Trust Corporation sued the Artesian Lithia Water Company upon four promissory notes, aggregating the principal sum of \$300. Each of these notes was signed, "Artesian Lithia Water Co. [Seal], by J. J. Verner, Sec. & Treas." The defendant company filed its plea and answer, in which it denied that the notes sued on were executed by any authorized agent or representative of the defendant, for it or on its behalf, or by its authority, or with its knowledge or consent, and therefore denied that it was liable to the plaintiff thereon.

Upon the trial the plaintiff proved the exe-

cution of the notes by J. J. Verner. It proved by the minutes of the defendant corporation. That Verner was its duly elected secretary and treasurer. That upon its book of minutes were resolutions, duly adopted by the defendant's board of directors on February 6, 1907, in which it was resolved: "(1) That the president and secretary and treasurer be authorized to borrow the sum of \$1,000 with which to open an agency in Atlanta, Ga., for the sale of water. That this money be expended for the purchase of utensils, delivery wagons, etc., for carrying on said business. (2) Resolved, that the said J. J. Verner is appointed for said position in Atlanta. (3) Resolved, that the said J. J. Verner is not to expend any sum in excess of \$1,000, and that no debts shall be contracted by him for and on account of said company in excess of said \$1,000, without the consent of the board of directors had and obtained for that purpose."

Verner, who was the plaintiff's witness, testified in substance as follows: He procured the loan from the Central Bank & Trust Corporation as secretary and treasurer of the water company, under authority of the foregoing resolution. He was at the time secretary and treasurer of the company, and as such it was his duty to operate the company, borrow money, spend money, and hold the money. From 1904 he had actual management and control of the business of the company. He opened the agency in Atlanta as provided in the resolution, bought material and fixtures, and opened an office. At the time of opening the agency W. C. Lanier was president of the company, but had nothing to do with the actual management of the business, and did not stay at the office of the company. No officer or stockholder other than the witness had management of the business for about one year after the resolution of February 6, 1907, above set forth. Under authority of that resolution the company borrowed, on February 8, 1907, the sum of \$500. That this loan was made to the company by Verner himself. The note therefore was signed by W. C. Lanier as president, and J. J. Verner as secretary and treasurer, of the water company. On March 19, 1907, a loan of \$300 was procured from the Central Bank & Trust Corporation, and the notes therefor, of which the notes sued on were given in renewal, were signed in the name of the water company by J. J. Verner as secretary and treasurer. Neither Lanier nor any one else as president had ever signed any notes, except the \$500 note above referred to. Verner, when he signed the renewal notes sued on, March 10, 1908, was acting in the capacity of secretary and treasurer, and continued to so act for three or four days thereafter.

W. C. Lanier, who was a witness for the defendant, testified in part: "That all he

ever did with reference to carrying out the resolution for borrowing that \$1,000 was to sign the one note for \$500; that he had nothing to do with the management or conduct of the business of the company at any time during the period of that contract; that he had no active duties to discharge; that he did not go out and make contracts for the company, or buy supplies or other necessary things for the company; * * * that Verner was manager of the Atlanta agency, and secretary and treasurer of the company; that there was no such officer as general manager of all branches of the company's business; * * * that Verner had control of the springs or wells in Cobb county, and of the pumping and shipping of the water, and directing the whole business of the company at Austell, as well as what the company was undertaking to do at Atlanta; that he bought wagons and horses, and had charge of the business as secretary and treasurer, and was the only officer of the company drawing any salary, and the only man that had active duties to perform."

The court directed a verdict for the plaintiff.

Dorsey & Shelton and Hugh M. Dorsey, all of Atlanta, for plaintiff in error. D. W. Blair, of Marietta, for defendant in error.

BECK, J. (after stating the facts as above). Under the facts of this case the court could not properly have done otherwise than direct the verdict of which complaint is made. Verner, who signed the notes in the name of the defendant company, was its secretary and treasurer, and not only did he hold this office by a regularly adopted resolution of the board of directors, but he also performed the functions of a general manager for the company. Under the first section of the resolution of February 6, 1907, set forth in the statement of facts, the president of the company and Verner were authorized to borrow as much as \$1,000. While there might be some question as to whether or not, in order to render a note given for such a loan valid and binding upon the company, it should have been the joint act of the president and secretary and treasurer, under the provisions of section 3 of the resolution of the last-mentioned date there can be no doubt that Verner was authorized to create an obligation binding upon the company for an amount not in excess of \$1,000, and especially is this true when we consider the language of the resolution in connection with the fact of the broad and comprehensive duties resting upon Verner, who sustained to the company the relation, not only of secretary and treasurer, but of its general manager. The notes sued on were executed on the 10th day of March, 1908, the very day on which Verner ceased to be the secretary and treasurer of the de-

defendant company; but there is not the slightest evidence to show that the bank knew of the termination of Verner's relation to the company at the time it accepted these notes. Besides, these notes were given in renewal of a debt which had been created by Verner, acting for the company, at a time when he was unquestionably its secretary and treasurer, and conducting its business as its general manager. While it does not appear that the corporate seal of the corporation was attached to the contract, the burden of showing authority to execute the written obligation sued upon was successfully carried by the plaintiff.

Judgment affirmed. All the Justices concur.

(128 Ga. 623)

ADDISON v. EDWARDS.

(Supreme Court of Georgia. Aug. 19, 1912.)

(Syllabus by the Court.)

1. TRIAL (§ 194*) — ESTABLISHMENT — INSTRUCTIONS.

The plaintiff and the defendant each owned a land lot in Haralson county, one adjoining the other. The dividing line was in controversy. The plaintiff sued the defendant for a strip of land which was in the possession of the latter. The land lots were intended to contain 40 acres each. It appeared that within the boundaries surrounding the two lots there were several acres more than 80. After instructing the jury as to finding a disputed line by agreement, acquiescence, marked trees, etc., the judge charged: "Now that is the rule in case you find that an acquiesced line, one that has been by acts and declarations treated by both sides as the dividing line; if that does not settle the case, and it comes to the question of being settled as to where the original land line is or should be, then you will determine first as to the natural landmarks, and if no natural landmarks, then ancient marks, such as corner, station, or marked trees, and if you have not these in evidence, it is not disclosed there are any stations or marked trees to enable you to determine where the true line is, then you would resort to courses and distances, and the land would be divided between them, showing an equal portion on each side." *Held*, that the last part of this charge was harmful error. The burden was on the plaintiff to establish that he was entitled to recover the land for which he sued, or some definite part of it. In the absence of higher proof, courses and distances are resorted to. Civil Code, § 3820. But a resort thereto did not require the jury, as a matter of law, to divide the aggregate amount of land contained in the two lots, so as to give one equal portion to each side, regardless of any agreement or acquiescence of the parties. One lot may have contained an excess over the normal amount, and not the other.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 413, 439-441, 446, 454, 456-466; Dec. Dig. § 194.*]

2. GROUNDS FOR NEW TRIAL—REVERSAL NOT REQUIRED.

None of the other grounds of the motion for a new trial require a reversal.

Error from Superior Court, Haralson County; Price Edwards, Judge.

Action by A. B. Edwards against G. W. Addison. Judgment for plaintiff, and defendant brings error. Reversed.

Robinson & Edwards, of Buchanan, and G. R. Hutchens, of Rome, for plaintiff in error. Griffith & Matthews, of Buchanan, for defendant in error.

LUMPKIN, J. Judgment reversed. All the Justices concur.

(128 Ga. 611)

DAVENPORT v. RICHARDS.

(Supreme Court of Georgia. Aug. 19, 1912.)

(Syllabus by the Court.)

1. CHATTEL MORTGAGES (§ 290*)—FORECLOSURE—PAYMENT OF ATTORNEY'S FEES.

Under statutory proceedings for the foreclosure of a chattel mortgage, an obligation contained therein to pay attorney's fees in addition to principal and interest cannot be enforced.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. § 579; Dec. Dig. § 290.*]

(Additional Syllabus by Editorial Staff.)

2. BILLS AND NOTES (§ 534*)—AGREEMENT FOR ATTORNEY'S FEES—"RETURN DAY."

The expression "return day," as used in Civ. Code 1910, § 4252, providing that agreements for attorney's fees in an action on a note are void, unless the debtor fails to pay such debt on or before the return day of the court in which suit is brought, means the same as filing day, or the last day on which suits may be filed so as to be returnable to the next term.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1946, 1947; Dec. Dig. § 534.*]

For other definitions, see Words and Phrases, vol. 7, p. 6205.]

Error from Superior Court, Hall County; J. B. Jones, Judge.

Action by C. E. Richards against H. S. Davenport. Judgment for plaintiff for the levy of a chattel mortgage *fi. fa.*, and defendant filed an affidavit of illegality. From a judgment overruling the same, he brings error. Affirmed, on conditions.

J. G. Collins, of Gainesville, for plaintiff in error. H. H. Dean of Gainesville, for defendant in error.

BECK, J. To the levy of a mortgage *fi. fa.* issued upon the foreclosure of a chattel mortgage under the provisions of the statute for the foreclosure of such mortgages, Davenport, the plaintiff in error, filed an affidavit of illegality embracing several grounds. The only question for determination made in the record is whether or not the *fi. fa.* could proceed for the collection of attorney's fees which the maker of the mortgage contracted to pay in addition to principal and interest. Notice by the mortgagee of his intention to foreclose the mortgage for principal, interest, and attorney's fees by the 6th day of February, 1911, was given 10 days

before that date; and on that date the mortgage was foreclosed according to the provisions of the statute for the foreclosure of chattel mortgages, and the *fi. fa.* was made returnable to the superior court of the county to be held on the third Monday in July, 1911.

[1] Section 4252 of the Civil Code provides that "obligations to pay attorney's fees upon any note or other evidence of indebtedness, in addition to the rate of interest specified therein, are void, and no court shall enforce such agreement to pay attorney's fees, unless the debtor shall fail to pay such debt on or before the return day of the court to which suit is brought for the collection of the same: Provided, the holder of the obligation sued upon, his agent, or attorney notifies the defendant in writing, ten days before suit is brought, of his intention to bring suit, and also the term of the court to which suit will be brought." Under the provisions of the section quoted, it is clear that the obligation to pay the attorney's fees was void, and could not be enforced, unless the debtor failed to pay the debt "on or before the return day of the court" in which the proceedings to collect the same were brought.

[2] The expression "return day," as used in the statute, means the same as filing day, or the last day on which suits may be filed so as to be returnable to the next term. *Everett & Son v. Ferst's Sons & Co.*, 126 Ga. 662, 55 S. E. 916. In proceedings to foreclose chattel mortgages under the statute there is no day which corresponds to the "return day," as contemplated in section 4252; and consequently no time is fixed within which it can be rendered the duty of the debtor to pay the debt when given the notice provided for in this section of the Code, so as to give validity to the contract to pay attorney's fees stipulated in the evidence of indebtedness and take such an obligation out of the provision of the law making obligations to pay attorney's fees void.

Two things are necessary to negative the positive legislative declaration that an obligation to pay attorney's fees upon a note or other evidence of indebtedness is void, to wit: Notice by the holder of his intention to bring suit, and of the term of court to which the suit will be brought; and a failure upon the part of the debtor to pay the debt on or before the return day. In the suits contemplated by this statute the law fixes the return day for each court, and either before or on that day the debtor may make payment of the debt, and the obligation to pay attorney's fees in addition to the principal and interest is void. The law has not made any provision whereby the holder of the obligation may himself fix a day which shall take the place of the return day contemplated by the statute, although he might fix such a day as would be more advantage-

ous to the debtor than the "return day" fixed by the statute. It may be that this is a hiatus in the remedial law for the enforcement of certain classes of obligations given by debtors, but it is one the court cannot fill. If it is desirable that it should be filled, the Legislature, and not the court, must deal with it, and correct the defect in the law, if it be one. We are of the opinion that the court erred in overruling that portion of the affidavit of illegality by which the plaintiff in error resisted the collection of the attorney's fees.

Inasmuch, however, as the mortgage was regularly foreclosed, and the only ground of illegality which can be sustained was that attacking the right of the creditor to foreclose for attorney's fees, it is ordered that the plaintiff in *fi. fa.* have the privilege of writing off the attorney's fees within 20 days after the return of the remittitur; otherwise, that the judgment be reversed.

Judgment affirmed, with direction. All the Justices concur.

(138 Ga. 524)

VAN DUZER v. IRVIN.

(Supreme Court of Georgia. Aug. 15, 1912.)

(Syllabus by the Court.)

1. MANDAMUS (§ 55*)—EXISTENCE OF RIGHT —MUNICIPAL TAX—AFFIDAVIT OF ILLEGALITY.

Notwithstanding the charter of the city of Elberton (Acts 1896, p. 148) authorizes one against whom a municipal execution is being enforced by levy to make defense thereto by affidavit of illegality, a mandamus will not be granted to compel the levying officer to accept such affidavit, where the defense therein pleaded is insufficient in law.

[Ed. Note.—For other cases, see *Mandamus*, Cent. Dig. §§ 109-112; Dec. Dig. § 55.*]

2. CONSTITUTIONAL LAW (§ 284*)—MUNICIPAL CORPORATIONS (§§ 957, 972, 976, 978*)—TAXATION—ASSESSMENT—CITY CHARTER—DUE PROCESS OF LAW.

The defense alleged in the affidavit in this case is insufficient in law.

(a) Section 17 of the charter (Acts 1896, p. 148), which provides for the assessment and valuation of property for taxation by a board of assessors, and requires notice to the taxpayer and an opportunity to be heard, and that the assessments shall be fixed according to the facts developed at such hearing, if one is had, is not unconstitutional as depriving the taxpayer of due process of law.

(b) This section of the act is not affected by the act approved August 13, 1910 (Acts 1910, p. 22).

(c) The payment of an amount based on the taxpayer's valuation of his property is no bar to the collection of the remainder of his tax calculated on the valuation fixed by the assessors.

(d) The averment in the affidavit that the tax is levied to pay in part certain alleged illegal indebtedness, without stating how much of the tax demanded is for such alleged illegal indebtedness, or facts from which the amount can be ascertained, is insufficient to form any issue between the municipality and the tax-

payer as to his disputed liability for any particular sum.

[Ed. Note.—For other cases, see Constitutional Law. Cent. Dig. §§ 893-896; Dec. Dig. § 284.* Municipal Corporations, Cent. Dig. §§ 2015-2022, 2075, 2078-2082, 2092-2098, 2104-2119; Dec. Dig. §§ 957, 972, 976, 978.*]

Error from Superior Court, Elbert County; D. W. Meadow, Judge.

Petition by I. C. Van Duzer against W. H. Irvin for writ of mandate to compel defendant to accept and return to the proper court for trial an affidavit of illegality to a municipal tax fl. fa. From an order denying the writ and revoking the restraining order previously granted, petitioner brings error. Affirmed.

C. P. Harris, of Elberton, for plaintiff in error. Worley & Nall, for defendant in error.

EVANS, P. J. I. C. Van Duzer filed his petition against W. H. Irvin, chief of police of the city of Elberton, praying for a mandamus absolute to compel the defendant to accept and return to the proper court for trial an affidavit of illegality to a municipal tax fl. fa. which the defendant was seeking to enforce, and to enjoin the defendant, pending the hearing and determination of his petition for mandamus, from further proceeding with the fl. fa. The substance of the affidavit of illegality is that in 1910 there existed no law requiring property owners in the city of Elberton to make a return of their property subject to taxation, nevertheless the plaintiff made a voluntary return of his property at a valuation fixed by himself, which was alleged to be just and equitable, and he paid the taxes assessed on this sum by the city authorities; that the city authorities ignored the valuation placed upon his property by himself, and assessed the same at a larger sum, the assessment being by the board of tax assessors by virtue of section 17 of the charter of the city as contained in Acts 1896, p. 153; and that the fl. fa. which is now proceeding against the plaintiff is for the difference between the taxes calculated at the assessed rate upon the amount for which the plaintiff returned his property and the assessment placed thereon by the board of assessors. It is averred that his assessment is void, because it is opposed to the due process clause of the Constitution, because he was not given an opportunity to have the valuation of his property submitted to arbitration, as provided by the act approved August 13, 1910 (Acts 1910, p. 25, § 5), and because several items of alleged indebtedness for the payment of which the tax was assessed were illegal, and for the payment of which the city authorities could not legally collect taxes. In the bill of exceptions it is stated that "no evidence was introduced upon the trial of said case, but the case was

tried solely on the pleadings, the defendant's answer being treated as a general demurrer to the plaintiff's petition." The court denied the mandamus, and revoked the restraining order previously granted, and exception is taken to this judgment.

[1] If the statute provides that a taxpayer may contest the validity of the tax or the legality of the process to collect it by affidavit of illegality to the fl. fa., then the officer to whom is intrusted the enforcement of the fl. fa. must accept the illegality and return it to the proper court for trial. This would be his plain duty, and for a refusal to perform it the writ of mandamus is an appropriate remedy. It is otherwise where the remedy of affidavit of illegality is not given by statute. *Webb v. Newsom*, 138 Ga. 342, 75 S. E. 106. Section 20 of the act incorporating the city of Elberton (Acts 1896, p. 148) is as follows: "Be it further enacted by the authority aforesaid, that should an affidavit of illegality be filed to an execution issued by the authorities of said city (which may be done under the same rules that prevail in state courts) or any property levied upon be claimed by a person not a party to the execution, said claim shall be interposed under the same rules, restrictions, and regulations that govern claim cases in the courts of the state, and such claims and illegalities shall be returned for trial to the justice's court or notary's court that is held in the city of Elberton, or the city court or superior court of Elbert county, the one having jurisdiction, as the case may be." It is contended that no illegality can be filed against executions issued by the city of Elberton, except and under the same rules prevailing in the state courts, and that the general remedy by illegality exists only against executions issuing on judgments. *City of Atlanta v. Jacobs*, 125 Ga. 528, 54 S. E. 534. This construction of the parenthetical clause contained in that section is entirely too narrow. The plain purport of the entire section is to provide for the contest, by affidavit of illegality, of liability under executions issued by the city, and we think it is broad enough to include resistance to the summary enforcement of an illegal tax by execution as well as any other executions. But it does not follow that the levying officer, who is proceeding to enforce a tax fl. fa., must accept and return to the proper court every so-called affidavit of illegality. The averments of the affidavit of illegality must distinctly disclose that the taxpayer either is not liable at all, or if liable for any amount, the extent of the disputed liability must be made to appear.

[2] The facts set up by the plaintiff in his affidavit of illegality in this case were insufficient to form an issue. He is in error as to the validity of section 17 of the act as to the assessment of property by asses-

sors. The act specifically provides for the appointment of tax assessors, who are to value property subject to taxation, whether given in by the owner or not, and that the taxpayer shall be given notice of the assessment and an opportunity to be heard before the assessment shall become final. He is thus given due process of law. *McWilliams v. Tallapoosa*, 137 Ga. 283, 73 S. E. 510. He is also in error as to the applicability of the act approved August 13, 1910 (Acts 1910, p. 22). This act provides for the method of assessing and collecting taxes where no adequate provision is made in the act authorizing the tax, or in the general law, for giving the taxpayer notice and opportunity to be heard as to the valuation and taxability of his property. This act is intended to supplement such tax laws as provide for the assessment of property where the taxpayer is not given notice and opportunity of hearing, and is not intended to apply to cases where the law for the levy of the tax provides for notice of its assessment. The fact that he has paid a part of his taxes on the valuation of his property is no reason why the city cannot proceed to collect the balance, made upon the increased valuation of the assessors.

It is alleged that certain items entering into the budget of expenses of the city of Elberton, and for which the tax was levied, did not constitute a legal indebtedness of the city. The affidavit does not undertake to say that the amount of the *fi. fa.* represents his part of that indebtedness, nor do the averments of the affidavit furnish any data as to what his proportionate part of the alleged illegal indebtedness would be. Indeed, no effort is made to do this. If municipal authorities include in a tax levy items of expense for the payment of which no tax can be legally levied, a taxpayer in his own behalf, as well as for other taxpayers, may enjoin the levy of the tax until purged of its illegality. But when the municipal charter provides for a defense by affidavit of illegality against the enforcement of a *fi. fa.* for a particular amount, and the taxpayer does not attack the legality of the entire levy, but only a certain amount thereof, in order to make the remedy available, he must directly state, or allege facts from which it may be inferred, the exact amount of the illegal tax which the municipality is undertaking to collect. Otherwise, no issue can be joined as to the proper amount due by the taxpayer. For the sake of the argument, let us admit that some or all of the items were debts which could not be legally collected, and that the complaining taxpayer's share of them was but a trifle as compared with the execution levied against him. If he really owed a part of the taxes for which the execution issued, it would be his duty under the general law (Civil Code, § 6287) to pay that which is due, in order to

contest that which is not due. If it is impracticable to do this, a taxpayer in such case may proceed in equity to restrain the municipality from paying the illegal debts, or from assessing any taxes to pay the same.

The affidavit of illegality being insufficient in law to raise any issue, the sheriff properly refused to accept the same, and there was no error in refusing the mandamus absolute.

Judgment affirmed. All the Justices concur.

(138 Ga. 631)

DOBBS v. McCLURE.

(Supreme Court of Georgia. Aug. 19, 1912.)

(*Syllabus by the Court.*)

DIRECTING VERDICT.

Irrespective of those portions of the evidence the admission of which constitutes the grounds of the special assignments of error, a verdict in favor of the defendant was demanded by the other evidence in the case, and the court did not err in directing the jury to find such a verdict.

Error from Superior Court, Cherokee County; N. A. Morris, Judge.

Action by C. F. Dobbs, administrator, against Ollie McClure. Judgment for defendant, and plaintiff brings error. Affirmed.

J. P. Brooke, of Alpharetta, D. W. Blair, of Marietta, and Thos. H. Latimer, of Woodstock, for plaintiff in error. P. P. Du Pre and G. I. Teasley, both of Canton, and J. Z. Foster, of Marietta, for defendant in error.

BECK, J. Judgment affirmed. All the Justices concur.

(138 Ga. 624)

POWERS v. STATE.

(Supreme Court of Georgia. Aug. 19, 1912.)

(*Syllabus by the Court.*)

1. SUFFICIENCY OF EVIDENCE.

The evidence, though in some respects unsatisfactory, was sufficient to authorize a conviction.

2. CRIMINAL LAW (§ 406*)—EVIDENCE—ADMISSIONS.

On the trial of a father, charged with rape of his daughter, letters from the accused to the daughter, written while incarcerated on that charge, stating that his freedom depended on her action, and pleading for the withdrawal of the charge against him, and which contained no protestation of innocence or denial of the charge, tended to corroborate the testimony of the daughter, and were admissible.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 785, 894-927; Dec. Dig. § 406.*]

3. CRIMINAL LAW (§ 1169*)—WRIT OF ERROR—REVIEW—HARMLESS ERROR.

The circumstances attending the arrest of the accused, viz., that he resisted arrest until informed that the officer had a warrant for him, when he submitted without further resist-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

ance, though inadmissible in evidence, were not prejudicial to the defendant.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3187-3143; Dec. Dig. § 1169.*]

4. CRIMINAL LAW (§ 770*)—TRIAL—INSTRUCTIONS IGNORING ISSUES.

"It is no valid ground of criticism upon a charge, correct and proper in itself, that it fails to state some other rule or principle of law pertinent to the issues of the case." *Jackson v. State*, 134 Ga. 473, 68 S. E. 71.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1806; Dec. Dig. § 770.*]

5. CRIMINAL LAW (§ 922*)—TRIAL—INSTRUCTIONS—NECESSITY FOR REQUEST.

In the absence of a written request, though it may be proper to give a cautionary instruction in an appropriate case, an omission to do so is not ground for a new trial. *Johnson v. State*, 128 Ga. 102, 57 S. E. 353.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2210-2218; Dec. Dig. § 922.*]

Hill, J., dissenting.

Error from Superior Court, Morgan County; Jas. B. Park, Judge.

Ed Powers was convicted of rape, and brings error. Affirmed.

Rogers & Knox, of Covington, for plaintiff in error. Joseph E. Pottle, Sol. Gen., of Milledgeville, and T. S. Felder, Atty. Gen., for the State.

EVANS, P. J. Judgment affirmed. All the Justices concur, except HILL, J., dissenting.

(138 Ga. 571)

SUBURBAN REALTY CO. et al. v. ELDER.
(Supreme Court of Georgia. Aug. 17, 1912.)

(Syllabus by the Court.)

NEW TRIAL (§ 72*)—GROUNDS—VERDICT CONTRARY TO EVIDENCE.

The only assignment of error being that "the verdict is contrary to evidence and without evidence to support it," "is decidedly and strongly against the weight of the evidence," and "is contrary to law and the principles of justice and equity," and the record disclosing that there is evidence sufficient to sustain the verdict, the court did not err in refusing a new trial.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 146-148; Dec. Dig. § 72.*]

Error from Superior Court, Fulton County; Geo. L. Bell, Judge.

Action between the Suburban Realty Company and others and L. J. Elder. From the judgment, the Suburban Realty Company and others bring error. Affirmed.

W. O. Wilson, of Atlanta, for plaintiffs in error. Samuel D. Hewlett, of Atlanta, for defendant in error.

FISH, C. J. Judgment affirmed. All the Justices concur.

(138 Ga. 583)

LYNAH v. CITIZENS' & SOUTHERN BANK et al.

(Supreme Court of Georgia. Aug. 17, 1912.)

(Syllabus by the Court.)

APPEAL AND ERROR (§ 681*)—NEW TRIAL (§ 18*)—RECORD—QUESTIONS PRESENTED FOR REVIEW—RULINGS ON PLEADINGS.

The bill of exceptions complains: (a) That the court refused to allow an amendment offered by the plaintiff in error to his answer; and (b) that the court overruled his motion for a new trial. Neither in the bill of exceptions, by exhibit or otherwise, nor in the exceptions pendente lite to the ruling disallowing the amendment, was the amendment set forth in form or substance. It was brought up as a part of the record, having been previously filed in the office of the clerk without any order by the judge allowing it filed. The only ground of the motion for new trial was that "the court erred in refusing to allow defendant's amendment to his answer, setting up an offset against plaintiff's claim against defendant." Held:

(a) The exception to the disallowance of the amendment cannot be considered. *Richards v. Shields*, this day decided.

(b) The refusal to allow the amendment furnishes no ground for a motion for a new trial. *Lee v. McCarty*, 132 Ga. 698, 64 S. E. 997. Hence the record fails to present any question for decision, and the judgment of the trial court will stand.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2883, 2884; Dec. Dig. § 681.* New Trial, Cent. Dig. §§ 24-29; Dec. Dig. § 18.*]

Error from Superior Court, Chatham County; W. G. Charlton, Judge.

Action by the Citizens' & Southern Bank and others against S. H. Lynah. Judgment for plaintiffs, and defendant brings error. Affirmed.

W. R. Hewlett, of Savannah, for plaintiff in error. Anderson, Cann & Cann, and Adams & Adams, all of Savannah, for defendants in error.

ATKINSON, J. Affirmed. All the Justices concur.

(138 Ga. 589)

COBB REAL ESTATE CO. et al. v. HOLMES.

(Supreme Court of Georgia. Aug. 19, 1912.)

(Syllabus by the Court.)

REFORMATION OF INSTRUMENTS (§ 21*)—DEED—FRAUD.

The petition did not set forth a cause of action, and the judge erred in refusing to dismiss it on general demurrer.

[Ed. Note.—For other cases, see Reformation of Instruments, Cent. Dig. § 80; Dec. Dig. § 21.*]

Error from Superior Court, Colquitt County; W. E. Thomas, Judge.

Action by James Holmes against the Cobb Real Estate Company and others. Judgment for plaintiff, and defendants bring error. Reversed.

Shipp & Kline and L. L. Moore, all of Moultrie, for plaintiffs in error. E. K. Wilcox, of Valdosta, and T. H. Parker, of Moultrie, for defendant in error.

ATKINSON, J. James Holmes brought an action against the Cobb Realty Company, a corporation, and two named individuals, to recover a described parcel of land, mesne profits, and damages for trespass on the land, and for injunction against further trespass. It appeared from the petition that the defendant corporation claimed the land sued for under a conveyance from the plaintiff. The petition was amended by allegations that the conveyance from the plaintiff to the defendant corporation was made to embrace the land sued for, by fraud practiced upon the plaintiff, and there was a prayer for the reformation of the conveyance. The substance of the allegations as to such fraud was: Plaintiff sold to Aycock certain described land, and executed to him a bond for title, in which the land sold was described as in effect all of a certain lot except described portions thereof belonging to the other parties. The bond contained a stipulation that the land sold should be subsequently surveyed by a competent surveyor, and that when so surveyed Aycock should pay to plaintiff a given sum cash and execute his notes, to mature at stated times, for the balance of the purchase price, the sum of the notes to be determined by the number of acres it should be found by the survey that the tract contained, and at a stated price per acre. A part of the land was afterwards surveyed and subdivided into town lots by agreement of plaintiff and Aycock, and the boundaries of the same marked and agreed upon between them, and the plat made by the surveyor filed and recorded in the office of the clerk of the superior court of the county where the land was situated. Aycock made the cash payment. After this the Cobb Realty Company was incorporated, and Aycock became a large stockholder therein and its president. He then informed the plaintiff that he had transferred the bond for title to the Cobb Realty Company, which was ready to pay the balance of the purchase price of that part of the land which had been surveyed and platted, and requested the plaintiff to convey such land to the corporation. Plaintiff expressed his willingness to do so, and found that Aycock had a deed already prepared for him to sign. Before signing the deed the plaintiff inquired of Aycock if the land described in the deed prepared at Aycock's instance described the land in accordance with the survey that he and Aycock had the surveyor to make, and a plat of which survey had been recorded, as stated. Aycock replied in the affirmative, and thereupon the plaintiff, having confidence in Aycock, and relying upon his representation that the deed he presented to plaintiff de-

scribed the land in accordance with such survey and plat, executed the same to the Cobb Realty Company and delivered it to Aycock as president of the company. Subsequently the plaintiff discovered that Aycock had practiced a fraud upon him, in that Aycock had had another and different survey and plat of the land made without the knowledge or consent of plaintiff, which last survey and plat embraced the land sued for; whereas the first survey and plat which had been agreed upon between them did not embrace the land sued for. The plaintiff could read and write, but had no knowledge of surveying, and was unable to ascertain, from the description of the land in the deed presented to him by Aycock, whether it differed from the plat of the survey which was first made of the land sold to Aycock, and which had been agreed to between them.

An examination of the bond for title given by the plaintiff to Aycock discloses the fact that the description of the land covers all the land described and conveyed by plaintiff to the Cobb Realty Company; and, this being true, we are unable to understand how the plaintiff had been defrauded, even though there may have been a material variance between the two surveys. The plaintiff has conveyed to the defendant company no more land than he was legally bound to convey under his bond. This conveyance, being only to that part of the land described in the bond for title which was surveyed, does not satisfy the bond. The defendant corporation, to whom the bond for title was assigned, is still entitled, upon payment of the agreed price per acre, to have the plaintiff convey the balance of the land described in the bond for title. There is no allegation that the acreage covered by the new plat was misstated, and thereby that the defendant procured a deed covering more acres than was paid for. But the allegation is that it embraced the land sued for, which was land which the plaintiff had never agreed to sell, either to defendant corporation or to any one else. This allegation, however, is not borne out by the bond for title, which controls; it appearing from that instrument that the plaintiff intended to sell all the land in the specified original land lot which lay west of the Georgia Northern Railroad, except the three described lots which were recited as being owned by other persons, thus showing an intention to sell all of that lot which he owned west of the said railroad, reserving to himself none of it. The land in dispute was some of the land which lay west of the railroad, and consequently the defendant, upon payment of the purchase price, was entitled to a deed; and it makes no difference that it might or might not have been included in the survey of the town lots. As there was no ground alleged for reforming the deed, and the deed concluded the plaintiff as to his right to recover the land, the

judge erred in refusing to dismiss the petition on general demurrer.

Judgment reversed. All the Justices concur.

(138 Ga. 624)

CODY v. KINSEY.

(Supreme Court of Georgia. Aug. 19, 1912.)

(Syllabus by the Court.)

APPEAL AND ERROR (§ 1094*)—REVIEW—QUESTIONS OF FACT.

This being a contest over the possession of a child between the grandmother and the father, and the evidence being sufficient to authorize a conclusion that the father, upon the death of the child's mother, and when the child was but a few months old, gave the child to the grandmother to rear, the judgment of the superior court, affirming the judgment of the ordinary, awarding the custody of the child to the grandmother, will not be disturbed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4322-4352; Dec. Dig. § 1094.*]

Error from Superior Court, Warren County; B. F. Walker, Judge.

Action by Roney Cody against Louisa Kinsey. Judgment for defendant, and plaintiff brings error. Affirmed.

L. D. McGregor, of Warrenton, for plaintiff in error. M. L. Felts, of Warrenton, for defendant in error.

EVANS, P. J. Judgment affirmed. All the Justices concur.

(138 Ga. 604)

SEABOARD AIR LINE RY. v. SOUTHERN FLOUR & GRAIN CO.

(Supreme Court of Georgia. Aug. 19, 1912.)

(Syllabus by the Court.)

CARRIERS (§ 197*)—CARRIAGE OF GOODS—CHARGES—CONNECTING CARRIERS.

When an owner delivers goods to a carrier for transportation to a destination beyond its line, and for that purpose to be delivered by it to a connecting carrier in order to continue the transportation, or where it becomes necessary for that purpose to make successive deliveries from one to another upon a continuous line or succession of carriers, the first and each succeeding carrier, if each conducts business independently of the others, becomes the agent of the owner to make delivery of the goods to the next carrier; and if in such case the initial carrier gives to the owner a bill of lading by the terms of which the goods are to be delivered at the terminus of its line to a named connecting carrier, to be transported over the latter's line and certain other designated lines to destination, and by the fault or negligence of the initial carrier the goods are transported to destination over other lines than those named in the bill of lading, the final carrier has the right to pay the charges for freight, if within the ordinary rates and apparently regular, of the prior connecting carriers over whose lines the goods were transported, and to hold the goods for reimbursement, as well as for its own share of the freight earned and for demurrage due it, provided the final carrier had no knowledge or notice of the agreement between the owner and the initial carrier, embodied in the bill of lading, as to a different routing of the goods. *Bird v. Georgia R.*, 72 Ga. 655; *Georgia R. Co. v. Murrah*, 85 Ga. 343, 11 S. E. 779, and authorities cited; *Goodin v. Southern Railway Co.*, 125 Ga. 630, 634, 54 S. E. 720, 6 L. R. A. (N. S.) 1054, 5 Ann. Cas. 573; *Seaboard Air Line Ry. v. Friedman*, 128 Ga. 316, 318, 57 S. E. 778; 1 *Hutch. Car.* (3d Ed.) § 139; 4 *Elliott on Railroads* (2d Ed.) § 1451; 5 *A. & E. Enc. Law* (2d Ed.) 408, 408; 11 *Notes to American Decisions*, 747, annotations to *Briggs v. Boston & L. R. Co.*, 6 *Allen* (Mass.) 246, 83 Am. Dec. 626.

(a) The final carrier and the next preceding connecting carrier would be none the less independent carriers merely because the settlement of the proportionate freight charges due each of them, according to regular published rates for goods carried over both lines, was made by their respective auditors at stated intervals, instead of such charges being paid at the junctional point by the receiving line to the delivering line.

(b) Applying the law as above announced to the facts of this case, the trial judge erred in directing a verdict for the plaintiff in an action of trover and bail, brought by the owner of goods against the final carrier, and in overruling the motion for new trial made by the defendant.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 891-900; Dec. Dig. § 197.*]

Error from Superior Court, Fulton County; J. T. Pendleton, Judge.

Action by the Southern Floor & Grain Company against the Seaboard Air Line Railway. Judgment for plaintiff, and defendant brings error. Reversed.

Brown & Randolph and Hugh M. Scott, all of Atlanta, for plaintiff in error. Walter McElreath, of Atlanta, for defendant in error.

FISH, C. J. Judgment reversed. All the Justices concur.

LUMPKIN and ATKINSON, JJ., concur, because in their opinion the case is controlled by the decision in *Bird v. Georgia R.*, 72 Ga. 655.

(138 Ga. 673)

WILDER v. WILDER.

(Supreme Court of Georgia. Aug. 17, 1912.)

(Syllabus by the Court.)

1. TRUSTS (§ 35*)—IMPLIED TRUSTS—PAYMENT OF CONSIDERATION FOR CONVEYANCE TO ANOTHER.

If a mother buys lands with her own funds, and causes the title to be made to her son under an understanding and agreement that the property is to be hers, and that the son will make to her such conveyance as she may require, a trust in favor of the mother will be implied.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 45-50; Dec. Dig. § 35.*]

2. TRUSTS (§ 43*)—EXPRESS TRUSTS—REQUIREMENT OF WRITING.

Under our statute an express trust must be created or declared in writing. Therefore, where three persons joined in the purchase of a tract of land, and title was made to one of them, parol evidence is inadmissible to show that it was the agreement that one of the oth-

ers was to have the complete title, and that the grantee and the other purchaser were only to have a home on the land until the happening of a specified contingency.

[Ed. Note.—For other cases, see *Trusts*, Cent. Dig. §§ 62-65; Dec. Dig. § 43.*]

3. PLEADING (§ 98*)—DEMURRER—GROUNDS.

The petition charged that the defendant pretended to claim the land sought to be recovered under an alleged will of the plaintiff's intestate, which had never been probated, and prayed its cancellation. The defendant in her answer denied that she claimed under the will, but set out the alleged will in extenso. The plaintiff specifically demurred to so much of the answer as set forth the will on the ground of irrelevancy. *Held* that, though the will may not be relevant to the real issue in the case, yet, as the plaintiff in her petition called on the defendant to produce this instrument and prayed its cancellation, the averments respecting it are responsive to the plaintiff's own allegations and prayer.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. §§ 200, 201; Dec. Dig. § 98.*]

4. PLEADING (§ 98*)—ANSWER—RESPONSE-NESS.

The defendant also averred that the plaintiff's intestate died shortly after his marriage, and that, in ignorance of the fact that a child would be born to his widow, she entered into an agreement with her respecting the disposition of her husband's property. This matter is irrelevant, because the defendant claimed no right or benefit under the agreement, and because any arrangement between the plaintiff as an individual and one of the defendants would not estop the former in her representative capacity.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. §§ 200, 201; Dec. Dig. § 98.*]

5. PLEADING (§ 194*)—DEMURRER—GROUNDS—MATTERS OF INDUCEMENT.

There were some special grounds of demurrer relating to the relevancy of certain averments in the answer; but, as they may properly be considered as matters of inducement to the material averments of the defense, there was no error in overruling these grounds.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. §§ 444-446, 449-452; Dec. Dig. § 194.*]

6. WITNESSES (§ 160*)—COMPETENCY—TRANSACTIONS WITH PERSONS SINCE DECEASED.

In a suit instituted by an administrator, a defendant is an incompetent witness to testify in his own favor concerning transactions and communications with the deceased person, whether such transactions or communications were had by such deceased person with the party testifying or with any other person. Acts 1900, p. 87.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. §§ 696, 697; Dec. Dig. § 160.*]

7. INSTRUCTIONS—PAROL TRUST.

Some of the excerpts from the charge were constructed to fit the allegations of the answer setting up a parol express trust, and for that reason were erroneous.

Error from Superior Court, Fulton County; Geo. L. Bell, Judge.

Action by Mrs. D. N. Wilder, as administratrix, against Mrs. F. E. Wilder and another. Judgment for defendants, and plaintiff brings error. Reversed.

A. H. Davis, of Atlanta, for plaintiff in error. Dorsey, Brewster, Howell & Heyman, for defendants in error.

EVANS, P. J. Mrs. Dovie N. Wilder, as administratrix of her deceased husband, brought an action against Mrs. F. E. Wilder, the mother of the plaintiff's intestate, to recover certain realty. It was alleged that the legal title to the property was in the plaintiff's intestate, but that the defendant claimed title under an alleged will of the plaintiff's intestate, which had never been probated, and was void because of the birth of a child after its alleged execution, there being no provision in the will in contemplation of such an event. Petitioner prayed for the cancellation of the will and a recovery of the property. The defendant in her answer admitted that the legal title was in the plaintiff's intestate, but averred that the equitable title was in her, firstly, because the property was purchased with her own funds and the legal title was taken in the name of her son, under an understanding and agreement that the property was always to be hers, and that the son should make to her such conveyance as she might require; and, secondly, that the property was purchased with the joint accumulations of the savings of herself, her sister, and her son, and the title was taken to the son under an agreement that the property was to be hers, charged with the right of the son and sister to live in the house so long as defendant occupied it as a home. The sister of the defendant was made a party to the suit, and adopted the defendant's answer as her own. The trial resulted in a verdict for the defendants, and a new trial was refused.

[1] 1. The plaintiff's demurrer challenged the sufficiency of the defendant's allegations to raise an implied or resulting trust. Express trusts are those created by agreement of the parties; implied trusts are such as are inferred by law from the nature of the transaction or the conduct of the parties. Civil Code, § 3732. Implied trusts are sometimes called resulting trusts. Civil Code, § 3739, enumerates the following instances of circumstances where a trust will be implied: "1. Whenever the legal title is in one person, but the beneficial interest, either from the payment of the purchase money or other circumstances, is either wholly or partially in another. 2. Where, from any fraud, one person obtains the title to property which rightly belongs to another. 3. Where, from the nature of the transaction, it is manifest that it was the intention of the parties that the person taking the legal title shall have no beneficial interest. 4. Where a trust is expressly created, but no uses are declared, or are ineffectually declared, or extend only to a part of the estate, or fall from any cause, a resulting trust is implied for the benefit of the grantor, or testator, or his heirs." The answer sets up that the money of the defendant, acquired from her earn-

ings and from gifts of her sister and son, was used in the purchase of the land, and that, though she caused the legal title to be taken in the name of the son, she was actuated to this course because she was a widow, and regarded her son as the man of the house, but that it was the common understanding and agreement of all parties concerned that she was to be the real owner, and that the son should make her a conveyance whenever required by her. As between parent and child, payment of the purchase money by one and causing the conveyance to be made to another will be presumed to be a gift; but a resulting trust in favor of the one paying the money may be shown and the presumption rebutted. Civil Code, § 3740. If the mother bought the property with her own money and took the title in the name of her son, and nothing else appeared, then the transaction would be a gift. But if the title was taken in the name of the son under circumstances indicating that no gift was intended, and that the mother was to continue to be the owner of the property notwithstanding the legal title was put in the son, as between them a trust would result to the mother. *Dyer v. Dyer*, 1 Lead.

Cases in Eq. 314; *Cottle v. Harrold*, 72 Ga. 830; 3 Pom. Eq. Jur. §§ 1037, 1038. In such cases the court may hear parol evidence of the nature of the transaction or the circumstances or conduct of the parties either to imply or rebut the trust. Civil Code, § 3741.

[2] 2. But the other defense stands on an entirely different footing. In the latter the defendant undertakes to ingraft a parol trust on a deed. The essence of the averment is that the property was bought with money belonging to the defendant, her sister, and her son, and that title was made to the latter under an express agreement that the property was to be held for the defendant, subject to the right of the sister and the son to live in the house as long as the defendant occupied it as a home. This is an express trust, resting upon the agreement of the parties, and must be created or declared in writing. Civil Code, § 3733. The demurrer to so much of the answer as undertook to set up a parol express trust should have been sustained.

[3-7] 3-7. The rulings made in headnotes 3 to 7 do not require discussion.

Judgment reversed. All the Justices concur.

(138 Ga. 592)

ROME INDUSTRIAL INS. CO. v. EIDSON.
(Supreme Court of Georgia. Aug. 19, 1912.)

(Syllabus by the Court.)

1. INSURANCE (§ 376*)—WAIVER OF FORFEITURES—AUTHORITY OF AGENT.

A policy of insurance required the payment of a weekly premium, and declared that, if any payment should not be made when due, the policy should be void. It also contained this clause: "Its terms cannot be changed or its conditions varied, except by a written agreement, signed by the president or secretary of the company. Therefore agents (which term includes superintendents and assistant superintendents) are not authorized and have no power to make, alter, or discharge contracts, waive forfeitures, or receive premiums on policies in arrears more than four weeks. * * * Should this policy become void in consequence of nonpayment of premium, it may be revived, if not more than 52 premiums are due, upon payment of all arrears and the presentation of evidence satisfactory to the company of the sound health of the insured." *Held*, that the company could thus limit the authority of its agents as to waiving forfeitures or receiving overdue premiums, and one who accepted a policy with these terms in it was charged with notice of such limitations.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 952-955; Dec. Dig. § 376.*]

2. INSURANCE (§ 664*)—ACTIONS ON POLICIES—EVIDENCE.

Under such a policy, it was error to admit evidence tending to show that, when the wife of the insured went to the local assistant superintendent, in a city other than that where the home office of the company was located, seeking to have a lapsed policy revived, and paid to him past-due premiums, she informed him of a sickness which her husband had undergone, and offered to have an examination made, and that the assistant superintendent told her it would be unnecessary, that he would see the physician, that she was "all right," and that the policy was as good as ever. In the absence of any enlargement of the authority of the agent, or ratification of his acts, such assurances by him were beyond his authority.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1555, 1687, 1688, 1699; Dec. Dig. § 664.*]

3. TRIAL (§ 252*)—INSTRUCTIONS—EVIDENCE.

The evidence did not authorize the court to charge in effect that if the jury believed that after lapse the policy was revived, or again brought into force and effect, by the company and the insured, and if under such revival the premiums and assessments past due were paid and accepted by the company, then if the premiums were kept up, and the terms of the policy otherwise complied with on the part of the insured, the company would be liable, or to charge that the company could not accept default payment, if any were made to it, with knowledge of the default, and retain the premium until after the death of the insured, and then repudiate the payment and liability under the policy and retain the premiums.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 505, 596-612; Dec. Dig. § 252.*]

4. INSURANCE (§ 669*)—ACTIONS ON POLICIES—INSTRUCTIONS.

Where a policy of life insurance provided that, if any premium should not be paid when due, the policy should become void, but that a lapsed policy might be revived upon payment of all arrears and "the presentation of evidence satisfactory to the company of the sound health of the insured," it was error to charge that

evidence of health, if presented, "ought to have been strong enough to have been satisfactory to the company, or sufficient to have been satisfactory to a reasonable man."

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1558, 1771-1784; Dec. Dig. § 669.*]

Error from Superior Court, Fulton County; W. D. Ellis, Judge.

Action by J. A. Eidson against the Rome Industrial Insurance Company. Judgment for plaintiff, and defendant brings error. Reversed.

Mrs. Julia Eidson brought suit against the Rome Industrial Insurance Company on a policy issued upon the life of her husband. The insured was required to pay a weekly premium of 70 cents. The policy also contained the following terms: "This policy is issued upon an application which omits the warranty usually contained in applications, and contains the entire agreement between the company and the insured and the holder and owner hereof. Its terms cannot be changed, or its conditions varied, except by a written agreement, signed by the president or secretary of the company. Therefore agents (which term includes superintendents and assistant superintendents) are not authorized and have no power to make, alter, or discharge contracts, waive forfeitures, or receive premiums on policies in arrears more than four weeks, or to receipt for the same in the receipt book, and all such arrears given to an agent to be at the risk of those who pay them, and shall not be credited upon the policy, whether entered in the receipt book or not. If this policy be assigned or otherwise parted with, or if any erasure or alteration be made therein, except by indorsement signed by the secretary, or if any premium shall not be paid when due, this policy shall be void. * * * Should this policy become void in consequence of nonpayment of premium, it may be revived, if not more than 52 premiums are due, upon payment of all arrears and the presentation of evidence satisfactory to the company of the sound health of the insured." It was conceded that the policy lapsed in February, 1908, for nonpayment of premiums. But the plaintiff contended that it was renewed in August, following, before the death of her husband, the insured. The jury found for the plaintiff. The defendant moved for a new trial, which was refused, and it excepted.

Anderson, Felder, Rountree & Wilson, of Atlanta, and Dean & Dean, of Rome, Ga., for plaintiff in error. Napier, Wright & Cox, and Stevens & Ogburn, all of Atlanta, for defendant in error.

LUMPKIN, J. (after stating the facts as above). [1, 2] 1, 2. The policy on its face contained limitations on the authority of the

agent. The company could waive a forfeiture by its conduct, without a written entry; and it would doubtless not be permitted to dally with an insured by accepting his money and application for a revival, retaining them an unreasonable time, and rejecting the application after his death. *Georgia Masonic Insurance Co. v. Gibson*, 52 Ga. 640. Some courts hold that a general agent of the company can waive a forfeiture by reason of the apparent authority conferred on him as an agent, in spite of provisions like those contained in this policy. But this court is committed to the doctrine that the company can limit the authority of the agent effectively as to one who has notice of the limitation, and that such terms in the policy charge the insured with notice. *Hutson v. Prudential Ins. Co.*, 122 Ga. 847, 50 S. E. 1000; *Vardeman v. Penn Mutual Life Ins. Co.*, 125 Ga. 117, 54 S. E. 66, 5 Ann. Cas. 221; *Bank of Commerce v. New York Life Ins. Co.*, 125 Ga. 552 (3), 557, 54 S. E. 643. It was accordingly error to admit evidence to the effect that the assistant local superintendent undertook to waive requirements of the policy as to revival, and also assured the wife of the insured that the policy was as good as ever, unless such acts were brought to the knowledge of the company and ratified by it. It may be unfortunate if the wife of the insured relied on such statements of the agent; but, if one takes a policy containing such limitations upon the authority of the company's agent, he has to abide by the agreement, unless it is waived by some one having greater authority than the agent. This ruling is not in conflict with those which hold that in the inception of the contract, in consummating the insurance and putting the policy in force, knowledge of the agent entrusted with doing so is attributable to the company, and waives a condition against its going into effect, arising from facts so known. *Johnson v. Aetna Ins. Co.*, 123 Ga. 404, 51 S. E. 339, 107 Am. St. Rep. 92. In the latter case, the policy is being put in force. In the former, it is in force, and its terms govern the future power of an agent to waive forfeiture.

[3] 3. The court charged in substance that if, after the policy lapsed, it was again brought into force and effect by the parties to it, the company and the insured, and if, under such revival, the premiums and assessments past due were paid and accepted by the company, then if the premiums were kept up, and the terms of the policy otherwise complied with on the part of the assured, the company would be liable. He also charged that the company could not accept default payments, if any were made to it, with knowledge of the default, and retain the premium until after the death of the assured, and then repudiate the payment and liability under the policy, and retain the premium.

We fail to find in the record evidence authorizing these charges. The policy lapsed in February, 1908, for nonpayment of premium. No effort to revive it was made until the following August. The insured then signed an application for that purpose, and his wife paid to one of several agents known as "assistant superintendents" in the company's Atlanta office the amount necessary to cover the monthly premiums due from February until that time. The evidence tended to show that the agent forwarded the application to the home office of the company at Rome, but it was rejected, and he was notified; that a letter was written by one of the agents in the Atlanta office, directed to the applicant, which bore date August 28th, but was not received by the wife of the insured until September 5th, after his death. In this it was stated that the application had been declined, and that the amount which she had paid to the assistant superintendent would be returned to her by him. It was tendered to her later, but she declined to receive it. There was no evidence to show that the money was forwarded to the company, or received or held by it. The only intimation to that effect is to be found in the evidence of one Bradley, who stated that he was acting superintendent of defendant for the Atlanta district, and testified that, when he received the notice of the rejection of the application, he wrote the letter of August 28th, and it was mailed the same day, in the afternoon; that "at that time I made the remittance from this office to the home office. I did not receive any amount of money from Mr. Akin [the assistant superintendent to whom it was paid by the wife of the insured], or remit to the company any amount of money. It has not been remitted from this office." One clause of this statement, taken alone, might indicate that he remitted the money to the home office after the application had been rejected, and after he had notified the insured of that fact by mail; but, taken together, the witness can hardly mean by his testimony that such was the fact. There was evidence that the secretary of the company offered to pay to the brother of the wife of the insured the amount of the premium; but this did not show that the company had received that amount from the local agent. It appeared to be rather in the nature of an offer of compromise. There was also no evidence that, after a revival of the policy, the premiums were then kept up.

[4] 4. The presiding judge charged: "To make the attempt to revive effectual, it must be shown to you that evidence of the sound health of the insured was presented to the company, and, if presented, it ought to have been strong enough to have been satisfactory to the company, or sufficient to have been satisfactory to a reasonable man." The policy declared that, if any premium should not

be paid, "this policy shall be void." In providing a method of obtaining a revival, one requirement was "the presentation of evidence satisfactory to the company of the sound health of the insured." It did not say "sufficient to satisfy a reasonable man," as the judge charged. Where the company reserved to itself the question of satisfaction, it would be changing the contract to hold that what would satisfy a reasonable man would answer the terms of the policy. Doubtless the company must act honestly and in good faith in passing upon the question. But, if it does so, the test applied by the trial court was erroneous. *Mackenzie v. Minis*, 132 Ga. 323 (1, 2), 327, 329, 63 S. E. 900, 23 L. R. A. (N. S.) 1003, 16 Ann. Cas. 723; *Stewart v. Exum*, 132 Ga. 422 (3), 425, 64 S. E. 471; *Ronald v. Mutual Reserve Fund Life Association*, 132 N. Y. 378, 382, 384, 30 N. E. 739; 2 *Joyce, Ins.* § 1276. A company may waive this requirement, or estop itself by its conduct from setting up noncompliance with it. But that is a different thing from defining what is a compliance. In this case there was evidence that the policy had lapsed for some six months when the effort was made to revive it, that the insured had been in bad health, that he died in three or four weeks after the application for reinstatement, and that he had been rejected as a risk by another company to which he applied for insurance.

Judgment reversed. All the Justices concur.

(138 Ga. 607)

ESTILL v. SAVANNAH BANK & TRUST CO.

(Supreme Court of Georgia. Aug. 19, 1912.)

(Syllabus by the Court.)

1. LANDLORD AND TENANT (§ 265*)—RENT—DISTRRAINT.

Although a tenant, who is a merchant, may sell and dispose of a considerable portion of his stock of merchandise, including all the goods in the store of a certain class, at a reduced price, and not with the intention of replacing these goods with other goods of a similar character or value, and though such a sale have the effect of decreasing the value of the stock of goods carried, it is error to charge as matter of law that this would have the effect of subjecting the tenant to immediate distraint under the provisions of section 3700 of the Civil Code of 1910, relative to tenants seeking to remove their goods from the premises.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 1062-1074; Dec. Dig. § 265.*]

2. DISTRRAINT FOR RENT.

Would the sale by such a tenant of his entire stock of goods in bulk have the effect of subjecting the tenant to distraint under the statute above referred to?—*quære*.

Error from Superior Court, Chatham County; W. G. Charlton, Judge.

Action by the Savannah Bank & Trust Company trustee against J. H. Estill. Judgment for plaintiff, and defendant brings error. Reversed.

Robt. L. Colding, of Savannah, for plaintiff in error. W. L. Clay, of Savannah, for defendant in error.

BECK, J. The plaintiff in the court below sued out a distress warrant against Estill, the defendant, on the ground that the defendant "is seeking to remove his goods from the premises." The distress warrant was levied upon a stock of goods on the leased premises. Estill filed a counter affidavit, in which he deposed "that it is not true, as alleged in the affidavit upon which the distress warrant issued, that this defendant is seeking to remove his goods from the premises leased by him, as alleged." The trial upon the issue thus formed resulted in a verdict for the plaintiff. The defendant filed a motion for a new trial, which was overruled.

[1] Section 3700 of the Civil Code provides that "the landlord shall have power to distrain for rent as soon as the same is due, or before due if the tenant is seeking to remove his goods from the premises." The distress warrant in the present case was issued on the ground that the tenant "is seeking to remove his goods from the premises." The tenant was a merchant, his stock of goods consisting of wall paper, a small quantity of paints, and some sash and blinds. There was evidence to show that he had sold the sash and blinds for about \$30, and that this amount was about 50 per cent. of the regular selling price. He had also sold some paint, the quantity of which was not very definitely stated, but must have been inconsiderable, as there was not enough of any one kind to paint a house. As to the sale of the sash, blinds, and doors, the tenant himself testified on the trial that it was his intention "not to handle that line of goods any more, * * * that he was going to put in a larger stock of wall paper," and that he had "just gotten in a new lot of wall paper." A witness for the plaintiff, who had purchased some brushes, putty, and oil at a reduced price from one of the salesmen of the defendant, stated that the reason given for "reducing the price was that they were going out of business, or liquidating." This reason was stated by a Mr. Kelley, or a Mr. Paxton, who were salesmen for the store.

Upon the trial, in course of his instructions to the jury the court charged them as follows: "If you find that what was done was in the usual course of business and trade as carried on in that place, the mere selling of goods to get other goods in their stead, or to get rid of old stock, or which was not otherwise merchantable or not in first-class condition, that would not be a removal in the eyes of the law. But if the intent was

to impair the stock, to get rid of any considerable portion of it finally, without the idea of restoring it in some way or other to the business, but with the idea of disposing of it at a sacrifice in order to get out of business finally, then, under such circumstances as those, if you find that was not in the usual and ordinary course of business as carried on there, that would be a removal in contemplation of law." Complaint is made of this charge. We do not consider this charge as merely submitting the proposition of law that, if a merchant sells or is seeking to sell his stock of goods in bulk, in such a case a distress warrant might be issued against him under the provisions of the statute above quoted. But the charge is more comprehensive than that, and is liable to be understood, and was probably understood by the jury, to mean that if a merchant sells any considerable portion of his stock of goods with intent to impair the stock, and without the idea of restoring it in some way to the business, and this was not done in the usual and ordinary course of business as carried on there, this would be a removal in contemplation of the law. And certainly the portion of the charge set forth above was open to the broad construction just placed upon it, under the court's additional instruction, which is also complained of in the motion for a new trial, and which is in the following language: "Take into consideration all of the circumstances as detailed to you from the stand, and reach a conclusion whether or not what was done was in the usual and ordinary course of trade and business as there conducted by the tenant, or whether it was beyond the usual and beyond the ordinary course of business, and what was done amounted to an impairment of the stock and business, with no intention of getting rid of old stock that could not be sold in the ordinary course of business and putting something back in place of it."

In fact the controlling idea running through the entire charge was that if the sale of the goods referred to by the witnesses in their testimony was not in the usual and ordinary course of trade, but was for the purpose of getting a final disposal of these goods, and without the intent of replacing them with other goods, and that this amounted to an impairment of the stock of goods in the business, the landlord had the right, under the statute, to issue the distress warrant. We do not think this doctrine is sound. While it has been held, as against a tenant of agricultural lands, that a sale of any part of the crops gives the landlord the right to sue out a distress warrant at once against a tenant who is seeking to remove his goods from the premises, we do not think that this principle can be extended to cover the case of a merchant who offers a portion of his goods for sale at reduced prices, even

though such a sale is not in the usual and ordinary course of business, and will have and is intended to have the effect of reducing the amount of his stock. That a difference might exist in the application of the rule to agricultural tenants and other tenants who remove or are seeking to remove their property from rented premises was recognized in *Daniel v. Harris*, 84 Ga. 479, 10 S. E. 1013, one of the cases in which it was ruled that the removal and disposal by an agricultural tenant of a part of the crop produced on the premises would subject the tenant to immediate distraint. In the case just cited it was said: "It is contended that the mere fact that a tenant is seeking to remove his goods from the premises will not justify the suing out of a distress warrant before the rent is due, but that the removal contemplated must be fraudulent, or with some intent or purpose to deprive the landlord of his rent, or to hinder, obstruct, or delay him in the collection of it. We think, however, that in the case of agricultural tenants what the statute has in view as to commercial crops, though it may be otherwise as to ordinary property, is the mere removal, and not the purpose of it. The statute gives the landlord a special lien upon the crop. Code, § 1997. This lien attached to the whole of the crop, and not to a part only. Without the landlord's consent, therefore, the tenant, however free from intention to defraud or injure his landlord, has no right to remove the crop or any part of it from the premises."

We do think, because a merchant, finding one line of goods, or goods kept in one department of his store, unprofitable to handle, decides to close out that line of goods and to no longer handle it in his business, or because for any other reason he sells or offers to sell all of his goods in such line or such department, though it be a considerable portion of his stock of merchandise, and though the sale may be made without intent to replace these goods with goods of like kind or like value, then it can be declared as matter of law that he hereby becomes subject to immediate distraint for rent not then due. Whether such evidence might be submitted for the consideration of the jury, to assist them in determining, as matter of fact, whether the merchant is seeking to remove his goods, is another matter.

[2] A different question would be presented from that which we have decided above, if it had appeared from the evidence that the defendant had sold or was offering to sell his stock of goods in bulk, and the trial judge had charged the jury distinctly that such a sale of goods by a merchant in bulk would authorize the landlord to distrain immediately.

Judgment reversed. All the Justices concur.

(138 Ga. 587)

SHAW et al. v. GOODMAN.

(Supreme Court of Georgia. Aug. 17, 1912.)

(Syllabus by the Court.)

1. DEMURRER TO INTERVENTION SUSTAINED.

There was no error in the judgment sustaining in part the demurrer to the intervention.

(Additional Syllabus by Editorial Staff.)

2. PARTNERSHIP (§ 183*)—RIGHTS AND LIABILITIES AS TO THIRD PARTIES—APPLICATION OF ASSETS TO LIABILITIES.

Where two members of a firm sell their interest to the remaining members and a third person, and the new partnership subsequently goes into the hands of a receiver, the claim of the former partners against the new partner for the price of his interest does not take precedence over claims of general creditors against the firm.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 320-336; Dec. Dig. § 183.*]

Error from Superior Court, Berrien County; W. E. Thomas, Judge.

Action by W. B. Goodman against A. E. Bullard and another, in which C. D. Shaw and another intervene. Judgment sustaining in part demurrer to intervention, and interveners bring error. Affirmed.

On and prior to September 25, 1907, there existed a partnership doing business under the name of C. D. Shaw & Co. The members of the firm were F. A. Shaw, C. D. Shaw, W. B. Goodman, and A. E. Bullard. On the date above mentioned the two Shaws sold the half interest which they together owned in the firm to Goodman and Bullard and J. T. Allen; the interest sold to Goodman and Bullard being a one-fourth interest, and a like interest to Allen. J. T. Allen gave his notes, with W. B. Allen as surety, to the Shaws for the purchase price of the one-fourth interest sold by them to him. After such sale the firm was reorganized and did business in the name of A. E. Bullard & Co.; A. E. Bullard, W. B. Goodman, and J. T. Allen constituting the partnership. On May 21, 1909, on his petition, W. B. Goodman was appointed receiver for the assets of the new firm. On May 20, 1909, the Shaws sued out an attachment against J. T. Allen for the purchase price of the one-fourth interest in the partnership of C. D. Shaw & Co. sold by them to Allen. The attachment was not levied, however, as the assets of A. E. Bullard & Co. were in the hands of Goodman, as receiver. On August 11, 1911, the Shaws obtained against J. T. Allen, as principal, and W. B. Allen, as surety, a common-law judgment on the notes given for the one-fourth interest in the firm of C. D. Shaw & Co. sold to J. T. Allen. The Shaws by leave of the court subsequently filed an intervention in the suit brought by Goodman against the firm of A. E. Bullard & Co., in which intervention they sought a decree establishing a prior lien in their favor on the assets

in the hands of the receiver, except as to older judgments and liens against the partnership assets; their contention being that as to the one-fourth interest in such assets belonging to J. T. Allen they had a superior lien, except as to older judgments and liens against the partnership of Bullard & Co. Upon the filing of such intervention, from which the foregoing facts appear, together with the fact that J. T. Allen was insolvent (it not appearing, however, upon what ground a receiver was appointed for the firm), a rule nisi was issued, calling upon the receiver, Goodman, to show cause why the intervention should not be allowed. Upon the matter coming on for a hearing at the first term of court thereafter, Goodman demurred to the petition for intervention, upon which demurrer the court ruled "that the debts of the partnership must be paid out of the partnership assets in the hands of the receiver, before payment of any part of the debts of the interveners is paid out of such assets; and the demurrer is sustained to the intervention, in so far and to the extent that it seeks priority of payment over the creditors of the partnership in the partnership assets." The Shaws excepted to this ruling.

Lankford & Dickerson, of Douglas, and J. P. Knight, of Nashville, for plaintiffs in error. W. D. Bule, W. G. Harrison, and Hendricks & Christian, all of Nashville, for defendant in error.

ATKINSON, J. The judgment sought to be established as a lien against one-fourth of the partnership assets in the hands of the receiver, and of a superior dignity to all liens upon such assets, except older judgments and liens against the partnership, was not a judgment against the partnership, but was one against J. T. Allen as an individual. Under the well-established rule as to the disposition of partnership assets by a court through the hands of its receiver, the joint or partnership assets will be applied first to the payment of partnership debts, and none of such assets can be devoted to the payment of the individual indebtedness of the partners until all of the partnership debts have been satisfied. It does not appear from the petition for intervention whether the assets in the hands of the receiver were sufficient to pay the partnership debts; but the contention made in the petition was that the judgment which the Shaws had obtained against Allen individually, who was a member of the partnership, had a prior lien on one-fourth of the partnership assets, except as to older judgments and liens against the partnership. Clearly such a contention was not sustainable. The attachment sued out by the Shaws against Allen as an individual, and for the purchase

price which he had agreed to pay them for their interest in the partnership which they had sold to him, certainly did not operate to give the Shaws any lien as against Allen's interest in the partnership over that of other creditors of the firm. The attachment was never levied, and, indeed, it could not have been levied upon Allen's interest in the partnership, even though the assets of the firm had not been in the hands of the receiver. The Civil Code expressly provides that an attachment against an individual member of a copartnership shall be levied only upon the separate property of such copartner. Section 5067. From what has been said it is manifest that the court did not err in granting the order of which complaint was made. *Camp v. Mayer*, 47 Ga. 414 (7). See, in this connection, *Sheppard v. Bridges*, 137 Ga. 61, 74 S. E. 245.

Judgment affirmed. All the Justices concur.

(138 Ga. 613)

HUFF et al. v. YARBROUGH et al.

(Supreme Court of Georgia. Aug. 19, 1912.)

(Syllabus by the Court.)

DEEDS (§ 124*)—CONSTRUCTION—ESTATE CONVEYED.

J. F. Huff executed the following instrument: "Georgia, Cobb County. This indenture, made this the 29th day of May, 1890, between J. F. Huff and Mrs. Martha Huff, both of the county and state aforesaid, witnesseth: That the said J. F. Huff, for and in consideration of the love and affection of his wife, the said Mrs. Martha Huff, the said J. F. Huff hereby gives, grants, and conveys to the said Mrs. Martha Huff all the property, both real and personal [which included the land in controversy], belonging to the estate of the said J. F. Huff, in the county of Cobb, state of Georgia, at his death, should the said Mrs. Martha Huff survive the said J. F. Huff, and the said Mrs. Martha Huff shall have the property as aforesaid, with all the rights and privileges belonging thereunto, for the support of the said Mrs. Martha Huff; * * * and should there remain any property, real or personal, at the death of the said Mrs. Martha Huff, the same shall be divided equally between James Huff and Mary Ragsdale." There arising a controversy as to whether this paper was not void, on the ground that it was testamentary in character and improperly executed and attested, all his children joined in executing an instrument which rendered it effectual to convey property according to the terms thereof. After the death of J. F. Huff, Mrs. Martha Huff conveyed the land referred to in this writing to the defendant in the instant case, and after the death of Mrs. Martha Huff the said James Huff and Mary Ragsdale brought suit to recover the land, alleging that they had a vested remainder interest therein, and were entitled to possession thereof upon the termination of the life estate. *Held* that, under the terms and provisions of the instrument set forth above, Mrs. Martha Huff had authority to consume the entire estate for her support, the corpus as well as the income, and that a sale of the land for that purpose by her, and a conveyance executed in pursuance thereof, divested James Huff and

Mary Ragsdale of any interest they might have had in the land.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 344-355, 416-428, 434, 435; Dec. Dig. § 124.*]

Error from Superior Court, Cobb County; N. A. Morris, Judge.

Action by James Huff and another against E. E. Yarbrough and others. Judgment for defendants, and plaintiffs bring error. Affirmed.

James Huff and Mary Ragsdale brought an action for the recovery of land in Cobb county, against E. E. Yarbrough and certain named tenants of the latter. It is alleged in the petition that plaintiffs and defendant claim under a common source of title, to wit, through J. F. Huff. Petitioners base their claim of title upon the two written instruments hereinafter set forth, each executed with the formality of a deed, and upon the further fact that Mrs. Martha Huff, therein named, has since died. The first of these instruments, executed by J. F. Huff, is as follows: "Georgia, Cobb county. This indenture, made this the 29th day of May, 1890, between J. F. Huff and Mrs. Martha Huff, both of the county and state aforesaid, witnesseth: That the said J. F. Huff, for and in consideration of the love and affection of his wife, the said Mrs. Martha Huff, the said J. F. Huff hereby gives, grants, and conveys to the said Mrs. Martha Huff all the property, both real and personal, belonging to the estate of the said J. F. Huff, in the county of Cobb, state of Georgia, at his death, should the said Mrs. Martha Huff survive the said J. F. Huff, and the said Mrs. Martha Huff shall have the property as aforesaid, with all the rights and privileges belonging thereunto, for the support of the said Mrs. Martha Huff; and should there remain any property, real or personal, at the death of the said Mrs. Martha Huff, the same shall be divided equally between James Huff and Mary Ragsdale." The other instrument was executed jointly by all the children of J. F. Huff, after his death, and was accepted by Mrs. Martha Huff, the widow of J. F. Huff, in full and final settlement of a controversy which had arisen between herself and the children of J. F. Huff as to her interest in the latter's estate. This instrument reads as follows: "State of Georgia, County of Fulton. This indenture, made this 24th day of April, 1891, between William T. Huff, James C. Huff, Henry T. Huff, John W. Huff, and Mary E. Ragsdale, all being 21 years of age and being all the children of J. F. Huff deceased, late of Cobb county, Georgia, and all of Fulton county, Georgia, do by these presents consent to and convey all and singular the rights to said party of the second part under a deed of gift made to the said M. A. (Martha) Huff [reference here

being made to the first quoted instrument], and the consideration of this agreement is the relinquishment, giving up, and electing of the provisions of said deed of gift by the said party of the second part in lieu of dower, child's, and any and all claim to any part in the real estate of the land of the said J. F. Huff, deceased, in Fulton county, Georgia, this to be full settlement to her, as widow of said J. F. Huff, deceased, in the land in Fulton county, as aforesaid." The petition further alleges that the defendant claims title to the land in controversy by reason of a deed of conveyance executed by the said Mrs. Martha Huff subsequently to the execution of the foregoing instruments, whereby she undertook to convey to defendant the land in controversy. The defendants filed a general demurrer to the petition, which the court sustained, and dismissed the petition.

Walter McElreath and J. A. Watson, both of Atlanta, for plaintiffs in error. J. Z. Foster, of Marietta, for defendants in error.

BECK, J. (after stating the facts as above). Under the allegations of the petition, the written instrument executed by J. F. Huff is to be given effect and construed according to the words and terms thereof, inasmuch as subsequently to the death of J. F. Huff all of his children joined in the execution of the other written instrument, conveying to Mrs. Martha Huff, the widow of J. F. Huff, "all and singular the rights" to the property purporting to have been conveyed to her by the instrument first set forth above. It is conceded in the petition brought by the complainants that this deed, which all the children of J. F. Huff joined in executing, was effectual to convey "all and singular the rights to the property" involved in this suit, which purports to have been conveyed or disposed of by the writing executed by J. F. Huff. And what right and interest in and to that property were conveyed by the written instrument last referred to must be ascertained from the language of that instrument itself. Considering the instrument in its entirety we are satisfied that it was the intention of the maker thereof to give to his wife all the property referred to therein, with authority to consume the entire property for her support, the corpus thereof as well as the income, and that the complainants in this case took no interest in the property, except one purely contingent upon there being a remainder of the property which had not been disposed of by Mrs. Martha Huff during her life. There are stronger grounds for holding that these complainants had only a contingent interest in this property than there was for a similar holding in the case of *Darnell v. Barton*, 75 Ga. 377. In that case it was said: "The sole point in this case turns on whether the

husband or plaintiff in error took a vested remainder on the death of his ancestor under the will. The bequest is of 'all of my property, both real and personal, or whatsoever kind it may be, to my beloved wife, Jane Barton, for and during her natural life; and after the death of my said wife I direct that all remainder of my said property be sold by my executors and be equally divided among my children; and in the event that any of my children should die prior to the death of their said mother, leaving a child or children living, then I desire said child or children so left should stand in the place of its or their deceased parent, and heir a child's part; that is, the part that the deceased parent would have taken if living.' The husband of plaintiff in error was one of the sons of the testator, who died before his mother died, and left no child. We think that his interest in the remainder was contingent on his surviving his mother, or his children's doing so, if he had any, to take his share. Really the contingency is double. It is only the remainder or residue of the estate, not consumed by the wife of testator, which was to be sold by the executors, and the proceeds of that residue divided. At the mother's death, and not before, could the estate bequeathed in remainder be ascertained, so as to be sold and divided. The remainder was contingent on what the life tenant did not consume, and the executors of the will were then to ascertain it, sell it, and divide it. The thing itself bequeathed, therefore, is contingent on what was left by the widow."

It will be noted in the excerpt from the instrument quoted in the decision cited that the bequest of property to the legatee was followed by the expression "for and during her natural life," which does not occur in the instrument which we have under consideration in the present case. And in discussing the item of the will involved in *Darnell's Case* this court said, in the case of *Hudgens v. Wilkins*, 77 Ga. 555, after quoting that item of the will in full: "It was only what remained of personalty and realty of every sort of property that was to be sold and divided by the executors. It was only that left of the corpus that was then—at the death of the widow—undisposed of. It was only 'all the remainder of my said property' that was to be sold and divided. Nothing may have remained. The event of any remainder was uncertain. What the entirety left would be was uncertain. What each would get was thus equally uncertain. So that there was nothing to vest until the mother's death; nothing certain; not an item of property, and it could not vest until ascertained. To ascertain it the executors were to act; to sell it and divide it was devolved upon them; and it is inconceivable that the event of any remainder at all necessarily would happen. It is upon the un-

certain contingency of such an event that any proceeds of any property would be subject to such sale and division by the executors."

It appearing from the petition that Mrs. Martha Huff during her life conveyed the property in controversy to the defendant in this case, and it not appearing therefrom that this conveyance was not made for the purpose of procuring a support for herself as contemplated in the deed of her husband, J. F. Huff, the petition showed on its face that the complainants had no title to the property which they sought to recover, and the court properly dismissed the petition on general demurrer.

Judgment affirmed. All the Justices concur.

(138 Ga. 596)

**GEORGIA RY. & ELECTRIC CO. v.
TOMPKINS.**

(Supreme Court of Georgia. Aug. 19, 1912.)

(Syllabus by the Court.)

1. MUNICIPAL CORPORATIONS (§ 808*)—INJURIES FROM DEFECTS—LIABILITIES OF PERSONS CAUSING DEFECTS.

Where a street railway company, which owned land abutting on a public highway outside of the limits of a municipal corporation, for its own benefit and without permission from the proper authorities, as required by the statutes, and in violation thereof (Pen. Code 1910, §§ 543-545), dug up the highway and placed a catch-basin in it on the edge of the sidewalk, with a pipe leading therefrom across the street under the surface to another catch-basin, and then refilled the ditch, this was unlawful; and if a person legitimately passing over the catch-basin after its construction stepped in a hole in its covering and was injured, the railway company was liable for such injury, without the necessity for showing that the top of the catch-basin was negligently constructed, or that the company was negligent in causing or permitting a hole to exist therein, it not appearing that the injured person was wanting in ordinary care.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1684-1687, 1690-1694; Dec. Dig. § 808.*]

2. MUNICIPAL CORPORATIONS (§ 808*)—INJURIES FROM DEFECTS—LIABILITIES OF PERSONS CAUSING DEFECTS.

An owner of property abutting upon a street or highway is not, because of such ownership, liable for defects in such street or highway. But this rule does not relieve the owner of abutting property from liability, if he unlawfully places in the highway a structure which later gets in bad repair and causes injury to a passer.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1684-1687, 1690-1694; Dec. Dig. § 808.*]

3. LIMITATION OF ACTIONS (§ 55*)—COMPUTATION OF PERIOD—ACCRUAL OF CAUSE OF ACTION—LIMITATIONS APPLICABLE.

Suit for a personal injury caused by stepping into a hole in the top of such a catch-basin was not barred by the statute of limitations, because the basin was originally constructed four years before the suit was brought, where the person injured sued within

less than two years from the time when the injury occurred.

(a) The statute of limitations applicable to the prosecution of a person who wrongfully obstructs or interferes with a highway has no application to a suit by one who suffers a personal injury by reason of the existence of a catch-basin so unlawfully built.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 299-306; Dec. Dig. § 55.*]

4. MUNICIPAL CORPORATIONS (§ 808*)—INJURIES FROM DEFECTS—LIABILITY OF PERSONS CAUSING DEFECTS.

The evidence was not such as to require a reversal, under the contention that the verdict was unauthorized, because the evidence showed that the county authorities had assumed jurisdiction over the structure in question and had relieved the defendant from any duty in regard to it.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1684-1687, 1690-1694; Dec. Dig. § 808.*]

5. MUNICIPAL CORPORATIONS (§ 759*)—TORTS—DEFECTS IN STREETS.

When the limits of the municipal corporation were extended, so as to include a part of a highway which had previously been beyond the limits, such part of the highway then became one of the public streets of the city, and the municipality became liable for failure to keep it in proper repair, as it would be for failure to repair its other streets.

(a) But, whether or not the municipality was liable on account of an injury occurring there, this did not operate to release from liability one who unlawfully placed in the highway before it became a street a catch-basin which caused a personal injury to a passer.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1595-1600; Dec. Dig. § 759.*]

6. MUNICIPAL CORPORATIONS (§ 818*)—INJURIES FROM DEFECTS—ACTIONS—ISSUES AND PROOF.

Allegations and proof as to the ownership by the defendant of abutting property, the situation of its tracks and station for passengers at that point, the digging of a ditch across the street, and the laying of a pipe connecting this with another catch-basin were competent, as showing the situation and surroundings, and that the defendant built the catch-basin for its own benefit.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1726-1738; Dec. Dig. § 818.*]

7. MUNICIPAL CORPORATIONS (§ 818*)—INJURIES FROM DEFECTS—ACTIONS—ISSUES AND PROOF.

Evidence on the part of the city engineer that the construction of sewers came within the control of the engineering department of the city, and that such department had never had anything to do with the catch-basin in question, was admissible as tending to show that the city had never assumed or exercised control over such basin as a part of its drainage system.

(a) So, likewise, evidence of the chief of the sanitary department was admissible to show that such department cleaned the catch-basins in the city, and that they had never cleaned out the one in question. If his other evidence as to the practice in cleaning catch-basins rendered the admissibility of this doubtful, its admission would not require a reversal.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1726-1738; Dec. Dig. § 818.*]

8. DAMAGES (§ 216*)—ASSESSMENT—INSTRUCTIONS—APPLICABILITY TO EVIDENCE.

In a suit for a personal injury, where the nature and extent of the injury, and the character of the treatment administered, the services rendered by physicians, and the amount paid therefor were fully proved, a charge to the effect that the plaintiff, if entitled to recover would be entitled to recover such reasonable amount of physician's bills and necessary expenses incurred in consequence of the injury as might have been proved to the satisfaction of the jury, was not without evidence to support it, although no witness expressed the opinion that the charges were reasonable.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. §§ 548-555; Dec. Dig. § 216.*]

9. NEW TRIAL (§ 63*)—PROCEEDINGS TO PROCURE—OBJECTIONS AT TRIAL.

Where there were two counts in the petition, and the verdict was in favor of the plaintiff, without stating on which count it was based, if this furnished any ground for objection to the verdict when returned, it was no cause for a new trial, in the absence of any such objection.

[Ed. Note.—For other cases, see *New Trial*, Cent. Dig. § 128; Dec. Dig. § 63.*]

10. REVERSAL NOT REQUIRED.

None of the other assignments of error require a reversal.

Error from Superior Court, Fulton County; Geo. L. Bell, Judge.

Action by H. C. Tompkins against the Georgia Railway & Electric Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Colquitt & Conyers, of Atlanta, for plaintiff in error. Jas. L. Key, of Atlanta, for defendant in error.

LUMPKIN, J. The Georgia Railway & Electric Company, without permission from the county authorities, constructed a catch-basin on the edge of a highway near the city of Atlanta, with a pipe running under the street to another catch-basin, and thence connecting with a drain. Afterwards the limits of Atlanta were extended, so that the highway at this point and the catch-basin were taken into the city. About four years after its construction, the plaintiff, while going to board a street car at night, stepped upon the covering of the catch-basin. At that time there was a hole in such covering, into which he stepped and was injured. He recovered a verdict, and after the refusal of a new trial the defendant excepted.

[1] 1. The digging up of the public highway and placing the catch-basin there, with its connecting pipe, without permission of the proper authorities, was unlawful. Pen. Code, §§ 543, 544, 545. The defendant, having placed the basin on the edge of the street or sidewalk to protect its own property from surface water, was liable for damages resulting therefrom. If it been placed there by permission of the proper authorities, the question of liability for injury would have depended on diligence or negligence in the manner of the construction or maintenance,

if there were a duty to maintain. But if one unlawfully places such an obstruction or excavation in a public highway, he is not relieved from liability resulting therefrom by setting up that he exercised diligence in the manner of the creation and maintenance thereof. 15 Am. & Eng. Enc. Law (2d Ed.) 433; 2 Dillon, Mun. Corp. (5th Ed.) § 1725; *Congreve v. Morgan*, 18 N. Y. 84, 72 Am. Dec. 495; 2 Elliott on Roads & Streets (3d Ed.) §§ 899, 902; *Joyce on Nuisances*, § 230. Note, also, the language of Penal Code, § 543, as to damages. The evidence did not require a finding that there was any want of ordinary care on the part of the person injured.

[2] 2. An owner of property abutting upon a street or highway is not, by virtue of being such owner, liable for defects in the street or highway. But this rule has no application where the owner of abutting property creates a defect in a street or highway or a nuisance therein. In the latter event he is liable, not because he owns the abutting property, but because he creates or maintains the thing from which injury results.

[3] 3. It was contended that if the placing of the catch-basin at that point was without authority when it was constructed, about four years had elapsed from that time until the suit was brought, that the defendant was not shown to have taken any further action after the construction was completed, and that a suit for an injury arising from such construction was barred by the statute of limitations. Inasmuch as the plaintiff was not hurt until 1908, and therefore had no cause of action until that time, and brought suit within less than two years after his cause of action arose, it is not easy to see how such cause of action was barred because the original construction of the catch-basin occurred two or three years before the injury. If the plaintiff had a cause of action arising from a personal injury to him, it could not well be barred before it arose, and it was not barred afterward. If the construction of the catch-basin in the highway by the defendant for its own benefit, without permission of the authorities, was the creation of a nuisance, injury from the maintenance of a nuisance furnishes ground for recovery, as well as injury arising from its original creation. No formality is necessary to maintain a nuisance. If it is kept or continued, when it should have been abated, it is maintained. That the defendant was not proved to have had work done at this place after constructing the catch-basin and before the injury does not suffice to show that it did not maintain the basin. In fact, the defendant's agent directed that the catch-basin be repaired after the injury. Though this was not admissible as evidence of negligence, it tended to show an assertion of control over and maintenance of the structure, even

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

after the plaintiff was injured. City Council of Augusta v. Marks, 124 Ga. 365, 52 S. E. 539; Wood on Nuisances, § 865; 29 Cyc. 1260.

The limitation of actions as to a continuing nuisance affecting the value of property cannot be applied to a case like this, where no injury arose to the person of the plaintiff at once upon the construction of the basin, but by its existence at the time when he was hurt. Likewise the statute of limitations applicable to the prosecution of a person who wrongfully obstructs or interferes with a highway has no application to a suit by one who suffers a personal injury by reason of the structure.

[4] 4. It was contended that the evidence showed that the county authorities had assumed jurisdiction over this basin after its erection, and had relieved the defendant from any duty in regard to it, and that the verdict was unauthorized. We cannot concur in this contention. The mere fact that the county or municipal authorities did not promptly require the plaintiff to remove the basin as a nuisance did not necessarily operate to accept it as a part of the public works. Whether it might have any evidential value is not the question. Nor do we think that the other evidence relied on for that purpose was sufficient to support the contention of the defendant.

[5] 5. When the limits of the city of Atlanta were so extended as to include the highway at that point, it became one of the public streets of the city, and the municipality became liable for failing to keep it in proper repair, as it would be for failing to repair other streets. It was contended that this duty on the part of the municipality relieved the defendant from any duty or liability on account of the catch-basin. This contention is not sound. Whether or not the city is liable for permitting a nuisance to exist in one of its streets, or permitting one of them to be in bad repair, this furnishes no relief to a person who creates the nuisance or puts the streets in bad repair. The possible liability of the city does not exculpate one who unlawfully places in the highway that which causes an injury to a passer. 2 Dill. Mun. Corp. (5th Ed.) § 1727; 15 Am. & Eng. Enc. Law, 433.

The argument that, if one cuts up a suburban tract of land into lots and streets, or lays a sidewalk on a country road, and the place where this is done is subsequently taken into the corporate limits of a city, the municipality becomes liable for failure to keep it in repair, and the person making the plat or laying the sidewalk is not liable on account of a bad condition which may arise therein, is not applicable to this case. The authorities cited, on those subjects, have reference to a case where the original act was lawful, and the injury involved resulted from subsequent negligence on the part of the municipality or others.

It was urged that the defendant, having put down the catch-basin and the drain, could not take it up or alter it without permission, and therefore it could not be held liable for not doing so. The sufficient answer to this proposition is that the defendant has made no effort to do so, with or without permission. If one should dig a hole in the middle of a city street and erect a post there without authority, it would furnish no argument against his liability for injuries resulting therefrom that, if he undertook to dig up the street in order to get the post out of the way without permission, he would again violate some law. This would lead to the position that, if one can get a nuisance erected in a street, he can keep it there without liability for damages by saying that he would have to dig up the street to get it out, and that he would have to ask the permission of the municipal authorities to dig up the street.

[6] 6. It was contended that the ownership by the defendant of abutting property, the situation of its tracks and station for passengers at that point, the digging of the ditch across the street, and the laying of a pipe connecting this with another catch-basin were irrelevant matters, and that the allegations on the subject should have been stricken, and the evidence rejected. Such allegations and evidence were proper to show the situation and surroundings, and that the defendant built the catch-basin for its own benefit.

[7] 7. Objection was made to evidence on the part of the city engineer that the construction of sewers came within the control of his department, and that such municipal department never had anything to do with the catch-basin in question. This evidence was admissible, in connection with that showing that no permission to do the work was originally obtained. It tended to prove that the city, through its officials dealing with matters of sewers and drains, never assumed or exercised jurisdiction over this particular catch-basin, by dealing with it in any way, so as to recognize it as a part of the municipal drainage, or authorize the defendant to assume that it had thus been taken over by the city.

The evidence of the chief of the sanitary department was also admitted, over objection, to show that that department had a force of men who cleaned catch-basins in the city, and that he did not think they ever cleaned out the catch-basin in question. This was admissible for the same reason. If its admissibility was rendered doubtful by the statement of the witness that he did not know there was no sewer there on that street in 1903, and that they never cleaned out catch-basins except where there was a sewer, the admission of the evidence would not cause a reversal.

[8] 8. The presiding judge charged that the

plaintiff, if entitled to recover, would be entitled to recover such reasonable amount of physician's bills and the necessary expenses incurred in consequence of the injury as might have been proved to the satisfaction of the jury. It was urged that this charge was without foundation in the evidence, because there was no proof that the amount of the physician's bills was reasonable or necessary, or what was the value of the services. As to this point counsel cited *Allen v. Harris*, 113 Ga. 107, 38 S. E. 322, and *So. Ry. Co. v. Williams*, 113 Ga. 335, 38 S. E. 744. In the first of those cases it was held that evidence of what was paid for professional services is not, without more, sufficient proof of their value. From the decision it seems that the only proof introduced in support of two items of damages recovered, on account of bad faith or stubborn litigiousness on the part of the defendant, was that the plaintiff paid a surveyor \$3 for surveying a lot intended to be described in the deed which it was sought to have reformed, and paid his attorney \$200 for bringing and prosecuting the case. It was said that it might have been legitimate to show what was actually paid for the services, but this alone was not sufficient to establish that such services were worth the amount contracted to be paid or actually paid therefor. In the second case above cited it was held that, while proof of the cost of an article or thing is not a criterion of its value, yet such evidence is admissible as a circumstance in an inquiry instituted to ascertain the value. In the present case there was proof of the amount of expenses incurred and paid by the plaintiff for treatment on account of the injury. But the evidence did not stop there. The physicians who attended him were introduced, and described the nature of the injury, the treatment given to him, and the nature and extent of the services rendered.

In *Baker v. Richmond City Mill Works*, 105 Ga. 225, 31 S. E. 426, it was held that jurors, in passing upon the testimony of an expert witness as to the value of professional services, are not absolutely bound by his opinion, but may exercise their own judgment on the subject, taking into consideration the nature of the services, the time required to perform them, and all the attendant circumstances. This ruling has since been followed. *Jennings v. Stripling*, 127 Ga. 778, 784, 56 S. E. 1026. If the jury are not bound by the opinion evidence, but may put their own estimate upon the value of the services, in view of their nature and character and the attendant circumstances, it cannot be said there is nothing on which they may base a verdict, or on which the judge may base a charge, if the nature of the injury, the character of the services rendered, and the amount paid therefor are all

proved, but there is a mere omission on the part of a witness to say that he thinks the amount was reasonable.

[9] 9. It was contended that there were two counts in the petition, and that the verdict did not show on which one it was based. If there would have been any merit in this as an original proposition, the defendant was not shown to have made any objection to the verdict when returned, or to have invoked any ruling of the court on the subject. *Dalton v. Drake*, 75 Ga. 115 (2).

[10] 10. There were various other assignments of error, distributed through 30 grounds of demurrer and 22 grounds of the motion for a new trial. What has been said above disposes of the most substantial questions raised. As to the others not specifically mentioned, it is sufficient to say that they require neither discussion nor a reversal.

Judgment affirmed. All the Justices concur.

(138 Ga. 584)

DARSEY v. DARSEY et al.

(Supreme Court of Georgia. Aug. 19, 1912.)

(Syllabus by the Court.)

1. TRIAL (§ 141*)—DIRECTING VERDICT—UNDISPUTED EVIDENCE.

Under undisputed evidence, and admissions contained in the plaintiff's petition, the verdict in favor of the defendant being demanded, the judge did not err in directing it.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. § 336; Dec. Dig. § 141.*]

2. APPEAL AND ERROR (§ 1047*)—REVIEW—RULINGS ON EVIDENCE—HARMLESS ERROR.

Evidence admitted over objection by the plaintiff, or that which was offered by the plaintiff and excluded, in view of the admissions in the petition and other uncontradicted evidence, would not have affected the result announced in the first headnote, and accordingly it is unnecessary to pass on any assignments of error based on rulings as to the admissibility of evidence.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4132, 4133, 4146-4152; Dec. Dig. § 1047.*]

Error from Superior Court, Decatur County; Frank Park, Judge.

Action by Lizzie Darsey against Rebecca Darsey and others. Judgment for defendants, and plaintiff brings error. Affirmed.

On October 21, 1902, Mrs. Lizzie Darsey instituted suit against Mrs. Rebecca Darsey, George E. Darsey, L. O. (Oscar) Darsey, and others, who were children and heirs at law of Jesse R. Darsey, who died in 1899, for the recovery of lot of land No. 26 in the Twenty-Second district of Decatur county, Ga., and seeking also a decree "setting up, establishing, and confirming" the plaintiff's title to the land above mentioned, "and forever barring and annulling all claims that may be urged by any of the aforesaid heirs of Jesse Darsey * * * to said land by

reason of their inheritance from their father." On the trial the judge directed a verdict in favor of the defendants. The plaintiff's motion for a new trial was overruled, and she excepted. The plaintiff, Jesse R. Darsey (under whom the defendants claimed by inheritance), and Mrs. Arenzi Daniel (née Darsey) were sisters and brother, and constituted all of the heirs at law of their father, Jesse Darsey, who died intestate in 1865, prior to July. After his death the lands of his estate were divided in kind by allotment on July 21, 1865, between the three heirs above named. At that time the two daughters, Lizzie and Arenzi, were married, the former to John F. Darsey and the latter to Robert Daniel. The lands which were to be divided were appraised by five disinterested persons and drawn for by the parties at interest. In this allotment Jesse R. Darsey (under whom the defendants claim by inheritance, and who died in 1899) drew the lot in dispute, and also lots 193 and 194 in the Eleventh district of Mitchell county. Lot No. 25 in the Twenty-Second district of Decatur county, and one-half of lot No. 385 in the Nineteenth district of Decatur county, constituting the home place of Jesse Darsey, deceased, were drawn by plaintiff, or her husband, John F. Darsey, and they thereafter, until December, 1865, resided on the property so drawn. Other lots unnecessary to mention were drawn by the remaining heir, Arenzi Daniel, or her husband, Robert Daniel. At the time of the allotment deeds were executed. Lizzie Darsey and Arenzi Daniel were not named as parties thereto, but their respective husbands were named as parties. Among the deeds so executed was one dated July 21, 1865, by which Robert Daniel and Jesse R. Darsey conveyed to John F. Darsey lot No. 25 and the east half of lot No. 385 in Decatur county, representing the allotment to Lizzie Darsey. The consideration named was \$1,058.33. Another of such deeds bore the same date and recited the same consideration; but it was executed by Robert Daniel and John F. Darsey, and conveyed to Jesse R. Darsey lot No. 26 (the land in dispute), and also lots 193 and 194 in the Eleventh district of Mitchell county. Immediately after this allotment Jesse R. Darsey expressed a preference for lot No. 25 and the east half of lot No. 385, which had been drawn by Mrs. Lizzie Darsey and her husband, and a verbal agreement was entered into by which this land was to go to Jesse R. Darsey in exchange for the whole or some part of the land which had been allotted to Mrs. Lizzie Darsey, or her husband, John Darsey. No deeds were executed between them evidencing this exchange, but Jesse R. Darsey in pursuance of the trade took possession of lot No. 25 and the east half of lot 385, and continued thereafter to maintain his possession; and Mrs. Lizzie Darsey and her husband, John Darsey, about December 1, 1865, moved to Mitchell county

and took possession of lots 193 and 194, which had been allotted to Jesse Darsey. They continued in possession for about four years, and sold the property to John P. Heath for \$2,250. Lot No. 26 in Decatur county, at the time of the allotment, and for a number of years thereafter, was wild land, and not in the actual possession of anybody; but in 1888 or 1889, before the death of Jesse R. Darsey, a house was erected thereon, a farm cleared, and other valuable improvements made, and the house was occupied by L. O. (Oscar) Darsey, one of the defendants in this case, and subsequently by his tenants or those claiming with or under him up to the time of the filing of the suit.

All that has been stated has been admitted by both sides, except as follows: It was contended by the plaintiff that in so far as her husband, John F. Darsey, participated in the allotment and exchange with Jesse R. Darsey, and the subsequent management of the property received in exchange, he did so as her agent, and all that he did in that connection was her act and deed, and also that the possession of lot 26, which commenced before the death of her brother, Jesse R. Darsey, was by her permission as accommodation to her brother, and not under any adverse claim of right. On the other hand, it was contended by the defendants that all that John F. Darsey did was in behalf of himself as by assertion of his marital rights to the property inherited by his wife, and that lot 26 in Decatur county was not included in the exchange of lots, but that Jesse R. Darsey had retained and continuously asserted title to it, and that the entry of possession in 1888 or 1889 was by right of his title, and in no manner under the plaintiff; also that the possession last mentioned was commenced by two of the defendants, George E. Darsey and L. O. Darsey, under an agreement with their father, J. R. Darsey, by which, if they entered possession, and made certain valuable improvements, and occupied the land for a certain number of years, the land should be theirs, and that the terms of such agreement had been complied with by George E. and L. O. Darsey; and thereupon it was sought to have the title decreed to be in George E. and L. O. Darsey, and, if that could not be done, then to all of the defendants.

Hawes, Pottle & Wright, of Blakely, for plaintiff in error. M. E. O'Neal, of Bainbridge, and Pope & Bennett, of Albany, for defendants in error.

ATKINSON, J. According to the case as made by the plaintiff, the following facts appear: Jesse Darsey died, leaving certain real estate. On July 1, 1865, there was an agreed division or partition among his heirs. One of these was Jesse R. Darsey, and another was his sister, the present plaintiff,

Lizzie Darsey, the wife of John Darsey. Deeds were made by the respective tenants in common for the purpose of carrying into effect the partition thus made. As to the share which fell to the plaintiff, the other tenants in common made a deed to John Darsey, and he and the plaintiff went into possession of the land so conveyed, and remained in possession until December 1, 1865. This, under the law as existing prior to the act of 1866 (Acts 1866, p. 146), known as the "Married Woman's Act," operated to put the title to the share which fell to the plaintiff into her husband, and it became his absolutely by virtue of his marital rights and of such conveyance and dominion. Code of 1861, §§ 1701, 1702; *Arnold v. Limeburger*, 122 Ga. 72, 49 S. E. 812. The share which fell to Jesse R. Darsey included two lots in Mitchell county, and lot 26 in Decatur county, the lot now in dispute. A deed was made to him, which was signed by John Darsey and Robert Daniel, the husbands of the other two tenants in common. According to the plaintiff's allegation and proof, on the day when the partition was made, a parol agreement was made with her brother, Jesse R. Darsey, by which there was to be an "exchange of shares," so that the share which was allotted to the plaintiff, and which passed to her husband, as above stated, should go to Jesse R. Darsey, and the part which was allotted to him, and conveyed to him, as above stated, should be transferred to plaintiff. After the marital rights of John Darsey had fully attached to the share allotted to the plaintiff, she had no interest whatever in it. The plaintiff contends that this share was delivered to her brother, Jesse R. Darsey, in lieu of the share allotted to him in the division. Her husband was present, and either made the trade or certainly took part in making it, so that, according to her own showing, it was in law an exchange between her husband and her brother, whether she took part in the negotiations or not. No trust was shown, and no creation of a separate estate. This would not serve any title in her to that which was exchanged by her brother for the property of her husband. According to the basis on which her claim rests, she acquired nothing by the exchange. If any equitable title arose from it, it was in her husband, not in her. After December 1, 1865, she and her husband took possession of the two lots in Mitchell county, which had formed a part of her brother's share in the partition of the estate. Lot 26 in Decatur county, the land in dispute, was wild land, and nobody had actual possession of it. She exercised no dominion over it, paid no taxes upon it, and did nothing to assert, much less create, title to it herself. Her testimony indicated that the taxes were paid by her brother, Jesse R. Darsey.

The defendants are the widow and chil-

dren of Jesse R. Darsey. They contend that in the partition of the estate lot 26 fell to his share. They deny that it was included in the trade under which plaintiff asserts title, but contend that the two lots in Mitchell county alone were included, and that Jesse R. Darsey retained the title to the lot now in dispute, which was acquired by virtue of the partition. If the contention of the defendants is true, and the lot in dispute was never traded by Jesse R. Darsey at all, of course the plaintiff would have no case, and would not be entitled to recover. Nor would she have title or be entitled to recover if the lot was included in the trade, because the property traded to Jesse R. Darsey, constituting the consideration paid to Jesse R. Darsey for the property in dispute, was the property of John Darsey, and no deed was ever made to plaintiff. If John Darsey did not make the trade alone, as some of the plaintiff's testimony indicates, but they negotiated together, this would not alone serve to put any title in the plaintiff. John Darsey is not shown ever to have done anything to relinquish his rights, or to convey any rights to plaintiff. Therefore, in either event, whether the contention of the defendants or that arising from the pleadings and evidence of the plaintiff be correct, the latter has no title, legal or equitable, to the land in dispute. In the evidence of the plaintiff there are some loose and vague expressions that Oscar Darsey, one of the defendants, moved on the land with her consent and permission; but immediately thereafter she testified that she did not have any conversation of any kind with Oscar Darsey relative to his possession of the property at the time he went upon it, and never said anything at all about it until he was going to sell it, "and I put in my claim and tried to explain it, but could not make any agreement relative to it." She also used certain expressions to the effect that "we were not going to charge him for the land," etc. Apparently this referred to herself and her husband. Inasmuch as she had no title to the land, as has been shown above, her consent or agreement was unnecessary. If John Darsey had title to the land, and consented, this would not make Oscar Darsey the plaintiff's tenant, or Oscar Darsey's possession the plaintiff's possession; and if John Darsey conferred with the plaintiff in regard to the management of his property, and she acquiesced, especially in view of the fact that he had acquired the property by reason of his marital rights, it amounted to nothing more than a conference between husband and wife. Taking her testimony as a whole, it makes no case of tenancy or permissive holding by the plaintiff, requiring a submission of the case to the jury.

Under the views above expressed, had the evidence objected to by plaintiff been excluded, or that which was offered by her

and excluded been admitted, the result would not have been affected.

Judgment affirmed. All the Justices concur.

(138 Ga. 571)

GREEN v. MORRIS.

(Supreme Court of Georgia. Aug. 17, 1912.)

(Syllabus by the Court.)

1. TORTS (§ 26*)—MEMBERS AND STOCKHOLDERS—ACTIONS BETWEEN PROMOTERS.

The petition was properly dismissed on general demurrer.

[Ed. Note.—For other cases, see Torts, Cent. Dig. § 33; Dec. Dig. § 26.*]

(Additional Syllabus by Editorial Staff.)

2. DAMAGES (§ 142*)—BREACH OF CONTRACT—NOMINAL DAMAGES.

In an action on a contract to recover for breach thereof, where special damages were alleged, plaintiff could not recover nominal damages, where neither nominal nor general damages were sought.

[Ed. Note.—For other cases, see Damages, Cent. Dig. § 413; Dec. Dig. § 142.*]

Error from Superior Court, Fulton County; Geo. L. Bell, Judge.

Action by A. L. Green against M. C. Morris. Judgment for defendant, and plaintiff brings error. Affirmed.

J. V. Pool, of Atlanta, for plaintiff in error. W. S. Dillon and Anderson, Felder, Rountree & Wilson, all of Atlanta, for defendant in error.

FISH, C. J. Green sued Morris for damages for breach of contract. The substance of the petition, now material, was as follows: Plaintiff, defendant, and another person, who was the inventor and owner of a device for the construction of automobiles, but who was without financial means of placing the same on the market, entered into a parol agreement to organize a corporation capitalized at \$100,000, for the purpose of manufacture, sale, etc., of automobiles, and doing a general automobile business. Under the agreement, each of the three parties was to receive \$17,000 worth of stock, and the plaintiff and defendant were to furnish the money for the purpose of organizing the corporation and placing the automobiles on the market. A charter was to be applied for, and the corporation organized at once. Plaintiff, "relying and acting on the terms of the contract as above set forth," spent several weeks traveling about endeavoring to interest the public in the proposed corporation, and succeeded in getting a number of persons interested therein, who were ready and willing to take stock in the corporation as soon as it could be chartered and organized. The time and service of plaintiff while so engaged were worth \$200. Plaintiff, "realizing that [the defendant] and himself were without sufficient funds to successfully or-

ganize and operate said concern beneficially to themselves and others who might take stock in the company when chartered and put in operation, * * * decided to sell one-half of his interest, which would be \$8,500." Another person offered to trade to plaintiff \$5,000 worth of stock in another named company for one-half of plaintiff's interest in said business, which was 85 shares, which proposition plaintiff accepted. Defendant, upon learning of such trade between plaintiff and such other person, informed the latter that "plaintiff had no interest in the said business" with the defendant, and that neither plaintiff nor the party with whom he had so traded should ever have any interest therein. Plaintiff "was ready and willing and anxious to apply for a charter for said company, to organize and begin business at once, according to the terms of the contract previously made between" the defendant himself and the other party thereto; but the defendant "refused to go ahead and organize the said company." The statement made by the defendant to the person with whom the plaintiff had traded for the \$5,000 worth of stock in the other company prevented the trade from being consummated, whereby the plaintiff lost \$5,000, the value of the stock he was to receive. The defendant refused to permit plaintiff to have any interest in the business for which the corporation was to be organized, but with several named persons the defendant organized the corporation himself, investing therein \$4,000, and subsequently selling out his interest for \$10,000. By reason of the facts alleged, defendant has damaged the plaintiff \$13,750. The petition was dismissed on general demurrer, and the plaintiff excepted.

[1] It does not appear that plaintiff paid anything toward organizing the corporation and placing the automobiles on the market, although under the terms of the contract he and the defendant were to furnish the money for such purpose. Indeed, it appears from the petition that plaintiff and defendant were without sufficient funds to successfully organize and operate the contemplated corporation. The petition alleges that, in order to raise funds for the purpose of organizing the corporation, plaintiff sold half of his interest therein to one who owned stock in another corporation, and was to receive in payment of his half interest \$5,000 worth of stock in such other corporation. It appears, however, that the plaintiff had no interest in the business for the transaction of which the corporation was to be organized, for the reason that he had contributed nothing towards such business, no corporation had been formed, and, of course, he could have no stock therein. While it is alleged that plaintiff spent several weeks in endeavoring to induce other people to take

stock in the contemplated corporation, and that his time and services in so doing were worth a given sum, it does not appear, from the terms of the contract set out in the petition, that he was under any obligation to perform such services.

[2] The suit was for damages in the sum of \$13,750, which sum was evidently made up of the \$5,000 which plaintiff alleged he lost by reason of the defendant breaking up the trade by which plaintiff was to obtain \$5,000 worth of stock in another company, and the amount of \$8,500, which was the value of half of the \$17,000 of stock which plaintiff was to have in the business to be incorporated, which half interest he would retain after paying for the \$5,000 worth of such other stock. As we have already intimated, the plaintiff was not entitled to recover for such damages; nor was he entitled to recover nominal damages, for the reason that neither nominal nor general damages were sought to be recovered. *Hadden v. Sou. Messenger Service*, 135 Ga. 372, 69 S. E. 480. It follows that the court did not err in dismissing the petition on general demurrer.

Judgment affirmed. All the Justices concur.

(138 Ga. 606)

SIMMONS v. THOMPSON.

(Supreme Court of Georgia. Aug. 19, 1912.)

(Syllabus by the Court.)

1. EVIDENCE (§ 461*)—PAROL EVIDENCE AFFECTING WRITINGS—DESCRIPTION OF LAND.

D. A. Thompson owned a tract of land in the town of Covington, and carved out of it several parcels fronting south on Conyers street. One of these was sold to W. B. Lee. Subsequently the most easterly parcel, which bordered easterly on New street, was sold to W. R. Ingram; the deed describing the property as follows: "All that tract or parcel of land lying and being in the city of Covington, Newton county, state of Georgia, known as lot No. 9 in a survey of D. A. Thompson's land, made by J. M. Heiger, fronting on Conyers street 100 feet, and running back north 220 feet, more or less, until the back line comes even with W. B. Lee's lot, bounded on the south by Conyers street, west by lands of D. A. Thompson, north by D. A. Thompson, east by New street, 33 feet wide, which said street is to be kept open as far back as Ingram's lot runs at least." *Held*, the descriptive words "running back north 220 feet, more or less, until the back line comes even with W. B. Lee's lot," are ambiguous, and subject to be explained by parol evidence, in an action of complaint for land between Thompson and his remote grantee.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2129-2133; Dec. Dig. § 461.*]

2. EJECTMENT (§§ 64, 111*)—PLEADING—VERDICT.

In a suit for the recovery of land, the petition should describe the land with such accuracy that, if a general verdict is found for the plaintiff, a writ of possession may issue based on such description. If the evidence authorizes a recovery for a part of the land included in the description, the verdict should

likewise describe the land recovered with sufficient accuracy. In the present case the petition described the land for which suit was brought in a vague and indefinite manner. Three amendments were made to it, but all of them were filed on the same day, and it cannot be determined with certainty from the record in what order they were made. They varied the description of the land in dispute, though themselves subject to criticism as to definiteness. The verdict was generally in favor of the plaintiff. The evidence did not authorize a recovery based on any description made in the petition or the amendments, as a whole. The verdict did not describe any particular part of the land included in such description, so as to adjust it to the evidence. *Held*, that a new trial must be granted.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. §§ 61, 107; Dec. Dig. §§ 64, 111.*]

Error from Superior Court, Newton County; L. S. Roan, Judge.

Action by D. A. Thompson against M. S. Simmons. Judgment for plaintiff, and defendant brings error. Reversed.

C. C. King, of Covington, for plaintiff in error. Rogers & Knox, of Covington, for defendant in error.

ATKINSON, J. Judgment reversed. All the Justices concur.

(11 Ga. App. 449)

WILSON v. STATE. (No. 3,606.)

(Court of Appeals of Georgia. Sept. 17, 1912.)

(Syllabus by the Court.)

DECISION OF SUPREME COURT CONTROLLING.

The only question raised by the record, relied upon by the plaintiff in error, was as to the constitutionality of the statute under which the indictment was framed. Acts 1903, p. 90; Penal Code, § 715. This question having been certified by this court to the Supreme Court, the case is fully controlled by the answer of that court, in the opinion handed down August 12, 1912 (138 Ga. 489, 75 S. E. 619), and accordingly the judgment of the court below is affirmed.

Error from City Court of Leesburg; H. L. Long, Judge.

Tim Wilson was convicted of crime, and brings error. Case certified to Supreme Court (75 S. E. 619). Affirmed.

C. H. Beazley and D. J. Ragan, both of Leesburg, for plaintiff in error. W. G. Martin, Sol., of Leesburg, for the State.

RUSSELL, J. Judgment affirmed.

POTTLE, J., not presiding.

(11 Ga. App. 453)

NEWS PUB. CO. v. LOWE. (No. 4,083.)

(Court of Appeals of Georgia. Sept. 17, 1912.)

(Syllabus by the Court.)

REVIEW—SUFFICIENCY OF EVIDENCE.

This is the third appearance of this case before this court. First, it was here on exceptions to the overruling of a demurrer and the allowance of an amendment to the petition;

and this court held that the petition set out a cause of action. *News Publishing Co. v. Lowe*, 8 Ga. App. 333, 69 S. E. 123. Second, it was here on exceptions to a judgment awarding a nonsuit; and this court reversed that judgment, it being held that the plaintiff proved his case as laid, and that the alleged publication was *prima facie* libelous. *Lowe v. News Publishing Co.*, 9 Ga. App. 103, 70 S. E. 607. It is now here for the purpose of having the trial of the case reviewed on the facts, on exception to the judgment overruling the defendant's motion for a new trial. A careful examination of the record shows that the evidence in behalf of the plaintiff entitled him to recover damages for the libel, and that the evidence in behalf of the defendant was material only on the question of mitigation of damages. The motion for new trial contains several objections to excerpts from the charge. These excerpts, considered in connection with the charge as a whole and in the light of the issues raised by the evidence, are without material error. No prejudicial error of law appears, substantial justice was reached by the verdict, and the litigation should end.

Error from City Court of Brunswick; D. W. Krauss, Judge.

Action by J. A. Lowe against the News Publishing Company. Judgment for plaintiff and defendant brings error. Affirmed.

Bolling Whitfield, Ernest Dart, and Courtland Symmes, all of Brunswick, for plaintiff in error. F. H. Harris, of Brunswick, for defendant in error.

HILL, C. J. Judgment affirmed.

(11 Ga. App. 450)

RANEY BROS. et al. v. GEORGIA COTTON CO. (No. 4,043.)

(Court of Appeals of Georgia. Sept. 17, 1912.)

(Syllabus by the Court.)

FORMER DECISION CONTROLLING.

This case is fully controlled by the decision of this court in *McNamara v. Georgia Cotton Co.*, 10 Ga. App. 669 (1, 2, and 3), 73 S. E. 1092.

Error from City Court of Ashburn; R. L. Tipton, Judge.

Action between Raney Bros. and others and the Georgia Cotton Company. From the judgment, Raney Bros. and others bring error. Affirmed.

Haygood & Cutts, of Fitzgerald, and Z. Bass, of Ashburn, for plaintiffs in error. J. T. Hill and J. W. Dennard, both of Cordele, and J. H. Pate, of Ashburn, for defendant in error.

HILL, C. J. Judgment affirmed.

(11 Ga. App. 456)

HAGAN SUPPLY CO. v. MORRIS & CO. (No. 4,149.)

(Court of Appeals of Georgia. Sept. 17, 1912.)

(Syllabus by the Court.)

SUFFICIENCY OF EVIDENCE.

The jury were authorized to find, from the evidence in this case, that a scheme was enter-

ed into between the vendor and the purchaser to evade the provisions of Civil Code 1910, § 3226, regulating the sale of merchandise in bulk, by which the plaintiff, as a creditor of the vendor, was defrauded; and the verdict returned against the purchaser, on the traverse of his answer to the summons of garnishment served at the instance of the plaintiff, was fully supported by the evidence, and no error of law appears.

Error from City Court of Reidsville; E. C. Collins, Judge.

Action between the Hagan Supply Company and Morris & Co. From the judgment, the Hagan Supply Company brings error. Affirmed.

P. M. Anderson, of Claxton, and Hines & Jordan, of Atlanta, for plaintiff in error. M. A. Smith, Jr., of Hagan, and H. H. Elders, of Reidsville, for defendants in error.

HILL, C. J. Judgment affirmed.

(11 Ga. App. 454)

MAY v. McCARTY. (No. 4,106.)

(Court of Appeals of Georgia. Sept. 17, 1912.)

(Syllabus by the Court.)

1. PARTIES (§ 7*)—ACTIONS BY TRUSTEE OR ASSIGNEE.

A trustee or assignee, who holds the legal title of choses in action under a valid deed of assignment for the benefit of creditors, can sue to recover the amount of an account included in the deed of assignment, for the use of one who purchased the account at a public sale held by him as such trustee or assignee. The legal title to the account as a chose in action is in the trustee or assignee, and the equitable interest is in the purchaser of the account.

[Ed. Note.—For other cases, see Parties, Cent. Dig. §§ 9-11; Dec. Dig. § 7.*]

2. NO ERROR OF LAW — EVIDENCE SUFFICIENT.

No material error of law appears, and the evidence supports the verdict.

(Additional Syllabus by Editorial Staff.)

3. ASSIGNMENTS FOR BENEFIT OF CREDITORS (§ 278*)—DOCUMENTARY EVIDENCE — BOOK ENTRIES.

In an action by an assignee for creditors on an account included in the deed of assignment for the use of a purchaser of the account, the books of the firm which made the assignment were properly admitted in evidence to corroborate the evidence of a member of the firm and as books of original entries.

[Ed. Note.—For other cases, see Assignments for Benefit of Creditors, Cent. Dig. §§ 829-832; Dec. Dig. § 278.*]

Error from City Court of Sandersville; E. W. Jordan, Judge.

Action by W. A. McCarty, for use of A. C. Harrison, against J. Q. May. Judgment for plaintiff, and defendant brings error. Affirmed.

J. E. Hyman, of Sandersville, for plaintiff in error. Evans & Evans, of Sandersville, for defendant in error.

HILL, C. J. Brown & Co. sued J. Q. May for the sum of \$97.65, alleged to be due on account. The plaintiffs insisted that they gave a check to May for this amount, which May wanted to pay on insurance premiums, and that May never paid back the sum so advanced. May admitted that they gave him the check for that sum, for the purpose stated; but he testified that he paid them the cash for the check when he received it. After the suit was filed, Brown & Co. failed in business, and made a written assignment to W. A. McCarty, for the benefit of their creditors, and McCarty accepted the trust, and proceeded, as such trustee or assignee, to liquidate the business, and, in pursuance of the deed, sold at public sale all the accounts and choses in action of Brown & Co., and A. C. Harrison became the purchaser thereof. The books of account and choses in action, including the account against May, were delivered to Harrison by McCarty, but no written transfer or assignment was made by McCarty to Harrison. During the trial an amendment was allowed, without objection, striking the names of Brown & Co. as plaintiffs, and substituting as plaintiff W. A. McCarty, as trustee, suing for the use of A. C. Harrison. A verdict was rendered for the plaintiff, and the defendant excepts to the judgment overruling his motion for a new trial.

[1] 1. The plaintiff in error insists that there was no evidence of any written transfer or assignment of the account to Harrison, and therefore no proof of his ownership. The rule is that transfers of accounts must be in writing. Civil Code 1910, § 3653; Swann-Davis Co. v. Stanton, 7 Ga. App. 668, 67 S. E. 888; Turk v. Cook, 63 Ga. 681. We do not think that this principle is pertinent or controlling, under the facts in the instant case. It is admitted that McCarty, as trustee or assignee, held the legal title to the choses in action by a valid instrument in writing. This title was still in him at the time the suit was filed, since he had not made any written transfer thereof to Harrison; but Harrison bought at the public sale, and the equitable title was in him. Suit must be brought by one who holds the legal title, for the benefit of the one who holds the beneficial interest; and so McCarty, as the holder of this legal title, was suing for the use of Harrison, who held the equitable title. This was in accordance with the statute. Civil Code 1910, § 5516. Brown & Co. having made a deed of assignment to McCarty, they could not sue, and Harrison, the purchaser at the sale made by McCarty, trustee, could not sue, because he held only the beneficial interest. The legal title was in McCarty, and the suit could only have been brought by him. May was bound to pay to the one who held the legal title, who, under the evidence, was McCarty, the nominal plaintiff.

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[3] 2. The next ground insisted upon by the plaintiff in error is that the court erred in admitting in evidence the ledger and cash book kept by Brown & Co. These books were admitted, not as primary evidence, but for the purpose of corroborating the evidence of Brown. Brown & Co. kept a clerk, but Brown testified that he gave the check in question to May, and that he knew that these books and this account were correct; and, besides, under the evidence, the cash book was clearly a book of original entries, and admissible. The books were admissible under the rulings of this court in *Bush v. Fourcher*, 3 Ga. App. 43, 59 S. E. 459.

[2] 3. The only real issue in the case was that of payment. Brown testified that he advanced the money sued for, by a check given to May, and that May had never paid the debt. May admitted getting the check, but testified that he paid the money at the time he received the check. The jury believed Brown's evidence, and the trial judge approved the verdict. In the absence of material or prejudicial error of law, the judgment refusing another trial must be affirmed. Judgment affirmed.

(11 Ga. App. 448)

ADAMS EXPRESS CO. v. MELLICHAMP.
(No. 3,225.)

(Court of Appeals of Georgia. Sept. 17, 1912.)

(Syllabus by the Court.)

EXPRESS COMPANIES—LIABILITIES.

In view of the ruling of the Supreme Court in answer to questions certified to it by this court (138 Ga. 443, 75 S. E. 596), that there is no valid distinction between the facts of the present case and those in the case of *Southern Express Co. v. Hanaw*, 134 Ga. 445, 67 S. E. 944, 137 Am. St. Rep. 227, and that neither the plaintiff's right to recover nor the amount of such recovery is affected by section 10 of the Interstate Commerce Act (Act Feb. 4, 1887, c. 104, 24 Stat. 382 [U. S. Comp. St. 1901, p. 3161]), as amended June 29, 1906 (Act June 29, 1906, c. 3591, 34 Stat. 584 [U. S. Comp. St. Supp. 1911, p. 1293]), or by the act of Congress known as the "Elkins Act" (Act Feb. 19, 1903, c. 708, 32 Stat. 847), as amended June 29, 1906 (Act June 29, 1906, c. 3591, 34 Stat. 584 [U. S. Comp. St. Supp. 1911, p. 1309]), the judge did not err in overruling the motion for a new trial.

Error from City Court of Atlanta; H. M. Reid, Judge.

Action by the Adams Express Company against A. P. Mellichamp. Judgment for plaintiff, and defendant brings error. Certified to Supreme Court. 75 S. E. 596. Affirmed.

McDaniel, Alston & Black and Edgar A. Neely, all of Atlanta, for plaintiff in error. Moore & Pomeroy, of Atlanta, for defendant in error.

RUSSELL, J. Judgment affirmed.

(11 Ga. App. 461)

CENTRAL OF GEORGIA RY. CO. v. O'NEAL (No. 4,182.)

(Court of Appeals of Georgia. Sept. 17, 1912.)

*(Syllabus by the Court.)***RAILROADS (§ 443*)—INJURIES TO CATTLE ON TRACK.**

The statutory presumption of negligence arising on proof of the killing by the running of the locomotive and cars of the railroad company, was fully rebutted by positive and uncontradicted evidence, and the verdict for the plaintiff was contrary to law. The judge of the superior court erred in overruling the certiorari. *Macon & Birmingham R. R. Co. v. Revis*, 119 Ga. 332, 46 S. E. 418; *Macon, Dublin & Savannah R. R. Co. v. Wood*, 3 Ga. App. 197, 59 S. E. 595.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1608-1620; Dec. Dig. § 443.*]

Error from Superior Court, Pike County; Robt. T. Daniel, Judge.

Action by Seaborn O'Neal against the Central of Georgia Railway Company. Judgment for plaintiff, and defendant brings error. Reversed.

Hall & Cleveland, of Griffin, and Redding & Lester, of Barnesville, for plaintiff in error. Jas. M. Smith, of Barnesville, for defendant in error.

HILL, C. J. Judgment reversed.

(11 Ga. App. 464)

McKINNEY v. TAYLOR (No. 4,223.)

(Court of Appeals of Georgia. Sept. 17, 1912.)

*(Syllabus by the Court.)***1. APPEAL AND ERROR (§ 880*)—PROCEEDINGS TO TRANSFER CAUSE—APPEAL BOND.**

Where a lien had been foreclosed, and personal property levied upon, and a claim interposed, and the property left by the levying officer in the possession of the defendant, upon the giving of a forthcoming bond, and subsequently the claimant appealed from an adverse judgment to the superior court, and the surety on the appeal bond was the same person as the surety on the forthcoming bond, there was no error in dismissing the appeal, on the ground that there was no sufficient appeal bond given. One who is surety on the forthcoming bond in a claim case cannot be surety on an appeal bond entered by the claimant, as in such case the plaintiff in execution would not, by the giving of the appeal bond, obtain additional security. The case is fully controlled by the decisions in *Woodliff v. Bloodworth*, 121 Ga. 456, 49 S. E. 289, and *Hines v. International Harvester Company*, 7 Ga. App. 364, 66 S. E. 989.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 2023-2028; Dec. Dig. § 880.*]

2. EXECUTION (§ 152*)—LEVY—FORTHCOMING BOND.

While the levying officer is the obligee in the forthcoming bond, and primarily the bond is given for his protection in leaving the property levied upon in the possession of the claimant or the defendant, yet the forthcoming bond furnishes additional security for the protection of the plaintiff in execution.

[Ed. Note.—For other cases, see *Execution*, Cent. Dig. §§ 406, 407; Dec. Dig. § 152.*]

Error from Superior Court, Whitfield County; A. W. Fite, Judge.

Claim by L. W. McKinney to personal property levied upon by Sam Taylor. From a judgment of the superior court, dismissing an appeal by claimant, he brings error. Affirmed.

Maddox, McCamy & Shumate, of Dalton, for plaintiff in error. W. E. Mann, of Dalton, and M. C. Tarver, of Macon, for defendant in error.

HILL, C. J. Judgment affirmed.

(11 Ga. App. 456)

GOETCHIUS v. WHITE (No. 4,165.)

(Court of Appeals of Georgia. Sept. 17, 1912.)

*(Syllabus by the Court.)***SHERIFFS AND CONSTABLES (§ 82*)—AUTHORITY—SERVICE OF PROCESS.**

A sheriff, as a general rule, has no authority to serve process beyond the limits of the county in which the suit is brought and of which he is an officer.

[Ed. Note.—For other cases, see *Sheriffs and Constables*, Cent. Dig. §§ 101-103; Dec. Dig. § 82.*]

Error from City Court of Floyd County; J. H. Reece, Judge.

Action by G. O. White against C. B. Goetchius. Judgment for plaintiff, and defendant brings error. Affirmed.

Lipscomb, Willingham & Wright and Nathan Harris, all of Rome, for plaintiff in error. Eubanks & Mebane, of Rome, for defendant in error.

HILL, C. J. The suit was brought in the city court of Floyd county, and was returnable to the June term, 1911. In due time for this term the deputy sheriff of Floyd county made a proper entry of personal service on the petition. At the appearance term the defendant filed a motion to dismiss the petition, alleging that the service was invalid, because it was made upon him in Chattooga county, where the deputy sheriff of Floyd county was without authority to make such service. On the filing of this motion the judge, without hearing any evidence in support of the traverse of the entry of service, passed an order in which, after reciting that it appeared that the service was perfected beyond the limits of Floyd county, Ga., and in the county of Chattooga, he directed that the defendant be again served with a copy of the petition and process, and that it be returnable to the September term of the city court of Floyd county. In compliance with the foregoing order, the clerk of the court attached new process to the petition, returnable to the September term of the court, and personal service was made upon the defendant by the deputy sheriff. No traverse was made as to this entry of service. The mo-

tion to dismiss the petition on the grounds stated was filed August 16, 1911, and on the same day the defendant filed a plea to the jurisdiction of the court, based on the ground that he was a nonresident of the county of Floyd, and lived in the county of Chattooga; and on August 18, 1911, he filed a general demurrer to the petition. On March 21, 1912, after argument, the court sustained the traverse to the service of the petition, vacated the entry and the process, and dismissed the suit, and the plaintiff excepts to this judgment.

It is first insisted by the plaintiff that the entry of service made by the deputy sheriff of Floyd county was sufficient to put the burden of proving the ground of the traverse on the defendant, and that, without such proof, the order passed on August 19, 1911, sustaining the traverse and ordering the clerk to attach process returnable to the September term, was unauthorized. It may be true that the sheriff's entry was sufficient prima facie; but the defendant took no exception to the order of the court sustaining the traverse without evidence, but substantially accepted the benefit of the order, and he cannot now be heard to contest it.

It is next said by the plaintiff that the judge fully adjudicated the exception to the process when he sustained the traverse filed August 10, 1911, and that the question was res judicata, and that he had no jurisdiction to enter the subsequent order dismissing the petition on March 21, 1911. This position would unquestionably be sound if the judge had authority to pass the order on August 19th, requiring that a second process be made returnable to a subsequent term. Section 5570 of the Civil Code of 1910, provides that, "whenever process is not served the length of time required by law before the appearance term, such service shall be good for the next succeeding term thereafter, which shall be the appearance term." If, therefore, the traverse of the original service had been sustained on the ground that the service was made too late, the order directing that additional service be made would clearly have been within the purview of the authority of the court, and the case would simply have stood returnable to the September term.

Counsel for the plaintiff in error called attention to the fact that, before the traverse was made to this second process, the defendant had appeared and filed a plea to the jurisdiction of the court, and had also filed a general demurrer, which was equivalent to a waiver of all defects in the process. The view that we take of this case, under the admitted facts of record as herein stated, is that the order passed on August 19th, directing that additional process be made upon the defendant, was a mere nullity, that it did not displace the traverse filed by the

defendant, and that the subsequent appearance of the defendant to the filing of this traverse did not constitute any waiver of his right to insist upon the ground of the traverse; and the judgment of the court sustaining the traverse being unexcepted to by the defendant, assuming (as the court necessarily did in passing the order) that the ground of the traverse was true, it necessarily followed that the deputy sheriff of the county of Floyd, where the suit was pending, had no authority to make service of the process and petition on the defendant in the county of Chattooga, and the service was invalid.

For the reasons stated, we think that the judgment of the lower court should be affirmed. *Hood v. Powers*, 57 Ga. 244; *Peck v. La Roche*, 86 Ga. 314, 12 S. E. 638.

Judgment affirmed.

(11 Ga. App. 449)

MILLER et al. v. PHILLIPS et al. (No. 3,992.)

(Court of Appeals of Georgia. Sept. 17, 1912.)

(Syllabus by the Court.)

APPEAL AND ERROR (§ 977*)—REVIEW—DISCRETION OF TRIAL COURT—GRANT OF NEW TRIAL.

It not appearing from the record that the law and the facts required the verdict, the discretion of the trial judge in granting a first new trial will not be disturbed. Civil Code 1910, § 6204.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3860-3865; Dec. Dig. § 977.*]

Error from City Court of Tifton; R. Eve, Judge.

Action between W. M. Miller and others and J. J. L. Phillips and others. From the judgment, Miller and others bring error. Affirmed.

R. E. Dinsmore and R. D. Smith, both of Tifton, for plaintiffs in error. Fulwood & Skeen, of Tifton, and J. H. Tipton, of Sylvester, for defendants in error.

HILL, C. J. Judgment affirmed.

(11 Ga. App. 449)

CLINTON et al. v. GARNER.

CLINTON v. WALDROP.

(Nos. 3,614, 3,615.)

(Court of Appeals of Georgia. Sept. 17, 1912.)

(Syllabus by the Court.)

APPEAL AND ERROR (§ 1092*)—REVIEW—QUESTIONS OF FACT—DECISIONS OF INTERMEDIATE COURTS.

The judge of the superior court did not err in refusing to dismiss the certiorari on any of the grounds of the motion to dismiss; and, in conformity with the repeated rulings of this court, and of the Supreme Court, the first grant of a new trial on certiorari will not be dis-

turbed, where, as in the present case, the verdict of the justice's court was not demanded.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4312-4321; Dec. Dig. § 1092.*]

Error from Superior Court, Paulding County; Price Edwards, Judge.

Action between S. W. Clinton and others and J. F. Garner and between S. W. Clinton and J. T. Waldrop. From the judgments, S. W. Clinton and others and S. W. Clinton bring error. Affirmed.

Griffith & Mathews, of Buchanan, for plaintiffs in error. Robinson & Edwards, of Buchanan, for defendants in error.

RUSSELL, J. Judgment affirmed.

POTTE, J., not presiding.

(11 Ga. App. 452)

SOUTHERN CEMENT STONE CO. v.
FLINN. (No. 4,066.)

(Court of Appeals of Georgia. Sept. 17, 1912.)

(Syllabus by the Court.)

1. APPEAL AND ERROR (§ 1002*)—REVIEW—QUESTIONS OF FACT.

The first, second, third, fourth, and fifth grounds of the amendment to the motion for a new trial are only amplifications of the general grounds of the motion, and raise no other question than that the verdict is not supported by the evidence, and is therefore contrary to law. The evidence was in sharp conflict on the controlling issue of fact, and cannot be disturbed by this court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3935-3937; Dec. Dig. § 1002.*]

2. NEW TRIAL (§ 52*)—GROUNDS—IRREGULARITIES—RENDITION OF VERDICT.

The sixth ground of the amendment to the motion for a new trial assigns error because the verdict is not unanimous; one of the jurors having stated to the court that the verdict was not his verdict. In a note to this ground the trial judge states that no request was made to poll the jury, that, when the case was submitted to the jury the previous night, it was agreed by counsel for both parties that, if the jury found a verdict during the night, they could disperse, and that the verdict should be retained by the foreman and received in court the next morning. The jury reached a verdict during the night and dispersed. Next morning the foreman handed the verdict to the clerk, who published it, and the jury were discharged.

A few minutes thereafter one of the jurors stated to the judge privately that he did not want to agree to the verdict, and only did so because he did not want to remain in the jury room all night. *Held*, there was no error in the refusal of the judge to reassemble the jury for further consideration of the case.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 101-105; Dec. Dig. § 52.*]

3. APPEAL AND ERROR (§ 303*)—RECORD—QUESTIONS PRESENTED FOR REVIEW.

The seventh and tenth grounds of the amendment to the motion for a new trial are not approved by the trial judge, and cannot be considered by the court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1756; Dec. Dig. § 303.*]

4. APPEAL AND ERROR (§ 1068*)—REVIEW—HARMLESS ERROR—INSTRUCTIONS.

The verdict being for the defendant, an instruction to the jury as to what they should find as interest, if they found for the plaintiff, even if erroneous, was harmless.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4225-4228, 4230; Dec. Dig. § 1068.*]

5. CHARGE OF COURT—CONSTRUCTION AS A WHOLE.

The remaining grounds of the motion for a new trial contain objections to excerpts from the charge of the court, and, when considered in connection with the entire charge, are without merit.

Error from City Court of Brunswick; D. W. Krauss, Judge.

Action by the Southern Cement Stone Company against Thomas P. Flinn. Judgment for defendant, and plaintiff brings error. Affirmed.

Ernest Dart, of Brunswick, for plaintiff in error. Courtland Symmes, of Brunswick, for defendant in error.

HILL, C. J. Judgment affirmed.

(11 Ga. App. 452)

ATKINSON v. MERCER. (No. 4,193.)

(Court of Appeals of Georgia. Sept. 17, 1912.)

(Syllabus by the Court.)

1. CARRIERS (§ 278*)—CARRIAGE OF PASSENGERS—CARE REQUIRED—QUESTION FOR JURY.

While, generally, a railroad company's employees in charge of a passenger train are not required to physically assist passengers to alight therefrom, yet in a particular case there may be circumstances which impose such a duty. And where a passenger is an old woman, incumbered with the care of four children, nine, seven, five, and three years of age, respectively, and one of them is sick, and the passenger thus incumbered requests the assistance of the conductor in changing cars, it is a question for a jury to determine whether a failure to render such assistance under these circumstances amounted to actionable negligence. *Georgia Railroad Co. v. Rives*, 137 Ga. 376, 73 S. E. 645, and citations.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1080, 1081; Dec. Dig. § 278.*]

2. CARRIERS (§ 277*)—CARRIAGE OF PASSENGERS—ACTION FOR INJURIES—DAMAGES.

An aged woman passenger, in charge of four small children, one of whom was sick, was compelled to change cars in order to reach her destination. When the conductor examined her ticket she informed him of her burdens and requested him to assist her in making the change of cars at the proper station. This he promised to do. When this station was reached, neither the conductor nor any other employee of the railroad company rendered her any assistance in changing cars as she had requested. When she disembarked from the car in which she had been traveling, she asked the conductor, who was standing near, to indicate to her the proper car for her to take, and the conductor, in compliance with her request, directed her to a car, lighted and filled with passengers, which she, without assistance, boarded with her four children. When she had traveled some distance on this car, the same conductor, who had previously examined her ticket and

had been informed of her situation and destination, again appeared for the purpose of taking up her ticket, and informed her that she had gotten aboard another car of the same train from which she had disembarked. The conductor then stated to her that he would put her off at the next station and would furnish her transportation back to the point of change for her destination. The conductor did put her off at the next station, but did not furnish her with any transportation. She was refused tickets back to the point where it was necessary for her to change cars to reach her destination. There was no train of cars returning to the point of change until late in the evening, and she was compelled to remain all day and until 11 o'clock at night at the depot where she had been put off by the conductor, incumbered with her children, and without any assistance, and thereby suffered great inconvenience, physical discomfort, and mental anguish. On proof of the above facts she recovered a verdict for \$150. *Held:* (a) The verdict was fully authorized; and, even if regarded as nominal damages, it was not excessive. (b) The measure of damages which she was entitled to recover was not limited to the amount that she had paid for her return ticket from the point where she was put off the train by the conductor back to the point where she was compelled to change cars to reach her destination. She was entitled to recover compensatory damages for the mental suffering and physical discomfort to which she was subjected by the failure of the conductor or other employé of the railroad company to exercise that degree of extraordinary diligence which is the legal standard imposed by the law of this state upon carriers of passengers. *Hopkins on Personal Injuries* (2d Ed.) § 661 et seq.; *G. S. & F. Ry. Co. v. Ransom*, 5 Ga. App. 740, 63 S. E. 525.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 1082-1084; Dec. Dig. § 277.*]

Error from City Court of Fitzgerald; E. Wall, Judge.

Action by Mrs. M. E. Mercer against H. M. Atkinson, receiver. Judgment for plaintiff, and defendant brings error. Affirmed.

Elkins & Wall, of Fitzgerald, and B. Whitfield, of Brunswick, for plaintiff in error. F. G. Boatright, of Cordele, for defendant in error.

HILL, C. J. Judgment affirmed.

(11 Ga. App. 465)

LOUISVILLE & N. R. CO. v. THARPE.
(No. 4,252.)

(Court of Appeals of Georgia. Sept. 17, 1912.)

(Syllabus by the Court.)

1. CARRIERS (§ 158*)—CARRIAGE OF GOODS—LIMITATION OF LIABILITY.

Public policy forbids a common carrier, to fix, by a mere arbitrary preadjudgment of damages, the measure of its liability in case of loss of or damage to goods delivered to it for transportation. An agreement made in good faith between shipper and carrier, that goods delivered for transportation are of a given value, is valid and enforceable. The facts bring the present case within the rule first above announced.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 663-667, 690-703½, 708-710, 718, 718½; Dec. Dig. § 158.*]

2. CARRIERS (§ 163*)—CARRIAGE OF GOODS—ACTION FOR LOSS OR INJURY—BURDEN OF PROOF.

Where, in an action for damages for loss of goods delivered to a common carrier for transportation, the plaintiff proves the actual value of the goods, if the carrier in defense to the action relies upon a stipulation in the contract of affreightment fixing the value of the goods at a sum greatly less than their actual value as shown by the evidence, the burden is on the carrier to show that the sum named in the contract was not a mere arbitrary preadjudgment of damages, but was an actual bona fide agreement as to the value of the goods.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 722-725; Dec. Dig. § 163.*]

3. CARRIERS (§ 218*) — CARRIAGE OF LIVE STOCK—LIMITATION OF LIABILITY—NOTICE OF CLAIM FOR DAMAGES.

A stipulation, in a contract of affreightment for the transportation of live stock, that, before the animals are removed from the place of destination and mingled with other animals, written notice of claim for damages shall be given to the agent of the carrier, may be waived by the carrier. It appearing in the present case that the agent of the carrier received without objection, and acted upon, an oral notice of the claim for damages, the stipulation in the contract above mentioned was waived, and cannot be set up by the carrier in defense to an action for damages for the death of the live stock.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 674-696, 927, 928, 932-949; Dec. Dig. § 218.*]

4. INJURIES TO LIVE STOCK SHIPPED—SUFFICIENCY OF EVIDENCE—NO ERROR.

The evidence authorized a finding that the death of the live stock was due to the fact that they were given improper food by the agent of the carrier, en route to their destination. The jury were authorized to find that this negligent act of the carrier caused the plaintiff damage. There were no material errors of law, and the recovery in favor of the plaintiff cannot be interfered with.

Error from City Court of Moultrie; J. D. McKenzie, Judge.

Action by E. M. Tharpe against the Louisville & Nashville Railroad Company. Judgment for plaintiff, and defendant brings error. Affirmed.

On October 28th a car load of mules was delivered to the Louisville & Nashville Railroad Company at Columbia, Tenn., to be shipped to the plaintiff at Moultrie, Ga., over the lines of the Louisville & Nashville Railroad Company to Montgomery, Ala., and from that point to Albany, Ga., over the Central of Georgia, and from Albany to Moultrie over the lines of the Georgia Northern Railway. The car reached Montgomery on Saturday afternoon, October 29th, and remained there over Sunday, arriving at Moultrie on the afternoon of November 1st. While at Montgomery the agent of the initial carrier fed and watered the stock.

The shipment was made under a special contract of affreightment, signed by the initial carrier and the Columbia Mule Company, the consignor, and contained, among other things, the following stipulations: "Said shipper will load and unload said animals at his

own risk, and feed, water, and attend the same at his own expense and risk while they are in the stockyards of the carrier awaiting shipment, and while on the cars or at feeding or transfer points, or where they may be unloaded for any purpose. Should damage occur for which the said carrier may be liable, the value at the place and date of shipment shall govern the settlement, in which the amount claimed shall not exceed for a stallion or jack \$150, for a horse or mule \$100, mare and colt together \$100, yearling colt \$50, cow and calf together \$35, domestic horned animals \$30 each, yearling cattle each \$15, calves, hogs, sheep, or goats \$5 each, chickens, ducks, and guinea fowls \$2.50 per dozen. As a condition precedent to the shipper's right to recover any damages for loss or injury to said animals, he will give notice in writing of his claim thereto to the agent of the railroad company or other carrier from whom he receives said animals, before said animals are removed from the place of destination above mentioned, or from the place of delivery of the same to said shipper, and before said animals are mingled with other animals." Indorsed on the back was the following: "The attention of the shipper has been called to the terms, conditions, value, etc., herein named." Also: "Bill of lading accepted with full knowledge of all its conditions, shipper's load and count."

When the mules reached Moultrie the plaintiff unloaded them from the car and placed them in his barn in the city of Moultrie. The next day several of the mules appeared to be sick, and the plaintiff verbally notified the agent of the Georgia Northern Railway at Moultrie of this fact, and this agent in turn notified the Central of Georgia Railway Company, but did not notify the initial carrier, the Louisville & Nashville Railroad Company. The agent at Moultrie promised the plaintiff to go down and examine the stock, but having been later informed that the stock appeared to be all right, did not make the examination. Shortly afterwards eight of the mules died. On November 16th, while the remainder of the mules were still in the plaintiff's barn, and before they had been mingled with other stock, the plaintiff caused written notice of the death of the eight mules and his claim for damages therefor to be served upon the agent of the Georgia Northern Railway Company at Moultrie. Suit was thereafter brought against the initial carrier for \$1,950 as the value of the eight mules which had died.

The plaintiff testified, in substance, that the agent at Moultrie had first refused to permit him to take the mules from the car before the surrender of the bill of lading, which had not yet arrived, but finally agreed that he would turn the mules over to the plaintiff as "railroad mules," and that the

plaintiff might place them in his barn. It appears that the mules were shipped at a reduced rate of freight. The plaintiff testified that, so far as he knew, the same rate was charged that was ordinarily charged for freight of that character; that he had made no agreement with the carrier in reference to the value of the stock, and that so far as he knew the shipper made no such agreement. There was no evidence, other than the statements appearing in the bill of lading, in reference to any agreement between the initial carrier and the shipper as to the value of the stock. There was evidence for the plaintiff that the actual value of the eight mules which had died was \$1,950.

The plaintiff's theory was that the mules had died as a result of having been fed decayed and poisoned food in Montgomery by the agent of the defendant. There was testimony that the death of the mules was the result of having eaten improper food for some time within 24 or 36 hours prior to their death. There was also evidence that, while the mules were fed by the plaintiff after they reached Moultrie, the food given was of the best quality and not defective in any respect. It appears, from the evidence, that within the period of 24 or 36 hours prior to their arrival at Moultrie they were fed at Montgomery, Ala., by the agent of the initial carrier. The jury found for the plaintiff the amount sued for, and the defendant's motion for new trial was overruled.

J. H. Merrill, of Thomasville, and Tye, Peeples & Jordan, of Atlanta, for plaintiff in error. W. W. Dykes, of Americus, and Shipp & Kline, of Moultrie, for defendant in error.

POTTLE, J. [1] 1, 2. It is argued in behalf of the defendant that, if the plaintiff was entitled to recover at all, he could not recover more than \$100 for each of the mules; that being the valuation agreed on in the contract of affreightment. While the liability of a carrier of live stock is somewhat different from that of a common carrier of other things, growing out of the inherent differences between live stock and inanimate property, nevertheless a common carrier of goods which transports live stock is, as to such property, a common carrier. In this state a common carrier is not permitted to relieve itself, by contract, from liability resulting from its own negligence, except that it may stipulate for liability only in the event of gross negligence. *Cooper v. Raleigh & Gaston R. Co.*, 110 Ga. 659, 36 S. E. 240. As a corollary from this principle, it follows that a common carrier cannot, by a mere arbitrary preadjustment of damages, enter into an agreement that in case of loss or damage it shall be liable only for a named sum, less than the actual damages which have been sustained by the owner. This question was thoroughly considered by the

Supreme Court in the case of *Central of Georgia Ry. Co. v. Hall*, 124 Ga. 322, 52 S. E. 679, 4 L. R. A. (N. S.) 898, 110 Am. St. Rep. 170, 4 Am. Cas. 128, where after reviewing the previous decisions of the Supreme Court, the rule was announced to be as follows: "A railway company in its capacity as a common carrier may, as a basis for fixing its charges and limiting the amount of its corresponding liability, lawfully make with a shipper a contract of affreightment embracing an actual and bona fide agreement as to the value of the property to be transported; and in such case the latter, when loss, damage, or destruction occurs, will be bound by the agreed valuation. But a mere general limitation as to value, expressed in a bill of lading, and amounting to no more than an arbitrary preadjustment of the measure of damages, will not, though the shipper assent in writing to the terms of the document, serve to exempt a negligent carrier from liability for the true value." There is no evidence in the present case that there was any actual bona fide agreement between either the shipper or the owner and the carrier as to the value of the property to be transported. So far as appears, the sum fixed in the contract of affreightment was a mere arbitrary amount, without any reference to the real value of the property transported. The fact that on the bill of lading there was an indorsement that the shipper's attention had been called to all of the terms of the bill of lading and that he had assented thereto does not alter the rule.

[2] It is contended, however, that this stipulation ought at least to cast the burden on the owner of the stock to prove that the stipulation as to the value was not a bona fide agreement, but only an arbitrary preadjustment of damages. We cannot assent to this view. A common carrier cannot stipulate against negligence. To permit it to contract, in case of loss on account of its negligence, to pay a sum greatly less than the real value of the article lost, would be in effect to permit it to contract against its own negligence. Where it is shown that the article transported is lost as a result of the negligence of the carrier, and the value of the article thus lost is also made to appear, and this value is largely in excess of the amount fixed in the contract of affreightment, the presumption is that the carrier has endeavored by contract to relieve itself from liability resulting from its negligence, and the law casts upon the carrier the burden of showing that that which appears to be a contract against negligence and a mere arbitrary preadjustment of damages was really an agreement entered into in good faith between the parties upon a sufficient consideration that the real value of the property was as stated in the bill of lading. In this case the owner testified that he did not make any agreement in reference to the value, and that, so far as he knew, the shipper had

made no such agreement in his behalf. This being so, the carrier could reduce the amount of its liability below the actual value of the rules only by showing that a bona fide agreement was entered into between the shipper and the carrier, fixing the value of the property at the amount stated in the bill of lading. Not having carried this burden, the carrier cannot rely upon what appears to be a mere arbitrary statement in the bill of lading as to the value of the property transported. See *Hutchinson, Carriers* (3d Ed.) § 427, p. 449. This we think is the right result, irrespective of the provisions of the act of Congress known as the "Hepburn Act." That act provides that a common carrier, transporting property from a point in one state to a point in another state, shall issue a bill of lading therefor, and "shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass, and no contract, receipt, rule, or regulation shall exempt such common carrier, railroad, or transportation company from the liability hereby imposed." The language of this section is very broad, and probably prohibits any limitation, even by express bona fide agreement, on the value of the goods shipped. Indeed, Mr. Hutchinson states broadly that such a limitation would be absolutely void, as in violation of the section of the Hepburn Act above quoted. *Hutchinson, Carriers* (3d Ed.) § 548. As stated above, however, it is not necessary for us to make any authoritative ruling upon this question.

[3] 3. It is further contended that the plaintiff was not entitled to recover, because he failed to give notice in writing of his claim, as provided in the contract of affreightment. That contract provides that written notice of the claim for damages shall be given to the agent of the carrier before the animals are "removed from the place of destination above mentioned, or from the place of delivery of the same to said shipper, and before said animals are mingled with other animals." Such a stipulation is reasonable and valid. *Roberts v. G. S. & F. Ry. Co.*, 10 Ga. App. 100, 72 S. E. 942, and citations. In order, however, for such a stipulation to be held to be reasonable, it must be given a reasonable construction. See *Hutchinson, Carriers* (3d Ed.) § 443. The purpose of the notice is to enable the carrier to examine into the claim of damages before the animals become mingled with other stock; and thus, either through mistake or through fraud, the carrier may be deceived in reference to the extent of the damages or loss. *Hutchinson, Carriers* (3d Ed.) § 444. To hold that the stipulation required notice of damage to be given before it was discovered, or could by the exercise of ordinary care

be discovered, would be to give the stipulation an unreasonable construction. It is argued in behalf of the plaintiff that, as Moultrie was the place of destination named in the bill of lading, i. e., "the place above mentioned," a notice given before the animals were removed from Moultrie would be a compliance with the contract. We do not think, however, that this is a fair meaning to give the stipulation. Such a construction might possibly be admissible if the language, "removed from the place of destination above mentioned," stood alone; but this language must be taken in connection with the language following, to wit, that the notice must be given before the animals are removed from the place of delivery and before they are mingled with other animals. A fair construction of this stipulation, taking all the language together, would seem to be that, after the animals are unloaded from the car and delivered to the consignee, he must give notice of any damage which he discovers, or which by the exercise of ordinary care he might discover, before he takes the animals away and mingles them with other animals.

It is well settled, however, that, while such a stipulation is reasonable and valid, it may, nevertheless, be waived by the carrier, either expressly or impliedly. *Roberts v. Georgia Southern & F. Ry. Co.*, 10 Ga. App. 100, 72 S. E. 942, and citations. In *Central of Georgia Ry. Co. v. Pickett*, 87 Ga. 734, 13 S. E. 750, it was held that where the stock never reached the place of destination, and the plaintiff had actual knowledge of the injury from the beginning of the journey, and the stock were taken from the car with the defendant's consent, written notice as contemplated by the contract was unnecessary. In *Hill v. Telegraph Co.*, 85 Ga. 425, 430, 11 S. E. 874, 21 Am. St. Rep. 166, it was held that, while the agent of the carrier was not bound to recognize an oral demand, yet, if he did so, making no objection to it on the ground that it was not in writing, this would amount to a waiver. In *Carter v. Southern Ry. Co.*, 3 Ga. App. 34, 42, 59 S. E. 209, it was held that if the carrier's agent, without objection to the form of the notice, received and acted upon it, this would amount to a waiver of the requirement as to written notice. In the present case, without reference to the question whether the written notice given on November 16th was a compliance with the terms of the contract, we think there was sufficient evidence to authorize the jury to find that written notice was waived. There was an express agreement between the plaintiff and the agent at Moultrie that he should be allowed to take the mules and put them in his barn as "railroad mules." From this it is inferable that until the next

day, when the bill of lading was surrendered, the plaintiff was the agent of the railroad company to take charge of the car of mules. As soon as it was discovered that the mules were sick, the plaintiff notified the local agent at Moultrie, and he in turn gave notice to the Central of Georgia Railway Company, one of the connecting carriers. It is thus apparent that the agent at Moultrie, who was, of course, the agent of the initial carrier, received and acted upon the oral notice. His conduct was such that the jury might find that he waived the stipulation in the contract requiring written notice to be served upon the carrier.

[4] 4. The evidence was conflicting. It may be that, under the terms of the contract requiring the shipper or owner to accompany the stock and feed and water them, the railroad company was not bound to feed the stock. See, in this connection, *Weaver v. Southern Ry. Co.*, 11 Ga. App. —, 75 S. E. 447. When the carrier undertook to feed and water the stock, it was, of course, bound to give them proper food, and exercise at least ordinary care and diligence in feeding and watering them. While there was direct evidence in behalf of the carrier that the food given the stock at Montgomery was not defective in any respect, there was evidence from which the jury were justified in finding that the stock were improperly fed at Montgomery, and that this improper feeding was the cause of the death of eight of the mules. This being so, it cannot be said that the jury were not authorized to find that the defendant had failed to overcome the presumption of its negligence arising from proof of the damages. There are several special assignments of error complaining of charges of the court.

What we have said above disposes of all of the material questions arising in the case, and there was no such error in any of the instructions complained of as will require the grant of a new trial.

Judgment affirmed.

(11 Ga. App. 473)

HUNT v. MAYOR, ETC., OF CITY OF MACON. (No. 4,293.)

(Court of Appeals of Georgia. Sept. 17, 1912.)

(Syllabus by the Court.)

1. APPEAL AND ERROR (§ 532*) — RECORD — BILL OF EXCEPTIONS — PETITION FOR CERTIORARI.

"In order for this court to review the refusal of the judge of the superior court to sanction a certiorari, the petition for certiorari must be incorporated in the bill of exceptions, or otherwise verified as a part thereof by the trial judge. An unsanctioned petition cannot be specified as a part of the record. *Clarke v. Deal*, 4 Ga. App. 326, 61 S. E. 295; *Hall v. State*, 2 Ga. App. 437, 53 S. E. 558." *Wimpey v. Mayor, etc., of Gainesville*, 6 Ga. App.

112, 64 S. E. 281. See, also, *Hanlon v. City of Atlanta*, 6 Ga. App. 786, 65 S. E. 815.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2399-2401; Dec. Dig. § 532.*]

2. APPEAL AND ERROR (§ 613*)—RECORD—BILL OF EXCEPTIONS—PETITION FOR CERTIORARI.

Being no part of the record, an unsanctioned petition for certiorari must be identified by the certificate of the trial judge. A certificate from the clerk of the trial court that such a petition is a part of the bill of exceptions, when in fact it is not so cannot be considered.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2702-2707; Dec. Dig. § 613.*]

Error from Superior Court, Bibb County; N. E. Harris, Judge.

Action between Emanuel Hunt and the Mayor, etc., of the City of Macon. From the judgment, Hunt brings error. Writ of error dismissed.

C. A. Glawson, of Macon, for plaintiff in error. Andrew W. Lane and Robt. W. Barnes, both of Macon, for defendant in error.

POTTLE, J. Writ of error dismissed.

(114 Va. 40)

JACKSON COAL & COKE CO. et al. v. PHILLIPS LINE et al.

SEWARD & ROPER v. SAME.

(Supreme Court of Appeals of Virginia. June 13, 1912.)

1. RECEIVERS (§ 196*) — COMPENSATION — CHARGES.

Receivers, operating under the orders of the court the business of the insolvent company, though unsuccessfully, not being charged with bad faith, are entitled to allowance of reasonable compensation for their services, and a fortiori cannot be chargeable with the expenses of operation.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. §§ 659-661; Dec. Dig. § 196.*]

2. RECEIVERS (§ 153*)—LIENS—PRIORITIES — RECEIVERSHIP.

The state and city having no lien on the personal property of an insolvent, which went into the hands of receivers, for the taxes previously assessed thereon, they never having exercised their right of levy or distress, priority of payment should not be given therefor, but only for the taxes thereafter assessed against and due from the receivers.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. §§ 467-471; Dec. Dig. § 153.*]

3. RECEIVERS (§ 202*)—ACCOUNTING—MOTION TO SURCHARGE.

The motion to surcharge the accounts of the receivers being accompanied by no data on which the court could ascertain with any degree of certainty what items or matters were complained of, it was too vague and indefinite to warrant entertaining it, especially when it was accompanied with a disclaimer of any intention to impute bad faith to the receivers.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. §§ 669, 670; Dec. Dig. § 202.*]

4. RECEIVERS (§ 155*)—PAYMENT OF CLAIMS—PRIORITIES—EXPENSES.

Though the bill for a receiver was filed by the trustees for creditors, to whom an insolvent company made an assignment, yet, the receivership being at the instance and for the benefit of the bondholders of the company, that it might, if possible, be sold as a going concern, expenses incurred in an effort to carry on the business through the receivers will be preferred in distribution of the assets to the claim of the bondholders, by reason of their having had to pay under a bond given by them to have a steamer of the company released from a libel which had been sued out against it before the assignment, though the court, by its decree authorizing the receivers to have the steamer released, provided, if said bondholders had to pay the libellant anything in accordance with the terms of the bond, they should be subrogated to libellant's right of priority of payment out of the proceeds of the steamer.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. §§ 474-476; Dec. Dig. § 155.*]

Appeals from Hustings Court of Petersburg.

Suit was filed by Bartlett Roper, Jr., and J. A. C. Groner, trustees, against the Phillips Line and others, for a receivership. From a decree ruling on exceptions to a master commissioner's report filed in such suit, two appeals, one by the Jackson Coal & Coke Company and others, and the other by Joseph W. Seward and Le Roy Roper, are taken. Reversed and remanded.

In Appeal of Jackson Coal & Coke Company et al.:

Hughes & Little, Willcox & Willcox, Harry E. McCoy, and W. McK. Woodhouse, for appellants. Carl H. Davis, Richard B. Davis, Chas. E. Plummer, Wm. B. McIlwaine, and Geo. Mason, for appellees.

In Appeal of Seward & Roper:

Carl H. Davis, Richard B. Davis, and Paul Pettit, for appellants. Hughes & Little, Willcox & Willcox, Harry E. McCoy, W. McK. Woodhouse, and W. B. McIlwaine, for appellees.

CARDWELL, J. The appeal in each of these cases is taken from a decree of the hustings court of the City of Petersburg entered therein on April 5, 1911, ruling upon exceptions to a master commissioner's report filed in the chancery cause then pending under the style of Roper & Groner, Trustees, v. Phillips Line et al.; and, though separate and distinct questions are presented in each appeal, they were argued together, and will therefore be disposed of in this opinion.

The Phillips Line was organized as a corporation in 1908 for the purpose of taking over the property, franchises, etc., of the Petersburg, Newport News & Norfolk Steamboat Company, a transportation company theretofore operating a line of boats on the James and Appomattox rivers between Richmond, Petersburg, and Norfolk, and the conduct of these operations was continued by the Phillips Line until January, 1910; on

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

which date it made an assignment of its property, etc., to Bartlett Roper, Jr., and J. A. C. Groner, trustees for the benefit of the company's creditors. On the same day the said trustees filed the original bill in the above-named cases, asking for the appointment of a receiver to take charge of and operate the property of the defendant company, in order to preserve it from dissipation by reason of litigation then pending or threatened, and to endeavor to sell the property, franchises, etc., of the company as a going concern. On the day of the filing of said bill, the hustings court entered its decree taking possession and control of the defendant company's property, etc., and appointing said trustees, Roper and Groner, as receivers to take, hold, and operate the property under the orders of the court. At this time the assets of the company consisted of the steamers Pokanoket and Aurora, a certain interest in some wharf property, and a freight and passenger business between the points named; while its liabilities amounted to \$59,795.36, consisting of capital stock outstanding, bonds and overdue interest thereon, taxes, operating expenses, including repairs, note due for wharf property secured by deed of trust, and an alleged debt due to one T. M. Davis.

A few days before said bill was filed and the receivers in the cause appointed, the Newport News Shipbuilding & Dry Dock Company had filed its libel in the United States District Court at Norfolk, Va., against the steamer Pokanoket for \$9,520 due it for repairs on the steamer, and the firm of Smith & McCoy had intervened in the proceeding for a certain amount due them for repairs on her; so that, at the time of the assignment made by the Phillips Line and the appointment of the receivers, the steamer Pokanoket was in the hands of the United States marshal, by virtue of the attachment issued in the libel proceedings, and in order to obtain possession of the steamer the receivers arranged with J. W. Seward, Le Roy Roper, and the Petersburg Investment Corporation, who were the holders of the bonds of the company, to execute or to guarantee a surety for the execution of a bond for the release of the steamer, upon the condition, as the reports of the receivers to the court state, that "if Seward, Le Roy Roper, and the Investment Corporation be compelled, in accordance with the terms of said bond, to pay to the Newport News Shipbuilding & Dry Dock Company the amount due to it by the Phillips Line as aforesaid, they, the said bondholders, will be held by the court to occupy the same position and to have the same priority of payment out of the proceeds of the sale of the said Pokanoket as is now held by the said Newport News Shipbuilding & Dry Dock Company."

The reports of the receivers just referred to were received by the court, approved, and the proposed arrangement for having the

Pokanoket released to the receivers was sanctioned and authorized by the court's decrees entered, respectively, on February 1 and 5, 1910. The last-named decree, after setting forth the proposed arrangement to have the Pokanoket released to the receivers, specifically provided that "if the said bondholders, or such of them as execute or cause to be executed said bond, are called on to pay and do pay to the person filing said libel proceedings, or to any person who may intervene in said proceedings, by petition or otherwise, any amount, then the said bondholders shall be entitled to and shall have against said steamer Pokanoket and shall be subrogated to all of the rights, claims, and liens against said steamer Pokanoket as would be had under the laws of the United States or the state of Virginia by the persons whose claims are so paid, in case the said bond were not executed, and in case the said libel proceedings were allowed to proceed to a sale of the said steamer Pokanoket, and the said bondholders paying such claims shall be protected as fully as if they held said claims and were enforcing same in admiralty proceedings." The provision of the decree of February 5th is practically the same as the provision contained in the decree of February 1, 1910, for the carrying out of the plan to have the Pokanoket released to the receivers.

Upon the release of the Pokanoket, as provided in said decree, she was turned over to the receivers, who operated her, together with the Aurora, until some time in October, 1910, when, having been unable to dispose of the property, etc., of the company as a going concern, and the receivers having become largely in debt to various persons on account of their operations, the business was brought to a close; the Pokanoket being sold in the early part of November following for \$13,000, and the Aurora, together with some other property of the company, in the early part of 1911 for \$1,050, the entire assets thus realized being \$14,050.

While negotiations looking to the sale of the Pokanoket were pending, the proposed purchasers thereof ascertaining that the appellants in the first of these appeals and other supply and repair creditors of the receivers claimed to have liens upon the Pokanoket for supplies furnished to, or repairs made upon, the steamer declined to pay the purchase price therefor agreed on, unless the receivers would arrange with such claimants to release their claims against the Pokanoket; whereupon an agreement was reached between the receivers and said creditors that the purchase price of the steamer, \$13,000, should be deposited to the credit of the court in the cause, to stand in lieu of the steamer until the creditors' liens thereon asserted were finally adjusted.

The matter then came before a master commissioner of the court, to whom the cause had been referred, and appellants Jack-

son Coal & Coke Company et al., upon notice, appeared before the commissioner and asserted their right to a lien, under their said stipulation, against the proceeds of the sale of the steamer, by virtue of section 2963 of the Code, as well as the general maritime law, for the amount due them, respectively, claiming by virtue of their lien a priority of payment out of the said fund. This contention was in the main sustained by the commissioner, who reported that said appellants were entitled to the same priority against the proceeds of the sale of the steamer over the general creditors of the receivers and of the company which they would have had if their liens had been adjudicated in an admiralty proceeding against the steamer, and gave them a preference next after the payment of "seamen's wages." The commissioner also reported that all the money received by the receivers during any month was disbursed during the same period, that the receivers were behind in their accounts as early as April 1, 1910, and that the majority of the indebtedness due by them was contracted prior to July 15, 1910.

It appears that, pursuant to the guaranty bond executed by Le Roy Roper, Seward, and the Investment Company in order to procure the release of the Pokanoket to the receivers from the attachment lien thereon in the aforesaid libel proceedings, Le Roy Roper and Seward were compelled to pay \$4,406.91 each, and they made claim before the commissioner that they were entitled to priority of payment out of the proceeds of sale of the Pokanoket for the amount so due them, respectively, over debts due to creditors of the receivers, and that they were entitled to this preference by reason of the said decrees of the court of February 1 and 5, 1910; but with respect to this debt due to Le Roy Roper and Seward the commissioner reported that it was really in the nature of a debt due by the defendant company, and placed it in the fourth class of debts reported by him, which practically defeated the collection of any part of it, to which ruling of the commissioner Roper and Seward excepted.

There were also other and various exceptions to the commissioner's report, and on a hearing upon the report and the exceptions thereto the court overruled the exceptions filed as to the priority of payment of taxes, the exceptions of Roper and Seward, and overruled the report of the commissioner as to the method reported by him for the distribution of the fund under the control of the court, and entered its decree distributing the fund, first, to the payment of court costs, including allowances to the receivers and their counsel; second, to the payment of taxes; third, to the payment, *pari passu*, of the claims of the creditors of the receivers on account of their operation of the Phillips Line; and, fourth, to the payment of

the guarantors on the bond given for the release of the Pokanoket.

It appears, also, that objection was made in due time by the creditors to any allowance being made to the receivers and their counsel, and a motion was made to surcharge the receivers' accounts, which objection and motion were also overruled.

Had the method of distribution of the fund reported by the commissioner been sustained by the trial court, appellants in the first-named appeal would have had no cause of complaint, as they would have received their money in full; but under the method of distribution adopted by the court's decree they can only receive a part thereof. Accordingly they assign as error the overruling of so much of the report of the commissioner as sustained their liens and awarded payment thereof out of the proceeds of sale of the steamers, etc., next after payment of seamen's wages, and in entering the decree directing payment of these and other claims of the creditors *pari passu*.

The second assignment of error is practically the same as the first, and the disposition of one will dispose of the other; the gravamen of the exceptions being that the court erred in not directing the payment of said appellants' claims in full.

The third assignment of error is to the ruling of the court making allowances to the receivers and their counsel.

The fourth assignment of error relates to the provision in the decree for the payment of taxes, and giving them priority over the creditors of the receivers; and the fifth assignment of error is to the action of the court in overruling appellants' motion to surcharge the accounts of the receivers.

Section 2963 of the Code, under which the supply and repair creditors of the receivers claim preference in the distribution of the fund under the control of the court, provides: "If any person has any claim against the master or owner of any steamboat or other vessel, raft or river craft, or against any steamboat or other vessel, raft or river craft found within the jurisdiction of this State, for materials or supplies furnished or provided, or for work done for, in or upon the same, * * * such person shall have a lien upon such steamboat or other vessel, raft or river craft for such materials or supplies furnished, work done or services rendered. * * *"

Unquestionably the lien provided by the statute is ordinarily a right of property in the vessel, raft, or river craft, existing independently of possession, and arises as soon as the contract for the materials, supplies, etc., is made, and may be enforced against the boat, raft, or river craft in the hands of the purchasers thereof, and such liens have been enforced so frequently in the admiralty courts that citation of authority is unnecessary; but can such a lien be enforced

under the facts and circumstances of this case to the exclusion of court costs, including allowances to the receivers, and of the lien of claimants in the aforesaid libel proceedings in the federal court, to whose rights appellants Seward and Le Roy Roper were subrogated by the decrees of the trial court in this cause?

[1] The receivers were, of course, acting under the orders of the court, and it is very true that the plan to operate the business of the insolvent company, the Phillips Line, was not pursued to a successful result by the receivers, so as to bring about a sale of the property, etc., as a going concern, as was designed; but the receivers are not charged with bad faith in the conduct of the business, and the only complaint is that they did not act wisely and failed to make certain reports to the court which they should have made. In these circumstances, the receivers were entitled to an allowance of reasonable compensation for their services, and a fortiori cannot be charged with the expenses of operation. The allowances to the receivers and to their counsel is not, as we understand appellants' contention, considered unreasonable, and therefore the court did not err in directing their payment as a part of the court costs incurred in marshaling and disposing of the property of the insolvent company, whose property came into the hands of the receivers and under the control of the court.

[2] With respect to that part of the decree appealed from which directed the payment of taxes due from the Phillips Line and its predecessor in title to the state of Virginia and the city of Petersburg out of the fund under the control of the court, and giving the taxes priority in payment over the creditors of the receivers, the court erred, except as to the taxes for the year 1910. The property upon which these taxes were assessed was wholly personal, and no effort appears to have been made, certainly as to the years prior to 1910, either by the auditor of the state or by the city of Petersburg, to collect the taxes until the property was placed in the hands of the receivers in this cause and an account of debts against the Phillips Line ordered. The state had a right, under sections 604-623 of the Code, for one year from the date on which the taxes in her favor were assessed, to levy upon the property assessed with the taxes, which right was not exercised; and it appears that the city of Petersburg had a right of distress against the property assessed with taxes in its favor, which the city might have exercised before the taxes were returned delinquent, or the property upon which they were assessed had passed into the hands of subsequent purchasers, and thereby have secured a lien therefor, but these rights were never exercised.

Under these circumstances, neither the state nor the city had a lien upon the prop-

erty of the Phillips Line when it went into the hands of the receivers for the taxes due them respectively, and therefore the position of the state and city was no better than that of the general creditors of the company, and they were not entitled to share in the proceeds of sale of the company's property, except as to the amount of taxes due them (the state and the city), respectively, for the year 1910, assessed against and due from the receivers.

[3] With respect to the fifth assignment of error in the petition for the first-named appeal, we deem it only necessary to say that the motion to surcharge the accounts of the receivers was accompanied by no data upon which the trial court could have ascertained with any degree of certainty what items or matters in the accounts of the receivers, which had been audited and approved by the court, were complained of, and therefore the motion to surcharge the accounts was too vague and indefinite to warrant the court in entertaining the motion, especially when the motion was accompanied with a disclaimer of any intention to impute bad faith on the part of the receivers.

[4] This brings us to a consideration of the first and second assignments of error by the appellants in the first-named of these appeals, upon which the contention is made that the trial court should have directed the payment of their respective claims in full, there being a sufficient fund under the control of the court; and in this connection it is necessary to consider the question presented on the second of these appeals, which is whether or not the court erred in denying the appellants Seward and Roper the priority claimed by them in the distribution of the proceeds of sale of the steamer Pokanoket, which was practically to deny them the payment of any part of their claim, amounting approximately to \$9,000.

To sustain their contention the supply and repair creditors of the receivers, appellants in the first of these appeals, rely upon the decision of this court, construing section 2963 of the Code, supra, in *People's Bank v. Va. Textile Co.*, 104 Va. 34, 51 S. E. 155, 7 Ann. Cas. 583; while the appellants Seward and Roper rely upon the decrees of the trial court of February 1 and 5, 1910, under which it is claimed that the court made with said appellants an agreement that, if they guaranteed the bond to be executed by the receivers of the court for the purpose of releasing the Pokanoket from the lien of the libel proceedings instituted in the United States District Court at Norfolk, Va., and pending at the time of the institution of this suit, and appellants were called on to pay and did pay any amount on account of the said guaranty, they should be repaid by the court such amount out of the proceeds of sale of the Pokanoket when the boat was sold by the court.

The case of *Bank v. Textile Co.*, supra, was decided upon sound principles of equity and justice, well established by the authorities, and declared to be the policy in this state by statute—section 2963 of the Code. In that case the court said: "The general rule is conceded that the appointment of a receiver does not affect vested rights or interests of third persons in property which is the subject of the receivership, or disarrange the order of priority of liens. But this principle is subject to an exception as firmly established as the rule itself, namely, that where the receiver is appointed at the instance and for the benefit of lien creditors, and charged with the duty of operating the property for their advantage, all proper charges, expenses, and liabilities incurred incident to the receivership are held to be a first charge upon not only the current earnings but also the corpus of the estate."

The bill in that case was filed by the bank for the ultimate purpose of enforcing the lien of a deed of trust upon the plant of the defendant the Virginia Textile Company to secure coupon bonds to the amount of \$25,000, all of which were held by the plaintiff, which bill, filed in open court, made defendants thereto the Textile Company and the trustees in the deed of trust, who were also attorneys for the plaintiff, and one of whom was the president of the bank. After setting out the indebtedness of the Textile Company, default in the payment of certain of its notes and installments of interest on the coupon bonds, and that loss and damage would result from a scramble among creditors for priority and a wasting of the assets by a multiplicity of suits, the bill prayed for the appointment of a receiver to continue the business of the company under the direction of the court, etc.; and the truth of all the allegations of the bill was admitted by the defendants in their answer, and they united in the bill's prayer. Accordingly a decree was passed by the court, appointing the president of the plaintiff bank receiver, with direction to take possession of all the company's property, etc.

In the case now in judgment the Phillips Line was admittedly insolvent, a libel had been sued out in the United States District Court at Norfolk against the Pokanoket, one of the company's steamboats, and thereupon the assignment of January 27, 1910, by the company of all of its assets to Bartlett Roper, Jr., and J. A. C. Groner was executed, and in turn, on the same day, these trustees filed their bill asking for the appointment of a receiver to take charge of and operate the property, in order to preserve the company's assets from dissipation * * * and endeavor to sell it as a going concern. Le Roy Roper and Seward, appellants, were bondholders of the Phillips Line. Seward was the vice president of the company, and signed the answer of the company, uniting in the

prayer of said bill of the trustees for the receivership. He also executed for and on behalf of the company the deed of assignment to Roper and Groner, trustees; the said Roper and Groner being on the same day, on their own motion, appointed receivers, the attorney for the receivers also acting as the attorney for Roper and Seward.

The two decrees of the court to which we have adverted were based upon two reports filed by the receivers for the purpose of obtaining said decrees, the first of which reports, filed on January 31, 1910, contains the following language: "The said receivers further report that Joseph W. Seward, Le Roy Roper, and Petersburg Investment Corporation are the holders of the \$15,000 of notes or bonds of said Phillips Line, holding respectively 6, 6, and 3 of the said bonds. In order to have the said steamer Pokanoket released from the lien of said libel, the said bondholders have agreed that the said bond of \$12,000 shall be executed, and that they will be responsible therefor in the proportions in which they hold bonds of the company, to wit, in the proportion of $\frac{2}{15}$, $\frac{2}{15}$ and $\frac{1}{15}$, respectively, as more fully appears from Exhibit A herewith filed. Upon the condition, however, that if they be compelled, in accordance with the terms of said bond, to pay to the Newport News Shipbuilding & Dry Dock Company the amount due to it by the said Phillips Line as aforesaid, that they, the said bondholders, will be held by the court to occupy the same position, and to have the same priority of payment out of the sale of the said Pokanoket, as is now had by the said Newport News Shipbuilding & Dry Dock Company."

The receivers' second report practically repeats what is just quoted from the first, upon which the decree of February 5, 1910, was based, and contains this statement: "Your receivers are of opinion that it is necessary, to the best interest of all parties concerned, and particularly of the bondholders of said Phillips Line, that the said steamer Pokanoket be released and turned over to your receivers, so that she may be put into operation between Petersburg and Norfolk; and in this way hold the business which she had before the libel proceedings were instituted."

It seems to us that it plainly appears from the record that, while the receivership was nominally applied for by Roper and Groner as trustees under the deed of assignment, it was at the instance and for the benefit of the bondholders, Roper and Seward. Both the deed of assignment and the bill show that parties holding claims upon which libel proceedings could be and were instituted were vigorously protecting their rights, and that the bondholders next in right of priority would absorb the remaining assets of the company; therefore it was apprehended that the libel proceedings would be so far-reaching and expensive as to defeat the bonds, and

the assignment was made and the receivership asked for on the same day, in order that the bondholders might thereby be protected and benefited by obtaining control of the boats and operating them through the receivers.

As said by the commissioner in his report in the cause: "In volunteering to take the position of the Newport News Shipbuilding & Dry Dock Company and other petitioning creditors in the libel proceedings, and to deliver the steamer Pokanoket into the possession of this court for the purpose of operation, they [Le Roy Roper and Seward] impliedly, if not expressly, agreed to all proper expenses incurred in operating the boats, and held out to the supply men, repair men, seamen, and all others who dealt with the receivers, the corpus of the estate, as well as its earnings, as a basis of credit sought and given."

In these circumstances appellants Seward and Roper cannot in equity and good conscience be heard to say that, while they have invited all that has been done in the proceedings to wind up the business of the Phillips Line and to protect its property, for the ultimate benefit of the bondholders of the company, and that this business should be carried on in the interest of all concerned, *particularly of the bondholders*, and impliedly, if not expressly, agreed that all proper expenses incurred in the effort to carry on the business should be "a charge upon the corpus of the estate, as well as its earnings," still, although the business carried on particularly for their benefit has been unsuccessful, they are to be preferred in the distribution of the assets of the insolvent company over the supply men and repair men who dealt with the receivers charged with the conduct of the business in their interest, and whose debts were necessarily contracted by the receivers.

"If the court was without power in such cases to charge the expenses of the receivership on the property, the innocent officer of the court would have to bear the loss. If such was the law of receivership, no one could be found to accept the important office." *Huling v. Jones*, 63 W. Va. 696, 60 S. E. 574.

In *Kneeland v. American Loan & Trust Co.*, 136 U. S. 98, 10 Sup. Ct. 950, 34 L. Ed. 379, the court said: "A court which appoints a receiver acquires, by virtue of the appointment, certain rights and assumes certain obligations, and the expenses which the court creates in discharge of those obligations are burdens necessarily on the property taken

possession of; and this irrespective of the question who may be the ultimate owner, or who may have the preferred lien, or who may invoke the receivership." See, also, *Va. & Ala. Coal Co. v. Railroad & Banking Co.*, 170 U. S. 356, 18 Sup. Ct. 657, 42 L. Ed. 1068; *International Tr. Co. v. U. S. Coal Co.*, 27 Colo. 246, 60 Pac. 621, 83 Am. St. Rep. 59, and note.

The established rule recognized in the cases just cited is fully sanctioned and approved in *People's Bank v. Textile Co.*, supra, and is in strict accord, when applied to a case like the one under consideration, with just and equitable principles and the general maritime law, as well as with the policy and terms of our own statutes.

With respect to the authorities upon which appellants Seward and Roper base their contention, it is only necessary for us to say that, so far as we have been able to examine them, they do not apply to a case where the controversy is between creditors of the receivers for operating expenses and holders of liens arising antecedent to the receivership, but only recognize the right of the court to take property subject to liens, and the duty of the court to recognize the existence of such liens undisturbed in their order by reason of the receivership.

We are of opinion that the lower court should have directed the distribution of the fund under its control in this case as follows: (1) To the payment of court costs, including allowances to the receivers and their counsel, taxes due the state of Virginia and city of Petersburg assessed against the property of the Phillips Line for the year 1910, and seamen's wages due from the receivers; (2) to the payment of the liens of appellants perfected under section 2963 of the Code for supplies furnished the receivers; (3) to the payment *pari passu* of the claims of the general creditors for general expenses incurred by the receivers; and (4) to the payment ratably of the taxes due the state and the city of Petersburg, assessed against the property of the Phillips Line's predecessor in title for the years 1907, 1908, and 1909, and the claim of Seward and Roper, guarantors on the bond of the receivers given for the release of the Pokanoket under the decrees of the court entered in the cause February 1 and February 5, 1910.

The decree appealed from is reversed and annulled, and the cause remanded for further proceedings in the cause, to be had in accordance with this opinion.

Reversed.

(92 S. C. 374)

DOUGLAS v. CITY COUNCIL OF GREENVILLE.

(Supreme Court of South Carolina. Sept. 10, 1912. On Submission to Full Court, Dec. 2, 1912.)

1. MUNICIPAL CORPORATIONS (§§ 57, 58*) — POWERS—SCOPE.

Municipal corporations have only such powers as have been expressly granted by the Legislature, or by reasonable implication, and a grant of power will be strictly construed.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 144, 145-147, 148; Dec. Dig. §§ 57, 58.*]

2. LICENSES (§ 6*)—ORDINANCES—VALIDITY.

Civ. Code 1902, § 1999, which authorizes municipal, health, police, etc., regulations, authorizes an ordinance requiring a license to open and conduct a livery stable at a new location, and providing that, in considering an application for a license, proximity to populous residence neighborhoods, etc., shall be considered.

[Ed. Note.—For other cases, see *Licenses*, Cent. Dig. §§ 5, 6; Dec. Dig. § 6.*]

3. MUNICIPAL CORPORATIONS (§ 63*) — LEGISLATIVE ACTION—JUDICIAL REVIEW.

The courts, in passing on the validity of legislative action, cannot inquire into the legislative body's motives, and hence cannot consider an objection that an ordinance restricting location of livery stables was adopted to subserve private interests.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 155, 1378, 1379; Dec. Dig. § 63.*]

4. NUISANCE (§ 3*)—LIVERY STABLES.

While a livery stable is not a nuisance per se, when properly located, it would be a nuisance in some places, without regard to how it was built or kept, because of many objectionable features which are inevitably incident to its existence and operation.

[Ed. Note.—For other cases, see *Nuisance*, Cent. Dig. §§ 4, 5, 9-25; Dec. Dig. § 3.*]

5. MUNICIPAL CORPORATIONS (§ 626*) — ORDINANCE—GENERAL OPERATION.

That an ordinance restricting the location of livery stables was adopted to prevent plaintiff from opening one under construction does not make it invalid, as discriminatory against him, if the ordinance is general in its operation.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1380; Dec. Dig. § 626.*]

6. LIVERY STABLE KEEPERS (§ 2*) — ORDINANCES—VALIDITY.

A proper ordinance restricting location of livery stables is not invalid as to one who had bought a lot and commenced building operations at considerable expense before the ordinance was adopted.

[Ed. Note.—For other cases, see *Livery Stable Keepers*, Cent. Dig. § 2; Dec. Dig. § 2.*]

7. MANDAMUS (§ 71*)—SUBJECTS OF RELIEF—MUNICIPAL ACTION.

Mandamus lies to compel a municipal corporation to perform a purely ministerial duty.

[Ed. Note.—For other cases, see *Mandamus*, Cent. Dig. § 133; Dec. Dig. § 71.*]

Mandamus proceeding by George J. Douglas against the City Council of Greenville. Petition dismissed.

Wilton H. Earle, of Greenville, for petitioner. L. O. Patterson and T. P. Cothran, for respondent.

HYDRICK, J. The petitioner seeks to have an ordinance of the city of Greenville annulled, and to obtain a writ of mandamus, directed to the city council, commanding that body to issue to him a license to open and operate a livery, feed, and sales stable on his lot, on the corner of North and Laurens streets, in said city. On October 5, 1911, petitioner paid \$22,100 for the lot, for the purpose of building a stable thereon, and, while it was worth what he paid for it for other purposes, he would not have bought it, if he had known that he would not be allowed to use it for that purpose. On October 6th he applied to the city engineer, who is ex officio building inspector, and authorized to issue building permits, and obtained a permit to build his stable. At that time, so far as it appears from the record, there was no ordinance on the subject of location of stables in the city. The ordinance under which the building permit was granted, related to the methods of constructing buildings and the kind of materials to be used, with a view to their structural safety and to the prevention of fires. Having obtained the building permit, petitioner contracted with a builder, bought several hundred dollars worth of building materials, cut down some shade trees on his lot, had the foundation graded for his stable, and incurred other expenses in preparation for the building of his stable.

On October 25th, when the residents and owners of property in the immediate neighborhood had discovered his purpose, they objected, and petitioned the council to prohibit the opening of a stable at that place, because it was in the midst of a densely populated residence section of the city, in which there was also situated a church and a hospital. Most active in pressing the objections of the neighboring citizens was Mr. W. E. Beattie, who was acting in the interest of his sister-in-law, whose residence adjoins petitioner's lot. Mr. Beattie is a member of the paving commission, which has the expenditure of large funds of the city, and in that way he is officially associated with the members of the council. He is also on terms of social or business friendship with most, if not all, of them. He exerted what influence he could to secure the passage of the ordinance and the refusal of a license to the petitioner under it. He went so far as to give bond to save the city harmless in the matter of expense incurred in defending the ordinance, if it should be attacked, and employed his own attorney to assist the city attorney in this case. It is therefore alleged, as one of the grounds of attack, that the ordinance is void, because its adoption was procured by im-

proper influence, and because, in adopting it under such influence, the members of council perverted the power intrusted to them to be exercised for the public to the promotion of private interests. On November 7th the ordinance was adopted. For the purpose of testing its validity, petitioner immediately applied for a license to open a stable on his lot, which was refused in a formal resolution, which recites that the application had been considered in all its bearings, under the ordinance and with reference to the various matters mentioned in section 4 thereof, and that it was the sense of council that, under all the circumstances, it would not be for the best interest of the city to grant it.

In disposing of the questions before the court, it will be necessary to consider only the first and fourth sections of the ordinance. As originally adopted, they read as follows:

"Section 1. That from and after this date it shall be unlawful for any person, firm, company or corporation to open and conduct a livery stable, feed stable, sale stable or other similar institution within the city limits at any place, *at which a similar business has not been conducted immediately preceding the date of the passage of this ordinance*, without first applying to the city council and obtaining from said city council special permission to open and conduct said business at said place."

"Sec. 4. In considering and passing upon the question of granting permission to open and operate such livery stable, feed stable, sale stable, or other similar institution, regard shall be had by said council to the proximity of said proposed stable or similar institution to shipping facilities, to the avoiding or prevention of danger to pedestrians in consequence of the use of the streets by large numbers of animals, to the presence or absence of densely populated residence neighborhoods, and to the question whether the proposed stable or similar institution is so near to churches, schools or other institutions as to prove injurious to them, and to the matter of protection against fire losses."

This proceeding was commenced on November 28th, and on December 19th, after the issue herein had been joined and the case had been referred, for the purpose of having the testimony taken, at the suggestion of the city attorney, the council amended the ordinance, presumably for the purpose of strengthening it against this attack. The amendment consisted in substituting "or" for italicized "and" in section 1, and in striking out the italicized adjective sentence therein. Respondent was permitted to set up the amended ordinance in a supplemental return.

[1, 2] We notice, first, the contention that the ordinance is not within the legislative grant of power to the city. It is so well settled as to require no citation of authority that municipal corporations have and can exercise only their inherent powers and such

as have been conferred upon them by the Legislature in express terms, or by reasonable implication, and also that the grant of power will be strictly construed against the municipality. Even under these rules, ample authority for the ordinance is found in section 1999, vol. 1, Code 1902, which confers upon cities and towns "power and authority to make, ordain and establish all such rules, by-laws, regulations and ordinances respecting the roads, streets, markets, police, health and order of said cities and towns, or respecting any subject as shall appear to them necessary and proper for the security, welfare and convenience of such cities and towns, or for preserving health, peace, order and good government within the same."

[3] The allegation that the ordinance was adopted and the license was refused through the undue influence of Mr. W. E. Beattie over the members of council, exercised for the purpose of subserving private interests, and not for the protection of public, is not sustained by the evidence. Private interests may be, and nearly always are, incidentally subserved in promoting the public good. But the members of the council deny emphatically that their action was controlled by the influence alleged, and assert positively that they were governed solely by what they believed to be for the best interest of the community. Aside from this, we cannot inquire into the motives which induce legislative action. In a proceeding to annul an ordinance of the city of San Francisco, it was alleged that it was adopted on account of a feeling of antipathy to the Chinese residents of the city; but the Supreme Court of the United States said they could not inquire into the motives of the board of supervisors in adopting the ordinance, "except as they may be disclosed on the face of the acts, or inferable from their operation, considered with reference to the condition of the country and existing legislation. The motives of the legislators, considered as to the purpose they had in view, will always be presumed to be to accomplish that which follows as the natural and reasonable effect of their enactment. Their motives, considered as the moral inducements for their votes, will vary with the different members of the legislative body. The diverse character of such motives, and the impossibility of penetrating into the hearts of men and ascertaining the truth, precludes all such inquiries as impracticable and futile. And in the present case, even if the motives of the supervisors were as alleged, the ordinance would not be thereby changed from a legitimate police regulation, unless in its enforcement it is made to operate only against the class mentioned; and of this there is no pretense." *Soon Hing v. Crowley*, 113 U. S. 703, 5 Sup. Ct. 730, 28 L. Ed. 1145; *Cooley*, Const. Lim. (7th Ed.) 258. Whether an act or ordinance is within the power of the Legislature or municipal cor-

poration is a judicial question; but whether it is a wise and proper exercise of the power is for the legislative body to determine, and for their action they are responsible only to the people whom they represent.

[4] We think the ordinance should be sustained as a valid and reasonable exercise of the police power. The place at which a thing is done may determine whether it is or is not a nuisance. While a livery stable is not a nuisance per se when properly located, it would be a nuisance in some places, without regard to how it was built or kept, because of many objectionable features which are inevitably incident to its existence and operation. Its proper location, therefore, depends upon a variety of circumstances, which involve the exercise of judgment and discretion when the matter is viewed from the standpoint of the public health, safety, and comfort; and it is therefore subject to municipal regulation. Dill. Mun. Corp. § 692; McQuill. Mun. Ord. § 450; 19 A. & E. Enc. L. (2d Ed.) 430.

[5] The contention that the ordinance is discriminatory and denies to petitioner the equal protection of the law, cannot be sustained, notwithstanding it was adopted to meet his case. That was merely an incident. Its character in that respect must be judged from the ordinance itself. Upon its face, it does not appear to be discriminatory; nor does it appear that such will be the necessary result of its practical operation. While it was primarily aimed at petitioner, it applies to all others in similar circumstances, and it applies to all alike; and while it affords opportunity for unfair discrimination in its administration that does not necessarily make against its validity. Unlike the ordinance condemned in *Yick Wo v. Hopkins*, 118 U. S. 356, 6 Sup. Ct. 1064, 30 L. Ed. 225, which conferred "a naked and arbitrary power to give or withhold consent not only as to places, but as to persons," this ordinance vests in the council "a discretion to be exercised upon a consideration of the circumstances of each case," which is a proper exercise of the police power.

In *Fischer v. St. Louis*, 194 U. S. 361, 24 Sup. Ct. 673, 48 L. Ed. 1018, the Supreme Court of the United States had under consideration an ordinance which prohibited the building of any dairy or cow stable in the city, and the maintenance of any then existing, without consent of the municipal assembly. *Fischer* was convicted and fined for using stables which had been built before the passage of the ordinance. In response to his contention that the ordinance denied him the equal protection of the laws and deprived him of his property without due process of law, the court said: "Defendant's main contention, however, is that, by vesting in the municipal assembly the power to permit the erection of dairy and cow stables to certain persons a discrimination is thus

declared in favor of such persons and against all other persons, and the equal protection of the laws denied to all the disfavored class. The power of the Legislature to authorize municipalities to regulate and suppress all such places or occupations as, in its judgment, are likely to be injurious to the health of its inhabitants, or to disturb people living in the immediate neighborhood by loud noises or offensive odors, is so clearly within the police power as to be no longer open to question. The keeping of swine and cattle within the city, or designated limits of the city, has been declared in a number of cases to be within the police power. The keeping of cow stables and dairies is not only likely to be offensive to neighbors, but it is too often made an excuse for the supply of impure milk from cows which are fed on unhealthful food, such as refuse from distilleries, etc. [Citing cases.] We do not regard the fact that permission to keep cattle may be granted by the municipal assembly as impairing, in any degree, the validity of the ordinance or as denying to the disfavored dairy keepers the equal protection of the laws. Such discrimination might well be made where one person desired to keep 2 cows and another 50; where one desired to establish a stable in the heart of the city, and another in the suburbs; or where one was known to keep his stable in a filthy condition, and the other had established reputation for good order and cleanliness. Such distinctions are constantly made the basis for licensing one person to sell intoxicating liquors and denying it to others. The question in each case is whether the establishing of a dairy and cow stable is likely, in the hands of the applicant, to be a nuisance or not to the neighborhood, and to imperil or conduce to the health of its customers. As the dispensing powers must be vested in some one, it is not easy to see why it may not properly be delegated to the municipal assembly which enacted the ordinance. Of course, cases may be imagined where the power to issue permits may be abused, and the permission accorded to social or political favorites and denied to others, who, for reasons totally disconnected with the merits of the case, are distasteful to the licensing power." To the same effect, see *Lieberman v. Van De Carr*, 199 U. S. 552, 26 Sup. Ct. 144, 50 L. Ed. 305; *California Reduction Co. v. Sanitary Reduction Works*, 199 U. S. 306, 26 Sup. Ct. 100, 50 L. Ed. 204; *Gundling v. Chicago*, 177 U. S. 183, 20 Sup. Ct. 633, 44 L. Ed. 725.

[6] The facts that petitioner had been granted a permit to build and had incurred considerable expense preparatory to building cannot avail against the ordinance. "As the state may not, by any law or contract, surrender or restrict any portion of the sovereignty which it holds in sacred trust for the public weal, so a municipality, as a gov-

ernmental agency, acting and bound always to act as trustee of the power delegated to it, may not, by contract, license, or by-law, surrender or restrict any portion of the police power conferred upon it." 28 Cyc. 696; *Knoxville v. Bird*, 12 Lea (Tenn.) 121, 49 Am. Rep. 326. These views do not conflict with the principles decided in *Dobbins v. Los Angeles*, 195 U. S. 223, 25 Sup. Ct. 18, 49 L. Ed. 169. That case was decided on a demurrer to the complaint, in which facts were alleged, which were admitted by the demurrer, which showed that the ordinance was not a bona fide exercise of the police power for the protection of the public, but that it was an arbitrary and capricious attempt to exercise that power to protect an existing gas company in the enjoyment of a monopoly, and for that reason the ordinance was held to be void. But the court distinctly recognizes and affirms the principles announced in *Fischer v. St. Louis*, in the following language: "It may be admitted as being a correct statement of the law as held by the California Supreme Court that notwithstanding the grant of the permit, and even after the erection of the works, the city might still, for the protection of the public health and safety, prohibit the further maintenance and continuance of such works, and the prosecution of the business, originally harmless, may become, by reason of the manner of its prosecution or a changed condition of the community, a menace to the public health and safety. In other words, the right to exercise the police power is a continuing one, and a business lawful to-day may, in the future, because of the changed situation, the growth of population, or other causes, become a menace to the public health and welfare, and be required to yield to the public good."

[7] The power of the court to compel a municipal corporation to perform a purely ministerial duty is not questioned. Although it should be a matter resting in discretion, the court would nevertheless compel its performance, if its refusal should be based upon a conclusion which is without foundation in fact—in other words, if the refusal is arbitrary or capricious. *Mauldin v. Matthews*, 81 S. C. 414, 62 S. E. 695, 128 Am. St. Rep. 919. For, "though the law itself be fair on its face and impartial in appearance, yet if it is applied and administered by public authority with an evil eye and an unequal hand, so as to practically make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution." *Yick Wo v. Hopkins*, supra; *Kirk v. Board*, 83 S. C. 372, 65 S. E. 387, 23 L. R. A. (N. S.) 1188. But the facts of this case fall short of making it appear that the license was arbitrarily or capriciously refused. Numerous circum-

stances appear in the evidence upon which the discretion to refuse it might have been reasonably exercised.

The petition is therefore dismissed.

GARY, C. J., and WOODS, WATTS, and FRASER, JJ., concur.

On Submission to Full Court.

PER CURIAM. After careful consideration thereof, ordered that the within petition be dismissed.

(92 S. C. 449)

WALL v. WESTERN UNION TELEGRAPH CO.

(Supreme Court of South Carolina. Sept. 18, 1912.)

TELEGRAPHS AND TELEPHONES (§ 73*)—DELAY IN DELIVERY OF MESSAGES — NEGLIGENCE—QUESTION FOR JURY.

In an action against a telegraph company for delay in the delivery of a message, the issue of negligence held, under the evidence, for the jury.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. § 76; Dec. Dig. § 73.*]

Appeal from Common Pleas Circuit Court of Hampton County; Robt. E. Copes, Judge. "To be officially reported."

Action by Mamie Wall against the Western Union Telegraph Company. There was a judgment of nonsuit, and plaintiff appeals. Reversed.

W. S. Smith, of Hampton, and W. H. Townsend, of Columbia, for appellant. G. H. Fearons, of New York City, and E. F. Warren and George Warren, of Hampton, for respondent.

WOODS, J. The plaintiff, who lived in the country, two miles from Ridgeland, had instituted, or was about to institute, an action for divorce in Jessup, Ga. On October 15, 1909, her attorney, J. R. Thomas, delivered to the defendant telegraph company for transmission the following message: "Jessup, Georgia, tenth-fifteenth, nineteen hundred and nine. Mrs. Mamie Wall, Ridgeland, S. C. Papers will be ready to-morrow. Come No. 85 train. James R. Thomas." The telegram was not delivered until the plaintiff called for it on October 20th, in consequence of a letter received on the subject. The complaint alleges that the delay in delivery was due to the negligence, willfulness, and wantonness of the defendant, and that thereby the plaintiff "was prevented from keeping an important business engagement in Jessup, was inconvenienced, annoyed, subjected to expense, a trip from Ridgeland, S. C., to Jessup, Ga., which was fruitless, for the reason that the said message had not been delivered when called for at defendant's office, and otherwise damaged, to her injury in the sum of \$1,999." The answer contains a general

denial, and the special defenses that the plaintiff lived beyond the free delivery limits at Ridgeland, and the charge for delivery beyond the limits was not paid, and that the plaintiff was not known by the name of Mamie Wall, but by the name of Sallie Nettles, or Sallie Wall. At the conclusion of the entire evidence the circuit judge granted a nonsuit.

There was testimony on the part of the plaintiff tending to show that her real name, by which she was generally known, was Mamie Wall, and that she had signed receipts for express packages to the defendant's agent by that name; that on October 15th she was in Ridgeland and asked for a telegram; that when she called again, and received the telegram from the agent, he found it in his waste basket; and that the divorce proceedings were retarded by the delay in the delivery of the message. On the part of the defendant, there was evidence that the plaintiff was not known by the name of Mamie Wall, but as Sallie Nettles, or Sallie Wall, and that there was another woman living some distance from Ridgeland whose name was Mamie Wall; that the defendant's agent did not know the plaintiff as Mamie Wall, and that he made inquiries for Mamie Wall of persons most likely to know her, and was informed that no such person was living in Ridgeland; that he sent a service message, requesting payment or guaranty of the charge for delivery of the message to the other woman, known as Mamie Wall, living beyond the free delivery limits; and that the sender of the message refused to pay or guarantee the charge. This general statement is, we think, sufficient to show that there was an issue made by the evidence, on the decision of which by the jury the verdict would depend.

Reversed.

GARY, C. J., and HYDRICK, WATTS, and FRASER, JJ., concur.

(92 S. C. 384)

WELBORN v. COBB et al.

(Supreme Court of South Carolina. Sept. 13, 1912.)

1. ACTION (§ 50*)—FORECLOSURE—PARTIES.

Under Code Civ. Proc. 1902, § 188, providing that, where a mortgage debt is secured by the obligation of any third person, plaintiff may make such person a party to the action to foreclose, an assignee of a mortgage and notes secured thereby may, on the default of the mortgagor, sue in one action the mortgagor to foreclose the mortgage and the mortgagee on his guaranty of the payment of the debt.

[Ed. Note.—For other cases, see Action, Cent. Dig. §§ 511-547; Dec. Dig. § 50.*]

2. ACTION (§ 38*)—FORECLOSURE—CAUSE OF ACTION.

A complaint in an action by an assignee of a mortgage and the notes secured thereby against the mortgagor and the mortgagee, who guaranteed payment, which alleges the mortga-

gor's failure to pay the note first maturing, and that the whole debt became due pursuant to a stipulation of the mortgage; that by consent of the assignee the mortgagor had sold a part of the land and paid the proceeds on the debt, under an agreement that the same, though exceeding the amount then due on the notes according to their terms, should not affect the right to foreclose; that the mortgagor claimed the right to set off against the mortgage debt a specified sum for deficiency of the acreage of the tract conveyed by the mortgagee; and that to the extent of the shortage the consideration of the notes and mortgage had failed—states but one cause of action; and, though the allegations as to a deficiency in the acreage are not necessary to a cause of action, they are not entirely irrelevant, as they show that a shortage in the acreage impairs the validity of the notes and mortgage, so as to require the mortgagee to make good his guaranty.

[Ed. Note.—For other cases, see Action, Cent. Dig. § 549; Dec. Dig. § 38.*]

3. MORTGAGES (§ 415*)—DEFENSES—FAILURE OF CONSIDERATION.

The equity of a purchase-money mortgagor, based on a shortage in the acreage of the land conveyed by the mortgagee, depends on a failure of consideration; and the mortgagor may obtain relief in a suit to foreclose the mortgage, and the misrepresentation of the mortgagee as to the acreage is available, either as a separate cause of action or as a defense in the foreclosure action.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 1210-1224; Dec. Dig. § 415.*]

4. JURY (§ 13*)—RIGHT TO JURY TRIAL.

Where a defendant sets up as a defense to an equitable cause of action facts which grow out of that cause of action, or the transactions which gave rise to it, and which are so interwoven with it as to be inseparable from it, the defense is not triable by jury as of right.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 35-83; Dec. Dig. § 13.*]

5. MORTGAGES (§ 248*)—FORECLOSURE—MATURITY OF DEBT.

A stipulation, in a mortgage securing notes, that on the nonpayment of any note at maturity the whole debt shall become due, is for the benefit of the mortgagee or his assignee; and where the mortgagee has assigned the mortgage and notes the assignee alone may enforce or waive his rights under the stipulation, and the mortgagee, assigning the mortgage and notes and guaranteeing the payment thereof, is liable on his guaranty, where the whole debt becomes due by the failure of the mortgagor to pay the first note at maturity, though thereafter the assignee accepts from the mortgagor more than is due on the first note under the agreement that he will not waive his right to foreclose.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 659; Dec. Dig. § 248.*]

6. APPEAL AND ERROR (§ 213*)—TRIAL—SUBMISSION OF ISSUES TO JURY.

Where, in a suit in equity, the court submitted to the jury issues prepared by plaintiff's attorney, and notice of the proposed submission was served on defendant's attorneys, defendant could not complain because the court submitted on its own motion other issues, in the absence of any objection at the time, or a refusal of request to be heard.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 213.*]

7. MORTGAGES (§ 486*)—FORECLOSURE—JUDGMENT.

Where the complaint in foreclosure of a purchase-money mortgage and to enforce the

guaranty of the mortgagee, assigning the mortgage and notes, prayed for a reference to ascertain the amount due, and there was a finding of deficiency in the quantity of the land sold, and the court abated the amount due under the mortgage by the amount of the deficiency, and gave judgment against the mortgagor for the balance, with the right to foreclose, and against the mortgagee for the amount of the deficiency, the judgment was not assailable by the mortgagee, who did not object in the trial court to final judgment, nor ask for a reference, or opportunity to offer further evidence.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. §§ 1404-1411; Dec. Dig. § 486.*]

8. INDEMNITY (§ 9*)—ASSIGNMENT—WARRANTY.

A mortgagee assigned a mortgage and the notes secured thereby by an assignment stipulating that the notes should be indorsed without recourse. An instrument signed by the mortgagee under seal stipulated that he guaranteed the mortgage and notes to be valid, and obligated himself to protect the assignee against any losses. Held a guaranty of payment of the notes, and the assignee could sue thereon, on default of the mortgagor.

[Ed. Note.—For other cases, see *Indemnity*, Cent. Dig. §§ 16, 17; Dec. Dig. § 9.*]

9. VENDOR AND PURCHASER (§ 34*)—MISREPRESENTATIONS.

A vendor may represent to a purchaser that his deed calls for a designated number of acres, so as to create in the mind of the purchaser the belief that the tract to be conveyed contains the designated number of acres; and where the vendor makes such an assertion with intent to create such a belief, and knowing that the tract does not contain that many acres, he is guilty of misrepresentation.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. § 39; Dec. Dig. § 34.*]

Appeal from Common Pleas Circuit Court of Anderson County; Ernest Gary and Geo. W. Gage, Judges.

Action by E. H. Welborn against W. W. Cobb and another. From a judgment for plaintiff, defendant J. W. Dickson appeals. Affirmed.

Bonham, Watkins & Allen and Leon L. Rice, all of Anderson, for appellant. Martin & Earle, of Anderson, for respondent.

HYDRIOK, J. On August 24, 1908, the defendant Dickson conveyed to the defendant Cobb a tract of land, described in the deed as containing 138 acres, more or less. The purchase price was \$4,800, \$1,000 of which was paid, and, for the balance, Cobb gave Dickson seven notes for \$500 each, and one for \$800, due at intervals of one year, with interest from date, and secured them by a mortgage of the land. The mortgage contained a stipulation that, if either of the notes was not paid at maturity, the whole debt should become due. On January 6, 1909, Dickson executed an assignment of these notes and mortgage, with others, to the plaintiff, in which he stipulated: "The notes to be indorsed without recourse on me." But an instrument of writing, signed by Dickson, under seal, and bearing date January 11,

1908, appears in the record, of which the following is a copy: "In view of the fact that the papers I am this day turning over to E. H. Welborn, as part payment for land deal made by and between the said E. H. Welborn and myself, have not as yet been examined by Welborn's attorney, I, J. W. Dickson, do hereby guarantee the papers, held by me and given by W. W. Cobb and J. P. Fortune, to be good and valid, and I hereby obligate myself to protect the said E. H. Welborn against any losses or otherwise pertaining to the above said papers of W. W. Cobb and J. P. Fortune."

In May, 1910, Welborn commenced this action against Cobb and Dickson for foreclosure. In addition to the facts above stated, the complaint alleged that the note which first became due was not paid at maturity, and that, under the stipulation of the mortgage above mentioned, the whole debt thereupon became due; that by consent of plaintiff Cobb had sold part of the land, and paid the proceeds on the mortgage debt, under agreement with plaintiff that such payment, though it exceeded the amount then due on the notes, according to their terms, should not affect his right to foreclose, which had already accrued, under the stipulation contained in the mortgage. Plaintiff alleged, further, that he was informed and believed that the defendant Cobb claimed the right to set off against the mortgage debt the sum of \$845, with interest thereon from August 24, 1908, because of a deficiency in the acreage of the tract conveyed to him by Dickson, on the ground that Dickson had falsely represented to him that it contained 138 acres, when it contained only 113, and to the extent of the shortage the consideration of the notes and mortgages had failed. Dickson demurred to the complaint on numerous grounds, which need not be repeated, as they will be considered in what we shall say.

[1.] One of the grounds chiefly relied upon is that the complaint states no cause of action against him, and therefore he is improperly made a defendant. He contends that the complaint is fatally defective in its allegations as to him, because it is not alleged that the land still owned by Cobb is not worth and will not bring enough to pay the balance due plaintiff, or that plaintiff is in danger of any loss on the notes and mortgage. As Dickson guaranteed the notes and mortgage, and obligated himself to protect Welborn from loss on them, and as his principal had defaulted, we do not see upon what ground it can be contended that Welborn could not maintain this action against both Cobb and Dickson, without making the allegations suggested. Plaintiff was under no obligation, by the terms of his contract, to exhaust his remedies against Cobb before resorting to Dickson, but had the right to proceed against both at the same time and in

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

the same action. Section 188 of the Code expressly covers the objection made by defendant. It provides: "If the mortgage debt be secured by the covenant or obligation of any person other than the mortgagor, the plaintiff may make such person a party to the action, and the court may adjudge payment of the residue of such debt remaining unsatisfied after a sale of the mortgaged premises against such other person, and may enforce such judgment as in other cases." See, also, Pom. Rem. § 334; *Wiltzie Mtge. Foreclosure*, §§ 77, 109; 27 Cyc. 1565.

[2] The next contention pressed under the demurrer is that several causes of action were improperly united in the complaint. This contention seems to be based upon the idea that the plaintiff sets up, in his complaint, a cause of action in favor of Cobb against Dickson for the deficiency in the acreage of the land, a cause of action with which, as Dickson contends, plaintiff has no concern; and he complains, further, that, if Cobb should be compelled to bring said cause of action against him in a separate action, he would be entitled to trial by jury, which has been denied to him by reason of his having been joined as a defendant, and compelled to litigate the issue between Cobb and himself in this action. Appellant has evidently failed to analyze and clearly comprehend the complaint. It states only one cause of action. True, the plaintiff does therein anticipate the defense which he was informed Cobb would make, by alleging the facts out of which it arose. While these facts were not strictly necessary to plaintiff's cause of action, because, as we have seen, the allegation that Dickson guaranteed the notes and mortgage was sufficient to make him a proper party defendant, still they were not entirely irrelevant, because they showed that, if Cobb established his defense, the validity of the notes and mortgage would be impaired, and that Dickson should thereupon be required to make good his guaranty. It appears, therefore, that plaintiff did not allege these facts, as appellant assumes, for the purpose of stating a cause of action which Cobb had against Dickson, and which he could maintain through the plaintiff, and in this action, or not at all. In this connection it may not be out of place to say that the decision of this court in the case of *Latimer v. Wharton*, 41 S. C. 508, 19 S. E. 855, 44 Am. St. Rep. 739, seems to have been misunderstood, at least to some extent, in the court below.

[3] That case does hold that in so far as the equity of a purchaser of land to be relieved from payment of the purchase money, or any part thereof, depends upon a mere failure of consideration, such equity can be set up only as a defense to an action for the purchase money. But that case does not hold, and we think no case can be found in our Reports which does hold, that a failure of consideration which results from a breach

of warranty, express or implied, or from fraud, accident, mistake, or misrepresentation, intentional or unintentional, cannot be asserted actively as a cause of action and afford ground for relief. Therefore, in so far as Cobb's equity depended upon a mere failure of consideration, he could be relieved in this action, or not at all; but, in so far as it depended upon Dickson's misrepresentation, it was available to him, either as a separate cause of action against Dickson, or as a defense in this action. But appellant seems to overlook the fact that the same facts which constitute a cause of action may also constitute a defense. The facts here referred to are as a defense. Therefore there was no improper joinder of causes of action in the complaint.

[4] As to the right of a trial by jury: Where a defendant sets up, as a defense to an equitable cause of action, facts which grow out of that cause of action, or the transaction which gave rise to it, and are so interwoven with it as to be inseparable from it, the defense partakes of the nature of the cause of action and is equitable, and not triable by jury, as of right. In *McLaurin v. Hodges*, 48 S. C. 187, 20 S. E. 991, the action was to foreclose a mortgage. The defense was usury, and a counterclaim to recover double the usurious interest which had been paid was set up. Now, unquestionably, if the facts constituting that counterclaim had been set up in a separate action by the defendant against the plaintiff, the action would have been legal, and triable by jury. But, when set up as a defense to the plaintiff's equitable cause of action for foreclosure, this court held that, as it grew out of that cause of action, or the transaction which gave rise to it, and was inseparable from it, and as its determination would directly affect the amount recoverable on the equitable cause of action, it was an equitable defense and triable by the court. In *Hunt v. Nolen*, 46 S. C. 553, 24 S. E. 544, the court said: "This action for foreclosure is on the equity side of the court, and the defense is that there was a partial failure of consideration, arising out of the transaction in which the mortgage was given. The issues are therefore all equitable in their nature." To the same effect is *Pratt v. Timmerman*, 60 S. C. 187, 48 S. E. 255; and numerous other cases might be cited. Besides, there are numerous instances in which equity administers legal rights which arise incidentally or collaterally in causes of which it has taken jurisdiction. *Hughes v. Kirkpatrick*, 37 S. C. 161, 15 S. E. 912; *Jenkins v. Jenkins*, 83 S. C. 544, 65 S. E. 736; *Ex parte Wilson*, 84 S. C. 447, 66 S. E. 675.

[5] The contention that it appeared from the complaint that the action could not be maintained, because the debt was not due, is so clearly untenable as to require little discussion. The allegation that the whole

debt became due according to the stipulation in the mortgage, by the failure to pay the first note at maturity, was admitted by the demurrer. The plaintiff also alleged that he did not waive, and did not intend to waive, his right to foreclose, which had accrued under that stipulation, by subsequently accepting more than was due on the notes at the date of the payment, and that Cobb agreed that his acceptance thereof should not be so construed; and that allegation was admitted by the demurrer. But Dickson contends that he was not a party to that agreement, and was not bound by it. A sufficient answer to that contention is that the stipulation in the mortgage was for the benefit of the mortgagee, or his assignee, and, when he assigned the mortgage to Welborn, the assignment carried with it all rights and privileges under the stipulation, and thereafter Welborn alone could enforce or waive his rights under that stipulation.

[6] The case was tried on the merits before his honor, Judge Gage, who submitted to a jury certain issues which had been prepared by plaintiff's attorneys, and of the proposed submission of which due notice had been served upon defendant's attorneys. In addition to those proposed by plaintiff's attorneys, his honor, of his own motion, submitted two others. Appellant imputes error to the court in submitting those issues of which no notice had been given him, on the ground that he had had no hearing as to them. Other reasons might be given for overruling this assignment of error; but it is enough to say that the record fails to disclose any objection made by appellant at the time to the submission of the additional issues, or that he asked to be heard as to their submission, and that a hearing was refused him.

[7] The findings of the jury, which were concurred in by the court, established the following facts: That Dickson misrepresented the acreage of the land to Cobb, but without intent to defraud him. (So far as the evidence shows, it does not appear that Dickson knew that the tract did not contain 138 acres. His deed, and several prior deeds in his chain of title, described it as containing 138 acres, more or less.) That the tract was sold as a whole, and not by the acre. That the deficiency amounted to 24½ acres, and that it was a gross deficiency. Thereupon the court, finding that the deficiency amounted in value to \$972.20, and that there was then due on the notes and mortgage \$1,041.55, abated the amount due by the amount of the deficiency, and gave the plaintiff judgment against Cobb for the balance, \$69.35, with the right to foreclose, and gave his judgment against Dickson for the amount of the deficiency. There is no merit in appellant's contention that the court erred in giving such judgment, because part of the relief prayed for

in the complaint was that the case be referred to a referee, to ascertain and report the amount due on the mortgage debt, and that he expected, therefore, that it would be referred, and at such reference he would have the opportunity to examine the witnesses as to the payments made. When the case was taken up for trial in open court, he should have known that it would be finally disposed of on that trial, or he should, at least, have informed himself as to that matter. But the record fails to show that he made any objection in the court below to a final judgment being passed, or that he asked for an opportunity to offer any further evidence, or for a reference. He had full opportunity to examine both plaintiff and Cobb as to payments made on the mortgage debt.

[8] It is contended that the court erred in disregarding the indorsement of the notes "without recourse," and in holding Dickson bound by the agreement, dated January 11, 1908, to guarantee payment and save Welborn from loss on the notes and mortgage. Appellant argues that the agreement dated January 11th did not bear its true date, and that it is inferable from the evidence that its true date was January 1st, and that it was intended to be only a temporary guaranty of the title to the land covered by the Cobb mortgage, pending the examination of that title by Welborn's attorneys, and that, when the transaction was subsequently closed, that agreement expired, because at that time Welborn's attorneys had examined and approved the title. An examination of the agreement does not warrant the inference of any such limitation of its purpose, or that it was intended to be only temporary, and of force only until the title could be examined. The findings and conclusions of the court are supported by the greater weight of the evidence.

[9] The appellant requested the court to charge the jury that, if he merely said to Cobb that his deed called for 138 acres, that would not be a misrepresentation. His honor refused the instruction, on the ground that it would be a charge on the facts. In this there was no error, because a seller might say to a buyer, "My deed calls for so much," in such a way and under such circumstances as to create in the mind of the buyer the belief that the tract contained that many acres. If he should make such an assertion with the intention to create such a belief, knowing that the tract did not contain that many acres, he would be guilty of misrepresentation. One may be guilty of misrepresentation in law, as well as in morals, by purposely creating a false impression of belief in the mind of another, with the intention that he act upon it, without making any positive or literal false statement of fact. The suppression of the truth, with misleading suggestions, may be as effective

to create an erroneous or false impression as a direct falsehood.

The other points raised are either involved in and concluded by what has been said, or they are so clearly untenable as to require no special consideration.

Affirmed.

GARY, C. J., and WOODS, J., concur.

(92 S. C. 423)

PEE DEE NAVAL STORES CO. v. HAMER
et al.

(Supreme Court of South Carolina. Sept. 17, 1912.)

1. NEW TRIAL (§ 65*)—ERRONEOUS VERDICT—DUTY TO SET ASIDE.

Where the jury finds a verdict capriciously, or one not warranted by the evidence, or contrary to the law as laid down by the judge, the trial court must set it aside.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. § 130; Dec. Dig. § 65.*]

2. COVENANTS (§ 100*)—BREACH OF WARRANTY—LIABILITY.

Where a grantor, conveying, by deed containing a warranty against incumbrances, land subject to a lien founded on a judgment against a third person, who had title to the land, made no attempt to show a title paramount to the title of the third person, he was liable for a breach of warranty, and the grantee, paying the judgment to prevent eviction, could sue on the warranty.

[Ed. Note.—For other cases, see Covenants, Cent. Dig. §§ 139-155; Dec. Dig. § 100.*]

3. EVIDENCE (§ 80*)—PRESUMPTIONS—COMMON LAW.

There is no presumption that the common law does not prevail in Florida.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 101; Dec. Dig. § 80.*]

Appeal from Common Pleas Circuit Court of Dillon County; James W. De Vore, Judge.

Action by the Pee Dee Naval Stores Company against Robert P. Hamer, Jr., and others. From a judgment granting insufficient relief, plaintiff appeals. Reversed and remanded.

Willcox & Willcox, for appellant. Livingston & Gibson, for respondents.

WATTS, J. This action was commenced in the court of common pleas, and the object was to recover \$1,731.85 on account of certain alleged breach of warranty contained in a deed made by defendants to plaintiff on December 24, 1902. The record shows that prior to December, 1900, the defendants were the owners of a large number of acres of timber lands in the state of Florida, approximating 50,000 acres. The plaintiff company was organized as a corporation under the laws of the state of South Carolina. Upon the formation of the corporation, the lands held by the defendants respondents were purchased by it, and a warranty deed of conveyance taken by it from the defendants respondents. The consideration was \$23,000. The company, as organized, held the premises

from December, 1900, until the fall of 1902, when J. W. Moore became the sole owner of the plaintiff corporation; he having purchased all of the stock of the stockholders therein. It appears at the time he purchased the stock, or a short time thereafter, he gave an option on the property, and in about two months sold it to the Naval Stores Manufacturing Company, of which W. B. Myers was president. It appears from Moore's testimony, when he investigated the title with a view of selling it, that it was then discovered that there was an outstanding judgment against the property for the sum of \$1,165.51, with interest from May 11, 1891, in favor of, James E. Johnson, and that the judgment was a lien on the property. The evidence shows that he took up and discussed the matter with R. P. Hamer, and Hamer authorized him to make the best settlement of the matter he could; that in pursuance of this agreement and understanding with Hamer he went to Florida, and on the 25th day of November, 1902, entered into an agreement with Myers, president of the Naval Stores Manufacturing Company, by which Myers was to retain out of the purchase price which was to be paid for the property the sum of \$1,320 in settlement of all defects in question to the title to the property sold.

Plaintiff then brought suit for this amount, alleging breach of warranty in the deed to it, and the cause was heard by his honor, Judge De Vore, and a jury, at the October term of court, 1910. At the close of the testimony, plaintiff moved the court to direct a verdict in its favor for full amount claimed, on the ground that the plaintiff had shown that at the time of its purchase of the lands there was an outstanding judgment, which was a lien on the land, in favor of James E. Johnson, and that it had to remove this incumbrance by paying \$1,320. The court refused to direct a verdict, and the jury found in favor of the plaintiff a verdict for \$660. Plaintiff appealed, and the only question raised is whether the circuit court committed error in refusing to direct a verdict for plaintiff as moved for.

We think the appeal should be sustained. There was no testimony in this, a contract case, to permit the jury to capriciously cut down the verdict to half of the amount actually proved. There was but one inference that could be drawn from the whole evidence in the case, and that was, if plaintiff was entitled to recover at all, it was entitled to recover the full amount it had paid out to clear its title to the land it had purchased from the defendants respondents, under a warranty deed.

[1, 2] The court should not permit a verdict to stand, where the jury found a verdict capriciously, or a verdict that the testimony does not warrant, or one contrary to the law as laid down by the judge. The undisputed

testimony in the case establishes the warranty of the title by the defendants, the breach of the warranty, and the damage to the plaintiff in the amount mentioned and asked for, and his honor should have directed the verdict asked for. The defendants made no attempt to show a paramount title in themselves as against the one held by Drew, against whom the Johnson judgment was obtained; but, on the contrary, the evidence conclusively shows that at the time this judgment was rendered Drew had a perfect title, and no evidence is offered or attempt made by the defendants respondents to avoid liability by establishing the invalidity of the judgment recovered by Johnson. The evidence in the case, unexplained and uncontradicted, shows that the Johnson judgment was an incumbrance on the land at the time of sale by respondents to the appellant. It has been held in *Kerngood v. Davis*, 21 S. C. 210, that an outstanding judgment constituting a lien upon the premises is an incumbrance, and the covenantor can recover from his covenantor the amount of damages caused thereby.

[3] By the common law, if there is an outstanding title against his property, the grantee need not wait to be actually evicted, but he may pay off the incumbrance and then sue on his warranty. *Lessly v. Bowie*, 27 S. C. 198, 3 S. E. 199; *Coleman v. Whittle*, 79 S. C. 216, 60 S. E. 523, 128 Am. St. Rep. 841; *Brown v. Thompson*, 81 S. C. 380, 62 S. E. 440. There is no presumption that the common-law does not prevail in Florida. *Crosby v. Railway Co.*, 81 S. C. 24, 30, 61 S. E. 1064. The evidence shows that there was an incumbrance on the property, and, if plaintiff was not actually evicted, there was such action on the part of the party holding said judgment as to make it necessary for the plaintiff to remove the same in order to prevent an eviction, and this gave the plaintiff the right to claim a breach of warranty and bring its suit.

It is the judgment of this court that the judgment of the circuit court be reversed, and the case remanded to the circuit court, with instructions to the clerk of the court of Dillon county to enter up judgment for the plaintiff in the sum of \$1,320, with interest on that amount from November 25, 1902.

GARY, C. J., and HYDRICK and FRASER, JJ., concur. WOODS, J., disqualified.

(92 S. C. 440)

HARTER v. BANK OF BRUNSON.

(Supreme Court of South Carolina. Sept. 18, 1912.)

1. BANKS AND BANKING (§ 175*)—DEPOSIT OF DRAFT FOR COLLECTION—LIABILITY OF INDORSER—BURDEN OF PROOF.

A bank, sued for damages from its negligence in failing to notify an indorser of the

dishonor of a draft received for collection, had the burden of showing that the necessary steps were taken to fix the liability of the indorser.

[Ed. Note.—For other cases, see *Banks and Banking*, Cent. Dig. §§ 634-652; Dec. Dig. § 175.*]

2. APPEAL AND ERROR (§ 1010*)—REVIEW OF FINDINGS OF FACT.

Findings of the court based on some evidence are conclusive on review.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3979-3982; Dec. Dig. § 1010.*]

3. BANKS AND BANKING (§ 171*)—COLLECTION OF DRAFT — LIABILITY OF BANK FOR NEGLIGENCE.

An indorser of a draft, who delivered it to a bank for collection, could recover from such bank for a loss occasioned by its negligence and that of its correspondent to whom it sent the draft for collection, in the absence of a contract varying such liability.

[Ed. Note.—For other cases, see *Banks and Banking*, Cent. Dig. §§ 597-618; Dec. Dig. § 171.*]

4. BANKS AND BANKING (§ 171*)—CONTRACT OF DEPOSIT.

A stipulation printed on a deposit slip that a depositor of a draft would not hold the bank liable until the cash had been paid the bank would not exempt such bank from liability for negligence in collection, or waive rights of the depositor under the law merchant with regard to presentment, demand, and notice of dishonor, but is merely evidence of an agreement that credit given the customer was not absolute but contingent on the bank's ability to make the collection in the exercise of due care.

[Ed. Note.—For other cases, see *Banks and Banking*, Cent. Dig. §§ 597-618; Dec. Dig. § 171.*]

Appeal from Common Pleas Circuit Court of Hampton County; Geo. W. Gage, Judge.

"To be officially reported."

Action by W. E. Harter against the Bank of Brunson. From a judgment for plaintiff, defendant appeals. Affirmed.

W. B. De Loach, of Camden, and W. D. Connor, of Brunson, for appellant. W. S. Smith and J. W. Vincent, both of Hampton, for respondent.

HYDRICK, J. On September 17, 1906, J. W. Sullivan, of Fairfax, S. C., for value received, made and delivered to plaintiff his draft for \$200 on W. F. Cummings, of Hampton, S. C. Plaintiff indorsed the draft and deposited it with defendant, and the amount thereof was placed to his credit on his account with defendant. It was listed, with other items, on a blank form of deposit slip which was filled up and signed by plaintiff, and upon which, over plaintiff's signature, there was printed the following stipulation: "For value received, we the undersigned hereby agree in depositing the items listed below for collection or credit with the Bank of Brunson, Brunson, S. C., that we will not hold the bank liable to us for said items until the cash for each has been paid to the Bank of Brunson, Brunson, S. C."

[1] Defendant promptly forwarded the draft to the Bank of Charleston, its regular

correspondent for the collection of items payable outside of Brunson. In due course of business, defendant should have received a report from its correspondent in about three days, but nothing was heard from the draft, until about the 1st of April, 1907—over six months after it was deposited—when defendant received information from the Bank of Charleston that it had been dishonored and protested, and that the draft, with notice of protest, had been mailed to defendant. The evidence fails to show when it was presented for payment, when protested, or when it was deposited in the mail. In fact, there is no competent evidence that any of the steps were taken which are necessary to fix the liability of the indorser; and the burden of proving that such steps were taken rested upon defendant. 2 Dan. Neg. Inst. § 1050. It appears, however, that defendant never received the draft, with the notice of protest, from the Bank of Charleston, and it is supposed that it was lost in the mail. On receiving the information above stated, in April, 1907, defendant notified plaintiff of the dishonor, protest, and loss of the draft, and charged his account with the amount thereof, and the protest fee. Plaintiff brought this action to recover the amount so charged to him, alleging that he had been damaged to the extent of that amount by defendant's negligence, in failing to give him notice, within a reasonable time, of the dishonor of the draft. Trial by jury was waived, and the issues were referred to a referee, who concluded that defendant was not liable to plaintiff, holding that, under the stipulation contained in the deposit slip, the credit given plaintiff for the amount of the draft was not absolute, but contingent upon its being collected by the exercise of due care and diligence by defendant, and subject to counter charge, if it proved uncollectible; that, when a bank receives paper for collection at a distant point, it must, according to the known usage and custom of the business, make the collection by means of the agency of others; that, if due care is exercised in the selection of suitable agents, the bank receiving such paper is not liable to its customer for their default or neglect, because the agents so selected are the agents of the customer, and not of the bank; that, in such case, the bank is liable only for its own neglect or default. The referee found that defendant was not guilty of any negligence, having promptly forwarded the draft to a suitable agent for collection, according to its own and the usual custom of the business. He also held that the negligence alleged was not the cause of any injury to plaintiff, because he found that the drawer was insolvent, when the draft was made, and has been so ever since. On exceptions the circuit court overruled the conclusion of the referee, holding that the agents selected by a bank for the collection of paper in-

dorsed and deposited with it, under the circumstances stated, are the agents of the bank and not of its customer, and therefore that the bank is liable to its customer for their neglect or default. The court also found that the defendant itself was guilty of negligence in failing to find out sooner from its correspondent whether the draft had been received and collected, and in failing sooner to notify plaintiff of its dishonor; also, that plaintiff was injured by the delay in giving him the notice, because the drawer was solvent, when the draft was made, and, if timely notice had been given plaintiff, he could have recovered the amount from him, but that he was insolvent when the notice was given. Accordingly, judgment was given against defendant.

[2] It is scarcely necessary to say that, as this is an action at law, and the findings of the circuit court are not wholly unsupported by evidence, they are not reviewable by this court.

[3] The principal question of law involved was settled against appellant, and in accord with the decision of the circuit court, in *Bank v. Cooper*, 91 S. C. 91, 74 S. E. 368, where the court said: "In 1884, the Supreme Court of the United States adopted the English rule that a bank receiving a draft or bill of exchange for collection is liable for neglect of duty occurring in its collection, whether arising from the default of its own officers, or from that of its correspondent, or an agent employed by such correspondent, in the absence of any express or implied contract varying such liability. *Exchange Nat. Bank v. Third Nat. Bank*, 112 U. S. 276, 5 Sup. Ct. 141, 28 L. Ed. 722. * * * We adopt this rule as the just one, because it is in accord with the common understanding of bank and customer in their dealings. In depositing his paper the customer ordinarily surrenders all control of it, and has nothing to do with the means taken by the bank to collect. On the other hand, the bank undertakes the collection for its own profit, takes its own methods and selects its own agents. It seems therefore illogical to regard the collecting bank or any of the intermediate banks as agents of the depositor, or to put upon him loss due to their default."

[4] Whatever else may be the legal effect of the stipulation printed on the deposit slip, it does not purport to exempt the bank from liability for its negligence, or that of its agents; and it should not have that effect; nor can it be construed as a waiver of the rights of a depositor of commercial paper, under the law merchant, with regard to presentment, demand, and notice of dishonor. It does, however, afford evidence of an agreement that the paper so deposited was not absolutely sold to the bank, and that the credit given a customer on the deposit of such an item is not absolute, but contingent upon its collection; and therefore, if it

proves to be uncollectible, notwithstanding the exercise of due and ordinary care and diligence on the part of the bank, such credit is subject to a counter charge, and the bank shall not be held liable for the failure to collect.

Under the facts found against appellant by the circuit court, judgment for plaintiff was inevitable.

Affirmed.

GARY, C. J., and WOODS, J., concur.

(92 S. C. 418)

JONES v. ATLANTIC COAST LUMBER CORPORATION et al.

(Supreme Court of South Carolina. Sept. 17, 1912.)

1. LOGS AND LOGGING (§ 3*) — SALES OF STANDING TIMBER—FAILURE TO CUT—ESTOPPEL.

Where a timber deed also conveyed to the grantee a right of way for a tramroad and a permanent road, the cutting of timber for the purpose of laying the tramroad was not a commencement of cutting on the timber contract; and the grantor, by failing to object to such cutting, or by participating therein, was not estopped to claim that by delay the grantee's rights under the timber contract had been lost.

[Ed. Note.—For other cases, see Logs and Logging, Cent. Dig. §§ 6-12; Dec. Dig. § 3.*]

2. INJUNCTION (§ 136*)—TEMPORARY INJUNCTION—APPLICATION—QUESTIONS DETERMINABLE.

In an action by a grantor of timber, who also conveyed to the grantee a right of way, to enjoin the cutting of timber, on the ground that the grantee had lost his rights by delay, where, on motion for a temporary injunction, the grantee showed that cutting had been commenced and that, notwithstanding the delay, the grantor had acquiesced and participated therein, while the grantor presented affidavits to show that such cutting was not under the timber contract, but for the purposes of the right of way, a question of fact was presented which should be determined on the trial, and which did not justify the denial of the injunction, since, in an action for an injunction, where a temporary injunction is essential to the preservation of a legal right, if established as alleged in the complaint, it is error to refuse the temporary injunction.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 305, 306; Dec. Dig. § 136.*]

3. APPEAL AND ERROR (§ 193*)—NECESSITY OF PRESENTATION OF QUESTIONS BELOW.

An order granting a temporary injunction will not be reversed on the ground that the complaint is insufficient, where defendant did not question its sufficiency in the trial court, but merely moved to make it more definite and certain.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1226-1240; Dec. Dig. § 193.*]

4. INJUNCTION (§ 118*)—SALES OF STANDING TIMBER — ACTIONS ON CONTRACT — COMPLAINT.

In an action to enjoin the cutting of timber, a complaint, alleging the making of a contract for the sale of the timber, the date and consideration thereof, the number of acres of timber, that more than 13 years had elapsed, and that the grantor had forfeited his rights by not cutting the timber within a reasonable time,

was sufficiently definite and certain as to the facts and circumstances upon which plaintiff based his conclusion that a reasonable time for cutting the timber had expired, since it was sufficient to open the door to proof of the facts and circumstances surrounding the parties when the contract was made.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 223-242; Dec. Dig. § 118.*]

5. PLEADING (§ 11*)—FORM OF ALLEGATIONS—ULTIMATE AND FIDUCIARY FACTS.

While a complaint must contain a statement of the facts constituting the cause of action, it need allege only the ultimate and not the evidentiary facts.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 31; Dec. Dig. § 11.*]

6. PLEADING (§ 8*)—FORM OF ALLEGATIONS—FACTS OR CONCLUSIONS.

An allegation of a mere conclusion of law is insufficient to raise an issue.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 12-28½; Dec. Dig. § 8.*]

Appeal from Common Pleas Circuit Court of Marion County; J. W. G. Shipp, Judge.

Action by J. W. Jones against the Atlantic Coast Lumber Corporation and another. From orders granting a temporary injunction and denying defendants' motion to make the complaint more definite and certain, the defendant named appeals. Affirmed.

Willcox & Willcox, of Florence, and M. C. Woods, of Marion, for appellant. Mullins & Hughes and Henry Buck, all of Marion, for respondent.

FRASER, J. This is an action for injunction and damages. The complaint alleges that on the 7th day of January, 1899, the plaintiff's grantor, David J. Atkinson, executed and delivered to one R. L. Montague a certain instrument of writing, styled and known as a "Deed and Contract," and commonly called a "Timber Deed," bearing date on said day, whereby he purported to sell and convey unto the said R. L. Montague all the timber of every kind and description to 12 inches stump diameter and upwards, 12 inches from the ground at the time of cutting, then standing and being upon a certain tract of land, the tract of land described in the complaint, together with certain timber rights, rights of way, privileges, and easements therein more specifically set forth, all of which will more fully appear by reference to said deed, a copy of which was thereto attached and thereby made a part of the complaint. That thereafter, by sundry mesne conveyances, the rights, etc., of said R. L. Montague were acquired by the defendant, Atlantic Coast Lumber Corporation. That at the time the said deed was executed and delivered it was the intention of the parties that the grantee should at once, or within a reasonable time, commence to cut and remove the said timber, and continue without cessation until said timber should have been cut and removed. No time was fixed in the deed to

commence. That, although a period of more than 12 years to wit, nearly 13 years, has elapsed and expired, neither the grantee nor his assigns had commenced the cutting and removal of said timber until the 20th of September, 1911. That a reasonable time for cutting and removing of said timber had expired long before said last-mentioned date. The plaintiff asked for an injunction against the defendants and for damages for the timber cut. After the service of the complaint, the plaintiff moved for and obtained an injunction pendente lite, and the defendant moved for order making the complaint more definite and certain, so as to require the plaintiff to allege the facts and circumstances upon which was based the allegation "that a reasonable time had long since expired in which to commence to cut and remove the timber." On the hearing, the defendant produced an affidavit of the plaintiff, in which it was admitted that the plaintiff himself had cut some timber on said land for the defendant in 1907, and the defendant claimed that the plaintiff was thereby estopped. The plaintiff made another affidavit, in which he said that, while it was true he had cut some timber on the land, the cutting was for the purpose of making a tramway, also provided for by his deed, and not to carry out the timber contract.

From this order of Judge Shipp, granting the temporary injunction and refusing to require the plaintiff to make the complaint more definite and certain, the defendant, Atlantic Coast Lumber Corporation, appealed upon four exceptions:

"(1) His honor erred, it is respectfully submitted, upon the showing made before him in enjoining the defendant, Atlantic Coast Lumber Corporation, from cutting and removing the sawmill timber from the land described in the complaint. He should have held that, from the admitted facts appearing in the return to the rule, the cutting of the timber conveyed by Atkinson to Montague was commenced within a reasonable time, and that, including the definite period of 10 years allowed for such cutting and removal, the defendant, Atlantic Coast Lumber Corporation, still had the right to cut the timber in question, and to exercise the other rights conveyed in the deed from Atkinson to Montague.

"(2) His honor erred, it is respectfully submitted, in not holding that plaintiff, by his active participation in cutting and removing timber from the tract of land in question, embraced within the terms of the deed of Atkinson to Montague, during the year 1907, and in failing and neglecting at that time, or at any other time until the commencement of this action, to object to the cutting, or to take the position that a reasonable time had expired, was, at the time of the commencement of this suit, estopped from taking such position. He should have held

the timber deed in question to be still valid and in full force, by reason of the estoppel of plaintiff to deny its validity or to contend that a reasonable time for commencing to cut had expired."

[1,2] These exceptions lose sight of the fact that the "Deed and Contract" not only conveys the timber, but also the right of way for a tramroad and a permanent road. If the cutting was for the purpose of laying the tramroad or railroad, then the cutting was not a "commencing" on the timber contract, and would not estop the plaintiff. This raised a question of fact to be determined on the trial of the cause. It is unnecessary to enter upon an extended discussion. In the recent case of McClary v. Atlantic Coast Lumber Corporation, 90 S. C. 153, 72 S. E. 145, this court says (quoting from Crawford v. Atlantic Coast Lumber Corporation, 77 S. C. 81, 57 S. E. 670): "Where the action is for the sole purpose of an injunction, and a temporary injunction is essential to the assertion and preservation of a legal right, if established as alleged in the complaint, it is error at law to refuse to set aside a temporary injunction." These exceptions are overruled.

"(3) His honor erred, it is respectfully submitted, in not holding that the complaint in this action did not contain a statement of facts sufficient to constitute a cause of action, and, for this reason, in not refusing the injunction."

[3] This exception is practically a demurrer to the complaint. This question does not appear to have been made before Judge Shipp. The motion there was to make more definite and certain. This court could not find that his honor erred in not sustaining a motion upon which he was not asked to pass. This exception is overruled.

[4] "(4) His honor erred, it is respectfully submitted, in refusing the motion for an order requiring plaintiff to make his complaint more definite and certain by stating the facts and circumstances upon which he based his conclusion that a reasonable time for cutting the timber in question had expired. He should have held that the complaint, in the particulars mentioned, is so indefinite and uncertain that the precise nature of the charge is not apparent, and should have required plaintiff to state facts, and not conclusions of law, as a basis of his claim, and, on his failure to do so, should have required his complaint to be dismissed."

We have been referred to Livingston v. Ruff, 65 S. C. 284, 43 S. E. 678.

[5,6] Undoubtedly the court requires a statement of the facts constituting a cause of action; but this means the ultimate facts, as distinguished from mere probative or evidentiary facts, as it is not required to state those facts which merely evidence the ultimate, basic facts upon which the action depends. It is also well settled that the alle-

gation of a mere conclusion of law raises no issue. The order appealed from fully answers this question. In this case the contract is set forth in the complaint, with the date thereof, the consideration, the number of acres of timber, and there is an allegation that more than 13 years have elapsed since the contract was made. I think this opens the door for proof of the facts and circumstances surrounding the parties when the contract was made. This exception is overruled.

The judgment of this court is that the order appealed from is affirmed.

GARY, C. J., and WATTS and HYDRICK, JJ., concur. WOODS, J., disqualified.

(92 S. C. 413)

GOODALE v. PAGE et al.
GILLESPIE BROS. v. SAME.

(Supreme Court of South Carolina. Sept. 17, 1912.)

1. CONTRACTS (§ 346*)—ACTIONS—ISSUES, PROOF AND VARIANCE.

Plaintiff cannot allege a joint liability on a contract and prove a joint and several or a several liability.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1718-1753; Dec. Dig. § 346.*]

2. PRINCIPAL AND AGENT (§§ 136, 188*)—LIABILITY OF AGENT OF DISCLOSED PRINCIPAL.

Where an agent, authorized to contract for his principal, made a contract with a third person and disclosed the principal, the principal was alone liable to the third person; and in an action on the contract the agent was not even a proper party.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 476-491, 711, 712; Dec. Dig. §§ 136, 188.*]

3. PRINCIPAL AND AGENT (§ 145*)—LIABILITY OF AGENT OF UNDISCLOSED PRINCIPAL.

Where an agent, authorized to make a contract for his principal, made a contract without disclosing the principal, the adverse party to the contract could not, on discovering the principal, hold both the agent and the principal, but he must elect which one he will hold.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 499, 513-520; Dec. Dig. § 145.*]

4. APPEAL AND ERROR (§ 1064*)—INSTRUCTIONS—HARMLESS ERROR.

Where the court during the trial, announced that the declarations of an agent could not prove agency and adhered throughout the trial to the rule, an instruction on the question of the admissibility of the declarations of an agent to prove agency, though involved, was not prejudicial as leading the jury to believe that such declarations proved agency.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4219, 4221-4224; Dec. Dig. § 1064.*]

5. WORK AND LABOR (§ 6*)—ACTION ON CONTRACT MADE BY AGENT.

Where a railroad company bought ties from a third person and paid him therefor, and made no contract, directly or indirectly, with plaintiff jointly with the third person, or severally through him as its agent, plaintiff

owning the ties could not recover from the company on a quantum meruit merely on the ground that the company used them in the construction of its roadbed.

[Ed. Note.—For other cases, see Work and Labor, Cent. Dig. § 11; Dec. Dig. § 6.*]

Appeal from Common Pleas Circuit Court of Chesterfield County; J. W. De Vore, Judge.

"To be officially reported."

Actions by S. O. Goodale and by Gillespie Bros. against J. W. Page and the Bennettsville & Cheraw Railroad Company. From judgments for plaintiff in each action, defendants appeal. Reversed.

Stevenson & Matheson, of Cheraw, for appellants. Edward McIver and W. P. Pollock, both of Cheraw, for respondents.

HYDRICK, J. The above-stated cases were tried together on circuit and in this court. The issues are the same in substance, and what is said in disposing of one applies to the other.

The plaintiff sued on two causes of action. In the first, he alleges a joint contract on the part of defendants with himself, whereby he was to furnish the railroad company with cross-ties at 25 cents each; that he delivered 12,221 ties under the contract; and that defendants owed him a balance therefor of \$1,823.90. The second cause of action is based on quantum meruit; and it is alleged that plaintiff furnished and delivered to defendants 12,221 ties for use in the construction and repair of said railroad, and which were accepted and so used; that they were worth 25 cents each; and that defendants owe the plaintiff therefor a balance of \$1,823.90.

The defendant Page denies the allegations of the complaint, and gives his version of the transaction between himself and the plaintiff, and also that between himself and his codefendant, as follows: He says that he made a contract with the railroad company to furnish it cross-ties of a specified size and kind; that he then made a contract with plaintiff to furnish a certain number of said ties at 25 cents each, which was 2 cents apiece less than the railroad company had agreed to pay him for them, the ties to be shipped to J. J. Heckart, an officer of the company; that his contract with plaintiff was independent of his contract with the railroad company, and that, in making it, he acted for himself alone, and not as agent of the railroad company, and that the railroad company had nothing whatever to do with his contract with plaintiff, except that, by his agreement with plaintiff, the ties were to be shipped to the railroad company, and were to be subject to its inspection; that plaintiff shipped a lot of ties under this contract, but many of them did not come up to the specifications agreed upon, and were rejected by the railroad company:

that he thereupon promptly notified plaintiff of their rejection, and they afterwards inspected them together, and it was found that many of them failed to come up to the size and kind agreed upon, and he and plaintiff then made a new contract, whereby he was to pay plaintiff the price agreed upon for all ties that came up to contract, and half price for all others which the company would accept, notwithstanding they did not come up to the specifications agreed upon; that he paid plaintiff for all ties used under this contract, except a balance of \$89.52, which he was willing to pay.

The answer of the railroad company denies the allegations of the complaint, and alleges that it made a contract with its codefendant Page to furnish it cross-ties, and that it has fully complied with that contract and paid him for all the ties furnished under it; that it did not know plaintiff in the transaction, and made no contract with him, directly or indirectly.

Under the charge of the court, the plaintiff in each case recovered judgment against both defendants, and both have appealed therefrom.

[1-3] It is an elementary rule that you cannot allege one cause of action and prove another; nor can you allege a joint liability and prove a joint and several or a several liability in actions on contracts. *Patton v. Magrath, Rice, 162, 33 Am. Dec. 98; Pope Mfg. Co. v. Cycle Co., 55 S. C. 528, 33 S. E. 787.* Now, in this case, plaintiff alleged a joint contract on the part of the defendants with him. At the trial he was allowed, without amendment of his complaint, to attempt to prove a different contract—one which had not been alleged—to wit, a contract made with him by the defendant railroad company through the defendant J. W. Page, as its agent. It is clear that, if Page was the agent of the railroad company, and was authorized to contract for the company and did so contract, disclosing his principal, the company alone is liable to plaintiff, and Page is not even a proper party to the action. *Waddell v. Mordecai, 3 Hill, 22; Pope v. Harter, 66 S. C. 54, 44 S. E. 407.* But even if Page did not disclose his principal, the plaintiff could not, on discovering the principal, hold both the agent and the principal, but would be required to elect which one he would pursue. *Gay v. Uren, 109 Minn. 101, 123 N. W. 295, 28 L. R. A. (N. S.) 742, and note.*

There are a number of good reasons for the rule of procedure above stated; but it will be necessary to mention only one or two to show its importance to the defendants in its application in this case. Under the allegations of the complaint, the defendants being sued jointly, neither of them could have set up a counterclaim in favor of himself individually against the plaintiff. *Pope Mfg. Co. v. Cycle Co., supra.* If the contract which plaintiff was allowed to attempt to prove had been alleged, Page could have had

the action dismissed as to him (*Pope v. Harter, supra*), and the other defendant could have interposed a counterclaim in its favor; or, if the venue was laid in the county of Chesterfield, because of the residence of the defendant Page in that county, it could have had the place of trial changed to a county of its residence.

It follows that the court erred in admitting evidence to prove a contract made by the company through Page, as its agent, and in charging the jury that if Page was the duly authorized agent of the company, and made the contract for the company, they might find a verdict against both defendants.

[4] The appellants contend that the court erred in admitting the declarations of the alleged agent to prove the agency, and in charging the jury that they might consider his declarations in aid of the other evidence tending to prove the agency, as, for instance, if the company held him out to the world as its agent. Throughout the trial, the court announced and adhered to the general rule that the mere declarations of an alleged agent are not admissible to prove the agency; and, while the part of the charge complained of is somewhat involved, we are not satisfied that, even if there was any error in it, the defendants were prejudiced by it.

[5] The next assignment of error is in the following instruction: "Now, with reference to the second cause of action, which in law is known as a quantum meruit suit, the law is this, for the purposes of this case: If the plaintiffs in both cases did ship cross-ties along the line of the railroad company, whether it shipped them to J. W. Page, contracting for himself, and the railroad accepted those cross-ties, or rather (strike out the word 'accept') and the railroad used those cross-ties in the construction or repairing of its roadbed, why, they would have to pay these people who owned the cross-ties what they are reasonably worth. It does not make any difference whether the plaintiff shipped the cross-ties to J. W. Page direct, or to the railroad company. If they were there, and the railroad company took them and used them in the construction of its roadbed and in the repairing of its roadbed, the railroad company would have to pay what they were reasonably worth." If the railroad company made no contract with plaintiff, directly or indirectly, jointly with Page, or severally through Page, as its agent, but if, on the contrary, as it alleged, it contracted with Page alone—bought the ties from him and paid him for them—it is not liable to the plaintiff. But, under the charge above quoted, the jury were bound to find for the plaintiff against the railroad company; for it was undisputed that plaintiff did ship cross-ties along the line of defendant's road, and that the company did use some of them; but, as we have seen, if the company bought them from Page and paid him for them, there being no contractual

relation between the company and the plaintiff, the company is not liable to the plaintiff for the ties so used. This charge was also erroneous, in that it assumed that plaintiff was the owner of the ties when the company used them.

Reversed.

GARY, C. J., and WOODS, WATTS, and FRASER, JJ., concur.

(92 S. C. 427)

STATE v. SANDERS.

(Supreme Court of South Carolina. Sept. 17, 1912.)

1. RAPE (§ 57*) — EVIDENCE — WEIGHT AND SUFFICIENCY—INTENT.

Evidence, on the trial of a negro for assault with intent to ravish, that he approached a white woman under a false pretense as to his purpose, asked if her husband was at home, and then requested her to have sexual intercourse with him, in connection with the improbability that he could have expected to accomplish his purpose without violence, was sufficient to present a question for the jury whether he intended to commit rape.

[Ed. Note.—For other cases, see Rape, Cent. Dig. § 87; Dec. Dig. § 57.*]

2. RAPE (§ 16*)—"ASSAULT WITH INTENT TO RAPE"—ABANDONMENT OF PURPOSE.

A solicitation or demand by a man that a woman submit to sexual intercourse with him, with the intention of enforcing his demand by violence, while a heinous moral offense, did not constitute the crime of an assault with intent to ravish, where he made no demonstration or effort to carry out his intention, but fled at the prospect of resistance; no "assault" having taken place.

[Ed. Note.—For other cases, see Rape, Cent. Dig. §§ 15-19; Dec. Dig. § 16.*]

For other definitions, see Words and Phrases, vol. 1, pp. 542-544; vol. 8, p. 7583.]

Gary, C. J., and Fraser, J., dissenting.

Appeal from General Sessions Circuit Court of Hampton County; Robert E. Copes, Judge.

John Henry Sanders was convicted of assault with intent to ravish, and he appeals. Reversed.

J. W. Vincent, of Hampton, for appellant. R. L. Gunter, Sol., and W. D. Connor, for the State.

WOODS, J. The defendant appeals from a conviction and sentence under an indictment charging that the defendant on the 30th day of May, 1911, "in and upon one Mrs. A. James, in the peace of God and of the said state then and there being, did make an assault, and her, the said Mrs. A. James, then and there did beat, bruise, wound, and ill-treat, with intent her, the said Mrs. A. James, violently and against her will then and there feloniously to ravish and carnally know, and other wrongs the said Mrs. A. James then and there did, to the great damage of the said Mrs. A. James, against the form of the statute in such case made and provided, and against the peace

and dignity of the state." The statute of 1909, under which the indictment was found, provides: "Section 1. Be it enacted by the General Assembly of the state of South Carolina, that any person convicted of rape or assault with intent to ravish shall suffer death by hanging, unless the jury shall recommend to the mercy of the court, in which event the defendant shall be confined at hard labor in the state penitentiary for a term not exceeding forty years or less than five years, at the discretion of the presiding judge." 28 St. 206.

The question made by the appeal is whether the circuit judge should have directed a verdict of acquittal on the ground that there was no evidence of an assault by the defendant on Mrs. James. It seems important to set out the entire evidence bearing on the question. The prosecutrix, Mrs. James, is a white woman living in the town of Brunson. The defendant is a negro. Mrs. James' testimony as to defendant's acts is as follows: "Q. State the circumstances under which you saw him and what occurred at that time. A. I was sitting out on my porch at good dark, and some one came up and says, 'Good evening, Mrs. James,' and I said 'Good evening.' He said, 'Minnie Fields sent me down here for 50 cents,' and I got it and gave him the money, and after taking the money he backed himself out in the shade of the house and propped himself on the balustrade, and asked me if my husband was at home. I asked him, 'Who are you?' and he told me his name was Son Best, and he said, 'No; not Son Best, Reverend Best.' Q. Was there a Reverend Best around there, if you know? A. Yes, sir. I said: 'No; my husband is not here: what do you want with him?' He said nothing, and he said, 'I want to ask a favor of you,' and I said, 'What is it?' He said, 'Nothing much, but I am kind of afraid to tell you,' and I said, 'I cannot accommodate you unless I know.' He said, 'I would like to see you in the room a minute,' and I said, 'Wait a minute.' I stepped in the hall, and got the pistol, and fired out at him three times. Q. Do you know whether you hit him? A. No, sir; I don't think I did, very much to my regret. Q. You said he was in the shadow of the house? A. The door was open, you know, and the light from the hall shone out in front of the house. Q. Did you see any one else with him? A. No one at all. Q. When he came up and said something about the money, where was he standing? A. Standing at the gate. Q. How far from the steps or piazza? A. I suppose eight or ten yards. Q. How far? A. About as far as from me to him (indicating man sitting near clerk's desk). Q. After you gave him the money, where did he go? A. He came up the steps, and I handed him the money. Q. How near were you sitting to the steps? A. He could have put his hand over the balustrade and touched me if

he had tried. Q. How near was he to you? A. In two feet. Q. When he took the money, did he come around there in front of the steps? A. No, sir; when I handed him the money, he backed right in the shade of the steps. Q. How near was he to you then? A. In about two feet of me. He could have very easily put his hand over the balustrade. He made no attempt to put his hand on me, though he did not have any good intention."

J. M. Sullivan, the town marshal, who arrested the defendant, testified as to defendant's statements: "Q. Did you make any threats before he made that statement? A. No, sir; I assured him that he would not be hurt. We told him we were there to protect him, and he came out and told us his intention was to go there and have intercourse with Mrs. James. He said afterwards that another fellow was with him that same afternoon or night. Q. Did he say who that was? A. Yes, sir; he said his name was Ham Sanders. We found out afterwards that that was false."

Magistrate Dowling testified as follows on the same subject: "Q. Did he make any statement in your presence? A. Yes, sir. Q. What was that? A. He stated to myself and Sullivan together that he and another negro had had some talk that afternoon before the occurrence, and they had agreed together to do what he did. At first he said he made up his mind to go around there, and did go there, and told Mrs. James he wanted her to do a favor for him, and she asked him what kind of a favor, and he told us that he told her to go to bed with him. Q. Did he say what was his intention? A. His intentions were to go to bed with her."

[1] The evidence of an intent to commit a rape was the approach to Mrs. James under false pretense, the inquiry whether her husband was at home, and the improbability that even the madness of lust could have led the defendant, a negro, to expect to accomplish his purpose without violence. On the issue of intent, therefore, defendant's counsel very properly conceded that there was evidence for the consideration of the jury.

[2] The demand or solicitation by a man that a woman should submit to sexual intercourse with him, with the intention to enforce his demand by violence, is a heinous moral offense against society. But the General Assembly has not seen fit to make such a demand with such an intent a crime, unless accompanied by an assault. If there be a deficiency in the law in this respect, it calls for the exercise of the legislative, not the judicial, power of the state.

The term "assault" is a very ancient one in our law, and its meaning has been long settled. The holding that the acts of the defendant constituted an assault was not in accord with the common understanding of the meaning of assault, nor with the law as established by the courts. Not only do the

facts fall short of the definition of assault, but we do not think a single case can be found where a court of last resort has decided that similar evidence would support a verdict of assault with intent to ravish. The essence of judicial authority on what is necessary to constitute an assault is thus given in 3 Cyc. 1020: "An assault is any attempt or offer, with force or violence, to do a corporal hurt to another, whether from malice or wantonness, with such circumstances as denote, at the time, an intention to do it coupled with a present ability to carry such intention into effect. * * * Mere preparation to commit a violent injury upon the person of another, unaccompanied by a physical effort to do so, will not constitute an assault; but there must be an attempt or offer, though interrupted—the commencement of an act which, if not prevented, would produce a battery. * * * The force or violence attempted or offered must be physical, and no words, of themselves, can constitute an assault." In *State v. Davis et al.*, 1 Hill, 46, assault is thus defined: "The general rule is that any attempt to do violence to the person of another, in a rude, angry, or resentful manner, is an assault; and raising a stick or fist, within striking distance, pointing a gun within the distance it will carry, spitting in one's face, and the like, are the instances usually put by way of illustration."

The case of *State v. Sims*, 3 Strob. 137, is relied on to sustain this conviction; but it strikingly illustrates the difference between the attempt or offer to do violence to another necessary to constitute an assault, and the absence of such attempt or offer in this case. In that case the defendant and the prosecutor had a violent quarrel in the morning. Later in the day the defendant "turned his horse across the path before the prosecutor, and then shook his hickory over his head, in striking distance. He rode his horse twice very near to the prosecutor. The third time he rode nearly upon him. The prosecutor said, 'Don't ride upon me,' and, thereupon struck the horse with his jacob staff on the neck. The horse fell on his haunches. The defendant jumped down and picked up a *junk*, but dropped it without attempting to throw." On these facts the following instruction was sustained: "The jury were told, if the defendant rode his horse so near to the prosecutor as to endanger his person and create a belief in his mind that it was his intention to ride upon him, it would be an assault; so too, if he shook his hickory over his head, indicating an intention to strike, and within striking distance, it would be an assault." In *State v. Johnson*, 84 S. C. 45, 65 S. E. 1023, the conviction was for assault and battery with intent to ravish. The proof was that the defendant actually laid his hands on a young white woman, who was a teacher, and the sole question decided was

that the circumstances warranted the inference that the touching of the white woman's person by the negro was an overt act done in the prosecution of an intention to commit rape. The case is no authority for the proposition that a solicitation with an intent to force compliance, but without any demonstration or menace, of any kind, constitutes an assault.

The case of *Jackson v. State*, 91 Ga. 322, 18 S. E. 132, 44 Am. St. Rep. 25, also relied on to support this conviction, was entirely different in facts. There the defendant, a negro, made the most violent demonstration and assumed the most threatening attitude possible for a man to assume towards a woman, when he went at night into the room of a white girl and got into the bed with her. Likewise in *State v. Shoyer*, 104 Mo. 441, 16 S. W. 286, 24 Am. St. Rep. 344, the defendant had not only got into the bed of the sleeping woman, but, when detected, was in the act of moving upon her to commit the rape. In *Gaskin v. State*, 105 Ga. 631, 31 S. E. 740, the court held there was no evidence of assault, although the facts were far stronger against the defendant than they are in this case. Among other authorities showing that the evidence does not sustain the charge, we cite *Halrston v. Commonwealth*, 97 Va. 754, 32 S. E. 797, *Carter v. State*, 44 Tex. Cr. R. 312, 70 S. W. 971, and *Clark v. State*, 56 Fla. 46, 47 South. 481. We are not bound by these decisions, but a perusal of them will show how far outside of established law is the holding that the acts of the defendant in this case in any view constitute an assault with intent to ravish.

If A. goes to the house of B. with the intention to beat him, and on arrival expresses that intention to B., but makes no effort to execute his purpose, but, on the contrary, runs away when B. makes a hostile demonstration, it would not be contended for a moment that A. was guilty of an assault. So, in this case, whatever may have been the purpose of the defendant, he made no effort to carry it out, but took to his heels at the prospect of resistance. To hold that the acts of the accused in this case constituted an assault with intent to ravish would be to give a new meaning to the crime of assault, and thus by judicial legislation create a new crime—and that, too, when the punishment may be death. If there be need for such a change in the law, it is the concern of the General Assembly.

For these reasons, I think the judgment of the circuit court should be reversed.

HYDRICK and WATTS, JJ., concur.

FRASER, J. This appeal is from a conviction for assault with intent to ravish. The appeal here is on the ground that there is no evidence of an assault. The facts are

undisputed, and are as follows: The "prosecutrix" was sitting alone on her piazza after dark, when a man (the appellant) approached the house, and, upon being asked his mission, said that he had been sent by the washerwoman of the "prosecutrix" to ask for a loan of 50 cents. The man gave the wrong name. By reason of the false statement he was allowed to approach to within two feet of the prosecutrix, and near enough to take the money from her. He made no attempt to take hold of her but approached near enough to do so. The appellant asked her if her husband was at home, and, being informed that he was not, asked her to go to her room with him, thereby soliciting carnal intercourse. The prosecutrix said, "Wait a minute." She then slipped into the hall, got the pistol, and fired out at him three times. The defendant then ran away.

The appellant claims that, inasmuch as he had not reached the stage at which he was to lay hands upon her, there was no assault. There was evidence (introduced without objection) that the prisoner confessed that he went to the house of the prosecutrix with intent to have carnal intercourse with her. The jury saw the appellant. They saw the prosecutrix. It was their province to say whether the appellant had any reasonable expectation that he could obtain the consent of the prosecutrix. If the appellant intended to have intercourse, and had no reasonable expectation that he could secure her consent, then the jury had the evidence from which they could infer that the appellant was there in pursuance of his purpose to use force; i. e., to commit rape. The intent is not a crime, and unless there was an assault there was no crime.

Appellant relies upon the following authority: Bishop on Criminal Law, 23, says: "Assault is an unlawful, physical force, partly or fully put in motion, creating a reasonable apprehension of immediate physical injury to a human being, as raising a cane to strike him, pointing in a threatening manner a loaded gun at him, and the like." The coming within reach of the prosecutrix with intent to carry out his purpose, together with his words showing his intent, is the unlawful physical force, partly put in motion, which created a reasonable apprehension of immediate physical injury, and is evidence sufficient to sustain a verdict of guilty. This case is a very much stronger case than *State v. Johnson*, 84 S. C. 45, 65 S. E. 1023. In that case the placing of the hands upon the shoulders of the victim was no part of the final struggle, and the intent was only an inference from that fact. Here the intent is not an issue, and the appellant had proceeded as far by overt act as the prompt and effective resistance of the prosecutrix allowed. *Jackson v. State*, 91 Ga. 322, 18 S. E. 132, 44 Am. St. Rep. 25. "When a man, under

the incitement of lust and with the intention of gratifying it by force, enter the bedroom of a virtuous woman at a late hour in the night, and gets upon the bed in which she is sleeping, within reach of her person, for the purpose of ravishing her, he commits an assault upon her, although he may not actually touch her, being prevented from doing so by her outcry and by the intervention of an occupant of the adjoining room." *State v. Shroyer*, 104 Mo. 441, 16 S. W. 286, 24 Am. St. Rep. 344. "It was not necessary, in order to constitute an assault, that actual violence should have been used. To sustain such an indictment [assault with intent to commit rape] it is not even necessary that the person of the one upon whom the attempt is intended should be touched. If the intent, with the present means of carrying it into effect, exists, and preparations therefor have been made, the assault is complete." *State v. Sims*, 3 Stro. 137. "To ride a horse so near one as to endanger his person and create a belief in his mind that it was the intention of the rider to ride over him would be an assault. His honor said to the jury that he did not think the defendant intended to either ride upon the prosecutor or to strike him, yet he thought, if his action and conduct was such as to create the belief in the mind of the prosecutor that he intended to ride upon or strike him, he would be guilty of an assault." This conviction was sustained. *Wharton, Crim. Law*, 1155. When the prisoner decoyed a female child into a building for the purpose of ravishing her, and was there detected while standing within a few feet of her in a state of indecent exposure, it was held that, although there was no evidence of his having actually touched her, he was properly convicted of an assault with intent to ravish.

The judgment of this court is that the judgment of the circuit court be affirmed.

GARY, C. J., concurs.

(92 S. C. 342)

WILLIAMS v. JONES et al.

(Supreme Court of South Carolina. Aug. 26, 1912.)

WATERS AND WATER COURSES (§ 75*) — TEMPORARY INJUNCTION.

An order temporarily enjoining defendant receivers from polluting a stream in mining operations, as against their objections that plaintiff did not obtain leave to sue them, that the matters to be litigated were res adjudicata, that the relief could be obtained in another action pending, affirmed by divided court.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. § 66; Dec. Dig. § 75.*]

Hydrick and Woods, JJ., dissenting.

Appeal from Common Pleas Circuit Court of Lancaster County; Geo. W. Gage, Judge.

"To be officially reported."

Action by Emma E. Williams against Charles D. Jones and another as receivers of the Haile Gold Mining Company. From a preliminary injunction, defendants appeal. Affirmed.

See, also, 88 S. C. 522, 71 S. E. 26.

The following is substantially the case on appeal:

Exhibit D.

"The amended complaint pursuant to order of court dated July 22, 1907, of the plaintiff herein, would respectfully show to this court:

"(1) That the Haile Gold Mining Company now is, and was at the time hereinafter stated, a corporation created and existing under the laws of the state of New York. That it is entitled to sue and be sued in the courts of South Carolina. That it has real estate situated in the said state and county. That it conducts its business in Lancaster and Kershaw counties, in said state, with resident agents in each of said counties.

"(2) That the plaintiff is in possession of, and owner in fee simple of, the tract of land containing 400 or 450 acres of land, situated in Lancaster and Kershaw counties, said land situated on Little Lynches creek, lying on the north side thereof, and bounded on the south by Will Holden, S. L. Gardner, and others, north by the Mine branch and lands of Thurlow Blackmon. Said land is also adjacent to the land of Frank Hough and others.

"(3) That a considerable portion of said tract of land consisted of bottom lands alongside of said Little Lynches creek, and said Haile Gold Mine branch, subject to the overflow of the waters thereof, which were beneficial and fertilizing thereto until corrupted and ruined and tainted by the defendant, as hereinafter stated.

"(4) That the defendant, through its agents and servants, now is, and has been for a number of years engaged in the digging and mining of gold ore in Lancaster county, said state, and extracting gold therefrom by various methods, devices, and processes, in which large quantities of water and chemicals, consisting of deleterious substances, the exact nature and composition of which are unknown to the plaintiff, are used and employed.

"(5) That the pulverized tailings, debris, and refuse matter resulting in great quantities from defendant's operations at said locality, charged with mineral or chemical properties, corruptive odors, and destructive of the fertility of the soil when deposited and exposed, have been and are being continually and constantly by the defendant's agents and servants discharged into the tributary waters of Little Lynches creek and in the Mine branch by said defendant, knowing that the same must pass in the flow and over-

flow of said branch and said creek upon the bottom lands and other lands of this plaintiff included in the aforesaid tract of land, to plaintiff's irreparable damage.

"(6) That the waters of the said branch and the waters of Little Lynches creek, filled with and polluted by the aforesaid deleterious substances, have overflowed the once fertile bottom fields of plaintiff, included in the boundaries of the aforesaid tract of lands, and the said deleterious, destructive chemical substance or unknown materials have been deposited, and are being deposited, on plaintiff's said lands, and such deposits, together with the waters tainted with the said chemical substances aforesaid, have proven destructive to about 30 acres of the plaintiff's bottom lands and fields, and are fast encroaching upon the remainder, so that a great part of said lands have become unproductive, the fertility thereof totally destroyed, to such an extent that no vegetation will grow on same. The said chemicals or substances destroyed the trees and other vegetation of said lands included in the aforesaid tract, and no corn, wheat, oats, or other crops can be produced thereon, and plaintiff's other lands in said tract are fast falling with each recurring freshet or swell in said branch or creek.

"(7) That about 30 acres of said lands, bottom lands, have been ruined by said defendant in the manner and way aforesaid in so far as the purposes of agriculture are concerned, and the value of much more land included in the aforesaid tract of land has been partially impaired or destroyed by reason of the same cause, and plaintiff has been deprived of the use of 30 acres above described for the last six years or more. That the plaintiff, by reason of the aforesaid acts of the defendant, its servants and agents, has been damaged \$1,500.

"(8) That the plaintiff, by reason of the aforesaid acts of the defendant, by which a nuisance has been created to the land, habitation, privilege, rights, and easements of the plaintiff to plaintiff's damages aforesaid, and hereinafter stated, and the plaintiff's damages are constantly increasing by the continuous nature of the said acts of the defendant, and the results of the same, and the defendant is going to continue the said acts and injuries, whereby the detriment of the plaintiff will be greatly aggravated and increased. That the plaintiff's damages are irreparable, her property is being destroyed and ruined, its value reduced and impaired, and the encroachments upon the plaintiff's rights are continuous and increasing.

"(9) That the plaintiff is advised and believes that her legal remedies against the defendant, its agents and servants, are wholly inadequate to compensate her for the serious and great injuries she has suffered, and continues to suffer, from the acts of the defendant, its agents, and servants, and that this

court only can afford her the protection needed by the exercise of the injunction or the restraining power.

"Wherefore the plaintiff demands judgment for \$1,500. (2) The defendant, its agents and servants, be restrained and enjoined from further letting loose or emptying the water, substances, tailing, debris, chemical, and detritus matters from its mining works or plant into said branch or Little Lynches creek, so that said water may be free from same, and have only the flow of water therein which naturally belongs thereto, and that said defendant be further enjoined and restrained from committing any acts whereby the plaintiff's rights may be impaired or otherwise interfered with by the means and acts aforesaid. (3) For such other and further relief as may be meet and just. (4) And for the costs of this action.

Exhibit E (Defendant's Answer).

"The defendant the Haile Gold Mining Company, answering the amended complaint herein, alleges:

"For a first defense:

"Admits paragraph 1 of said complaint; denies each and every allegation in said complaint contained, except in so far as the same be herein expressly admitted, and specifically denies, upon information and belief, the title of the plaintiff to the lands described in the complaint, and denies that there is as much of the land described in the complaint affected by the tailings from the mill, as is alleged in the complaint.

"For a second defense:

"That the defendant was not guilty of the grievances alleged in the complaint at any time within six years before the commencement of this action.

"For a third defense:

"That the defendant is seised and possessed of a tract of land situated in the county of Lancaster, in said state, whereon it carries on its gold-mining operations. That through this tract of land flows a small branch or stream of water, a tributary of Little Lynches creek. That into this branch, commonly called the Mine branch, on the premises of the defendant, the defendant and those from whom it derived title to said premises and mine have discharged the pulverized tailings, debris, and other waste material resulting from the operation of said gold mine for more than 20 years before the time of the alleged grievance. That said branch has been during all the time above mentioned held and used by this defendant, and those from whom it derived title, for the mining purposes above mentioned, claiming right and title thereto adverse to the plaintiff and all other persons using and enjoying said branch and its waters, for the said purpose complained of by the plaintiff in this action, during the said time, openly, and continuously,

and without hindrance or molestation from the plaintiff or any other person.

"For a fourth defense:

"That the plaintiff has a plain and adequate remedy at law, and can be compensated for any damage she may have suffered by the operations of the defendant, of which complaint is made in this action, without the intervention of the court of equity.

"For a fifth defense:

"That the defendant has expended large sums of money erecting and maintaining its mining plant, and that defendant gives employment to a large number of operatives at remunerative prices, and through its operatives furnishes a market for the products of the land of the surrounding country, and the stoppage of said plant will throw out of employment a large number of operatives skilled in that class of work, and render it necessary for them to seek and obtain, at distant points, employment such as is suitable to their experience and training: and has in various ways advanced the value of property in that neighborhood (including the property of the plaintiff) to such an extent that if its operations were stopped by an injunction, such as is asked for herein, it would suffer a great loss itself, and entail a heavy loss upon the surrounding country, and depreciate the property of the entire community to such an extent that the injury and inconvenience to the country about the said mine would far exceed any damage which could possibly be suffered by the plaintiff. And it further says that, while it was erecting its plant and developing its property, the plaintiff stood by, knowing the said expenditure, and of the use that would be made of said branch and creek, and made no objections and has quietly acquiesced in same for more than 20 years, and by her laches she has deprived herself of the right to invoke the aid of the court of equity in restraining the defendant from operating its valuable plant."

Exhibit C (Order to Abate the Nuisance).

"The plaintiff sued for \$1,500, and for injunction. The complaint alleges that some 30 acres of land on a creek has been rendered unfit for cultivation for six years next before action brought, by reason of poisonous agencies let loose in its mining operations. Compensation therefor was demanded, and, further, that defendant be restrained from fouling the said stream of water any more. The jury rendered a verdict for \$1,200. Now defendant moves to set same aside, and the plaintiff moves for an injunction. The verdict was special. The defendant pleads a prescriptive right to foul the stream. On the issue the jury found against the defendant.

"I see no ground to disturb the verdict, or any of the issues submitted. There is no question but the defendant has used the stream in its mining operations for more than 20 years, but the sharp issue was made

that within recent years, that of the statutory period, the defendant installed what the witnesses called a 'chlorinating process,' which process is ruinous to vegetable life. On that issue the jury found for the plaintiff. The amount of the verdict might well be sustained by the testimony of the witnesses for the defendant. The matter that has given me more concern than all else is the remedy by injunction.

"The contention of the defendant is that injunction would harm the defendant and all those interested as employes of it, and those to supply it with wood to run the engines, etc., and that such harm is out of all proportion to the damage its operating may inflict upon the plaintiff's lands. Abundant authority is cited to that effect from other states than this. But the case of *Mason v. Apache Mill*, by our own court, makes against the contention, and it seems to me is conclusive against the contention. Nor do I think the defendant's plea of laches has been sustained. I do not think the plaintiff has been guilty of laches in asserting her rights.

"I am therefore of the opinion that the special verdict should stand, and that the plaintiff shall have at the foot hereof an order of injunction to stop the nuisance complained of, and it is so ordered."

Order of Injunction.

"Ordered that you, Charles D. Jones and Leonard W. Amerman, receivers of the Haile Gold Mining Company, do show cause before me, at Chester, S. C., on May —, 1910, at 11 o'clock, why you should not be perpetually restrained and enjoined, as receivers of the Haile Gold Mining Company, from operating and discharging acidulated or chlorinated water, or other harmful substances, into the waters of the Mine branch and the waters of Little Lynches creek, and to effectually and perpetually restrain and enjoin you, as such receivers, and your agents and servants, to continue the trespasses and damages to the plaintiff, and to abate the nuisance found to exist in the case of *Emma E. Williams, Plaintiff, v. Haile Gold Mining Company, Defendant*. That in the meantime, and until the further order of this court, you, the said Charles D. Jones and Leonard W. Amerman, your servants and agents and representatives, are hereby restrained and enjoined from emptying from the chlorination system, plant, or process chlorinated water or discharges into the waters of said branch and creek, whereby the waters thereof may become polluted and rendered unfit for cattle to drink, or be in any way liable to damage or injury to the property and rights of this plaintiff. The question whether the said receivers, their servants, and agents have a right to discharge into the said streams the tailing, not at all affected by the said chlorinating

process, is a matter not herein determined, but is left open.

"But the court does effectually and expressly restrain and enjoin until the further order of this court any system or operations employed by said receivers, their servants or agents, which in any degree or to any extent does damage to the lands of the plaintiff, or pollutes the water rights of said plaintiff or property of the plaintiff, and the said receivers are forbidden from emptying any chemicals or substances into said waters, whereby the same may in any way corrupt or pollute the said waters.

"Ordered, further, that a copy of this order, after being certified to by the clerk of this court, be served upon said receivers, or any one of them."

Order.

"On May 4, 1910, one of the defendants called it to my attention that the order of 30th April is broader in its terms than that of 22d December, 1908. The last-named order enjoined the letting loose on the lands of debris poisoned by the chlorination process. The first order enjoins (temporarily) the letting loose of, not only that character of debris, but of 'other harmful substances,' and 'any system or operations which, to any extent, does damage to the land or pollutes the water.' It is true this is a new action, and puts in issue matters not before determined in the first suit. But the temporary order (of April 30th) ought to be modified, or security ought to be required of the plaintiff pending the hearing. I am more fully of this opinion since the hearing fixed for the 7th day of May must now be postponed at the request of Mr. Blakeney, through Mr. Foster, evidenced by a letter of the latter to me. The order of the 30th April, in enjoining the letting loose of other harmful substances, and any system or operation which to any extent does damage to the land or pollutes the water is too indefinite; and it lays a burden on the defendants which is uncertain, yet it is therefore ordered that pending the hearing those words be eliminated from the order. Ordered, further, that the hearing be had at Chester, on Monday, the 16th May, 1910, at 10 o'clock a. m."

Order.

"This is an action to enjoin a nuisance. The nuisance alleged is the letting loose by defendants into a stream which traverses the plaintiff's lands of acidulated water, chlorinated water, or any other deleterious substance or chemicals from the defendant's mining operations thereabout. Just now the motion is for a temporary order of injunction of the nuisance to stand until the issues shall have been tried.

"I heard the motion just on the eve of my departure for the Twelfth circuit, and I have just returned therefrom. In the

meantime I am advised that Judge Prince has made the final order of injunction authorized by the circuit court in the action entitled Emma E. Williams v. Haile Gold Mining Company. The answer is not in, but the defendants have made return to a rule signed by me on the 30th April. The third paragraph of the return alleges what is now irrelevant matter, for since the return was made Judge Prince has handed down an order.

"The first and fourth grounds of the return must be overruled; for leave was granted the plaintiff to sue, and this is not a motion for permanent injunction.

"The second paragraph of the return is of a more serious character. Therein it is alleged that the wrongs detailed in the complaint herein were pleaded, or ought to have been pleaded, in the cause entitled Williams v. Haile Gold Mining Company; and that such wrongs were, therefore, settled by the judgment in that cause. It is not worth while now to further refer to such wrongs and such injuries as may result from the chlorination process. That process has been found to be hurtful, and its practice enjoined.

"But the complaint herein sets out other ways than those which result from the chlorination process. I have no clear conception of them, because the whole subject is one about which I have a meager knowledge, to wit, the mining for gold. But the defendant's return, in effect, sets up *res adjudicata*. If that plea should be sustained now, it would be equivalent to finally determining the action now on a motion. That ought not to be done, and cannot be done. I have such serious doubts, however, about the plaintiff's right to maintain this action, that I have concluded to grant the temporary injunction only upon the execution by the plaintiff to the defendants of a bond for \$5,000, conditioned to save the defendants harmless in the event of a failure of the plaintiff's action.

"It is therefore ordered that upon the execution and delivery of such a bond to the clerk of this court then the defendants are restrained from casting upon the plaintiff's lands any sulphides, tailings, acids, or chemicals which may be hurtful to lands or to vegetation. It is further ordered that the bond shall be signed by one or more sureties to be approved by the clerk of this court. It is further ordered that the plaintiff may move to decrease the bond, or the defendants may move to increase it."

Rule to Show Cause.

"The respondent C. D. Jones, as one of the receivers of the Haile Gold Mining Company, defendant herein, in return to the rule to show cause herein issued by Hon. Geo. W. Gage, dated April 30, 1910, why the injunc-

tion prayed for in the complaint herein should not be granted for cause, shows:

"(1) That it does not appear in the complaint herein, or any exhibits attached thereto, upon which the rule herein was obtained that leave or permission to commence and maintain this suit was granted by the court having jurisdiction and authority to grant the same.

"(2) That it appears fully from the complaint herein, and the exhibits thereto attached, that all the matters of fact and law alleged by the plaintiff for a cause of action herein against these defendants, and all of the plaintiff's rights and remedies, in respect to the matters alleged herein, have been fully adjudicated and determined in a previous action entitled *Emma E. Williams v. Halle Gold Mining Company*, the pleading and final judgment wherein are made a part of the complaint in this action, from which it fully appears that the parties defendants herein are in privity with the defendant in said previous action, as is recognized and alleged in paragraph 9 of the complaint herein. That the right of the plaintiff herein to injunction in respect to the matters complained of and the scope of such injunction having been already defined and established by decree of the circuit and Supreme Courts, as against the Halle Gold Mining Company, and these defendants in privity therewith, the plaintiff has a clear and adequate remedy for the grievances complained of by enforcement of said decree through the administrative forms of the court, and therefore cannot maintain this action.

"(3) That there is now pending before his honor, Judge G. E. Prince, an application presented to him on behalf of the plaintiff while presiding in the Fifth circuit at Camden, S. C., on the 18th day of March, 1910, for an order of injunction enforcing the decree in the case of *Emma E. Williams v. Halle Gold Mining Company*, copy of which proposed order is hereto attached and marked 'Exhibit A,' and made a part of this return. That at the hearing of said application for injunction counsel were heard on behalf of the plaintiff and defendant, and his honor, Judge Prince, declined to grant the said order to the broad extent proposed, but stated orally that he would limit the scope of such order to restraining the discharge of the debris from the chlorinating process, according to his construction of the decision of the Supreme Court, and that he would dispose of such application accordingly. That thereupon he marked the said case 'heard March 18, 1910,' upon the calendar, and, the court being about to adjourn, he directed plaintiff's attorney to present to him at his chambers, in Columbia, S. C., an order for injunction in the terms indicated by him, which order he would sign. That no further order in the premises has been made so far as this defendant is informed and believes. That an order for the enforcement of plain-

tiff's right to injunctive relief being pending in another, and the proper jurisdiction, plaintiff cannot maintain this action or this motion.

"(4) That this court has no jurisdiction at chambers without consent to grant a permanent injunction upon the merits before trial of the issues in this action."

Exceptions.

"The defendants appellants, Charles D. Jones and L. W. Amerman, receivers, hereby except to the order of his honor, Geo. W. Gage, herein, dated June 20, 1910, upon the following grounds:

"(1) That his honor erred in holding that leave to sue was granted by any court of competent jurisdiction, so far as appears by the complaint, and in holding, by implication, that mere permission granted to plaintiff 'to commence and maintain this suit, as she may be advised,' without notice to defendants, in any wise precluded consideration of the adequacy of these pleadings to support a cause of action or injunction, as it does not follow that the court granting leave 'to commence this suit,' predetermined that any complaint the plaintiff might be advised to frame would suffice to constitute a cause of action, be immune from any plea apparent on its face, or that it would support an injunction temporary or otherwise.

"(2) That his honor erred in holding that in considering the rule and return herein he could not consider whether or not the plea of *res judicata* was established upon the face of the complaint, and exhibits submitted therewith; whereas, he should have held the same showed an adjudication upon the very acts complained of in another suit, to which the parties herein were privy, and that a motion for permanent injunction, based upon practically identical cause of action and allegations, was pending in such other suit, and should have consequently refused the application for injunction in this case.

"(3) That his honor erred in holding the return irrelevant in showing the pendency of a motion in another jurisdiction for the same injunction sought in the present motion, and in not discharging the rule and refusing the motion after it appeared that the order of Judge Prince referred to had been granted."

E. D. Blakeney, of Kershaw, and T. J. Kirkland, of Camden, for appellants. J. Harry Foster, of Yorkville, and M. L. Smith, of Camden, for respondent.

BYNUM, A. A. J. This case comes up to this court on appeal from an interlocutory or preliminary injunction issued by Judge Gage on June 20, 1910, on the following exceptions, viz.:

"(1) That his honor erred in holding that leave to sue was granted by any court of competent jurisdiction, so far as appears

by the complaint, and in holding, by implication, that mere permission granted to plaintiff 'to commence and maintain this suit, as she may be advised,' without notice to defendant, in any wise precluded consideration of the adequacy of these pleadings to support a cause of action or injunction, as it does not follow that the court granting leave 'to commence this suit,' predetermined that any complaint the plaintiff might be advised to frame would suffice to constitute a cause of action, be immune from any plea apparent on its face, or it would support an injunction temporary or otherwise.

"(2) That his honor erred in holding that in considering the rule and return herein he could not consider whether or not the plea of *res judicata* was established upon the face of the complaint and exhibits submitted therewith; whereas, he should have held the same showed an adjudication upon the very acts complained of in another suit, to which the parties herein were privy, and that a motion for permanent injunction, based upon practically identical cause of action and allegations, was pending in such other suit, and should have consequently refused the application for injunction in this case.

"(3) That his honor erred in holding the return irrelevant in showing the pendency of a motion in another jurisdiction for the same injunction sought in the present motion, and in not discharging the rule and refusing the motion after it appeared that the order of Judge Prince referred to had been granted."

In order that there may be a clear understanding of the matters herein presented, the "case" for appeal herein, except Exhibit F, which is the opinion of this court reported in 85 S. C. 1, 66 S. E. 117, 1057, should be incorporated in the report of this case.

We will first consider the proposition urged by the defendants in the fourth clause of their return to the rule to show cause issued by Judge Gage on April 30, 1910, in this matter, wherein the defendants took the position that Judge Gage had no jurisdiction at chambers without consent to grant a permanent injunction upon the merits before trial of the issues in this action. This proposition is not included in the exceptions of the defendants, but it is proper for this court to consider it. It is true that this order required the defendants to show cause why they should not be "perpetually enjoined and restrained," etc. But this appeal cannot be sustained on the ground that Judge Gage undertook to grant at chambers a permanent injunction decisive of the case, for the order appealed from herein shows on its face that it is not permanent, but only a temporary injunction pending the hearing of the cause on its merits, and that the motion therefor was so treated; Judge Gage using the following language in said order, viz.: "Just now the motion is for a temporary order of injunction of the nuisance to stand

until the issues shall have been tried." And quoting from another part of said order wherein the judge required the plaintiff to give bond "conditioned to save the defendants harmless in the event of a failure of the plaintiff's action." In addition to this, we fail to find any objection made by the defendants on this ground to the issuance by Judge Gage of a temporary injunction. The order appealed from is only a temporary injunction until the case is heard on its merits, and this is all it purports to be.

All of the other questions raised by the defendants appellants in their said return and exceptions are collateral issues or matters of defense, involving the merits of the case, which Judge Gage could not consider except in so far as he may have done so in reaching the conclusion as to whether the plaintiff was entitled to the temporary injunction appealed from herein. "Where it appears by the complaint that the plaintiff is entitled to the relief demanded, and such relief, or any part thereof, consists in restraining the commission or continuance of some act, the commission or continuance of which, during the litigation, would produce injury to the plaintiff, * * * a temporary injunction may be granted to restrain such act." Quoted from section 240, 2 Code of Laws of S. C. 1902. The sole object of this section of the Code is to preserve the subject of controversy in its then existing condition, and, without determining any question of right, merely to prevent a further perpetration of wrong or the doing of any act whereby the right in controversy may be materially injured or endangered, until a full and deliberate investigation of the case is afforded to the party.

In passing upon an application for an interlocutory or preliminary injunction the court must satisfy itself, not that the plaintiff has certainly the right, but that he has a fair question to raise as to the existence of such a right. It is true that the court will not interfere if it thinks there is no real question between the parties; but, seeing that there is a substantial question to be decided, it will preserve the property until such question can be disposed of. The complainant may be entitled to a preliminary injunction in cases where his right to the relief sought may fall on a hearing on the merits. 16 Am. & E. Enc. L. p. 345.

Under the decisions of our court it is not proper for a circuit judge to consider the merits of a case of this kind at chambers on a motion for a temporary injunction, except in so far as they may enable him to come to a proper conclusion as to whether a *prima facie* showing has been made. When such showing is made, a temporary injunction will be granted without regard to how the case may terminate on the hearing on the merits. Our courts hold that where the action is for the sole purpose of an injunction, and a temporary injunction is essential to

the assertion and preservation of a legal right, if established in the complaint, it would be error of law to refuse a temporary injunction. *Alderman & Sons Co. v. Wilson*, 69 S. C. 156, 48 S. E. 85, and cases therein cited. Ordinarily, however, an interlocutory injunction is not a matter of right, but of grace, resting in the sound discretion of the judge. *Pelzer Rodgers & Co. v. Hughes*, 27 S. C. 415, 3 S. E. 781. And we do not see that Judge Gage committed any error of law, or abused his discretion, in granting the temporary injunction herein appealed from.

For these reasons, the exceptions of the defendants are overruled and the order of Judge Gage herein appealed from sustained.

GARY, C. J., concurs.

HYDRICK, J. (dissenting). A short history of the litigation between the plaintiff and the Halle Gold Mining Company will be necessary to a clear understanding of this case.

On May 1, 1907, plaintiff brought an action against the Halle Gold Mining Company for damages and injunction, damages for injury to her land caused by said defendants discharging into the streams which flow through it the tailings from its mining operations, which polluted the waters, and, when thrown upon the land in times of freshet, destroyed its fertility, and injunction to prevent the continuation thereof. The verdict of the jury established the fact that the acts of the defendant constituted a nuisance, and plaintiff recovered a judgment for damages. Thereupon the court, his honor, Judge Gage, presiding, held that the nuisance established consisted of discharging into the streams tailings from the company's mining operations which had been affected by the chlorinating process in extracting the gold from them, and he held that plaintiff was entitled to an injunction to stop the nuisance so established. On appeal that judgment was affirmed; and the questions whether tailings which had not been subjected to the chlorinating process were or were not injurious to plaintiff's land, and whether the company had acquired a prescriptive right to discharge such tailings into the streams, were left open. 85 S. C. 1.¹ On March 23, 1909, while that appeal was pending in this court, the defendants in this action were appointed receivers of the Halle Gold Mining Company, with authority to carry on the business of the company. When the case of *Williams v. Halle Gold Mining Company* went back to the circuit court, that court, his honor, Judge Prince, presiding, on motion of plaintiff's attorneys, granted a permanent injunction which was broader in its scope than had been indicated by the previous order of Judge Gage. On appeal Judge Prince's order was modified so as to make it conform to the injunction which Judge Gage had held the

plaintiff entitled to. 88 S. C. 522, 71 S. E. 26.

After the motion before Judge Prince had been heard, and while he had the matter under advisement, plaintiff commenced this action against the receivers. As defendants have interposed the plea of *res judicata* and the pendency of the action above mentioned as a bar to this action, it will be necessary to state the substance of the complaint, in order that the sufficiency of the pleas may be determined. Omitting formal allegations, the complaint recites the proceedings in the former case, and the pleadings, order for injunction, and the opinion of this court are attached as exhibits. Plaintiff further alleges, in substance, the insolvency of the Halle Gold Mining Company, the inadequacy of her remedy at law, and irreparable injury resulting from the conduct of the defendants in continuing to discharge into the streams which flow through her land the tailings from their mining operations, because the same are charged with mineral or chemical matters which pollute the waters, so that the cattle in her pasture will not drink thereof, and destroy the fertility of the soil, when cast thereon by recurring freshets, so that about 40 acres of her land have been greatly injured, and the injured boundary is rapidly extending on account of the continuance of the nuisance; that, but for the continued discharge of acidulated and chlorinated tailings into said streams, she could and would adopt measures for the restoration of her lands lying thereon, and they would soon be restored to fertility and become valuable, whereas they are now worthless. The relief prayed for is that defendants be restrained "from further letting loose or emptying into the said Mine branch or Little Lynchess creek any acidulated water, chlorinated water, or any other detritus, substance, or chemicals from its mining operations or plant, so that said waters of said streams may be free from said poisonous or harmful substances, and that said waters may have only the flow which naturally belongs thereto, and that the said receivers, their servants or agents, be further enjoined and restrained from committing any acts whereby plaintiff's rights may be damaged, impaired, or injured, or interfered with, by the manner and means herein set out."

Upon the verified complaint Judge Gage issued a rule, returnable at chambers, requiring defendants to show cause why the injunction prayed for should not be granted. For cause defendants alleged (1) that plaintiff had not obtained leave of court to sue them; (2) that it appeared from the complaint and exhibits that the matters which plaintiff seeks to litigate are *res judicata*; (3) that a motion was then pending before Judge Prince in the other case, in which plaintiff could obtain all the relief to which she was entitled; (4) that the court had no

jurisdiction to grant a permanent injunction at chambers. His honor overruled the return and granted an order restraining defendants until the hearing on the merits "from casting upon the plaintiff's lands any sulphides, tailings, acids, or chemicals which may be hurtful to lands or to vegetation."

The exceptions assign error in overruling the grounds of the return. As the complaint alleges that the suit was commenced by leave and as the injunction granted at chambers was only temporary, the first and fourth grounds were properly overruled.

The controlling questions in the case are whether the matters sought to be litigated in this action are *res judicata*, and whether the pendency of the other action is a bar to this. These grounds required refusal of plaintiff's motion. It will be noticed that plaintiff does not sue in this action for damages which have accrued since the rendition of the verdict in the other action. She sues only for injunction. If the tailings whose discharge into the streams she seeks in this action to enjoin were affected by the chlorinating process, the injunction which she seeks has been granted in the other case and the matter is *res judicata*. *Hart v. Bates*, 17 S. C. 35. If they are not of that character, then the questions whether they were and are injurious to her lands or not, and whether the defendants have the right by prescription to discharge them into the streams, were expressly left open in the other case, and either party has the right to have those issues tried by a jury in that case. The defendants are privies in estate with the Halle Gold Mining Company, and they are concluded by the judgment in the other case. It appears, therefore, that another action is pending between the same parties or their privies for the same cause, and that action is a bar to this.

Respondent contends that the points made by the return should have been raised by demurrer or answer, and, not having been so raised, they were waived. Defendants had 20 days after service of the complaint within which to answer or demur. As the rule required them to show cause in less time than the law gave them to answer or demur, they had the right to raise any point by return which they could have raised by demurrer or answer. His honor held that he could not determine the plea of *res judicata*, because, "if that plea should be sustained now, it would be equivalent to finally determining the action now on a motion. That ought not to be done, and cannot be done." If his honor meant that he could not finally decide the question on a motion at chambers, he was correct; but, if he meant that he could not consider that plea in reaching a correct conclusion as to whether the motion ought to be granted or refused, he was in error. While a judge at chambers

cannot finally decide anything as to the merits, he can, and of necessity must often, look into the merits, whether they present issues of law or of fact, and consider them to the extent necessary to enable him to wisely exercise the discretion vested in him. In *Sease v. Dobson*, 34 S. C. 345, 13 S. E. 530, the second syllabus, which correctly states the point decided, is as follows: "A circuit judge has the right to refuse an injunction, and such refusal is not a decision on the merits, even though he base his decision upon a ground which would be decisive of the case if so held at the hearing on the merits; but, if his refusal is rested upon an erroneous proposition of law, it may be corrected by appeal." In *Crawford v. Lumber Co.*, 77 S. C. 81, 57 S. E. 670, the court said that, even if the complaint states a cause of action for injunction, a temporary injunction should not follow automatically, "for the court should consider the showing made in opposition thereto, and must determine, *in view of all the circumstances* [*italics added*], whether an injunction is reasonably essential to protect the legal right of the plaintiffs pending the litigation, subject to review by this court." In *Hutchison v. York*, 86 S. C. 405, 68 S. E. 578, the court said: "If plaintiff's *prima facie* case depends upon allegations that a statute is unconstitutional, the judge hearing the application must consider that matter in determining the reasonable necessity for temporary injunction, and, if he hold the statute valid, the necessity is not made to appear. The question is one of law, in which the presumption is in favor of the validity of the statute. In order to reverse the refusal of temporary injunction in such a case, this court must review the constitutional question."

For the foregoing reasons, the judgment of the circuit court should be reversed.

WOODS, J., concurs.

(159 N. C. 518)

PARKER v. DANIELS.

(Supreme Court of North Carolina. Sept. 11, 1912.)

1. FRAUDS, STATUTE OF (§ 32*)—PROMISE TO PAY THE DEBT OF ANOTHER.

The statute of frauds, requiring a promise to answer the debt of another to be in writing, only invalidates verbal agreements to be surety of the debt of another for which the latter remains liable, and does not forbid a verbal contract to assume the contract of another, discharged from liability on the promisor becoming sole debtor.

[Ed. Note.—For other cases, see *Frauds, Statute of*, Cent. Dig. § 49; Dec. Dig. § 32.*]

2. FRAUDS, STATUTE OF (§ 32*)—PROMISE TO PAY THE DEBT OF ANOTHER.

Where a plaintiff refused to go on with his agreement with a corporation to carry freight because of the insolvency of the corporation, and when the management was changed and defendant became president of the corporation,

a parol contract between plaintiff and defendant was made, whereby defendant personally assumed liability to plaintiff for the payment of the amounts which he should earn, and credit was given exclusively to defendant, the contract was not within the statute of frauds.

[Ed. Note.—For other cases, see *Frauds, Statute of*, Cent. Dig. § 49; Dec. Dig. § 32.*]

Appeal from Superior Court, Pasquotank County; Bragaw, Judge.

Action by J. A. Parker against E. R. Daniels. From a judgment for plaintiff, defendant appeals. Affirmed.

The following issues were submitted without objection:

"1. Did defendant contract with the plaintiff to personally pay for the freight hauled as alleged? Answer: Yes.

"2. What amount is due plaintiff by defendant? Answer: \$399.10."

E. F. Aydlott and W. A. Worth, for appellant. I. M. Meekins and Ward & Thompson, for appellee.

BROWN, J. We have considered the several assignments of error set out in the briefs of the learned counsel for the defendant, and do not think that any of them can be sustained. The matter seems to be one almost entirely of fact, and was settled by the jury adversely to the defendant under the clear charge of the court. The only assignment of error we deem it necessary to consider is that which relates to the statute of frauds. The plaintiff sought to recover from the defendant the sum of \$399.10, alleged to be due plaintiff by the defendant for freights hauled by plaintiff for the Le Roy Steamboat Company, a corporation of which the defendant was president; the plaintiff contending that the defendant agreed to be responsible for the indebtedness. The defendant denied the contract, and contended, further, that it was a contract to answer for the debt of another, was not in writing, and came within the statute of frauds.

Upon this feature of the case his honor charged the jury: "That if you shall find from the evidence and by the greater weight thereof that the defendant agreed to be responsible to plaintiff for such sums as might become due to the plaintiff if he would continue his work of freighting, and would see that plaintiff should be paid such sums as he earned thereby, then you should answer the first issue, 'Yes'; otherwise, you should answer it, 'No.'" There is abundant evidence in the record sustaining the charge of the court intending to prove a contract upon the part of the defendant, not so much to assume a debt of the Le Roy Steamboat Company, as to create a new responsibility for which the defendant alone agreed to be held responsible. The evidence tends to prove that the plaintiff had been operating a boat between Weeksville and Elizabeth City in conjunction with the Le Roy Steamboat Company

under an agreement whereby he was to receive a certain portion of the freights; that on June 14, 1911, the said company owed the plaintiff about \$700, which has never been paid; that at that time the management of the said company changed hands, and the defendant became its president. The testimony tends, further, to prove that on that date the plaintiff refused to carry any further freight, or to go on with his work in connection with the said company, because it had failed to pay him the aforesaid indebtedness; that plaintiff had a conversation with the defendant, and told him that he would not do any more work under the contract with the said company; and that the defendant said that he would not be responsible for any past debt of the company, but that if Parker would go on with his work, from then on the defendant would be personally responsible for what Parker should earn. This statement was made by the defendant on the 14th of June, 1911, and is proven by several witnesses and expressed in various forms of language.

Under this contract with the defendant the plaintiff worked up to the 19th of July, 1911, at which time the amount due him by the defendant was \$399.10. It is to be observed that the defendant does not plead the statute of frauds, nor does he object to the evidence when it was offered, and strictly speaking the point cannot be fairly raised upon this record. But, as that seems to have been waived, we consider the question upon its merits as if the statute had been properly pleaded, or the point raised upon an objection to the evidence.

[1] We are of opinion that upon this evidence, which is scarcely controvertible, the contract is not one within the statute of frauds. This statute, which requires a special promise to answer the "debt, default, or miscarriage of another" to be in writing, is intended only to invalidate verbal agreements to be surety for the debt of another, for which that other continues to remain liable. It does not forbid a verbal contract to assume the contract of another, who may be discharged from all liability to the creditor; the promisor becoming sole debtor in his place. *Haun v. Burrell*, 119 N. C. 547, 26 S. E. 111; *Whitehurst v. Hyman*, 90 N. C. 489; *Sheppard v. Newton*, 139 N. C. 533, 52 S. E. 143; *Jenkins v. Holley*, 140 N. C. 380, 53 S. E. 237, 111 Am. St. Rep. 846; *Clark on Contracts*, p. 57.

[2] Applying this principle to the evidence in this case, it is apparent that the plaintiff had ended his contract with the Le Roy Steamboat Company because of its insolvency and refused to go on further with his work. When the management was changed and the defendant became president, the evidence shows that a new contract was entered into, not between the Le Roy Steamboat Company and the plaintiff, but between

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

the defendant and the plaintiff, whereby the defendant personally assumed the liability to the plaintiff for the payment of the amounts which he should earn, and that the credit was given exclusively to the defendant. This was not, in any view of the evidence, an assumption of a debt for and on account of the Le Roy Steamboat Company, but was in every sense a new contract, for which the defendant became personally liable. *Mason v. Wilson*, 84 N. C. 51, 37 Am. Rep. 612; *Packer v. Benton*, 35 Conn. 350, 95 Am. Dec. 246.

No error.

(160 N. C. 281)

FRANK HITCH LUMBER CO. v. BROWN.
(Supreme Court of North Carolina. Sept. 11, 1912.)

1. EVIDENCE (§ 471*)—CONCLUSION OF WITNESSES—STATEMENT OF FACT.

The testimony of a purchaser of land that he bought the logs on the land cut by a purchaser of standing timber, but not removed within the time fixed for the cutting and removal of the timber, is admissible as a statement of fact, and is not objectionable as a conclusion of law as to the construction of the timber deed.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 2149-2185; Dec. Dig. § 471.*]

2. LOGS AND LOGGING (§ 34*)—SALE OF LOGS—EVIDENCE.

Where a purchaser of land testified that he also bought the logs on the land, cut by a purchaser of standing timber, but not removed within the time fixed for the cutting and removal, and that the vendor told him that the time for the removal of the logs had expired, and that they belonged to him, and that he sold to the purchaser the land and everything on it, there was evidence of a sale of the logs independently of the sale of the land.

[Ed. Note.—For other cases, see *Logs and Logging*, Cent. Dig. §§ 104-111; Dec. Dig. § 34.*]

3. FRAUDS, STATUTE OF (§ 72*)—SALE OF LOGS—PAROL CONTRACTS.

Trees cut from the land and converted into sawlogs constitute personal property, and a parol conveyance passes the title.

[Ed. Note.—For other cases, see *Frauds, Statute of*, Cent. Dig. §§ 116-118; Dec. Dig. § 72.*]

4. LOGS AND LOGGING (§ 3*)—SALE OF STANDING TIMBER—RIGHT OF OWNER OF LAND.

Where a purchaser of standing timber, to be cut and removed within a specified time, cuts timber, but does not remove the same within the time, the timber cut belongs to the owner of the land, and he may sell the same to another.

[Ed. Note.—For other cases, see *Logs and Logging*, Cent. Dig. §§ 6-12; Dec. Dig. § 3.*]

Appeal from Superior Court, Bertie County; Cline, Judge.

Action by the Frank Hitch Lumber Company against Walter R. Brown. From a judgment for plaintiff, defendant appeals. Reversed, and new trial granted.

This is an action, with claim and delivery, to recover the possession of certain sawlogs. In January, 1903, James Morris sold the poplar, pine, and gum timber on his

tract of land in Bertie county to Brown and Bundy, who assigned the contract to the plaintiff. The timber was to be cut and removed from the land within eight years from January 1, 1903. Brown and Bundy "cut a lot of sawlogs," and left them on the land after the time for cutting and removing them had expired. The Morris land was sold and conveyed to T. J. White, who sold and conveyed it to the defendant, W. R. Brown. In his own behalf the defendant testified: "When I bought the land, I asked Mr. White about the timber. He said: 'The time is out on it, and it all now belongs to me. I sell you the land and everything there is on it. I can show you the timber deed and satisfy you about it.' When I bought the land from White, I bought the logs that were on the land. When I bought the land, I got a deed for it. I asked him about the timber. I told him I wanted a straight deed for everything there—to be no strings to it. I told Mr. White about the timber logs and stuff, and he said he sold me his entire holdings." After Brown bought the land, and, as he alleges, the sawlogs, White sold the logs and conveyed them to plaintiff on May 10, 1911, who immediately brought this action to recover the logs. In the pleadings the plaintiff describes the property as "a certain lot of gum, poplar, and cypress sawlogs on the James Morris land, in the possession of defendant." The defendant requested the court to charge the jury that, if White sold the logs to Brown at the time he sold the land to him, they would answer the first issue, "No," as the plaintiff would not be the owner of the logs. The court stated, in response to this prayer, that there was no evidence of a sale of the logs to defendant. Verdict and judgment for the plaintiff, and defendant excepted and appealed.

Winston & Matthews, for appellant. Winborne & Winborne, for appellee.

WALKER, J. (after stating the facts as above). [1, 2] There was error in the refusal to give the prayer for instructions. The defendant testified that he had bought the logs from White. This was the statement of a fact, and not a conclusion of law as to the construction of the timber deed. It may be that he referred to the timber deed as conveying the logs, but it does not so appear. The jury might well have inferred that White had sold him the logs independently. Besides, White said to him: "The time is now out, and it all belongs to me. I sell you the land and everything there is on it. * * * I told Mr. White about the logs and stuff, and he said he sold me his entire holdings." This surely was some evidence of a sale of the logs.

[3] They were personal property, the trees having been severed from the land and con-

verted into sawlogs. A parol conveyance was sufficient to pass the title. *Wall v. Williams*, 91 N. C. 477. If White sold the logs to defendant, it can make no difference that it was done by parol, and was not inserted in the deed; it not being necessary that the sale of the logs should be in writing. *Nissen v. Mining Co.*, 104 N. C. 309, 10 S. E. 512.

[4] The timber cut and not removed after the time fixed by the contract had expired belonged to White, who had the right to sell it to the defendant. This is settled by numerous cases. *Hornthal v. Howcott*, 154 N. C. 228, 70 S. E. 171; *Bateman v. Lumber Co.*, 154 N. C. 248, 70 S. E. 474, 34 L. R. A. (N. S.) 615; *Bunch v. Lumber Co.*, 134 N. C. 116, 46 S. E. 24; *Lumber Co. v. Corey*, 140 N. C. 462, 53 S. E. 300, 6 L. R. A. (N. S.) 468; *Hawkins v. Lumber Co.*, 139 N. C. 160, 51 S. E. 852; *Strasson v. Montgomery*, 32 Wls. 52. The evidence of a sale to defendant, which was disregarded by the learned judge, if again offered, must be submitted to another jury, with proper instructions as to its legal effect.

New trial.

(159 N. C. 503)

TOWNSEND et al. v. McLEAN CONST. CO.
et al.

(Supreme Court of North Carolina. Sept. 11, 1912.)

1. NAVIGABLE WATERS (§ 20*)—CONSTRUCTION OF BRIDGES—DUTY TO VESSELS.

While a railroad company and its contractor had the right to construct a bridge across Albemarle Sound under authority from the state and the War Department, they were bound to do the work in such a manner as to leave open during the constructive period spaces amply sufficient for the safe passage of vessels, and are liable for injuries resulting from obstructions to such navigation.

[Ed. Note.—For other cases, see *Navigable Waters*, Cent. Dig. §§ 73-99; Dec. Dig. § 20.*]

2. EVIDENCE (§ 519*)—EXPLANATION OF NAUTICAL MATTERS.

In an action for injury to a vessel caused by an obstruction in a channel, witnesses were properly permitted to testify to the meaning of certain lights in nautical terms, though they were fixed by rules and regulations of the federal government; their meaning not being known to the jurors.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. § 2328; Dec. Dig. § 519.*]

Appeal from Superior Court, Pasquotank County; Bragaw, Judge.

Action by J. H. Townsend and others against the McLean Construction Company and others. Judgment for plaintiffs, and defendants appeal. Affirmed.

The following issues were submitted to the jury:

"First. Was plaintiffs' vessel injured by the negligence of the defendants as alleged? Answer: Yes.

"Second. Did the plaintiffs by their own

negligence contribute to their injury? Answer: No.

"Third. What damage, if any, have plaintiffs sustained? Answer: \$500.

"Fourth. Was the property of R. S. Neal injured by the negligence of plaintiff Townsend as alleged in answer? Answer:

"Fifth. What damage has defendant R. S. Neal sustained thereby? Answer:"

Bond & Bond and Pruden & Pruden, for appellants. Thomas J. Markham and E. F. Aydlott, for appellees.

BROWN J. [1] This action is brought to recover damages against the defendant construction company for an injury to the defendants' vessel, a three-masted schooner called the "Edna A. Pogue," while attempting to pass through an opening in the bridge across Albemarle Sound, en route from Elizabeth City to Plymouth for a cargo. There are several assignments of error contained in the record, but we deem it unnecessary to consider more than one or two.

The defendants request the court to instruct the jury that, if they believe the evidence, they should answer the first issue, "No." This prayer for instruction, we think, was properly refused. At the time of the injury to the Edna Pogue, the defendant company was engaged in constructing a bridge across Albemarle Sound for the Norfolk-Southern Railway Company. While they had the right to construct this bridge under the authority of the state, as well as the War Department, it was the duty of the defendants to leave open a space sufficient to enable passing vessels to go through. This the evidence shows that the defendants' agents in charge of the work undertook to do. The evidence shows that on the 12th of December the Pogue sailed up to within three-quarters of a mile of the bridge and anchored to wait for a favorable breeze. It is common knowledge to all who are familiar with sailing craft that it is impracticable to "beat them" against a head wind through an opening in a bridge. The evidence shows that at half past 2 o'clock on the following morning, the wind having arisen, the captain weighed anchor and got under way up the Sound. The evidence shows that at that time the regular drawbridges intended for the passage of vessels, one on one side of the Sound, and one on the other, had not been completed and were not in use for the passage of vessels. The evidence further shows that the open space through which the master of the Pogue attempted to sail her was in use with the knowledge and permission of the defendants' agents for the passage of craft going up and down the Sound.

The captain testifies that he saw a large tugboat, with large raft, and a number of other vessels, passing through this same

opening, and that there was a light put there for the purpose of indicating that it was intended to be used for the passage of vessels. In attempting to make the passage through the bridge, the vessel came in contact with a raft of piling material which had been tied by the constructors of the bridge to the east side of it, and to the south side of the gap by a rope made fast to one end of the raft of piling, leaving the other end of the raft loose, so that it had swung around into the opening and the vessel had come in contact with it, causing her to lose her headway, whereby she fell off to the leeward, and her rigging became entangled with the pile driver, which had been left on the north end of this opening, and the vessel was very greatly injured. The evidence shows that the wind increased very much at the time, so that the captain was unable to free his vessel and get her away from the bridge, and, a large sea making up in the morning, she was badly chafed before she could get away. The testimony of one of the witnesses, who was an employé of the defendants at the time, was to the effect that this gap or opening was being used by all the craft going up and down the Sound while the drawbridges were being completed.

It scarcely needs the citation of authority to prove that, although the right to build this bridge cannot be gainsaid, it was nevertheless the duty of the constructors to do the work in a safe and careful manner, to leave open during the constructive period spaces amply sufficient for the safe passage of vessels navigating the waters of Albemarle Sound, and to keep those spaces free from all obstructions that would endanger the passage of vessels through such spaces. There are numbers of cases which support the contention of the plaintiffs in this case. *Jutte v. Bridge Co.*, 21 Ohio Cir. Ct. R. 422; *Maxon v. Railroad* (D. C.) 122 Fed. 555; *Kelley Lime Co. v. Cleveland* (D. C.) 144 Fed. 207. In this case it is said that a company constructing a bridge is liable for injury resulting from its negligence when a vessel collides with the partly constructed bridge, or with works used in the construction, when such collision could have been avoided by reasonable precaution upon the part of the constructors. See, also, 29 Cyc. p. 214; *Jutte v. Keystone Bridge Co.*, 146 Pa. 400, 23 Atl. 235; *Casement v. Brown*, 148 U. S. 615, 13 Sup. Ct. 672, 37 L. Ed. 582; *Wilson v. Chicago* (D. C.) 42 Fed. 506.

At a prior term of this court we considered the case of *Whitehurst v. Norfolk-Southern R. Co.*, 156 N. C. 48, 72 S. E. 73. We think it has no bearing whatever upon this controversy. There was no evidence of negligence whatever upon the part of the defendant in that case, as it was perfectly manifest that the vessel was lost before she ever reached the bridge, by failing to respond to her helm at a critical moment.

[2] The defendants except because the court permitted witnesses to testify to the meaning of certain lights and what such lights are intended to communicate in nautical terms. It is true that these are fixed by the rules and regulations of the national government; but they are not known to jurors, but only to navigators and persons familiar with nautical regulations. It was entirely competent to prove by witnesses the meaning of such terms, and what certain kinds of lights were intended to indicate.

We have examined the charge of the judge, and deem it unnecessary to comment upon the exceptions relating to that. The charge was eminently clear and fair, and presented the matter to the jury fully and completely, with conspicuous impartiality.

Upon a review of the whole record, we find no error.

The motion to nonsuit is covered by the ruling on the prayer for instruction, and is therefore overruled.

(159 N. C. 532)

LEACH v. FOSBURGH LUMBER CO.

(Supreme Court of North Carolina. Sept. 11, 1912.)

1. FRAUDS, STATUTE OF (§ 99*)—CONVEYANCE OF RIGHT OF WAY—SUFFICIENCY OF "MEMORANDUM."

The mere indorsement and deposit for collection of a check tendered in payment for a right of way is not a sufficient "memorandum," within Revisal 1905, § 976, which requires a conveyance of an interest in land to be in writing.

[Ed. Note.—For other cases, see *Frauds, Statute of*, Cent. Dig. § 188; Dec. Dig. § 99.*]

For other definitions, see *Words and Phrases*, vol. 5, pp. 4472, 4473; vol. 8, p. 7720.]

2. EVIDENCE (§ 151*)—EXPLANATION OF ACTS.

On an issue as to whether plaintiff granted a right of way to defendant, plaintiff was entitled to explain why he indorsed and deposited for collection a check tendered in payment for a right of way.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. § 440; Dec. Dig. § 151.*]

3. LICENSES (§ 51*)—CONVEYANCES—CONDITIONS—DUTY TO CONFORM TO.

One who enters land under a deed for a right of way is bound by the terms of such deed.

[Ed. Note.—For other cases, see *Licenses*, Cent. Dig. § 108; Dec. Dig. § 51.*]

4. LICENSES (§ 51*)—RIGHT OF WAY—DAMAGES.

If defendant entered plaintiff's land to construct a right of way under permission, but on a misunderstanding as to the terms on which the right of way should be granted, defendant is not a willful trespasser, and cannot be held for exemplary damages, but is liable for the value of the right of way, its use and occupation, and any injury to the land through such occupation, subject to accounting by plaintiff for payment made by defendant and interest thereon.

[Ed. Note.—For other cases, see *Licenses*, Cent. Dig. § 108; Dec. Dig. § 51.*]

Appeal from Superior Court, Halifax County; Cline, Judge.

Action by M. T. Leach against the Fosburgh Lumber Company. Judgment for plaintiff, and defendant appeals. New trial granted.

Civil action to recover damages for entering upon the plaintiff's land and occupying a right of way across the same. The defendant claimed the right of way under a contract alleged to have been executed by the plaintiff. The following issues were submitted to the jury:

"1. Is the paper writing set out in the complaint, providing for a one-year right of way and a one-year privilege, the contract and agreement entered into between the parties hereto? Answer: No.

"2. Is the paper writing originally prepared by Joseph P. Pippin, providing for a five-year right of way and a five-year extension privilege, the contract and agreement between the parties, as alleged in the answer? Answer: Yes.

"3. Has the defendant failed and refused to comply with its agreement, as alleged in the complaint? Answer:

"4. Is the defendant trespassing upon plaintiff's lands, as alleged in the complaint? Answer:

"5. What are the plaintiff's damages? Answer:"

From the judgment rendered, the defendant appealed.

W. E. Daniel, E. L. Travis, and R. C. Dunn, for appellant. Mason, Worrell & Long and Geo. C. Green, for appellee.

BROWN, J. The defendant was negotiating with the plaintiff for a right of way across his lands in Halifax county, and the question to be determined is whether the defendant acquired any title thereto. The desired right of way was three-quarters of a mile long and was to be used for a lumber road to haul out the defendant's logs. The negotiations were conducted with the plaintiff by one Joseph Pippin, an attorney. The evidence shows that Pippin prepared a contract for a five-year right of way and sent it to Leach, together with a check for \$275. The plaintiff requested the court to instruct the jury substantially in the fifth and sixth prayers for instruction that there was no sufficient evidence, that Leach executed or assented to the contract for five years as first prepared and sent to him, and that the jury should be directed to answer the second issue "No." His honor refused to give this instruction, and in so doing we think he was in error.

The evidence shows that, when the plaintiff received the five-year contract, he placed the check in the bank for collection for his credit, and that he returned the contract for five years to Pippin, refusing to sign it. The plaintiff testified that he told Mr. Gray, defendant's agent, that he would not sign a contract for any specific number of years

beyond one. It is further in evidence by the testimony of Pippin himself, a witness for the defendant, that he returned the contract to the plaintiff with instructions to make such changes as he saw fit, and that the plaintiff changed it to its present form, then executed and returned it to Pippin, who delivered it to the defendant's agent. As returned to Pippin, as delivered to the defendant, and as executed by the plaintiff, the contract conferred a right of way for one year for the consideration of \$275, with the right of renewal for one additional year upon the payment of the further sum of \$275.

[1] There is no evidence whatever that the plaintiff ever executed any other contract than this. A mere indorsing of a draft for money and placing it in the bank for collection upon the part of the plaintiff would not be sufficient of itself to convey a right of way or any other interest in the plaintiff's land. This is not such a memorandum as fulfills the requirement of the statute. *Pell's Rev.* § 976, and cases cited; *Hall v. Misenheimer*, 137 N. C. 186, 49 S. E. 104, 107 Am. St. Rep. 474.

[2] The act of receiving the check and depositing it in the bank for collection is an act which in itself is open to explanation. *Clark on Contracts* (2d Ed.) p. 27. This opportunity to explain why he deposited the check was denied to the plaintiff, and is the basis of one of his exceptions. All the evidence, we think, shows that the plaintiff deposited the check in the bank to his credit, being admittedly solvent, to await the result of further negotiations. That he did not accept it in payment for a five-year contract for the right of way is conclusively shown by the admitted fact that he at once returned the contract to Pippin, refusing to execute it in its then form. Besides, he had also informed Mr. Gray, the defendant's agent, he would not sign a contract for five years. It appears in evidence that, when the plaintiff received the contract from Pippin, and changed its terms to one year, and signed it and returned it to Pippin, Pippin delivered it to the defendant's agent.

[3] The question, then, to be determined, is: Did the defendant, after receiving this contract from Pippin, as executed by the plaintiff, accept it, and enter upon the plaintiff's lands, and prosecute his work under it? If so, the defendant would be bound by it, and compelled to perform it; for one who accepts a deed is bound by its terms and conditions. *Fort v. Allen*, 110 N. C. 184, 14 S. E. 685.

[4] If the jury should find that the defendant did not accept the contract as finally executed and returned by the plaintiff, and did not act under it, then there would be no contract in existence between the plaintiff and the defendant, no coming together of two minds, and the parties would

stand upon their legal rights as if no contract had been attempted to be made. We do not think in any view of the evidence, that the defendant can be held to be a willful trespasser; for he entered upon the land by the plaintiff's permission, although there seems to have been a misunderstanding as to terms.

Such being the case, it would be liable to the plaintiff for the value of the right of way, its use and occupation, and any real injury that the land had sustained in consequence of such occupation; but the defendant could not in any view be held for exemplary damages. At the same time the plaintiff must necessarily account for the \$275 and interest thereon accruing since he received it.

We are of opinion that a new trial should be had, to the end that proper issues be submitted to the jury.

New trial.

(159 N. C. 507)

WALSH MFG. CO. v. PLYMOUTH LUMBER CO.

(Supreme Court of North Carolina. Sept. 11, 1912.)

SALES (§ 286*)—CONTRACTS OF SALE OR RETURN—DUTY OF BUYER.

A contract to sell a dry kiln apparatus, warranted as to quality and workmanship, under a provision that, on the failure of the kiln to do the work as warranted, the buyer should notify the seller, giving the latter opportunity to correct any defects, and providing that if, after such correction, the kiln still failed to do the work as warranted, the buyer should return it to the seller, and that thereupon all money paid on the price, etc., should be refunded, without further responsibility of the seller, is an enforceable contract for sale or return, and the buyer's failure to comply with the conditions of the warranty is fatal to a counterclaim for damages resulting from breach of the warranty in a suit brought by the seller for the price; the buyer retaining the property.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 809; Dec. Dig. § 286.*]

Appeal from Superior Court, Washington County; Bragaw, Judge.

Action by the Walsh Manufacturing Company against the Plymouth Lumber Company. Judgment for plaintiff, and defendant appeals. Affirmed.

This action was brought to recover the contract price for a certain green gum dry kiln, and is based upon a written contract. The defendant resisted the right of the plaintiff to recover: First, because the material and workmanship of the equipment was not first-class in every particular, as guaranteed in said contract, but, on the contrary, was of an inferior quality, and in many respects defective; second, because the dry kiln failed to do the work which the plaintiff guaranteed it would do. The defendant further contended that because of defects in the material of the dry kiln, and its failure to do

the work guaranteed, it lost a large amount of lumber while testing same under the direction of the plaintiff. The defendant offered evidence tending to sustain its contention, and there was evidence to the contrary offered by the plaintiff.

The material parts of the written contract, under which the plaintiff sold the kiln to the defendant, are as follows: "We guarantee the material and workmanship of the above-specified equipment to be first-class in every particular, and, in consideration of payments being made as agreed, we further guarantee that, when kiln is constructed in strict accordance with our plans, and operated as per our instructions, and furnished with steam at 14 hours per day, and exhaust steam at 2 to 5 pounds, the remaining 10 hours 70 pounds' pressure at kiln, to be of ample capacity to dry 7,500 feet 1-inch x 16-foot gum lumber per day of 24 hours' continuous operation, without adding to any defects the stock may have when placed in the kiln, such as checking, mildewing, molding, or discoloring, and the material so dried will not warp or twist to any greater extent than by outdoor piling. It is understood that you are to furnish all the necessary material for testing the capacity of the kiln, material to be green from the saw when it is placed in the kiln." "In the event of the failure of the kiln to do the work as guaranteed, you having given us due notice in writing to that effect, and afforded us the opportunity of making any necessary corrections, and after such corrections, the kiln should still fail to work as guaranteed, you are to reload the material furnished within 10 days and return to us. Upon receipt of bill of lading covering the shipment of same in good condition, we will refund all money covering freight charges paid by you, also the amount of any cash payments made to us, and further responsibility on our part shall then cease. It is agreed that, should you violate any of the provisions of this agreement, then the right to return apparatus shall be forfeited, and you will pay to us as liquidated damages the sum of money herein specified under the heading of price, the same as though you had volunteered your acceptance in writing."

After the jury was impaneled, defendant admitted the execution of the contract and amount of debt, nothing else appearing, and assumed the burden upon its counterclaim and recoupment. There was no evidence that, after notice in writing, the plaintiff was given the opportunity to correct any defects, or that the defendant offered to return the property, and the defendant failed to make the cash payment of \$700, and retained the kiln, and has continued to use it. After the conclusion of the evidence, the court, being of opinion that the failure of

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

defendant to allow plaintiff to make test, together with defendant's failure to return or offer to return the property to plaintiff, the defendant could not maintain its counterclaim against plaintiff, and granted the motion to dismiss the alleged counterclaim, and gave judgment for plaintiff, and defendant excepted.

H. S. Ward and Gaylord & Gaylord, for appellant. Pruden & Pruden, Wm. Bond, and Wm. Bond, Jr., for appellee.

ALLEN, J. The correctness of the ruling in the superior court depends on the construction of the written contract entered into between the plaintiff and the defendant. By its terms the plaintiff agreed to furnish the defendant a complete dry kiln apparatus for the sum of \$1,725, of which \$700 was to be paid in cash, and it guaranteed its quality and workmanship, and it was provided therein that, upon failure of the kiln to do the work *as guaranteed*, the defendant should notify the plaintiff to that effect, and give it the opportunity to correct any defects, and if, after such correction, the kiln still failed to do the work as guaranteed, the defendant agreed to reload the material furnished and ship to the plaintiff. It was further stipulated in the contract that, upon return of the material, the plaintiff would refund all money covering freight charges and cash payments paid by the defendant, and that further responsibility on the part of the plaintiff should then cease. The defendant did not give the plaintiff the opportunity to correct defects, if they existed, nor did it offer to return the material.

The contract is fair and reasonable on its face, and in the absence of fraud, which is not alleged, must be enforced. It belongs to the class of contracts called "Contracts of Sale or Return," of which it is said in Parsons on Contracts (5th Ed.) vol. 1, p. 539: "In these the property in the goods passes to the purchaser, subject to an option in him to return them within a fixed time or a reasonable time; and if he fails to exercise this option by so returning them, the sale becomes absolute, and the price of the goods may be recovered in an action for goods sold and delivered"—and in Cyc. vol. 35, p. 237: "Where the contract provides for a return of the goods if not satisfactory, the buyer cannot relieve himself from liability for the price, unless he returns or offers to return them, and the offer to return must be unconditional." This principle, as applicable to the facts in this case, is approved in Main v. Griffin, 141 N. C. 43, 53 S. E. 727, Main v. Field, 144 N. C. 307, 56 S. E. 943, 11 L. R. A. (N. S.) 245, 119 Am. St. Rep. 956, and Piano Co. v. Kennedy, 152 N. C. 197, 67 S. E. 488, in which last-cited case the court says: "We have recognized the prin-

ciple that there can be no implied warranty of quality in the sale of personal property where there is an express warranty, and that where a party sets up and relies upon a written warranty he is bound by its terms and must comply with them. 30 Am. & Eng. p. 199; Main v. Griffin, 141 N. C. 43, 53 S. E. 727. We recognize the further principle, applied by us in that case, that a failure by the purchaser to comply with the conditions of the warranty is fatal to a recovery for breach of the warranty in an action on it, or where, as in this case, damages for the breach are pleaded as a counterclaim in an action by the seller for the purchase money."

The defendant, having failed to return the material, and not having offered to do so, and having failed to perform other stipulations contained in the contract, was not entitled to recover on his counterclaim, and on the admitted facts judgment was properly rendered in favor of the plaintiff for the contract price.

No error.

(180 N. C. 17)

WOOD et al. v. WOODLEY et al.

(Supreme Court of North Carolina. Sept. 11, 1912.)

1. EASEMENTS (§ 3*)—RIGHT OF WAY—GRANTS.

A grantee of a part of a parcel of land abutting on a street, together with a right of way over the remaining part to the street, acquires a right of way appurtenant to the land conveyed, inuring to himself, his heirs and assigns, as owners and occupants of the land, and not otherwise; and he may not convey to another a right of way in gross or a right of way appurtenant as owner of an entirely separate parcel of land.

[Ed. Note.—For other cases, see Easements, Cent. Dig. §§ 8-12; Dec. Dig. § 3.*]

2. INJUNCTION (§ 47*)—THREATENED EXERCISE OF ILLEGAL RIGHT.

Where a deed purporting to convey to the grantee a right of way over a third person's land in fact conveyed no right over such land, but the grantee threatened to exercise the right, equity would, at the suit of the third person, enjoin the exercise of the right claimed.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 100; Dec. Dig. § 47.*]

Appeal from Superior Court, Pasquotank County; Stephen C. Bragaw, Judge.

Action by John Q. A. Wood and another against W. J. Woodley and another. From an order continuing a preliminary restraining order until the hearing, defendants appeal. Affirmed.

W. A. Worth and E. F. Aydlett, for appellants. Ward & Thompson, for appellees.

HOKE, J. [1] On the hearing it was made to appear: That on May 8, 1899, one Wiley N. Gregory owned a parcel or lot of land in Elizabeth City, N. C., abutting on the south on Matthews street, and on said

day he conveyed to W. J. Broughton and wife the northern portion of this lot, to the amount of one acre. The deed, after describing and conveying the acre in question, contained the following: "Together with the right of ingress and egress for the space of 20 feet wide along the Riggs line to Matthews street"—the habendum being as follows: "To have and to hold the said lot of land as follows, with the right and privileges thereto belonging to the said Wm. J. Broughton and his heirs and assigns forever." And on March 28, 1900, said Broughton and wife conveyed said acre of land by apt words to defendant W. J. Woodley; this deed containing the same stipulation for ingress and egress with habendum as follows: "To have and to hold the aforesaid land, etc., together with all improvements, privileges, and appurtenances thereto belonging, to the said W. J. Woodley and his heirs and assigns," etc. That on the 11th of November, 1904, said Wm. Gregory conveyed the southern portion of the aforesaid land to one Joseph A. Byrum, subject to the above right of way, and on September 1, 1908, said Byrum conveyed said southern portion to plaintiff subject to the same right of way, etc. That on February 16, 1912, defendant A. C. Stokes owned a parcel or lot of land adjoining the acre conveyed by Gregory to Broughton, and from Broughton to Woodley, and on said date said Woodley undertook to convey to A. C. Stokes, owning and occupying this adjoining lot, the right to use and enjoy the right of way created and conveyed by said deeds of Gregory and Broughton in terms as follows: "Do bargain, sell, give, grant, and convey unto the party of the second part, his heirs and assigns, a right of way over and along the southwest corner of the property purchased by said W. J. Woodley from W. J. Broughton and wife, said right of way to be 20 feet wide east and west, and 40 feet long north and south, together with the right of ingress and egress over and along a 20-foot alley leading from Matthews street to the property described above, along the eastern side of the Riggs land in so far as the parties of the first part have authority to convey, and for further reference see deed to said W. J. Woodley from W. J. Broughton and wife, recorded in Book 21, page 644, register of deed's office for Pasquotank county." It was further alleged and admitted that said defendant A. C. Stokes intended presently to use and enjoy said way, claiming the right to do so under said deed from his codefendant, Woodley.

Upon these facts the restraining order was properly continued to the hearing. The

deeds from Gregory to Broughton and from Broughton to Woodley conveyed the land therein described, and a right of way over the remaining portion of the tract to Matthews street. It was, however, a right of way appurtenant to the land conveyed, inuring to Woodley, his heirs and assigns, as owners and occupants of said land and not otherwise, provided that, even as to them, the burden could not be unduly increased. "It may accordingly be stated as a general principle that, if an easement has become appurtenant to an estate, it follows every part of the estate into whosoever hands the same may come by purchase or descent, 'quacunq̃ue servitus fundo debetur, omnibus ejus partibus debetur,' provided the burden upon the servient estate is not thereby increased." Washburn on Easements (3d. Ed.) p. 36. This being the extent of his right over plaintiffs' lands, Woodley had no power to convey to Stokes either a right of way in gross or a right of way appurtenant as owner of an entirely distinct and separate parcel of land. In Jones on Easements the doctrine is stated as follows: "Sec. 28. An appurtenant easement cannot be conveyed by the party entitled to it separate from the land to which it is appurtenant. It can be conveyed only by a conveyance of such land. It adheres in the land and cannot exist separate from it. It cannot be converted into an easement in gross." And further at section 360: "One having a right of way appurtenant to certain land cannot use it for the benefit of other land to which the right is not attached, although such other land is within the same inclosure with that to which the easement belongs. Except for this rule, the burden upon the servient estate might be increased at the pleasure of the owner of the dominant estate. This rule is therefore applicable, whether the way was created by grant, reservation, prescription, or as a way of necessity. In either case the way is created by grant, either express, presumed or applied. The way is granted for the benefit of the particular land, and its use is limited to such land. Its use cannot be extended to other land, nor can the way be converted into a public way without the consent of the owner of the servient estate."

[2] The deed of W. J. Woodley therefore conveyed to defendant Stokes no right of way over plaintiffs' land. On the facts as they now appear the threatened exercise of such right was properly enjoined. 23 A. & E. (2d Ed.) p. 35.

There is no error, and the judgment continuing the restraining order to the hearing is affirmed.

Affirmed.

(159 N. C. 497)

SNOWDEN v. BELL.

(Supreme Court of North Carolina. Sept. 11, 1912.)

1. EASEMENTS (§ 8*)—PRIVATE WAYS—ACQUISITION BY ADVERSE USE.

The right to a private way may be acquired by a continuous adverse use for 20 years, but mere user for that time is insufficient.

[Ed. Note.—For other cases, see Easements, Cent. Dig. §§ 23, 24, 33; Dec. Dig. § 8.*]

2. ADVERSE POSSESSION (§ 31*)—DEFINITION—"ADVERSE USER."

The term "adverse user," or "adverse possession," implies a user or possession that is not only under a claim of right, but that is open and of such character that the true owner may have notice of the claim.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 123-133; Dec. Dig. § 31.*]

For other definitions, see Words and Phrases, vol. 1, pp. 227-236; vol. 8, p. 7568.]

3. ADVERSE POSSESSION (§ 114*)—CIRCUMSTANTIAL EVIDENCE—ADVERSE USER.

Adverse user or possession under a claim of right may be established by circumstantial, as well as by direct, evidence.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 682-690; Dec. Dig. § 114.*]

4. EASEMENTS (§ 61*)—PRIVATE WAYS—ADVERSE USER—JURY QUESTION.

In an action to restrain defendant from obstructing a lane over which plaintiff claims the right to travel as a private way, *held*, under the evidence, a jury question whether he had maintained adverse user for more than 20 years.

[Ed. Note.—For other cases, see Easements, Cent. Dig. §§ 102, 130, 144, 148; Dec. Dig. § 61.*]

5. EVIDENCE (§ 587*)—CIRCUMSTANTIAL EVIDENCE—WEIGHT.

When a fact is to be proven by circumstantial evidence, the finding of the jury is not dependent altogether upon belief in the truth of the evidence, as the jurors must not only believe the witnesses, but must also draw from their testimony the inferences arising from the facts proven.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2436; Dec. Dig. § 587.*]

6. EASEMENTS (§ 61*)—RIGHT OF WAY BY ADVERSE USER—INSTRUCTIONS.

In an action to restrain defendant from obstructing a lane over which plaintiff claims the right to travel as a private way through adverse user, it was the trial judge's duty to explain to the jury the meaning of the term "adverse user," and to direct a finding for plaintiff if the greater weight of the evidence showed that there had been adverse user for 20 years, and otherwise to find for defendant.

[Ed. Note.—For other cases, see Easements, Cent. Dig. §§ 102, 130, 144, 148; Dec. Dig. § 61.*]

Appeal from Superior Court, Currituck County.

Action by Edmond Snowden against C. M. Bell. Judgment for plaintiff, and defendant appeals. New trial granted.

The plaintiff brings this suit to restrain the defendant from interfering with his use of a lane from the Etheridge farm, owned by plaintiff, and running eastwardly to the public road leading to Snowden station.

Plaintiff's evidence tends to prove that the Etheridge and Humphrey lands were originally owned by Isaac Snowden; that this lane in controversy runs between the Bell land on the north and the Humphrey land on the south, and runs to the Etheridge land; that for years the Isaac Snowden fence to Humphrey land was *inside* the lane, and that there was a line tree of the Etheridge farm at the end of this lane; that the lane has been kept up jointly by Bell and Snowden heirs, and plaintiff when he succeeded the Snowden heirs, since its establishment; also that for 50 to 60 years the owners of the Etheridge and Humphrey farms have continuously used this lane for any and all purposes. The plaintiff also offered evidence that he did not know of permission to use the lane being asked at any time, and that he used it as of right. There was also evidence that the defendant caused a warrant to issue against a tenant of the plaintiff for using the lane, and that the plaintiff gave the defendant a bond to repair any injuries to the lane caused by his hauling logs over it, at a time when he wished to use it for that purpose.

The following issues were submitted to the jury:

"1. Is the plaintiff the owner of an easement entitling him to use the lane in controversy? Answer: Yes.

"2. If so, has defendant obstructed plaintiff in the use of said lane as alleged? Answer: Yes."

At the conclusion of the evidence, his honor instructed the jury to answer the first issue, "Yes," if they believed the evidence, and the defendant excepted. Judgment was rendered on the verdict in favor of the plaintiff, and the defendant appealed.

Ward & Grimes, for appellant. E. F. Aylett and J. C. B. Ehringhaus, for appellee.

ALLEN, J. [1] It is well established in this state that the right to a private way may be acquired by a continuous adverse use for 20 years and that a mere user for the required period is not sufficient to confer the right. *Ingraham v. Hough*, 46 N. C. 43; *Mebane v. Patrick*, 46 N. C. 23; *Ray v. Lipscomb*, 48 N. C. 186; *Boyden v. Achenbach*, 79 N. C. 539; *Id.*, 86 N. C. 397. In the last case cited the doctrine is well stated as follows: "It would be unreasonable to deduce from the owner's quiet acquiescence, a simple act of neighborhood courtesy, in the use of a way convenient to others and not injurious to himself, over land unimproved or in woods, consequences so seriously detracting from the value of the land thus used, and compel him needlessly to interpose and prevent the enjoyment of the privilege in order to the preservation of the right of property unimpaired. And so it is declared in *Mebane v. Patrick*, 46 N. C. 23, and reiterated in *Smith v. Bennett*, *Id.* 372, by the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes 75 S.E.—46

late Chief Justice, in his comments upon the charge that, if the plaintiff had continuously and without interruption used and enjoyed the way for more than 20 years, he was entitled to recover. He says: 'The charge is correct as far as it goes, but it does not go far enough. There is another and very essential requisite, in order to raise the presumption of a grant. The user must be adverse and as of right.' Again, in *Ray v. Lipscomb*, 48 N. C. 185, referring to those adjudications, he says: 'These cases, as it seems to us, put the doctrine of presumption of a right of way from user on its true basis; and as was said in the argument, considering the state of things among us for many years past in regard to a neighbor's passing on the uninclosed land of another, either on horseback or with his wagon, any other conclusion would have resulted in great and general inconvenience.' There must, then, be some evidence accompanying the user, giving it a hostile character, and repelling the inference that it is permissive and with the owner's consent, to create the easement by prescription and impose the burden upon the land."

[2, 3] The term "adverse user" or "adverse possession" implies a user or possession that is not only under a claim of right, but that it is open and of such character that the true owner may have notice of the claim, and this may be proven by circumstances as well as by direct evidence. In *Parker v. Banks*, 79 N. C. 485, the court, speaking of an adverse possession, says: "Mr. Angell says 'that the clearest and most comprehensive definition of a disseisin and adverse possession is an actual, visible, and exclusive appropriation of land, commenced and continued under a claim of right.' The claim must be adverse, and accompanied by such an invasion of the rights of the opposite party as to give him a cause of action. It is the occupation with an *intent* to claim against the true owner, which renders the entry and possession adverse; and it is the settled doctrine that this question of adverse possession, as one of intention, ought to be found by the jury, or in some other way ascertained as an essential fact, without which the quality of the possession cannot be determined."

[4] Applying these principles, we are of opinion that the plaintiff introduced evidence of an adverse user for more than 20 years, which entitled him to have his case submitted to the jury, but that it was not of such conclusive character as to warrant a peremptory instruction in favor of the plaintiff. A user for more than 40 years is clearly shown, but much of the evidence is consistent with the contention that it was not hostile and adverse, but permissive, and the evidence of notice to the defendant that it was under a claim of right was entirely circumstantial.

[5] When a fact is to be proven by circumstantial evidence, the finding of the jury is not dependent altogether upon belief in the truth of the evidence, as the jurors must not only believe the witnesses, but must also draw from their testimony the inferences arising from the facts proven. There is also evidence, although not clearly stated, that the defendant objected to one of the tenants using the way, and that he required the plaintiff to execute a bond to him to repair any injuries caused by hauling timber over it.

[6] We think it was the duty of his honor to explain to the jury the meaning of the term "adverse user," and to instruct them to answer the issue in the affirmative if they found, by the greater weight of the evidence, there had been such user for 20 years, and otherwise to answer the issue in the negative, and that there was error in the instruction given.

New trial.

(160 N. C. 312)

DOLES v. SEABOARD AIR LINE RY. CO.

(Supreme Court of North Carolina. Sept. 11, 1912.)

CONTRIBUTION (§ 5*)—JOINT TORT-FEASORS—LIABILITY.

Where the negligence of an express company in leaving its truck near a railroad track and the negligence of the railroad company in operating its train concurred in causing the death of a passenger, unable to gain a foothold on the train because of its speed and the crowded condition of the platform, and knocked under the cars by the truck, the two companies were joint tort-feasors as to the administrator of the deceased passenger, suing for his death, and as between the companies there was no right of indemnity or contribution, though the negligent act of the express company would not have injured the passenger, if the railroad company had not also been negligent.

[Ed. Note.—For other cases, see Contribution, Cent. Dig. §§ 6-9; Dec. Dig. § 5*]

Appeal from Superior Court, Northampton County; Cline, Judge.

Action by J. W. Doles, administrator of Frank Brown, deceased, against the Seaboard Air Line Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Mason & Worrell and Murray Allen, for appellant. S. T. Stancell, Peebles & Harris, and Gay & Midyette, for appellee.

WALKER, J. It is not necessary to make an extended statement of the facts in this case. The plaintiff's intestate, Frank Brown, was killed at Suffolk, Va., while, as alleged, he was boarding the defendant's passenger train at that place, bound for Margaretsville, in this state. The plaintiff's testimony tended to show that the intestate purchased a ticket for his passage from Suffolk to his destination, and was in the act of getting upon the passenger coach just after the con-

ductor had given the call, "All aboard!" when the train was started, "at once after the signal was given," and the intestate, who was unable to gain a foothold because of the speed of the train and the crowded condition of the steps and platform of the car, was knocked under the cars by a truck of the Southern Express Company, which had been left on the platform at the station, within a few feet of the passing train, and killed. One witness testified that the train started with a jerk and "with full force," while passengers were trying to alight from the train and the intestate was attempting to get on the steps, and that plaintiff could have been seen by the engineer and the porter, who called for passengers to get aboard. On the contrary, there was evidence tending to show that the train started at its usual speed, and that intestate was leaving the car, and jumped on the truck, and was killed. There was also evidence that he was warned not to leave the car by the porter, who told him that he would have the train stopped, so that he could get off safely. It may be said, generally, that some of the evidence tended to show negligence on the part of the defendant, which proximately caused the intestate's death, while there was other evidence which tended to prove that the intestate's death was caused entirely by his own fault in jumping from a rapidly moving train.

The court submitted the case to the jury in a charge which fully explained every phase of the evidence and clearly set forth the law applicable to the facts as they might find them to be. The charge of the court was in accordance with the principles laid down in *Roberts v. Railroad*, 155 N. C. 79, 70 S. E. 1080, and the essential facts of the two cases cannot well be distinguished. That case must control our decision in this one on all the points raised by the defendant, except the contention that the court should not have entered a nonsuit upon the evidence as to the Southern Express Company. The defendant objected to this ruling of the court, and relies upon *Gregg v. Wilmington*, 155 N. C. 18, 70 S. E. 1070, to sustain his objection. But we do not see the analogy between the two cases. In that case, Wolvin's negligence was active and the efficient cause of the injury, while the negligence of the city of Wilmington was merely passive, in allowing the dangerous condition, brought about by Wolvin's negligence, to exist in one of its streets. The city did not actually co-operate with Wolvin in committing the wrong to the plaintiff's intestate. In the *Gregg Case*, approving what is said by Judge Cooley in his treatise on Torts (3d Ed., p. 254), we stated the general rule to be according to the maxim that no man can make his own misconduct the ground for an action against another in his own favor. If he suffers because of his own wrongdoing, the law

will not relieve him. The law cannot recognize equities as springing from a wrong in favor of one who was concerned in committing it. 155 N. C. 24, 70 S. E. 1070. Where two or more persons have participated in the commission of a wrong, the general rule undoubtedly is that a right to contribution or indemnity will not arise in favor of the one held responsible by the injured party. 88 Cyc. 493. There are exceptions to the rule, but this case is not included in any of them.

The case of *Churchill v. Holt*, 181 Mass. 67, 41 Am. Rep. 191, seems to be a strong authority against the contention of the defendant. It appeared that Churchill left his hatchway in an unsafe condition. Defendant's servant, in the performance of his master's business, interfered with it, so that it became more dangerous—that is, the danger already existing by the fault of Churchill was increased—and Mrs. Meston fell into the hatchway, and was thereby injured, and recovered damages of Churchill. It was held that Churchill was not entitled to indemnity or contribution from the defendant, Holt, whose servant interfered with the hatchway. With respect to the right of indemnity, upon the facts presented, the court said: "In such a case, both parties, whether they act with a common purpose or independently, aid in creating the danger or nuisance, and it is impossible to apportion the degree of their respective negligence, or to determine by whose individual negligence the injury was caused. They are both wrongdoers, whose unlawful acts contribute to produce the injury. They are in *pari delicto*, and therefore neither can recover indemnity or contribution of the other. The plaintiffs contend that they had the right to go to the jury upon the question whether the sole cause of the injury to Mrs. Meston was the negligent acts of the defendants' servant. We must presume that proper instructions were given as to other aspects of the case; but, in the aspect of the case supposed in the instruction we are considering, that is, if the jury found that the plaintiffs negligently left the hatchway in a dangerous condition, and that the acts of the defendants' servant merely made it more dangerous, it is impossible for the jury to find that the fault of the plaintiffs did not contribute to the injury. It is like the case of a man injured by falling into a hole dug partly by one person and partly by another. The acts of both aid in creating the danger which causes the injury, and it cannot be ascertained whether the acts of one excluding the acts of the other would have caused the same injury. If the acts are unlawful, both are wrongdoers in *pari delicto*, and, though each would be liable to the person injured, neither could recover indemnity or contribution of the other." *Churchill v. Holt*, 181 Mass. 67, 41 Am. Rep. 193. When the same

case was before the court on a former appeal (127 Mass. 165, 34 Am. Rep. 355), it was said: "The rule that one of two joint tortfeasors cannot maintain an action against the other for indemnity or contribution does not apply to a case where one does the act or creates the nuisance, and the other does not join therein, but is thereby exposed to liability. In such case the parties are not in pari delicto, as to each other, though as to third persons either may be held liable."

But that is not our case. Here the express company left the truck near the track of the railroad company, and, if this was a negligent act, it would not have harmed the intestate if the defendant had not also been negligent. The two acts concurred in producing the injury, and, upon the assumption that the express company was negligent, it and the railroad company were joint tortfeasors, as to the plaintiff and as between themselves, and there is no right of indemnity or contribution. It may also be said that the defendant's wrong was the active and dominant cause of the injury, without which it would not have occurred, and it therefore has no ground whatever upon which to base a claim for compensation against its codefendant. *Commissioners v. Indemnity Co.*, 155 N. C. 219, 71 S. E. 214.

We find no error in the record.

No error.

(159 N. C. 513)

BROCK v. SCOTT.

(Supreme Court of North Carolina. Sept. 11, 1912.)

1. ABATEMENT AND REVIVAL (§ 11*)—PENDENCY OF OTHER ACTION.

The pendency of an action begun before a justice of the peace at the time of the institution in the superior court of an action on the same cause of action does not justify a dismissal of the action in the superior court, where judgment of nonsuit was entered in the prior action before pleadings were filed in the subsequent action.

[Ed. Note.—For other cases, see *Abatement and Revival*, Cent. Dig. §§ 86, 94-104; Dec. Dig. § 11.*]

2. COURTS (§ 121*)—JURISDICTION—AMOUNT IN CONTROVERSY.

The sum demanded in good faith by plaintiff determines the jurisdiction of the superior court; and a plaintiff, instituting an action in the superior court pending an action begun in justice's court on the same cause of action, and alleging facts which, if proved, justify a judgment in excess of \$200, shows a case within the jurisdiction of the superior court, though he is mistaken as to the legal effect of remitting in the first action the excess over \$200 to confer jurisdiction on the justice, so that he cannot recover in the superior court more than \$200.

[Ed. Note.—For other cases, see *Courts*, Cent. Dig. §§ 413-426, 428; Dec. Dig. § 121.*]

3. JUSTICES OF THE PEACE (§ 44*)—REMITTING EXCESS OVER \$200 TO CONFER JURISDICTION—EFFECT.

Revisal 1905, § 1421, providing that where, in an action by a justice, the principal sum demanded exceeds \$200, the justice shall dismiss

the action unless plaintiff shall remit the excess above \$200, and the justice shall make the entry that plaintiff remits to defendant the excess, gives to a creditor the opportunity of a speedy trial before a justice by reducing his debt to \$200, but he need not sue before a justice; but where he does so, and remits the excess over \$200 to confer jurisdiction, he releases such excess, and any recovery before the justice or in a subsequent action is limited to \$200.

[Ed. Note.—For other cases, see *Justices of the Peace*, Cent. Dig. §§ 157-172; Dec. Dig. § 44.*]

Appeal from Superior Court, Currituck County; Bragaw, Judge.

Action by C. H. Brock against S. J. Scott. From a judgment of dismissal, plaintiff appeals. Reversed.

This was a civil action for debt; the plaintiff demanding, in his complaint, \$251.02. An action had previously been instituted between the same parties before a justice of the peace on the same cause of action, in which the amount above \$200 was remitted to confer jurisdiction. An appeal from the judgment rendered by the justice was taken to February term, 1910, of the superior court of Currituck, at which term, and on Wednesday of the same, the plaintiff took a voluntary nonsuit. Prior to the taking of this nonsuit, summons in this action was issued and served, which summons was returnable to this same February term, 1910, at which the nonsuit above mentioned was taken. The nonsuit in the action instituted before the justice was taken before any pleadings in this action were filed by either party. At this term the defendant appeared, and both parties asked and obtained time to plead. Between this and the succeeding term the plaintiff filed his complaint for the whole amount of \$251.02 and at the succeeding or fall term, 1910, the defendant filed no plea, and made no motion to dismiss, but again asked for time to answer. Between September term, 1910, and March term, 1911, the answer of defendant was filed, setting up, among other defenses, a plea that an action was pending between the same parties for the same cause at the time of the institution of this action. No motion for the determination of the plea filed was made by the defendant, though the cause was continued from term to term until February term, 1912, from which this appeal was taken. At this last term, when the case was called, defendant for the first time moved to dismiss the action. The motion was allowed, and plaintiff excepted, and appealed to this court.

E. F. Aydlett and J. C. B. Ehringhaus, for appellant. Ward & Grimes, for appellee.

ALLEN, J. [1] The pendency of the action, commenced before the justice of the peace, at the time this action was instituted in the superior court, did not justify

the judgment of dismissal, because a judgment of nonsuit was entered in the former action before pleadings were filed in this, or it came on for trial. *Grubbs v. Ferguson*, 136 N. C. 60, 48 S. E. 551; *Cook v. Cook*, 159 N. C. —, 74 S. E. 639. In the case last cited, Justice Hoke, speaking for the court, says: "As a general rule, this right to plead the pendency of another action between the same parties before judgment had is regarded to a large extent as a rule of convenience, resting on the principle embodied in the maxim, 'Nemo debet bis vexare,' etc. The defect is one that can be waived, and it may also be cured by dismissing the prior action at any time before the hearing."

[2] Nor do we think it is true, as contended by the defendant, that the superior court has no jurisdiction of the plaintiff's cause of action. The plaintiff alleges in his complaint facts which, if true, entitle him to a judgment for more than \$200, and it has been repeatedly held that it is the sum demanded in good faith which determines the jurisdiction. *Sloan v. Railroad*, 126 N. C. 487, 36 S. E. 21; *Cromer v. Marsha*, 122 N. C. 564, 29 S. E. 836; *Horner School v. Wescott*, 124 N. C. 518, 32 S. E. 885; *Boyd v. Lumber Co.*, 132 N. C. 186, 43 S. E. 631; *Shankle v. Ingram*, 133 N. C. 254, 45 S. E. 578; *Thompson v. Express Co.*, 144 N. C. 392, 57 S. E. 18.

The fact that the plaintiff was mistaken as to the legal effect of remitting the excess over \$200, in order to confer jurisdiction on the justice, and cannot now recover more than that sum, does not oust the jurisdiction. In *Boyd v. Lumber Co.*, supra, the sum demanded was \$225, and the plaintiff admitted on the trial that he was not entitled to recover more than \$178.25, and Justice Walker says, in discussing a motion to nonsuit, which was denied: "The aggregate sum demanded in good faith is the test of jurisdiction, and if the plaintiff claimed more than \$200, the fact that he failed in his proof to establish all of his claim did not oust the jurisdiction of the court. The plaintiff may claim a sum sufficient to give the court jurisdiction, and a part of his claim may be based upon an erroneous principle of law, and for this reason he may fail to recover that part, and the total recovery may therefore fall short of the jurisdictional amount; but the court will still have jurisdiction of the case, and may award judgment for the smaller sum, provided it appears that the right to recover the larger amount was asserted in good faith." And in *Horner School v. Wescott*, supra, it was held that the superior court had jurisdiction of a cause of action based on a contract; the plaintiff demanding \$479.25, when he was mistaken as to the construction of the contract and under its terms could not recover more than \$200.

There is no suggestion that the plaintiff was not acting in good faith and did not believe that he was entitled to recover the amount demanded, and no reason can be assigned, upon the facts appearing in the record, for taking a nonsuit in the action commenced before the justice, except that he believed he was entitled to and would claim the full sum alleged to be due him, as an appeal had been taken, and the case would be tried in the superior court in any event.

[3] We are of opinion, however, that the act of the plaintiff in remitting the excess over \$200, in order to confer jurisdiction on the justice, operates as a release, and that the recovery must be limited to that sum. The statute (Rev. § 1421) provides that: "Where it appears in any action brought before a justice, that the principal sum demanded exceeds two hundred dollars, the justice shall dismiss the action and render a judgment against the plaintiff for the costs, unless the plaintiff shall remit the excess of the principal above two hundred dollars, with the interest on said excess, and shall, at the time of filing his complaint, direct the justice to make this entry: 'The plaintiff, in this action, forgives and remits to the defendant so much of the principal of this claim as is in excess of two hundred dollars, together with the interest on said excess.'" The justice of the peace has no jurisdiction in civil actions founded on contract, if the sum demanded, exclusive of interest, exceeds \$200, and the plain purpose of section 1421 of the Revisal is to give to one holding a debt the opportunity of a speedy trial before a justice, by reducing his debt to \$200, instead of requiring him to wait for a term of the superior court.

The plaintiff was not compelled to sue before a justice, but he had the privilege of doing so, and the statute imposes as a condition to the exercise of this privilege that he "forgive and remit to the defendant" so much of the principal of the claim as is in excess of \$200, which is in effect a release. If this is not the correct interpretation of the statute, it would seem that but one other conclusion could be reached, and that is that the plaintiff, having a claim in excess of \$200, can remit the excess and recover judgment for \$200, and hold the excess as a claim against the debtor, which could not have been contemplated. The case of *Coggins v. Harrell*, 86 N. C. 320, sustains this view. In that case the plaintiff sued a surety on the bond of a constable, the penalty of the bond being \$4,000, to recover \$140, and undertook to remit the penalty of the bond in excess of \$140, and the court, after holding that the plaintiff did not have the right to remit, says: "If this plaintiff could remit the penalty of the bond, as attempted in this case, the bond would be satisfied by the judgment rendered upon it, and

no action would lie for any further breaches thereof by other parties claiming to be injured thereby."

We conclude that the superior court has jurisdiction, but that the plaintiff cannot recover more than \$200 principal money.

Reversed.

(159 N. C. 535)

HODGES v. SMITH.

(Supreme Court of North Carolina. Sept. 11, 1912.)

1. APPEAL AND ERROR (§ 999*)—REVIEW—FINDINGS—CONCLUSIVENESS.

In an action for personal injury caused by a horse bought from defendant by plaintiff, findings against defendant on issues as to warranty and false representation as to the qualities of the horse are conclusive on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3912-3924; Dec. Dig. § 999.*]

2. SALES (§ 441*)—FALSE REPRESENTATIONS BY SELLER—EVIDENCE—SUFFICIENCY.

In an action for personal injury caused by a horse bought by plaintiff from defendant, evidence held to sustain a finding that defendant falsely represented that the horse was gentle and that he knew of its vicious propensities.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1277-1283; Dec. Dig. § 441.*]

3. SALES (§ 261*)—MISREPRESENTATION BY SELLER—LIABILITY.

A seller of a horse is liable for falsely representing it to be gentle, though the representation was made in good faith; he having no right to make it, unless he positively knew that the horse was gentle.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 727-735; Dec. Dig. § 261.*]

4. SALES (§ 442*)—BREACH OF WARRANTY—DAMAGES—ELEMENTS.

A buyer of a horse can recover from the seller for personal injury received through the horse's vicious character; the measure of damages not being limited to the difference between the value of the horse as warranted and as he actually proved to be.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1284-1301; Dec. Dig. § 442.*]

Appeal from Superior Court, Beaufort County; Webb, Judge.

Action by J. B. Hodges against R. L. Smith. Judgment for plaintiff, and defendant appeals. Affirmed.

The following issues were submitted to the jury:

"1. Did defendant warrant and represent to plaintiff that the horse in question was gentle in harness and safe to drive, as alleged in the complaint? Answer: Yes.

"2. If so, was said warranty and representation false, as alleged in the complaint? Answer: Yes.

"3. If so, was plaintiff injured in consequence thereof, as alleged in the complaint? Answer: Yes.

"4. What damage is plaintiff entitled to recover of defendant? Answer: One thousand dollars (\$1,000)."

From the judgment rendered the defendant appealed.

F. G. James & Son and Ward & Grimes, for appellant. Small, MacLean & McMullan, for appellee.

BROWN, J. This case was before this court on a former appeal, and is reported in 158 N. C. 256, 73 S. E. 807. The plaintiff seeks to recover damages for personal injuries sustained by the running away of a horse purchased by him of the defendant, on the ground that the horse was falsely warranted to be gentle. On a former trial a motion to nonsuit was sustained, and this court held that there was sufficient evidence to go to the jury and ordered a new trial.

[1] The issues as to warranty and false representation as to the qualities of the horse have been found against the defendant on a charge not excepted to, and those findings may be considered as settled. The case now comes before this court upon the sole question as to whether, in any view of the evidence, there is sufficient ground to warrant a recovery for damages for injuries consequent upon the running away of the horse.

[2] As we read the case upon the record now sent up, the facts and evidence as developed in the second trial are substantially the same as on the former trial, and are recited fully in the opinion of Mr. Justice Walker. It is contended, however, upon this hearing, that the plaintiff can recover only the difference between the value of the horse as warranted and as he actually turned out to be, upon the ground that there is not evidence of a false representation upon the part of the defendant, or that he knew of the vicious character of the animal.

We think the contention of the learned counsel for the defendant cannot be sustained. It was held by us on the former trial that there was evidence tending to prove that the defendant falsely and knowingly represented that the horse was kind and gentle. The evidence on both trials seems to be practically the same. The plaintiff testified that he went to the defendant's stables in Greenville to purchase a horse, and that he told the defendant that he wanted a gentle horse, "one for my mother and father to drive; that they are old, and I want one that is safe." He said: "All right, we have got him. Here is one that I can sell you that I know is gentle. I can guarantee this horse to be gentle, and that any lady can drive him." The plaintiff testified that he told the defendant that he did not know anything about horses, that he had never bought one before in his life, and the defendant repeatedly stated that he knew this horse to be gentle, and that he guaranteed him to be perfectly gentle. If the evidence introduced by the plaintiff is to be believed, the animal was anything else but gentle, and his "natural gait was running away and kicking." He ran away shortly after the plain-

tiff got him, threw him out of the buggy, and seriously injured him.

It is not necessary to offer evidence that is conclusive of the defendant's knowledge of the vicious character of the horse, but it is only necessary to offer such evidence as is sufficient to go to the jury. The defendant was told by the plaintiff the purpose for which the plaintiff desired the animal, and the defendant repeatedly stated that he knew the horse to be gentle. The horse had been in the defendant's possession for some time, and it is a fair inference, although not a necessary one, that the defendant knew the vicious character of the horse, and misrepresented his qualities to the plaintiff. It is not for us nor for the judge below to draw such inferences; but the evidence in the case is of such a character that his honor was well warranted in submitting it to the jury, that they might draw such inferences if they saw fit.

[3] Assuming that the defendant made this representation as to the horse's qualities in good faith, he had no right to do it, unless he positively knew that the horse was a gentle one, which the evidence shows that he was not, but was an animal of the most vicious and unreliable character. The case of *Allen v. Truesdell*, 135 Mass. 75, cited in the former opinion of this court, is almost on all fours with the present case, and fully warrants the judgment of the court upon the issues as found by the jury.

[4] It being thus adjudicated on the former hearing of this case that there is evidence of false warranty and deceit in the sale of a horse, the rule of damage does not confine the plaintiff solely to such as was in the contemplation of the parties; but, having established to the satisfaction of the jury a tort, the plaintiff is entitled to recover such damages as naturally flow from, and as were consequent upon, the wrongful and tortious conduct of the defendant.

No error.

(159 N. C. 536)

WALKER & MYERS v. COOPER.

(Supreme Court of North Carolina. Sept. 11, 1912.)

1. WITNESSES (§ 162*)—TRANSACTIONS WITH DECEASED AGENT—COMPETENCY.

The testimony of a party as to a conversation with a deceased agent of the adverse party is not incompetent, within Revisal 1905, § 1631, forbidding a party to an action from testifying to a communication with a decedent from whom he derives his interest.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. § 701; Dec. Dig. § 162.*]

2. WITNESSES (§ 414*)—CORROBORATION—ADMISSIBILITY.

Where a party to a contract testified to the failure of the adverse party to furnish materials contracted for, and that he had made complaints to the adverse party, the testimony of a third person that he had heard the party

complain of the failure of the adverse party to furnish the materials was admissible to corroborate the party.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. §§ 1287, 1288; Dec. Dig. § 414.*]

3. APPEAL AND ERROR (§ 690*)—QUESTIONS REVIEWABLE—RECORD.

An exception to the introduction of a part of the examination of defendant taken before trial, under Revisal 1905, § 865, cannot be considered on appeal, where the record, by direction of the party complaining, omits any statement of the examination.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 2897-2899, 2902-2904, 2906, 2908; Dec. Dig. § 690.*]

4. APPEAL AND ERROR (§ 216*)—INSTRUCTIONS—REQUESTS—NECESSITY.

Where, in an action for damages, the court stated the contentions of the parties and authorized a recovery if there had been a failure to deliver materials under the contract, and charged that the jury must ascertain the amount of the damages in view of the contentions of the parties, a party desiring more specific instructions on the measure of damages must request such instructions or he cannot complain.

[Ed. Note.—For other cases, see *Appeal and Error*, Dec. Dig. § 216; Trial, Cent. Dig. §§ 627, 628, 630-641, 660, 662-676.]

Appeal from Superior Court, Bertie County; Cline, Judge.

Action by Walker & Myers against George P. Cooper. From a judgment for defendant, plaintiffs appeal. Affirmed.

This is an action to recover certain personal property, in which the defendant alleges a counterclaim, and demands damages for breach of a logging contract, and this appeal is based upon exceptions relating to the counterclaim; the jury having awarded damages in favor of the defendant. The defendant offered evidence tending to prove that he entered into a contract with the plaintiffs, under which he was to deliver the timber from two tracts of land at Plymouth for \$5 per thousand; that the plaintiffs were to furnish him money and equipment to enable him to perform the contract on his part; that they were to furnish him iron for a railroad track and other equipment; that the plaintiffs failed to perform their agreement, and that he was damaged thereby; that among other elements of damage he lost a profit of \$1.50 per thousand, which he would have made under said contract. The plaintiff offered evidence to the contrary, and particularly that the defendant would have made no profit under said contract, or in any event less than \$1.50 per thousand. There was no evidence that the contract could not have been completed prior to the commencement of this action.

The defendant was examined as a witness and testified, among other things, that the iron for the railroad was not furnished him, and that he made complaints about it; that he told Mr. Bash that he did not have enough iron, and he replied, "We can't get any more right now, and as we can get

boats we will send you more." Mr. Bash was general manager for the plaintiffs, with authority to make contracts, and was dead at the time of the trial. The plaintiffs objected to this evidence, under Revisal, § 1631, because it was a conversation with a deceased person. The objection was overruled, and the plaintiff excepted. One Smithwick was a witness, and testified that he had heard the defendant complain of the failure of the plaintiffs to furnish iron, and plaintiffs excepted. His honor explained to the jury that this evidence was admitted in corroboration of the defendant only. The defendant was examined before the trial, under Revisal, § 865, and at the trial the plaintiffs introduced a part of this examination, and the defendant was permitted, over the objection of the plaintiffs, to introduce the whole examination, and plaintiffs excepted. The examination is omitted from the record at the request of the plaintiffs, and there is no statement as to its contents.

The plaintiffs excepted to the part of the charge as to the recovery of profits by the defendant, because of failure to state a rule for measuring the damages. There was a verdict for the defendant on his counterclaim, and the plaintiffs appealed.

Pruden & Pruden, Gillham & Davenport, and S. Brown Shepherd, for appellants. Winston & Matthews, for appellee.

ALLEN, J. Four exceptions are considered in the plaintiffs' brief, and all others are deemed abandoned. The first three relate to rulings upon the evidence, and none of these can be sustained.

[1, 2] The evidence of the defendant as to a conversation with a deceased agent of the plaintiffs is not condemned by Revisal, § 1631 (Roberts v. Railroad, 109 N. C. 870, 14 S. E. 106; Gwaltney v. Assurance Co., 132 N. C. 925, 44 S. E. 659), and it was clearly competent to prove by the witness Smithwick that he had heard the defendant complain of the failure to furnish iron, in corroboration of the evidence of the defendant, for which purpose alone it was admitted.

[3] The exception to the introduction of the examination of the defendant, taken under Revisal, § 865, cannot be considered, because we are unable to see that it was in any way prejudicial to the plaintiff, as there is no statement of what was in the examination, and it was omitted from the record by direction of the appellant. It would seem, however, that the exception could not have availed the plaintiffs, as they introduced a part of the examination, and, further, the statute (Revisal, § 867) provides that the examination "may be read by either party on the trial."

[4] The charge of his honor is subject to the criticism that he did not state explicitly the measure of damages; but, when the part

excepted to for this reason is considered as a whole, we do not think the jury could fail to understand that they were to award the defendant as damages the net profit he would have made under the contract, if any. He stated fully the contentions of the parties, and instructed the jury substantially that the defendant was entitled to recover damages if the plaintiffs had agreed to furnish iron and had failed to do so; that the defendant contended that, if the contract had been performed by the plaintiffs, he would have made a clear profit of \$1.50 per thousand; that the plaintiffs contended that his profits would have been nothing, or in any event less than \$1.50 per thousand; and that they must ascertain the amount of this damage under the fourth issue. If the plaintiffs thought more specific instructions necessary, it was their duty to call it to the attention of the court by prayers for instruction. *Simmons v. Davenport*, 140 N. C. 407, 53 S. E. 225; *Ives v. Railroad*, 142 N. C. 131, 55 S. E. 74, 115 Am. St. Rep. 732, 9 Ann. Cas. 188.

The case of *Wilkinson v. Dunbar*, 149 N. C. 20, 62 S. E. 748, sustains the ruling that the defendant is entitled to recover the profits he would have made, but it is not authority in favor of the plaintiffs upon the exception taken, as in that case a new trial was ordered on account of an erroneous rule laid down in the charge for estimating damages, and not because of failure to charge.

We find no error.

No error.

(160 N. C. 42)

MIDGETT v. MEEKINS et al.

(Supreme Court of North Carolina. Sept. 11, 1912.)

1. DEEDS (§ 97*)—CONSTRUCTION—REPUGNANT CLAUSES.

The rule that a clause in a deed, irreconcilable with a former clause and repugnant to the general purpose of the instrument, will be set aside, is subject to the rule that the intent of the parties, as embodied in the entire instrument, is to be given effect, if that can be done by any reasonable interpretation.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 267-273, 434-447; Dec. Dig. § 97.*]

2. DEEDS (§ 130*)—CONSTRUCTION—REVERSION.

A deed from a husband to his wife and her heirs, to have and to hold as long as she should live and remain a widow after his death, with provision that at her death or remarriage the land should go to their children, and that, on her dying before him, the property should revert to him, gives him an estate in fee, and not a mere life estate, on her predecease; there being no irreconcilable conflict in the different clauses.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 366-374; Dec. Dig. § 130.*]

Appeal from Superior Court, Dare County; Webb, Judge.

Action by Thomas P. Midgett against Rosa Meekins and others. Judgment for de-

defendants, and plaintiff appeals. New trial granted.

On the trial it was made to appear that on April 28, 1898, plaintiff, Thomas P. Midgett, executed a deed for two tracts of his land; the grantees being his then wife, Sarah H. Midgett, and the children of the marriage. The terms of the deed relevant to the inquiry are as follows: "This deed, made this the 28th day of April, 1898, by Thomas P. Midgett, of Manteo, Dare county, North Carolina, of the first part, to Sarah H. Midgett, of Manteo, Dare county, North Carolina, of the second part, witnesseth: That said Thomas P. Midgett, in consideration of one dollar and other valuable consideration to him paid by the said Sarah H. Midgett, the receipt of which is hereby acknowledged, have bargained and sold, and by these presents do bargain, sell, and convey, to said Sarah H. Midgett and her heirs two certain lots or parcels of land, situated in the town of Manteo, county of Dare, and state of North Carolina, bounded as follows, viz.: [Here follows description of land in detail.] To have and to hold the aforesaid lots or parcels of land and all privileges and appurtenances thereto belonging to the said Sarah H. Midgett and her heirs as long as she lives and remains a widow after my death, and at her death or remarriage I do hereby convey the aforesaid lots or parcels of land, with the privileges and appurtenances thereto belonging, to my children that has been or may hereafter be born of her, the said Sarah H. Midgett, by me, the said Thomas P. Midgett, to their only use and behoof, forever. Provided, however, that, should the said Sarah H. Midgett die before I, the said Thomas P. Midgett, does, then and in that event the said property shall revert to me, the said Thomas P. Midgett." The wife having died, the children, the other grantors of the deed, made claim to the land, subject to a life estate of the grantor, their father. On issues submitted, and under charge of the court construing the deed, the jury rendered the following verdict:

"Is the plaintiff the owner in fee of the land set out and described in the complaint? Answer: No.

"What interest, if any, has the plaintiff in the land set out in the complaint? Answer: A life estate."

There was judgment on the verdict, declaring the children the owners of the land, subject to a life estate in the grantor, their father, and plaintiff excepted and appealed.

B. G. Crisp, for appellant. E. F. Aydtlett and J. C. B. Ehringhaus, for appellees.

HOKE, J. (after stating the facts as above). [1] In *Davis v. Frazier*, 150 N. C. 451, 64 S. E. 201, the court said: "It is

an undoubted principle that a subsequent clause, irreconcilable with a former clause and repugnant to the general purpose and intent of the contract, will be set aside. This was expressly held in *Jones v. Casualty Co.*, 140 N. C. 262 [52 S. C. 578, 5 L. R. A. (N. S.) 932, 111 Am. St. Rep. 843], and there were many decisions with us to like effect; but, as indicated in the case referred to and the authorities cited in its support, this principle is in subordination to another position, that the intent of the parties as embodied in the entire instrument is the end to be attained, and that each and every part of the contract must be given effect, if this can be done by any fair or reasonable interpretation; and it is only after subjecting the instrument to this controlling principle of construction that a subsequent clause may be rejected as repugnant and irreconcilable. *Jones v. Casualty Co.*, supra; *Lawson on Contracts*, §§ 388, 389; *Bishop on Contracts*, §§ 386, 387." This decision was cited and approved in *Gulf v. Refining Co.*, 157 N. C. 280, 72 S. E. 1003, and by Allen, Judge, in *Hendricks v. Furniture Co.*, 156 N. C. 569, 72 S. E. 592, and the general principle has been directly applied to deeds conveying realty in several recent and well-considered decisions of the court. *Acker and Wife v. Pridgen*, 158 N. C. 337, 74 S. E. 335; *In re Roberta C. Dixon*, 156 N. C. 26, 72 S. E. 71; *Triplett v. Williams*, 149 N. C. 394, 63 S. E. 79, 24 L. R. A. (N. S.) 514; *Featherston v. Merrimon*, 148 N. C. 199, 61 S. E. 675.

[2] In our opinion these authorities are decisive, and are against the defendants' position as to the interpretation of the present deed. From a perusal of the entire instrument, and giving to every clause its reasonable effect, we think it clear that the grantor had in mind the two conditions or events—one in case he survived his wife, and the other if she survived him. In the latter case the land is in effect conveyed to her during her life or widowhood, and then to the children of the marriage in fee, and in the former "the property shall revert to me." There is nothing in the instrument to indicate that the grantor intended only a life estate should revert, as in *Dixon Case*, supra; but by correct and reasonable interpretation, in case he survived his wife, the property and all interest in it should revert. *Revisal 1905*, § 946. There is, therefore, no irreconcilable conflict in the different clauses of the deed, and on the facts and evidence and under the authorities cited the grantor should be declared the owner of the property in fee. In *Fortune v. Hunt*, 152 N. C. 715, 68 S. E. 213, and in *Wilkins v. Norman*, 139 N. C. 40, 51 S. E. 797, 111 Am. St. Rep. 767, it was held that the former and the latter clauses of the deeds were in irreconcilable conflict, and the court applied the familiar principle that in

such case and as to deeds the former should prevail.

For the error indicated, the plaintiff is entitled to a new trial; and it is so ordered.

New trial.

(160 N. C. 36)

NICHOLSON et al. v. EUREKA LUMBER CO.

(Supreme Court of North Carolina. Sept. 11, 1912.)

1. DEEDS (§ 207*)—IDENTITY OF GRANTOR—EVIDENCE.

On the question of the identity of a grantor, the heir of the record owner of the land conveyed, evidence held sufficient to justify a finding that the grantor was the surviving grandchild and heir at law of the deceased record owner.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 614-624; Dec. Dig. § 207.*]

2. ACKNOWLEDGMENT (§ 57*)—VALIDITY—PRESUMPTIONS.

Where a woman was intrusted by a sister state with a notarial seal, and she acted in such state as a notary public in taking an acknowledgment to a deed, the court will presume that she was rightfully appointed to the office and that she acted rightfully in taking the acknowledgment, unless the contrary is proved.

[Ed. Note.—For other cases, see Acknowledgment, Cent. Dig. § 264; Dec. Dig. § 57.*]

3. TRIAL (§ 253*)—EVIDENCE—INSTRUCTIONS.

Where, in an action of trespass and to try title, the issue involved the location of a boundary line, and the evidence showed that a theoretical variation of the magnetic needle was controlled to some extent by an old and marked line, a charge that the burden was on plaintiff to show, by the greater weight of the evidence, that defendant had cut within plaintiff's lines, the course of which would be determined by the lines of the grant and the proper variation for the difference in time, was not objectionable as disregarding evidence of variation.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 613-623; Dec. Dig. § 253.*]

Appeal from Superior Court, Beaufort County; Webb, Judge.

Action by P. A. Nicholson and another against the Eureka Lumber Company. From a judgment for plaintiffs, defendant appeals. Affirmed.

See, also, 156 N. C. 59, 72 S. E. 86, 36 L. R. A. (N. S.) 162.

The jury rendered the following verdict:

"1. Are the plaintiffs the owners of the land described in the complaint? Answer: Yes; all the lands lying east of the lines E down to 3, then to A.

"2. Did defendant trespass on said land, as alleged? Answer: Yes.

"3. If so, what damages are plaintiffs entitled to recover? Answer: Seven dollars and fifty cents (\$7.50)."

Rodman & Rodman and Ward & Grimes, for appellant. B. B. Nicholson and E. A. Daniel, Jr., for appellees.

HOKE, J. Both parties claimed title to the land in controversy under Ruel Windley,

deceased; the plaintiffs, by deed purporting to be from Sadie Delany and her husband, the said Sadie (née Sadie Tooker) being the grandchild, and only heir at law of James Windley, to whom Ruel Windley had devised it. This deed, admitted in evidence over defendant's objection, was from Sadie Delany and her husband, Thomas, to P. A. Nicholson, plaintiff, bore date of December 12, 1908, and had been duly registered in Beaufort county on acknowledgment formally correct as follows: "State of Texas, McLennan County; I, Della Sadler, a notary public in and for the said county of McLennan, do hereby certify that Thomas Delany and wife, Sadie Delany, personally appeared before me this day and acknowledged the due execution of the within deed of conveyance; and the said Sadie Delany, being by me privately examined, separate and apart from her said husband, touching her voluntary execution of the same, doth state that she signed the same freely and voluntarily, without fear or compulsion of her said husband or any other person, and that she doth still voluntarily assent thereto. Witness my hand and notarial seal this the 14th day of December, 1908. Della Sadler, Notary Public, McLennan County, Texas."

[1] It was chiefly urged for error by defendant that there was no testimony amounting to legal evidence that the Sadie Delany, grantor in said deed, was the Sadie Delany (née Tooker) who was the grandchild and heir at law of James Windley, deceased; but, on the facts in evidence, the position cannot be sustained. On this question a witness, Wm. Draper, testified in substance that James Windley was dead, and all of his children had died without descendants, except Lovey, who married one Capt. Tooker; that she died, leaving two children; that one was drowned in a mill pond, and Sadie Tooker, the surviving child, married Thomas Delany, and was now in Waco, Tex.; that he had received several letters from her, and answered them, which he had at home, the letters being about this land. There was other testimony from this witness as to this 100 acres, the land in controversy, which was the James Windley land, and as to its correct location. On cross-examination, the witness stated that this Sadie Tooker was named Sadie Delany before she ever left Bath, N. C.; that he had never seen her husband, and had never seen Sadie Delany write in her life; did not know her husband, except what was said about him in these letters; "that he answered the letters he received from Mrs. Delany, and received replies from her; that he got the replies out of the post office and had them at home now." A motion to strike out this testimony was properly overruled, and the identity of name, the subject-matter of the correspondence, and attendant circumstances, were in our opinion

amply sufficient to justify the conclusion, as stated, that the grantor in plaintiff's deed and Sadie Delany, the sole surviving grandchild and heir at law of James Windley, were one and the same person. *Freeman v. Loftis*, 51 N. C. 524; 1 Greenleaf (16th Ed.) § 43 a; *Lawson*, Presumptive Evidence, p. 309; 16 Cyc. p. 1055.

[2] It was further objected that the acknowledgment is invalid because taken by a woman. The only evidence that the officer taking this acknowledgment was a woman is the fact that the certificate is signed, "Delia Sadler, a notary public in and for said County of McLennan," and in favor of the stability of titles and the regularity of judicial proceedings we might, if required, rest the case here on the position that it does not sufficiently appear that this notary was a woman; but, whether man or woman, we think it entirely safe to hold that, having been intrusted by the state of Texas with a notarial seal and having acted and professed to act in that state as a notary public, it will be assumed that she was rightfully appointed to that office, and that she acted rightfully in taking this probate, until the contrary is made to appear. As an open question this would be so from convenience, and the position is, we think, in accord with authority. *Piland v. Taypor*, 113 N. C. 1, 18 S. E. 70; *Jones on Evidence* (2d Ed.) § 41; *Elliot on Evidence*, § 103. The controversy between these litigants was really one of boundary, dependent largely on the correct location of plaintiff's deeds: "Beginning on an oak at or near the head of Ashe Branch," and thence various specified courses and distances, inclosing the property. Under a comprehensive charge the jury have established the location as contended for by plaintiffs, and after careful examination we find no good reason for disturbing their verdict.

[3] The objection made that the court in its charge ignored or disregarded evidence tending to show that a proper allowance for the variation of the magnetic needle would give the land a somewhat different placing is without merit. It would seem from the testimony that the theoretical variation was controlled to some extent by an old and marked line, and, further, there are no data in the record from which the court could determine that any substantial change in the location would have resulted. Apart from this, a perusal of his honor's charge will disclose that he directed the jury to make the allowance for the variation which the facts would require; the language of the court in reference thereto being in part as follows: "The burden is upon the plaintiffs to satisfy you by the greater weight of the evidence that the defendant has cut within their lines, the course of which will be determined by the lines of the grant and the proper variation for the difference in time."

We find no reversible error in the record, and the judgment in plaintiffs' favor is affirmed.

No error.

CLARK, C. J., did not sit in this case, being related to some of the parties, but on the collateral question as to whether the certificate of a notary public in Texas to a legal instrument is valid here or not, because it appears that she was a woman, observes that each state or country is sole judge of the qualifications for voters and for office therein, and that such matter cannot be inquired into in any other jurisdiction. In Great Britain the chief executive in two of its longest and most brilliant reigns—Queen Victoria and Queen Elizabeth—was a woman, and the same is true even of Russia, whose most brilliant reign was that of Catherine the Great. In six states of this country, and in many foreign nations, women have now equal suffrage with men, and usually the right of suffrage carries with it the right to hold office. While the women have the full right of suffrage in only six states of this country, they vote in school matters and on local assessment in most of the other states. These are matters for each jurisdiction to settle for itself, and when a certificate of a notary public is sent to this state from another under a notarial seal, our courts cannot go back of it to inquire into the qualifications of the officer, though it cannot be doubted that a notary public is a public office, for "full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state." Const. U. S. art. 4, § 1 (Comp. St. 1901, p. lxxxviii). At common law in England women held not only the office of queen, but that of sheriff and others. Some courts in this country (but none in England) have held that at common law she could not be a notary public. 29 Cyc. 1068, 1071, where the matter is fully discussed.

(159 N. C. 511)

McKEEL-RICHARDSON HARDWARE CO.
v. BUHMAN et al.

(Supreme Court of North Carolina. Sept. 11, 1912.)

1. JUDGMENT (§ 163*)—DEFAULT JUDGMENT—MOTION TO VACATE—FINDINGS—DUTY TO MAKE.

On motion to set aside a default judgment on the ground of excusable neglect, it is the court's duty to find the facts; but defendants should request such finding.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 323; Dec. Dig. § 163.*]

2. APPEAL AND ERROR (§ 1008*)—DEFAULT JUDGMENT—MOTION TO VACATE—FINDINGS—CONCLUSIVENESS.

On motion to vacate a default judgment on the ground of excusable neglect, the trial court's finding of facts is conclusive; only the

conclusion of law based thereon being reviewable.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3955-3969; Dec. Dig. § 1008.*]

3. APPEAL AND ERROR (§ 1071*)—HARMLESS ERROR—FAILURE TO MAKE FINDINGS.

On motion to vacate a default judgment on the ground of excusable neglect, the trial judge's failure to find the facts is immaterial, on defendants' appeal from an order refusing to vacate the judgment, where the moving affidavits show inexcusable neglect.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4234-4239; Dec. Dig. § 1071.*]

4. JUDGMENT (§ 143*)—DEFAULT—EXCUSE—SUFFICIENCY.

A defendant, against whom default judgment has been taken, cannot excuse his failure to answer within the time required by statute because of a custom at the bar of the particular county to allow 60 days in which to answer, in the absence of a written or admitted agreement between the parties to that effect.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 269, 270, 272, 291; Dec. Dig. § 143.*]

5. APPEAL AND ERROR (§ 170*)—REVIEW—EXCEPTIONS NOT MADE BELOW.

No exception can be considered by the Supreme Court on appeal which was not regularly taken below, except that the court did not have jurisdiction of the subject-matter or that the complaint does not state a cause of action; and hence, on appeal from an order refusing to vacate a default judgment, an objection that the judgment should be set aside for irregularity, in that on the verified complaint a judgment by default and inquiry should have been entered, and not a judgment by default final, where that objection was not made below.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1035-1052; Dec. Dig. § 170.*]

6. APPEAL AND ERROR (§ 1199*)—PROCEEDINGS AFTER REMAND.

Affirmance of an order refusing to vacate a default judgment on the ground of excusable neglect does not preclude defendant from subsequently moving to vacate the judgment below on the ground of irregularity in entering judgment by default final, instead of judgment by default and inquiry.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4674-4676; Dec. Dig. § 1199.*]

Appeal from Superior Court, Beaufort County; Webb, Judge.

Action by the McKeel-Richardson Hardware Company against W. C. Buhman and another. From an order refusing to set aside a judgment on the ground of excusable neglect, defendants appeal. Affirmed.

J. W. Little, for appellants. Small, MacLean & McMullan, for appellee.

CLARK, C. J. [1-3] This is an appeal from the refusal of a motion to set aside a judgment on the ground of excusable neglect. The court held that no excusable neglect had been shown. It is true that it is the duty of the court in such case to find the

facts, as to which its finding is conclusive, and that upon such facts the conclusion of law only is reviewable. *Norton v. McLaurin*, 125 N. C. 185, 34 S. E. 269, and cases there cited. The failure of the judge to find the facts in this case, however, is immaterial; for, taking the affidavits of the appellant as correct, he has shown inexcusable neglect. It appears therefrom that the defendant employed a lawyer residing in New Hanover county to appear in a case pending in Beaufort superior court, which he was not in the habit of attending, and such counsel was not present at the term of the court and did not file answer. *Manning v. Railroad*, 122 N. C. 825, 28 S. E. 963; *Williamson v. Cocke*, 124 N. C. 585, 32 S. E. 963. Indeed, the appellant should have asked the judge to find the facts. *Albertson v. Terry*, 108 N. C. 75, 12 S. E. 892.

[4] The excuse of the counsel is that in New Hanover there was a "custom" that the defendant was allowed 60 days in which to answer. But it is not contradicted that this was not the custom in Beaufort county. Besides, if it had been such custom, it would not justify the defendant in failing to comply with the statutory requirement as to the time in which the answer should be filed, in the absence of a written or admitted agreement to that effect. *Brown v. Hale*, 93 N. C. 188. The judgment should therefore be affirmed.

[5, 6] It was suggested in this court by the appellant that the judgment should be set aside for irregularity, in that upon the verified complaint a judgment by default and inquiry should have been entered, and not a judgment by default final. There was no motion below, nor exception in this appeal, presenting that point, and no exception can be passed upon in this court which was not regularly taken below, except that the court did not have jurisdiction of the subject-matter, or that the complaint does not state a cause of action. But the order refusing to set aside the judgment for excusable neglect, which is affirmed by us, does not bar the defendant from hereafter making his motion in the cause below upon the ground of irregularity, if the facts and the law will justify the judgment being set aside or modified on that ground. *Jeffries v. Aaron*, 120 N. C. 167, 26 S. E. 696.

Affirmed.

(159 N. C. 653)

VINSON v. WISE et al.

(Supreme Court of North Carolina. Sept. 18, 1912.)

1. PARTITION (§ 12*)—SALE FOR PARTITION—ACTION—PARTIES—REMAINDERMEN.

An action for sale of a remainder interest in land for partition among the remaindermen cannot be maintained, where all the parties are contingent remaindermen; *Revisal 1905*, §§ 1590, 2508, requiring that plaintiff,

or at least some party, be a holder of a vested interest.

[Ed. Note.—For other cases, see Partition, Cent. Dig. §§ 38-51; Dec. Dig. § 12.*]

2. WILLS (§ 634*)—DEVISE—CONTINGENT REMAINDER.

Under a will devising land for life to several, "and after the death of all, with no issue then living," the same in remainder to others, while any issue of any of the life tenants living at the death of the last life tenant takes a vested remainder, the remainder remains contingent till death of the last life tenant.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1488-1510; Dec. Dig. § 634.*]

Appeal from Superior Court, Hertford County; Cline, Judge.

Action by J. C. Vinson against Bartelle Wise and others. Action dismissed, and plaintiff appeals. Affirmed.

It appeared that J. C. Vinson, plaintiff, having acquired and holding by deed and mesne conveyances the interest of K. R. Wise and his daughter, Emma, the same being a portion of the estate in remainder, subject to the life estate of M. L. Wise, instituted this action against his grantors and the other remaindermen to obtain a sale of the land for division; the life tenant, M. L. Wise, mother of K. R. Wise, not being a party or in any way seeking relief. Defendants demurred, assigning for cause in part "that plaintiff has no right to maintain the action, in that the interest held by him in the land described in the complaint is not vested, but a contingent interest." The demurrer was sustained on the ground stated, and, plaintiff having declined to amend, judgment was entered that the action be dismissed. Plaintiff excepted and appealed.

Winborne & Winborne, for appellant.
Lloyd J. Lawrence, for appellees.

HOKE, J. The land in question, a storehouse and lot in Murfreesboro, N. C., is a part of the property devised by W. N. H. Smith, deceased, in item 3 of his last will and testament, and the terms of the said devise and the facts material and relevant to the inquiry are as follows: "(1) That William N. H. Smith, late of Wake county, in the state of North Carolina, died on the 14th day of November, 1889, leaving a last will and testament, which was duly proved and admitted to record in the superior court of said county of Wake. (2) That item 3 of said will is as follows: 'The land at Murfreesboro belonging to Major W. Wise, by him conveyed in trust to John C. Laurence and bought by me at the trustee's sale, I give the use of the same remaining to him for life, and to his surviving widow for life, and thereafter to his children, now three in number, and after the death of all with no issue then living the same in remainder to my children, William and Edward.' (3) That

said Major W. Wise died on the 8th day of July, 1902, leaving him surviving his widow, M. L. Wise, referred to in said item 3 of said will, and who is still living, and his said three children, K. R. Wise, Bartelle Wise, and Eula Wise Smith, wife of the defendant W. W. Smith. (4) That said Eula Smith, wife of said W. W. Smith, died intestate on the 2d day of January, 1911, leaving her surviving the defendants W. N. H. Smith, Gordon Smith, and Louis Smith as her only children and heirs at law, and her husband, W. W. Smith. (5) That said K. R. Wise and Bartelle Wise are still living. (6) That the defendant Emma S. Wise is the only child of K. R. Wise. (7) That the defendant Bartelle Wise has never married. (8) That the defendants Ed. Chambers Smith and W. W. Smith are the sons of said testator, W. N. H. Smith, and referred to in said item 3 of said will as his sons 'William and Edward.' " That plaintiff has acquired the interest of said K. R. Wise and his daughter Emma in said store and lot, having purchased the same for full value from A. Brinckley and wife, who bought at foreclosure sale under a mortgage executed by said K. R. Wise and his daughter, and under and by virtue of said deeds claims to be the present owner of one undivided third interest in the property, subject to the life estate of M. L. Wise; the other present holders and claimants of the estate in remainder being parties defendant.

[1] If it be conceded that, under our statutes and the principles of law as they obtain with us, the plaintiff could maintain the present action without joinder of the life tenant and asking for a sale of the land itself, it is very properly admitted by the parties that he can only do so on the position that he is the owner of a vested estate in remainder. The statute under which he is endeavoring to proceed requires this in express terms. Rev. §§ 1590, 2508. And unless plaintiff now has a vested interest, or in any event unless some holder of a vested interest is a party, the demurrer was properly sustained.

[2] By the terms of this will, and on the death of the testator, K. R. Wise and the other children referred to became the devisees of a contingent estate in remainder, to determine in case "all of them die with no issue then living." *Smith v. Lumber Co.*, 155 N. C. 389, 71 S. E. 445; *Richardson v. Richardson*, 152 N. C. 705, 68 S. E. 217; *Perrett v. Bird*, 152 N. C. 220, 67 S. E. 507; *Bowen v. Hackney*, 136 N. C. 187, 48 S. E. 633, 67 L. R. A. 440; *Whitesides v. Cooper*, 115 N. C. 571, 20 S. E. 295. Under numerous decisions of the court in a devise of this character, and unless a contrary intent appears from the will, the event by which the estate must be determined will be referred, not to the death of the deviser, but the holder of the particular state itself, and the deter-

minable quality of such an estate or interest will continue to affect it till "the event occurs by which same is to be determined or the estate becomes absolute." *Smith v. Lumber Co.*, supra; *Harrell v. Hagan*, 147 N. C. 111, 60 S. E. 909, 125 Am. St. Rep. 539; *Kornegay v. Morris*, 122 N. C. 199, 29 S. E. 875; *Williams v. Lewis*, 100 N. C. 142, 5 S. E. 435, 6 Am. St. Rep. 574; *Galloway v. Carter*, 100 N. C. 112, 5 S. E. 4; *Buchanan v. Buchanan*, 99 N. C. 308, 5 S. E. 430. In the case of *Harrell v. Hagan*, supra, this general principle was applied, and it was held that, when either child died leaving issue, that interest became absolute, but that was by reason of a different wording of the contingent clause: "And if either or all of the above girls die without leaving a lawful heir," etc. In our case the devise is to the children of Major W. Wise, now three in number, and "in case all of them die with no issue then living the same in remainder to return to my children, William and Edward;" the intent evidently being to pass the estate to this Wise stock, if there were issue of that stock to take it when the last child of Major W. Wise, who took as devisee under the will, died, and, if not, the same was to return to members of his own family, to wit, his sons William and Edward.

There is no error and the judgment dismissing the action is affirmed.

Affirmed.

(150 N. C. 523)

GRANT v. GRANT.

(Supreme Court of North Carolina. Sept. 18, 1912.)

1. APPEARANCE (§§ 9, 24*)—SPECIAL OR GENERAL.

A special appearance can be only for purpose of moving for dismissal for want of jurisdiction. One for purpose of moving to remove the action to another county, though styled special, is general, and therefore cures any defects in the process.

[Ed. Note.—For other cases, see Appearance, Cent. Dig. §§ 42-52, 118-143; Dec. Dig. §§ 9, 24.*]

2. APPEARANCE (§ 20*)—EFFECT OF GENERAL APPEARANCE.

Entering a general appearance and moving for continuance makes service of summons unnecessary.

[Ed. Note.—For other cases, see Appearance, Cent. Dig. §§ 91-102; Dec. Dig. § 20.*]

3. DIVORCE (§ 105*)—COMPLAINT—VERIFICATION.

Revisal 1905, § 1563, providing for the accompaniment of a complaint for divorce by affidavit of plaintiff that the facts alleged in the complaint are true to the best of his knowledge and belief, is satisfied by plaintiff's oath that the complaint is true of his own knowledge except as to those matters therein stated on information and belief, and as to them he believes it true, particularly where the complaint alleges no facts on information and belief.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 340-343; Dec. Dig. § 105.*]

Appeal from Superior Court, Northampton County; Cline, Judge.

Action by Claud Grant against Ella Early Grant. From an adverse order and judgment, defendant appeals. Affirmed.

This is an action, commenced in Bertie county, to obtain an absolute divorce, and at the return term of the summons the defendant, through counsel, filed the following motion: "The defendant, by her attorneys, appears specially in this action and moves to dismiss this action, for want of jurisdiction of this court for the following causes: (1) That at the time this action was begun the plaintiff was not a resident of this county, but a resident of the county of Northampton, N. C., and is still a resident of that county. Wherefore, the defendant prays that this action be dismissed, but, if the court be of opinion that the defendant is not entitled to have this action dismissed, then that it be removed to said Northampton county for trial." His honor refused to dismiss the action, but found as a fact that the plaintiff was a resident of Northampton county, and on motion of the defendant, based on affidavits of Alex Lassiter and others, filed by her, removed the action for trial in that county. The defendant excepted and appealed.

On of the affidavits filed in support of the motion was made by the father of the defendant, in which, among other things, he says: That he is the father of the defendant, Ella Early Grant, and that she left this state last summer to make her residence and domicile in a distant state beyond the borders of this state, where she still resides. That she has written to him, expressing a strong desire to be at this term of this court, but was unable to reach here in time to be present during this term. That if the case is removed to Northampton county, N. C., for trial, she can be at the next term of the superior court of that county, but if not removed, but continued to the next term of this court, she can be present at that term.

When the action was called for trial in Northampton county, the defendant, through her counsel, filed the following motion: "The defendant, Ella E. Grant, appears specially and through her attorneys, Winborne & Winborne and J. H. Kerr, alone to move and do hereby move to dismiss this action for the following reasons: (1) Because the summons has not been legally served, and this court has not acquired jurisdiction of the defendant. (2) That the court has not jurisdiction of this action." The motion was denied, and the defendant excepted.

The motion to dismiss for want of jurisdiction is based upon the alleged failure to verify the complaint, as required by Rev. § 1563.

The verification is as follows: "Claude

Grant maketh oath that he is the plaintiff in the above-entitled cause, and that the foregoing complaint is true of his own knowledge, except as to those matters therein stated on information and belief, and as to them he believes it to be true, that the said complaint is not made out of levity or by collusion between plaintiff and his wife, nor for the mere purpose of being freed and separated from each other, but in sincerity and truth for the causes mentioned in the complaint; that the facts set forth in the complaint as grounds for divorce have existed to his knowledge at least six months prior to the bringing of this action and filing this complaint, and he has been a resident of the state of North Carolina for more than two years next immediately preceding the filing of this complaint and bringing of this action. Claude Grant. Sworn to and subscribed before me this November 16, 1911. W. L. Lyon, Clerk Superior Court."

After the denial of the motion, the defendant entered a general appearance and moved for a continuance. There was a verdict and judgment for the plaintiff, and the defendant appealed.

Winborne & Winborne, for appellant.
Peebles & Harris and Winston & Matthews, for appellee.

ALLEN, J. [1] The effect of special and general appearances is fully considered in the learned opinion of Justice Walker in *Scott v. Life Association*, 137 N. C. 518, 50 S. E. 222, in which it is held that a special appearance cannot be entered except for the purpose of moving to dismiss for want of jurisdiction, and that, if the motion affects the merits, the appearance is general, and it is there said: "The test for determining the character of an appearance is the relief asked, the law looking to its substance rather than to its form. If the appearance is in effect general, the fact that the party styles it a special appearance will not change its real character. 3 Cyc. pp. 502, 508. The question always is what a party has done, and not what he intended to do. If the relief prayed affects the merits or the motion involves the merits, and a motion to vacate a judgment is such a motion, then the appearance is in law a general one." It follows from this statement of the law that the appearance in *Bertle* for the purpose of making a motion to remove the action to Northampton county was general, although styled special, and, if so, it cured any defects in the process, and gave the court jurisdiction of the person of the defendant.

[2] If, however, there was any doubt upon this question, it appears in the record that the defendant afterwards formally entered a general appearance in Northampton and moved

for a continuance, which made a service of the summons unnecessary.

[3] The other ground for the motion to dismiss is on account of alleged defects in the verification of the complaint. It is true, as contended by the defendant, that an objection to the verification of a complaint in an action for divorce is jurisdictional (*Hopkins v. Hopkins*, 132 N. C. 23, 43 S. E. 508; *Johnson v. Johnson*, 142 N. C. 462, 55 S. E. 341), but in our opinion the verification in this case substantially complies with the statute, and particularly as the complaint alleges no facts on information and belief, but, if it did not, the judge states that the plaintiff is allowed to amend the affidavit of verification by adding "that the facts set forth in the complaint are true to the best of affiant's knowledge and belief," which conforms to the words of the statute. This disposes of both appeals. There is no error.

Affirmed.

(159 N. C. 647)

RICKS et al. v. WOODARD.

(Supreme Court of North Carolina. Sept. 18, 1912.)

1. WITNESSES (§ 87*)—COMPETENCY—GENERAL REPUTATION AS TO BOUNDARIES—RE-MOTENESS OF ORIGIN.

Persons who had known land for 40 or 45 years, and who knew the general reputation in the community as to the location of a boundary line, could testify as to the location of such line.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. §§ 80-87; Dec. Dig. § 87.*]

2. BOUNDARIES (§ 35*)—GENERAL REPUTATION—BOUNDARIES—LOCATION WITH RESPECT TO NATURAL OBJECT.

And, as such evidence must attach itself to some monument of boundary or natural object, their location of the boundary according to general reputation with reference to a fence and a particular pine tree was competent evidence.

[Ed. Note.—For other cases, see *Boundaries*, Cent. Dig. §§ 153-159, 163, 165, 177-183; Dec. Dig. § 35.*]

3. APPEAL AND ERROR (§ 231*)—OBJECTIONS TO EVIDENCE—NECESSITY OF SPECIFIC OBJECTION.

A reviewing court cannot reverse for the admission of objectionable evidence, where the only objection was made to a general statement of a witness which included competent testimony.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 1299, 1352; Dec. Dig. § 231.*]

4. BOUNDARIES (§ 35*)—EVIDENCE—ADMISSIBILITY.

While evidence of the general reputation as to the location of a boundary at a time 20 years before the action is inadmissible for its lack of remoteness, it was properly admitted to support and corroborate testimony tending to establish the existence of an earlier reputation which was sufficiently remote and already before the jury.

[Ed. Note.—For other cases, see *Boundaries*, Cent. Dig. §§ 153-159, 163, 165, 177-183; Dec. Dig. § 35.*]

Appeal from Superior Court, Northampton County; Cline, Judge.

Action by W. S. Ricks and others against W. T. Woodard. From a judgment for plaintiffs, defendant appealed. No error.

Winborne & Winborne, for appellant. Mason, Worrell & Long and D. C. Barnes, for appellees.

HOKE, J. [1, 2] The suit involved the correct location of a divisional line between two adjoining tracts of land in said county—the Barnes tract and the Tyner tract. Under a charge, to which no exceptions were taken, the jury established the line as contended for by the plaintiff, and we find no exceptions on the record which may be allowed for reversible error. In the progress of the trial evidence was admitted from several witnesses tending to establish a general reputation that the true dividing line was located as claimed by plaintiff. The reception of this evidence was urged for error; the objection being chiefly that it was too vague and indefinite, but the record in our opinion will not sustain the position. Speaking in this character of evidence, in *Hemphill v. Hemphill*, 138 N. C. 506, 51 S. E. 43, the court said: "Such evidence has been uniformly received in this state, and the restrictions put upon it by our decisions seem to be that the reputation, whether by parol or otherwise, should have its origin at a time comparatively remote, and always ante litem motam; second, that it should attach itself to some monument of boundary or natural object, or be fortified and supported by evidence of occupation and acquiescence tending to give the land in question some fixed or definite location"—citing *Tate v. Southard*, 8 N. C. 45; *Mendennall v. Cassells*, 20 N. C. 43; *Dobson v. Finley*, 53 N. C. 496; *Shaffer v. Gaynor*, 117 N. C. 15, 23 S. E. 154; *Westfelt v. Adams*, 131 N. C. 379-384, 42 S. E. 823—a statement quoted with approval in *Lamb v. Copeland*, 158 N. C. 136, 73 S. E. 797.

In the present case the great bulk of this testimony, and the only portion to which exception was properly taken, was to the effect that so long as 40 and 50 years ago there was a general reputation that the dividing line between these two tracts of land was

as claimed by plaintiff; one witness, E. S. Vick, saying in this connection: "There was a general reputation when I first knew these matters of the dividing line between the Tyner and Barnes land. I knew that reputation. It was a cross-fence on the south and east side of the Mary Cook field and the northwest side of a field on the Tyner land, known as the Vick field." Another, Lee Davis: "There was a general reputation of location of the dividing line between the Barnes and Tyner lands; that by that reputation the line tree was just behind the stable on the Jack field, and went to the upper corner of the Jack field fence to a large pine, which was a line tree. This ran along the southeast side of the Jack field." And another, Britt Morgan: "That he is 76 years old; that there was a general reputation 45 years ago as to the dividing line between the Barnes and Tyner land; was the fence along the Jack field, and there used to be a footpath on a part of this line. The fore and aft tree stood right behind the stable on the Jack field. It was a spruce pine tree, and the line went on down putting the Jack field on the west and the Tyner land on the east side; went to three corn shuckings in the Jack field for Henry Barnes forty years or more ago," etc. This testimony fully meets the requirements of the principle. It was sufficiently remote, and did attach itself to physical objects "tending to give the land in question a fixed and definite location."

[3, 4] True, one witness spoke of this reputation as existing to his knowledge 20 years ago, and this, under our decisions, could not properly be considered as coming within the rule heretofore stated. See *Lamb v. Copeland*, supra. But this, in our opinion, cannot be held for reversible error: (1) Because the objection was made to a more general statement of the witness, in which was included much testimony that was undoubtedly competent. *State v. Ledford*, 133 N. C. 714, 45 S. E. 944. (2) It was permissible in support and corroboration of the testimony tending to establish the existence of an earlier reputation, which, as we have seen, had been properly received in evidence and as before the jury for consideration on the issue. There is no error, and the judgment in plaintiff's favor is affirmed.

No error.

(114 Va. 307)

PATTERSON v. COMMONWEALTH.

(Supreme Court of Appeals of Virginia. Sept. 18, 1912.)

1. HOMICIDE (§ 216*)—DYING DECLARATIONS—ADMISSIBILITY.

To lay a foundation for the admission of a dying declaration, the commonwealth called a witness, who testified that decedent, when assisted, declared, "lay me down and let me die," and called another witness, who testified that decedent said he felt poorly, and he did not reckon taking medicine would do any good, but that he would take it, and that decedent made no arrangements about dying, but talked about wanting to go to a hospital. The attending physician testified that decedent said that if nothing was done to relieve his pain he would die; that the physician relieved his pain; and that decedent said he rested easier. The wound inflicted on decedent consisted of a shot, which took effect in his right leg between the knee and body. He died in the evening of the day he was shot. *Held* not to show that decedent believed he was going to die; and declarations made by him were inadmissible as dying declarations.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 457; Dec. Dig. § 216.*]

2. HOMICIDE (§ 214*)—DYING DECLARATIONS—ADMISSIBILITY.

Dying declarations are only admissible as to the circumstances of the transaction itself which results in the death of declarant; and any self-serving statements must be excluded.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 448-450; Dec. Dig. § 214.*]

3. HOMICIDE (§ 214*)—DYING DECLARATIONS—ADMISSIBILITY.

A declaration by decedent, not confined to the transaction resulting in his death, but containing self-serving declarations as to his attitude toward accused and the daughters of accused prior to the date of the killing, is inadmissible.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 448-450; Dec. Dig. § 214.*]

4. HOMICIDE (§ 214*)—EVIDENCE—ADMISSIBILITY.

Where the court erroneously admitted the declarations of decedent as to his conduct towards the daughters of accused, it was error to refuse to permit accused to contradict such declarations.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 448-450; Dec. Dig. § 214.*]

5. HOMICIDE (§ 300*)—EVIDENCE—INSTRUCTIONS.

Where there was evidence of decedent's misbehavior towards accused and his two daughters, and that he had attempted an assault on one of the daughters, and that accused had been informed thereof before the killing, a charge that the jury might consider the evidence of the state of feeling between decedent and accused, preceding the killing, as throwing light on the situation and occurrences, was correct; and a charge that, though decedent had used insulting language to accused and his daughters, the same could not be considered, unless decedent was the aggressor, and that accused acted in self-defense, was erroneous.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 614-632; Dec. Dig. § 300.*]

Keith, P., dissenting in part.

Error to Circuit Court, Rockbridge County.

R. V. Patterson was convicted of murder in the second degree, and he brings error. Reversed and remanded.

Greenlee D. Letcher, for plaintiff in error
Samuel W. Williams, Atty. Gen., for the Commonwealth.

CARDWELL, J. At the September term of the circuit court of Rockbridge county, 1911, plaintiff in error was indicted for the murder of S. H. Campbell on June 30, 1911, and at that term of the court he was put upon trial; but the jury failed to agree upon a verdict. The case was again tried at the November term of the court, 1911, when the jury found a verdict of guilty of murder in the second degree, and fixed the accused's punishment at six years in the penitentiary, which verdict the court refused to set aside.

The assignments of error in the petition, upon which this writ of error was awarded the prisoner, relate (1) to the admission of improper evidence, (2) exclusion of evidence offered by the defense, (3) instructions given on behalf of the commonwealth and the rejection of instructions asked for by the defense, (4) refusal to set aside the verdict and award a new trial because of after-discovered evidence, and (5) refusal to set aside the verdict because contrary to the law and the evidence.

The deceased, it appears, moved to the house where he died about Christmas preceding the occurrence resulting in the wound inflicted by plaintiff in error upon him, which was followed by his death, and, according to evidence in the record unobjected to, from the time he went there he began to behave very badly towards plaintiff in error and his two daughters, who lived near him, growing out of the refusal of plaintiff in error to allow hunting on his lands. Plaintiff in error lived upon his own land with his two daughters, aged 16 and 17 years, respectively, whose mother died when they were about 12 years younger, since which time he had had the entire care of these girls, carrying them about with him until they became large enough for one to remain at home while the other went with him to work when he went to the fields. Deceased on numerous occasions, and whenever opportunity was afforded, not only used abusive language to plaintiff in error in the presence of his daughters, but behaved in the presence of the latter, when alone and unprotected, in the most indecent and shocking manner, using language too vile and indecent to be here repeated. There was evidence tending to show that on the morning of the day of the homicide plaintiff in error left his home accompanied by one of his daughters, each riding a horse, to go to his mountain land, one mile up South river, where he and his daughter had seen a ground hog the day before, and for the purpose of killing it carried his double-barrel gun loaded with large shot; that when they reached the turn of the road at which the deceased's house, situated

several hundred yards off, could be seen they observed him standing in the door, where he remained until they got opposite his house, when he came down to the railroad and disappeared behind a sycamore and other trees in foliage at the time, after which plaintiff in error and his daughter neither thought nor saw anything more of the deceased until about 100 yards further on, when they turned back at an acute angle into plaintiff in error's right of way leading across the railroad up to his mountain land, at which time they saw the deceased, looking mad, step off the railroad down towards them, muttering something which could not be understood because of the roar of the river, and thereupon plaintiff in error told the deceased to go away and not give him any trouble; that deceased then cursed plaintiff in error and told him "he had to take it, that he had it in for him," and threw a rock which came close to plaintiff in error's head, and came on, quickly throwing another rock, which also nearly struck him, which rocks deceased took from his pockets or from under his overall flap, and then came to the gate, which was about 13 steps from the railroad, and picked up another large rock and started to rise, with his left hand extended towards the latch of the gate, saying, "Damn you, I will come through and kill you this morning;" whereupon plaintiff in error lowered his gun and shot one barrel of it through the gate at deceased's legs, the shot taking effect in his right leg between the knee and the body. Plaintiff in error fired but one barrel of his gun, and the deceased, after standing a moment, dropped the rock from his hand and walked back towards his home, and, when about 75 yards or about half the distance to his house, laid down by the railroad track, from which point he was later carried to his home, where he died about 7 o'clock that evening.

The court is of opinion that the dying declarations of the deceased, allowed to go to the jury at the trial over the objection of plaintiff in error, were improperly admitted in evidence, (1) because it was not clearly shown that the deceased believed he was going to die when these declarations were made; and, (2) even if the deceased had believed he was going to die at the time he made the declarations narrated by the witness Painter, some of the statements said to have been made by the deceased were not a part of the *res gestæ*; nor did they relate to the transaction itself which resulted in the declarant's death.

[1] The commonwealth introduced one B. D. Armstrong as a witness, who testified, over objection by plaintiff in error, that he was a brakeman on the train of the Norfolk & Western Railway Company which came along about 7:25 o'clock a. m. on the morning that deceased was shot, and saw him by the railroad, his wife and children and one Gerald being with him, and he asked wit-

ness to help him up, and upon witness doing so (presumably) deceased said, "Lay me down and let me die." This was nothing more than a simple exclamation on the part of the deceased, actuated doubtless by the sensation of pain and suffering at the time in his wounded leg, but in no wise proves that he thought he was going to die, and threw no light whatever, as we shall presently see, on his frame of mind five or six hours after, when the so-called "dying declarations" under consideration were made.

The witness Painter, a brother-in-law of deceased, alone testifies as to the dying declarations of the deceased admitted in evidence, and as far as pertinent his statement is: "After I got my dinner, I went back to Campbell's and stayed there until about 2 o'clock, when I went to Vesuvius, and when I got back later in the evening Campbell was dying. When I got back to Campbell's (about 2 o'clock) after arresting Patterson, I told him what Patterson said about him throwing the rocks, and Campbell said that there had been no trouble between him and Patterson, and he asked me whether Patterson said that he had thrown any rocks. Says he, 'Did he say that?' and Campbell then said that he had been telling him [Painter] all day that he was going to die, and that he never had any trouble with Patterson only at the spring on the mountain, and that Patterson said that he had eight feet of his land and must put the fence back, and that Patterson ripped out an oath and refused to speak to him. Campbell said there had been no trouble between them, and that Patterson shot and killed him for nothing; that Patterson said, 'God damn you, don't come through my gate, or I will blow your brains out!' And Campbell said that he hoped he would die that minute if he threw a rock; that whether Patterson's nerve failed him or not he did not know, but that he dropped the gun from his head and shot him in the leg. When I went back after the arrest, he was resting, not suffering much, but said, 'I am poorly;' that he never had mistreated Patterson's daughters—respected them as his own." On cross-examination the witness said that when Campbell made the above statement to him he took a glass of water without assistance, and in drinking it choked; that he then assisted him to take some medicine that the doctor had left there, and with witness' help Campbell took the medicine and did not choke, and took it easily and without trouble; that when witness asked him about taking the medicine Campbell said that "he did not reckon it would do him any good," but that he would take it, and he did take it; that Campbell made no arrangements about dying, either about his worldly affairs or about his soul; that he asked nobody to have prayers or read the Bible, and did not ask for the preacher; that he heard Campbell talking about not wanting to go to the Buena

Vista hospital, but wanted to go to Roanoke, but he did not say for what reason; that Campbell told nobody good-bye; and that witness, shortly after hearing the above conversation, went up to Vesuvius, and when he got back later in the evening had no further conversation with Campbell, and Campbell said nothing to any one and died about 7 o'clock.

The attending physician, upon reaching the deceased, found him suffering from great loss of blood, and he (deceased) said that if something was not done to relieve his pain he would die. This physician further testified that "the bleeding had stopped when I reached Campbell. I relieved his pain. He said he was easier." It further appears from the testimony of this witness that when he left deceased shortly before his alleged conversation with the witness Painter, not only was the hope of life held out, but without any suggestion of death he suggested to deceased that he would take him to the Buena Vista hospital; but the deceased said that he wanted to go to the hospital at Roanoke. The physician never told deceased or any one else that he (deceased) was going to die, but did say to some that his chances were poor or not good. True he says also that when he reached the deceased he knew that if something was not done to relieve his pain he would die; but he says also, as we have just stated, that when he reached deceased the bleeding had stopped, and he relieved his pain and talked with him about going to the hospital, and he stated that he wanted to go to Roanoke, and not to Buena Vista.

Another significant fact appearing in the record going to show the absence of thought on the part of the deceased or those around him that he was under a sense of impending death and without any expectation or hope of recovery is that his wife, knowing little or nothing about the matter, went to the preliminary hearing given the plaintiff in error by a justice several miles from their home on the day deceased was shot, and was gone several hours.

It is very true that in ascertaining consciousness of approaching death recourse should naturally be had to all the attending circumstances, such as the nature of the injury, etc.; but in this case neither the nature of the injury nor the circumstances shown clearly warranted the conclusion that the deceased was conscious of approaching death when he made the statements introduced as his dying declarations. It will not do to say that because death did actually occur a few hours after the declarations were made the conclusion must be reached that the declarant was conscious of approaching death when they were made.

In Jackson's Case, 60 Va. 667, the deceased appeared impressed with the belief that he would soon die, and generally so expressed himself, and in the preparation for death

made his will, yet after waking up from a nap of sleep he said, "Who knows but that I may get well;" and this was held to imply the existence in his mind of a possibility of his recovery, and evidence offered as to dying declarations made by him were not admissible. See, also, Bull's Case, 55 Va. 620; Swisher's Case, 67 Va. 964, 21 Am. Dec. 330; O'Boyle's Case, 100 Va. 785, 40 S. E. 121; Bowles' Case, 103 Va. 815, 48 S. E. 527.

In the case of *Tip v. State*, 14 Lea (Tenn.) 502, the facts and circumstances relied on as a sufficient foundation for the introduction in evidence of certain alleged dying declarations of the deceased were strikingly similar to the facts and circumstances relied on in this case; but the court, in an opinion reviewing the authorities at some length, held that there was not sufficient proof that the deceased was without any hope of recovery, and therefore the evidence as to his dying declaration had to be rejected. The opinion quotes from Lord Coleridge in *Rex v. Spillbury*, 7 C. & P. L. 87, as follows: "It is an extremely painful matter for me to decide upon; but when I consider that this species of proof is an anomaly and contrary to all the rules of evidence, and that if received it would have the greatest weight with the jury, I think I ought not to receive the evidence, unless I feel fully convinced that the deceased was in such state as to render the evidence clearly admissible. It appears from the evidence that the deceased said he thought he should not recover, as he was very ill. Now, people often make use of expressions of that kind who have no conviction that their death is near approaching. If the deceased in this case had felt that his end was drawing very near, and that he had no hope of recovering, I should expect him to be saying something of his affairs, and of who was to have his property, or giving some directions as to his funeral, or as to where he would be buried, or that he would have used expressions to his widow purporting that they were soon to be separated by death, or that he would have taken leave of his friends and relations in a way that showed he was convinced that his death was at hand. As nothing of this sort appears, I think there was no sufficient proof that he was without any hope of recovery, and that I therefore ought to reject the evidence."

"It follows from the general principle that the belief must be, not merely of the possibility of death, nor even of its probability, but of its *certainly*. A less stringent rule might with safety have been adopted, but this is the accepted one. The tests have been variously phrased; there must be 'no hope of recovery;' 'a settled expectation of death;' 'an undoubting belief.' Their general effect is the same. The essential idea is that the belief should be a positive and absolute one, not limited by doubts or re-

serve, so that no room is left for the operation of worldly motives." 2 Wigmore on Ev. § 1440.

Among the authorities cited in support of the text is the case of *Peak v. State*, 50 N. J. Law, 222, 12 Atl. 701, in which the opinion by Beasley, C. J., says: "(The declarant) shall have a complete conviction that death is at hand. * * * Death shortly to ensue must be an absolute certainty, so far as the consciousness of the person making the declaration is concerned." The syllabus of that case, so far as pertinent, is: "In order to make dying declarations admissible, the state must make it plainly apparent that the declarant had given up all hope of life and believed that death was impending." "Where the surgeon told the patient she might die at any moment, and that there was but one chance, from a contemplated operation, and the patient said she did not expect to recover, but would like to, and the conditions of the situation did not control such expressions, held, that the statements of the patient then made were not admissible, on the ground that it was not shown that such declarant had given up all hope of life."

See, also, 4 Va. & W. Va. Enc. Digest, p. 848, where, under the head "Foundation for the Admission of the Evidence," it is said that the rule (as stated in the authorities above cited) is a well-settled rule, and all the decisions of this court relating to the subject are cited.

[2] Dying declarations are only admissible in evidence as to the circumstances of the transaction itself which results in the death of the declarant. *Clark's Crim. Proc.* 525; 9 Am. & Eng. Enc. L. 679; *O'Boyle's Case*, supra. The absence of any self-serving purpose to be furthered on the part of the declarant is an essential element of the circumstantial guaranty of the trustworthiness of dying declarations. 2 Wigmore on Ev. § 1443.

[3] The so-called "dying declarations" of the deceased admitted in evidence in this case are obnoxious to the established rules governing the admissibility of such evidence, not only because they were not confined to the transaction itself which resulted in the death of the deceased, but contained self-serving declarations as to his attitude toward plaintiff in error and his daughters prior to the date of the transaction, notably that he (deceased) "had never mistreated Patterson's daughters—respected them as his own."

[4] At the trial of the case, after the said declarations had been admitted in evidence, and after one of the daughters of plaintiff in error had been allowed to testify as to deceased's conduct toward her, her father, and her sister, and had given an account of his solicitations and attempted assault upon her "in the mountain field," which

fact she straightway communicated to her father, counsel for the defense offered to prove by one Aud. Davis that the deceased, prior to the occurrence, had in vile language declared his purpose to do just what the daughter of the deceased testified he had attempted to do, but the witness Davis was not allowed to testify, to which ruling plaintiff in error excepted and assigns error.

As before stated, the declarations of the deceased as to his conduct towards the daughters of the accused were not admissible and ought to have been excluded; but, the trial court having admitted them, the accused ought to have been permitted to contradict the said declarations of the accused. In the view we take of the case, neither the said declarations of the deceased, nor the statements which the deceased made to Davis, were admissible, and upon the next trial neither should go to the jury.

We shall not attempt to consider at length the assignment of error relating to the instructions given for the commonwealth and the refusal of instructions asked for the defense; in fact, it is not necessary.

[5] The instructions to the jury given for the commonwealth were embraced in one very lengthy and detailed statement of the principles of law applicable to cases of homicide in general, and to the evidence in this case in particular, and then contain the following paragraph: "And you are further instructed that, even though you may believe from the evidence that the deceased, Sam'l Campbell, had used insulting and threatening language to the accused, and had used improper and indecent language to and about the daughters of the accused, in their presence and in his presence, yet, unless you further believe from the evidence and all the immediate circumstances surrounding the killing of deceased that he was the aggressor, and that said accused acted in self-defense, with the real or apparent necessity of saving himself from death or great bodily injury, you cannot consider such evidence at all in arriving at your verdict."

The contention of counsel for plaintiff in error is that, not only were the instructions given for the commonwealth confusing to the jury and misleading, but that the language of the instructions just quoted was not a correct statement of the law, as applied to the facts which the evidence in the case tended to prove, and was in conflict with an instruction given for the defense, in which the court rightly instructed the jury that, in considering the question as to whether Campbell made an attack upon Patterson which led to the shooting, they might consider the evidence of the state of feeling between Campbell and Patterson, preceding same, as throwing light upon the situation and occurrences.

We are of opinion that the principle of law propounded in the instruction for the defense, which told the jury that they might con-

sider the evidence of the state of feeling between Campbell and Patterson, preceding the shooting, as throwing light upon the situation and occurrences, was a correct one, and therefore the language embraced in the instructions given for the commonwealth, quoted above, was in conflict therewith, and should not have been given.

As the other questions raised with respect to the instructions are not likely to arise upon another trial of the case, they need not be considered here, and for the same reason it is not necessary to consider the assignment of error relating to the refusal of the court to grant the accused a new trial because of after-discovered evidence.

The remaining assignment of error is to the refusal of the court to set aside the verdict of the jury, because contrary to the law and the evidence; and as the case has to be remanded for a new trial we deem it inexpedient to review the evidence certified in the record.

It follows that the judgment of the circuit court has to be reversed, the verdict of the jury set aside, and the case remanded for a new trial, to be had not in conflict with the views expressed in this opinion.

Reversed.

KEITH, P. (concurring). I think the dying declaration which appears in the record was too broad, and that so much of it as related to facts not directly connected with the homicide should have been excluded, but that, subject to proper correction, the declaration should have been admitted.

Whether or not a dying declaration is admissible depends largely upon the mental condition of the declarant. If a man who has received a wound believes that wound to be mortal, and that he will shortly die of it, his declaration is admissible; and I know of no way in which his mental attitude can be ascertained, except by what the declarant may say and do.

In the case under consideration, Campbell stated that he was going to die; and when offered the medicine said that he "did not reckon it would do any good," but that he would take it. There was no word which emanated from him between the time he received the wound and the moment of his death which cast the slightest doubt upon his sincerity, or upon his belief that he was within the shadow of impending death. It is true that when the physician spoke to him about sending him to a hospital he said that he preferred to go to the hospital at Roanoke, rather than that at Buena Vista; but there was nothing that indicated that he entertained the slightest hope of recovery, and, as a matter of fact, he died on the afternoon of the day he received the wound.

I think the dying declaration was admissible, but should have been confined to the

facts connected with the homicide; and for these reasons I concur in the judgment of reversal, but not in the opinion of the court.

(114 Va. 37)

HONAKER v. STARKS.

(Supreme Court of Appeals of Virginia. Sept. 9, 1912.)

1. WILLS (§ 449*)—CONSTRUCTION—PROPERTY DISPOSED OF.

Where testatrix, owning five shares of stock in a bank, disposed of her estate, real and personal, to a number of devisees and legatees, and her will, containing no residuary clause, gave to a beneficiary named "my stock (one share)" in a bank, the gift of the stock included all the shares of stock.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 965; Dec. Dig. § 449.*]

2. WILLS (§ 463*)—CONSTRUCTION—PROPERTY DISPOSED OF.

Where the subject of a gift in a will is sufficiently and clearly ascertained, effect will be given to the gift, notwithstanding any added particulars of description, which are found to be false or mistaken.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 962; Dec. Dig. § 463.*]

3. WILLS (§ 449*)—CONSTRUCTION—INTESTACY.

Where a will is subject to two constructions, the construction which will prevent total or partial intestacy will be preferred.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 965; Dec. Dig. § 449.*]

Appeal from Circuit Court, Bland County.

Suit between J. D. Honaker, administrator of Rebecca J. Hicks, deceased, and C. J. M. Starks. From a decree for the latter, the former appeals. Affirmed.

Williams & Williams, for appellant. A. R. Porterfield and W. J. Henson, for appellee.

HARRISON, J. [1] The last will and testament of Rebecca J. Hicks was duly probated in Bland county on the 10th day of March, 1909. The testatrix disposes of her estate, real and personal, to a number of devisees and legatees, there being no residuary clause in the will.

The seventh clause of the will is as follows: "I give, devise and bequeath to C. M. Starks my stock (one share) in the Bank of Bland County, located at Bland, Virginia."

The record shows that the testatrix owned five shares of stock in the bank mentioned, and it is contended by the appellant that under the seventh clause the appellee took only one share of stock, and that the testatrix died intestate as to the remaining four shares.

We are of opinion that the devise of "my stock" carried with it the five shares of stock owned by the testatrix in the Bank of Bland, and that such devise was not limited or in any way diminished by the subsequent parenthetical words "(one share)." This was merely an attempted, but mistaken, descrip-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

tion of the stock owned by the testatrix in the Bank of Bland, which had previously been disposed of by the use of the broad term "my stock," which was five shares.

[2] Statements of quantity are seldom given much weight, because the amount is not often exactly known, and is easily mistaken. Where the subject is sufficiently and clearly ascertained, as it is in the case before us, by the use of the words "my stock," though there be added particulars of description, which are found to be false or mistaken, effect will be given to the devise notwithstanding, and the false or mistaken description will be rejected. *Wootton v. Redd's Ex'r*, 53 Va. 196; *Savings Bank v. Stewart*, 93 Va. 447, 25 S. E. 543. If this view needed any support, it is strengthened by the fact that the construction insisted upon by the appellant would create a partial intestacy, which should be avoided, if possible.

[3] When a man makes a will, the presumption, in the absence of evidence to the contrary, is that he intended thereby to dispose of his whole estate. Accordingly, where two modes of interpretation are possible, that is preferred which will prevent either total or partial intestacy. *Michie's Digest* (Va.) 787, and cases there cited.

In the case under consideration, it is obvious from the will, taken as a whole, that the testatrix did not intend to die intestate as to any part of her estate, and that she did intend to give to the appellee the five shares of stock owned by her in the Bank of Bland county. This conclusion was reached by the circuit court, and its decree must be affirmed.

Affirmed.

(114 Va. 117)

SMITH v. STANLEY.

(Supreme Court of Appeals of Virginia. Sept. 9, 1912.)

1. APPEAL AND ERROR (§ 171*)—QUESTIONS REVIEWABLE—QUESTIONS NOT RAISED IN TRIAL COURT.

Where a trial in ejectment proceeded on the theory that it was a case of common source of title, and defendant, in a requested instruction, conceded that if plaintiff traced his title back to a grantor and showed a present right of possession he established a prima facie case, defendant, on plaintiff's writ of error to review a judgment of dismissal, could not raise the question that the parties did not derive title from a common source.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1053-1069, 1161-1165; Dec. Dig. § 171.*]

2. EVIDENCE (§ 472*)—OPINION EVIDENCE—QUESTION FOR JURY.

Where, in ejectment involving the location of a disputed boundary, a surveyor of the lands claimed by plaintiff, who had made a plat thereof which was in evidence, could not testify, after stating how he had located a part of the disputed line, if there was any other rule of surveying in locating a line than that adopted by him, since the question wheth-

er the line was properly located was for the jury.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2186-2195; Dec. Dig. § 472.*]

3. WITNESSES (§ 269*)—CROSS-EXAMINATION—EXTENT.

A party cross-examining a witness as to matters other than those stated in the examination in chief should make the witness his own witness, calling him as such in the progress of the cause.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 949-954; Dec. Dig. § 269.*]

4. TRIAL (§ 84*)—EVIDENCE—OBJECTIONS—SUFFICIENCY.

A general objection to a question asked a witness on cross-examination is not sufficient to raise the objection that the question calls for matters not stated in the examination in chief; but, where the objection is based on that fact, it should specifically so state.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 211-218, 220-222; Dec. Dig. § 84.*]

5. WITNESSES (§ 226*)—APPEAL AND ERROR (§ 971*)—EXAMINATION OF WITNESSES—DISCRETION OF COURT.

The manner of examining witnesses is largely in the discretion of the trial court, and its action will not be disturbed in the absence of an abuse of discretion.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 792-797; Dec. Dig. § 226.* Appeal and Error, Cent. Dig. §§ 3852-3857; Dec. Dig. § 971.*]

6. EVIDENCE (§ 274*)—DECLARATIONS AS TO RIGHTS IN REAL ESTATE—ADMISSIBILITY.

A statement of what a person had said as to where a boundary line was located is not admissible in a controversy between strangers to the title, in the absence of anything to show that the person was a surveyor or chain carrier at the making of the original survey, or that he was the owner of the land or of any adjoining land calling for the same boundary, or that he had been engaged as a processioner of the land, or that his situation was such as to render it his duty or interest to make diligent inquiry and obtain information as to the facts, or that he claimed any title.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1121-1134; Dec. Dig. § 274.*]

7. EVIDENCE (§ 519*)—OPINION EVIDENCE—EXPERT TESTIMONY.

Where, in ejectment involving the location of a disputed boundary, there was evidence that a former owner had said that when he had his claim surveyed he did not survey all of it, but only had the heads of the bottoms run out, as he did not wish to pay taxes on more land than he could farm, a witness, testifying that the land was hilly and rocky, could not testify as to whether it was such land as a man running out the heads of bottoms for a farm, who did not want to pay taxes on more land than he could farm, would include in his survey, since the matter was not the subject of expert testimony.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2328; Dec. Dig. § 519.*]

8. EVIDENCE (§ 274*)—TITLE TO LAND—DECLARATIONS.

In ejectment involving the location of a disputed boundary line, a witness was properly permitted to testify as to an admission by a former owner, through whom a party claimed, to the effect that the former owner did not claim the lines as claimed by such party.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1121-1134; Dec. Dig. § 274.*]

9. EVIDENCE (§ 474½*)—OPINION EVIDENCE—EXPERT TESTIMONY.

The court in ejectment may properly refuse to permit a witness to give his opinion as to whether a former owner, under whom a party claimed, would or would not have sold land in dispute.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2220-2233; Dec. Dig. § 474½.*]

10. BOUNDARIES (§ 35*)—EVIDENCE—ADMISSIBILITY.

In ejectment involving the location of a disputed boundary, evidence that a prior owner, under whom a party claimed, had exercised acts of ownership to a line with the knowledge of and without objection from a former owner, under whom the adverse party claimed, was competent to show that both the former owners regarded the line between them as a correct line and as showing adversary possession of the parties and those claiming under them.

[Ed. Note.—For other cases, see Boundaries, Cent. Dig. §§ 153-159, 163, 165, 177-183; Dec. Dig. § 35.*]

11. APPEAL AND ERROR (§ 1048*)—EXAMINATION—LEADING QUESTIONS.

Ordinarily, the permitting of a leading question asked a witness is not ground for reversal, especially where the witness has stated the facts to which the leading question relates.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4140-4145, 4151, 4158-4160; Dec. Dig. § 1048.*]

12. EVIDENCE (§ 230*)—ADMISSIONS—QUESTION FOR JURY.

In ejectment involving the location of a disputed boundary line, a party may prove the admission of a former owner, under whom the adverse party claimed, as to the location of the line, as against the objection that the admission of the former owner was made under a mistake, since the question of mistake was for the jury and not for the court.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 835-851; Dec. Dig. § 230.*]

13. BOUNDARIES (§ 36*)—EVIDENCE—ADMISSIBILITY.

Where, in ejectment involving the location of a disputed boundary, there was evidence that a former owner, under whom a party claimed, had recognized the southern boundary line of his land as correctly described in a deed, and that such line had been treated by the former owner as the true dividing line, the deed was properly received in evidence.

[Ed. Note.—For other cases, see Boundaries, Cent. Dig. §§ 160-162, 164, 166-176; Dec. Dig. § 36.*]

14. EVIDENCE (§ 370*)—INDORSEMENTS ON DEEDS—ADMISSIBILITY.

Where an indorsement on a deed was signed by the grantor by his mark and was witnessed by a subscribing witness, who was dead, and three persons testified to the handwriting of such subscribing witness and stated that they were familiar with his handwriting, and that the name of the subscribing witness was in his own handwriting, and two of them thought that the name of the grantor and the words "his mark" were also in the handwriting of the subscribing witness, there was sufficient proof of the execution of the indorsement to authorize its admission in evidence.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1559-1579, 1592; Dec. Dig. § 370.*]

15. EVIDENCE (§ 357*)—INSTRUMENTS ADMISSIBLE IN EVIDENCE—LETTERS.

Where letters were not written by or to a party nor by or to any one under whom he

claimed in ejectment, the letters were properly excluded when offered by the adverse party, and their contents, if relied on by the adverse party, must be proved orally or by deposition.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1492-1499; Dec. Dig. § 357.*]

16. TRIAL (§ 260*)—INSTRUCTIONS—CONSTRUCTION.

Where the instructions, when considered as a whole, as they must be, fairly submitted the case, the refusal to give other instructions embodying correct propositions of the law applicable to the facts was not erroneous.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 651-659; Dec. Dig. § 260.*]

17. TRIAL (§ 314*)—COERCING VERDICT—INSTRUCTIONS.

Where the third jury, after two mistrials because of inability of the jurors to agree, were given the case on Saturday, and, on being unable to agree, they were adjourned over until Monday, the action of the court in charging the jury, before they retired on Monday to consider the verdict, that it was their duty to agree if they could, and that a juror should not hold out against other jurors on controverted questions unless convinced that he was right, but the jurors should make concessions and try to agree if they could do so without violating their oaths or consciences, was not objectionable as coercing a verdict.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 747, 748; Dec. Dig. § 314.*]

18. TRIAL (§ 312*)—INSTRUCTIONS.

Where, in ejectment involving the location of a disputed boundary, the jury returned to the courtroom, and one of them asked the court "what possession would be sufficient for the jury to believe or find that the defendant was entitled to the land," the statement by the court that if a man lived on his land or any part thereof and claimed to the extent of his boundary, and no part of it was in the possession of anyone else, his possession extended to the boundaries called for in his deed, and if there was an express agreement between former owners, under whom the parties claimed, and the parties exercised acts of ownership up to the agreed line, it was sufficient to establish the line, was in reply to the juror's question and correctly stated the law.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 744, 745; Dec. Dig. § 312.*]

Error to Circuit Court, Dickenson County.

Ejectment by M. T. Smith against H. E. Stanley. There was a judgment of dismissal, and plaintiff brings error. Affirmed.

Skeen & Skeen and Sutherland & Sutherland, for plaintiff in error. W. H. Rouse and Vicars & Peery, for defendant in error.

BUCHANAN, J. This is an action of ejectment brought by the plaintiff in error against the defendant in error to recover a small parcel of land.

The rights of the parties depend upon the location of a disputed boundary line. Both parties claim under conveyances from George A. Warder. In February, 1888, Warder conveyed to Rainwater Ramsey a tract of land containing, as stated in the deed, about 250 acres, known as the "Wm. Hale" land, and upon which Ramsey had resided since about the year 1868. The defendant acquired Ram-

sey's interest in the land sued for. In April, 1888, Warder conveyed two contiguous parcels of land to Wm. Green, one known as the "Elias Green tract," and the other known as the "Aaron Wright tract." Along the controverted lines the deed to Wm. Green calls for corners and lines on the Wm. Hale (Ramsey) land theretofore conveyed. The plaintiff claims under William Green.

There was a verdict and judgment in favor of the defendant in the trial court, and to that judgment this writ of error was awarded.

The plaintiff took 18 bills of exception to the action of the court upon the admission and rejection of evidence; and offered 27 instructions, 2 of which were given as offered, 4 amended and as amended given, and the others refused. The plaintiff excepted to the action of the court in refusing and amending his instructions, and also to its action in giving 7 instructions asked for by the defendant, to 1 given orally by the court in answer to a question asked by one of the jurors, and to the refusal of the court to set aside the verdict.

The record is voluminous, much of the evidence parol and more or less conflicting. If the case was properly submitted to the jury, it is clear that the court did not err in refusing to set aside the verdict.

[1] The plaintiff did not trace title to the commonwealth, and the defendant insists that, unless it appears that both parties derived title from a common source, it will be unnecessary to consider any other question in the case. It is conceded that both parties claim under a common grantor, George A. Warder; but the defendant denies that the conveyance of two distinct parcels of land, one to one grantee and the other to another grantee, although the deed to the junior grantee calls for the lines of the senior grantee, shows that the parties derived title from a "common source" within the meaning of that term.

Whatever may be the merits of that contention, we do not think it can be raised in this court. In the trial court both parties proceeded upon the theory that it was a case of common source of title. By the defendant's instruction No. 2 it is conceded that, if the plaintiff traced his title back to Warder and showed a present right of possession to the land sued for, he had made out a prima facie case. This, of course, could not be true unless Warder was regarded as the common source of title.

[2] Thacker, a surveyor, who has surveyed the lands claimed by the plaintiff and made a plat thereof which was in evidence, after testifying how he had located a part of the disputed line, was asked if there was any other rule of surveying in locating such a line than that adopted by him. The witness was not permitted to answer the question, and this action of the court is assigned as error.

Whether or not the line in question was properly located was a question for the jury upon all the evidence in the case. Upon the facts stated in the bill of exceptions (No. 3), the ruling of the court was proper.

[3-5] The same witness, John Green, Brownlow Green, and Samuel Green were asked certain questions upon cross-examination by the defendant's counsel as to matters not connected, it is claimed, with their examination in chief. The action of the court in permitting such questions to be asked at that time is assigned as error.

The bills of exceptions upon which this assignment of error is based show that the said questions were objected to generally, but do not show upon what ground. The general rule unquestionably is that, if the party cross-examining wishes to examine a witness as to matters other than those stated in his examination in chief, he should do so by making the witness his own and calling him as such in the progress of the cause. 1 Greenleaf, § 445. But where the objection to the evidence is as to the time it is offered, the objection should so state. But even if that be done, the manner of examining witnesses is so largely in the discretion of the trial court that its action will not be reversed unless it has abused its discretion. 1 Greenleaf on Ev. §§ 431, 447; 2 Elliott on Ev. § 927.

[6] The refusal of the court to permit A. W. Hale, a son of Wm. Hale, to testify as to what the witness had heard his brother say with reference to where the line in controversy was located is assigned as error.

It does not appear that the person whose statement was sought to be proved was either a surveyor or chain carrier at the making of the original survey, or that he was the owner of the tract or of any adjoining tract calling for the same boundaries. It does not appear that he had been engaged as a processioner of the land, or that his situation was such in reference to the land as to render it his duty or his interest to make diligent inquiry and obtain accurate information as to the facts. It appears that he was living on the land at the time, but in what character is not stated. It is not stated that he was there as the tenant of Wm. Hale, or as a claimant for himself under any title; certainly it does not appear that he had that peculiar means of knowing the facts which would impress upon his unsworn statement the character of evidence in a subsequent controversy between others to whom he was entirely a stranger, about the title to the land. His statement under our decisions was properly rejected. *Harri-man v. Brown*, 35 Va. 697, 712-713; *Clements v. Kyles*, 54 Va. 468, 478; *Fry v. Stowers*, 92 Va. 13, 14, 22 S. E. 500.

[7] There was evidence tending to prove that Wm. Hale, a former owner, had said that when he had his claim surveyed he did not survey all of it, but only had the "heads

of the bottoms run out," as he did not wish to pay taxes on more land than he could farm. E. D. Sutherland, after stating that the land was hilly and rocky, was not permitted to answer whether it was "such land as a man running out the heads of bottoms for him a farm—a man who did not want to pay taxes on more land than he could farm—would include in his survey." This action of the court is assigned as error.

The answer sought was the opinion of the witness upon a matter which was clearly not the subject of expert evidence.

The action of the court in permitting certain questions to be answered by Mrs. Margaret Hale, as set out in bill of exceptions numbered 9, is assigned as error. When that bill of exceptions is considered in connection with bill of exceptions numbered 1, we do not think the court erred in permitting the evidence objected to, which it is true was somewhat indefinite, to go to the jury for what it was worth.

The court, as appears from bill of exceptions No. 10, refused to permit a surveyor named Raines, on cross-examination, to answer certain questions therein set out. The answers called for by the questions were the opinions of the witness. In passing upon the objection to that evidence and upon the motion of the defendant to exclude other evidence of like kind which had gone to the jury, the court sustained the objection and excluded all the opinion evidence of the surveyors who had testified in the cause, except their opinions as to the age of the marks on timber. The ruling of the court in excluding said evidence and the language in which its ruling was made is assigned as error.

While the language of the court is somewhat involved, it is clear, we think, that the jury must have understood from it that all the opinion evidence of the surveyors, except as to the age of the marks on timber, was excluded and must not be considered by them in arriving at their verdict. Neither do we think that the court erred in excluding the evidence objected to and asked to be excluded.

[8.] The action of the court in permitting E. T. Sutherland to testify as to an admission made by Wm. Green (through whom the plaintiff claims) as set out in bill of exceptions No. 11, and the refusal of the court to permit the same witness, upon cross-examination, to answer a question as to the habits of Wm. Green, as appears from the same bill of exceptions, are assigned as errors.

The question which the witness was permitted to answer tended to show that Wm. Green did not claim the lines in controversy where the defendant, his vendee, now claims them. The question which the court declined to permit the witness to answer sought the opinion of the witness as to whether Wm. Green would or would not have sold

land in dispute. The ruling of the court upon each question was clearly proper.

[10] The court, as will appear from bills of exceptions numbered 12, 13, 14, 16, and 19, refused to exclude evidence tending to show that Rainwater Ramsey claimed the land now in controversy, and that he and those who claim under him exercised acts of ownership over the same, or portions thereof, by cutting, using, and selling timber from it, clearing and cultivating portions of it, with the knowledge of and without objection on the part of Wm. Green.

This evidence was clearly competent as tending to show where both Ramsey and Green regarded the line between them, and also as tending to show adversary possession on the part of Ramsey and those who claim under him—even if the acts mentioned were not sufficient, as claimed by the plaintiff, to show title by adversary possession.

[11] The court permitted Reedy, a witness who had testified to a conversation between himself and Wm. Green (bill of exceptions No. 15), to be asked the following question: "He (Green) was then talking about the division line between him and Ramsey?" and his reply was, "Yes, sir." This question was objected to because leading, and because the statement of Green was made under a mistake.

[12] Ordinarily, permitting a leading question to be asked furnishes no ground for reversal—certainly not in this case, for it appears from what the witness had already stated that Green was talking about the division line. Whether his admission as to the location of that line was made under a mistake was a question for the jury, not for the court.

[13] The assignment of error based upon bill of exceptions No. 17 is to the action of the court in permitting the defendant to introduce in evidence a deed from Wm. Green to Willard, trustee. The deed shows upon its face that the land embraced in it is a portion of the two tracts of land owned by Wm. Green, as hereinbefore stated. There was evidence in the case tending to show that Wm. Green recognized and treated the southern boundary line of his land as correctly described in the Willard deed, and that the said southern boundary line was the Hale line, or a line treated by him (Green) and Ramsey as the true division line between them. If the line called for in the Willard deed was the boundary line between the lands of Ramsey and Green, then the land in controversy belonged to the Ramsey tract and the plaintiff could not recover it. The Willard deed, in this view of the case, was material evidence, and the court did not err in admitting it.

[14] The defendant was permitted to introduce in evidence a notation or indorsement on the margin of the deed from Warder to Wm. Green. The objection made to the introduction of said indorsement, as

stated in substance in bill of exceptions No. 18, was that it was not proved to have been the act of Wm. Green. It was signed

his
"Wm. X Green," and witnessed by J. F.
mark

Gilliam. J. F. Gilliam was dead. Three witnesses were placed upon the stand to testify to his handwriting, with which they stated they were familiar. All of them were of opinion that the name of the subscribing witness was in his own handwriting, and two of them thought that the words

his
"Wm. X Green" were also in his hand-
mark

writing. This was sufficient proof of the execution of the indorsement to render it admissible.

[15] Under the facts disclosed by bill of exceptions No. 20, we do not think that the court erred in refusing to permit the papers therein set out to go to the jury. The letters excluded were not written by or to the defendant, nor by or to any one under whom he claimed. Their contents, if relied on to show that the plaintiff was not withholding from the jury the title bond to the Green land, ought to have been proved orally or by deposition.

The court gave the following instructions:

Defendant's Instructions.

"(1) The court instructs the jury that the plaintiff can recover in this action only on the strength of his own title; that it does not matter whether the title of the defendants is defective or not, the question is not whether the defendants have title to the land in this suit mentioned, but whether the plaintiff has title thereto.

"(2) The court instructs the jury that the plaintiff must show the Warder title in himself and a present right of possession at the time of the commencement of this action before the defendants are called upon to show anything, and the party in possession is presumed to be the owner until the contrary is proved.

"(3) The court instructs the jury that the burden is on the plaintiff in this case to prove that the deed from George A. Warder to Rainwater Ramsey offered in evidence by the plaintiff in this case does not include the land in controversy; and, unless they do believe by a preponderance of the evidence in this case that the land in controversy is not included in said deed from George A. Warder to Rainwater Ramsey, they must find for the defendant.

"(4) The court instructs the jury that as a matter of law the use and occupancy of contiguous property by the respective owners thereof without disturbance for a sufficient length of time to show that the owners thereof knew their boundary lines will be sufficient evidence of an agreement between the parties to establish such line as the true

boundary line between the parties, and if they take and hold possession up to that line the requisite statutory period, for at least 10 years, the possession thereof will ripen into title and will preclude the parties and those holding under them from thereafter disputing the same.

"(5) The court further instructs the jury that in an action of ejectment a defendant, who is in the peaceable possession of land sought to be recovered, is entitled to hold the same against all the world except the true owner thereof.

"(6) The court instructs the jury that, where the boundaries are doubtful, actual occupation for a number of years up to the line whence the party supposed his land to extend, without objection from the adjoining proprietor, is strong presumptive evidence of the true place of the line.

"(7) The court instructs the jury that if in this case they believe that Rainwater Ramsey and those claiming under him were in possession for a number of years up to the northern line of the land in controversy to which they supposed their land to extend, without objection from William Green and those claiming under him, then that is strong presumptive evidence of the true location of the division line between the lands of Ramsey and Green."

Plaintiff's Instructions.

"(3, as amended) Where corner trees are called for, but not found, nor the place at which they stood located, then the lines running to and from such corner should be determined by the courses and distances called for in the deed, provided such courses and distances will run to the next located corner.

"(4) If such course and distance will not run to the next located corner, then distance must give way to course or course to distance according to the manifest intent of the parties and the circumstances of the case."

"(4) The court further instructs the jury that if they believe from the evidence that Warder, the common grantor, under which both complainant and defendant claims, conveyed to Rainwater Ramsey by deed the lands on the south side of the Billy Hale line, and that he subsequently conveyed to William Green the adjacent lands on the northern side of said Hale line, then, in order to determine in whom the title to the land in controversy is now vested, it is necessary for you to determine by a preponderance of the evidence the true location of the original William Hale line called for in the title papers of both complainant and defendant, and if you believe by a preponderance of the evidence that the land in controversy is located on the north side of the William Hale line, and that same was conveyed to Green by Warders and not previously conveyed by Warders to Ramsey, then you should find for the plaintiff."

Amendment to 4: "Unless you believe by a preponderance of the evidence that, after a dispute or controversy arose between Ramsey and Green, the adjacent owners, as to the true location of the Hale line, they mutually agreed upon a location of the Hale line, and that in pursuance of said agreement each of the said adjacent owners, namely, Green and Ramsey, took possession, used, and occupied said land up to said agreed line for the statutory period of 10 years."

"(5) The court further tells the jury that if they believe from the evidence that William Green did not know during his lifetime where the Billy Hale line was located, but that he continued to claim title up to the said Billy Hale line, then he and those claiming under him are not estopped from now showing the true location of the said Billy Hale line and may claim up to said line wherever it may be actually located."

Amendment to 5: "Unless you further believe the parties did agree upon another line and each held possession up to said agreed line for a period of 10 years prior to the bringing of this suit."

"(7) The court further tells the jury that cutting timber is not sufficient act of ownership to amount to a disseisin or dispossession of the rightful owner; neither is a disclaimer of title by the true owner sufficient to divest himself of the legal title or defeat this action."

"(10) The court tells the jury that the law is that a disclaimer sufficient to divest an owner of title to lands can only be made by deed or in a court of record. In the case of disputed boundaries, the parties may agree upon a line, by way of compromise, and if they take and hold possession up to that line for the requisite statutory period, the mere possession will in time ripen to title."

"(11) The court tells the jury that fixed monuments, natural boundaries, and the topography of the country control over course and distance in locating the boundary of a deed."

The action of the court in giving these instructions except No. 7 and No. 11, offered by the plaintiff, is assigned as error, as is also the action of the court in refusing to give 25 other instructions as offered by the plaintiff.

[16] Without attempting any detailed discussion of the numerous objections to the instructions given and to the action of the court in refusing to give those which were rejected, it is sufficient to say that, while some of the instructions given are not as full and as clear as it is desirable that instructions should be, yet when considered as a whole, as they must be, we think they fairly submitted the case to the jury. This being so, the court did not err in refusing to give the other instructions offered, even if they had stated, as many of them fail to

do, correct propositions of law as applied to the facts of this case.

[17] The case was submitted to the jury on Saturday, and, being unable to agree upon a verdict, they were adjourned over until Monday.

Before retiring to their room on Monday to consider of their verdict, the court said to the jury: "Gentlemen: The court had thought he would sum up the evidence in this case, but after deliberation I have decided not to do so, but I will say that it is the duty of juries to agree if they can, that it is the duty of a juror or jurors not to hold out and be positive against the other jurors on controverted questions, unless he is convinced that he is right. But such juror or jurors should make concessions and try to agree with the others if he can possibly do so without violating his oath or his conscience."

This action of the court is assigned as error.

Not only was there no error in the court's direction to the jury as to their duty as jurors, but such direction was especially appropriate in this case, in which there had already been two mistrials because of the inability of the jurors to agree.

[18] Before agreeing upon their verdict, the jury returned to the courtroom, when one of them asked the court: "What possession would be sufficient for the jury to believe or find that the defendant was entitled to the land?" The court orally replied: "That if a man living upon his lands, or any part thereof, and claiming to the extent of his boundary and no part of it in the possession of any one else, his possession extended to the boundaries called for in his deed, and in this case if you believe from the evidence there was an express agreement between Ramsey and Green and the parties exercised acts of ownership up to this agreed line for a considerable period of time, this is sufficient to establish the line between the parties. If you believe there was an agreed line established by the parties as claimed by the defendant, and if you further believe there was no express agreement between the parties and neither party knew the exact location of the division line, yet if the parties, Ramsey and Green, claimed up to a certain line on each side and exercised ownership, cut the timber up to that line, and sold their lands up to that line, you have a right to come to the conclusion that there was a line established by the parties."

This action of the court is assigned as error, first, because the court's statement was not a reply to the juror's question, and, second, because it does not state the law correctly.

The court is of opinion that the statement of the court was an answer to the juror's question, and as applied to the facts of this

case was substantially a correct statement of law.

Upon the whole case we are of opinion that the judgment of the circuit court should be affirmed.

Affirmed.

(114 Va. 31)

ELY et al. v. JOHNSON et al.

(Supreme Court of Appeals of Virginia. Sept. 9, 1912.)

1. EQUITY (§ 39*)—JURISDICTION—COMPLETE RELIEF—RESTRAINING TRESPASS ON REAL ESTATE.

Where the primary object of a suit is to enjoin trespasses on real estate involving irreparable injury, and the quieting of title and removal of clouds are merely incidental, the court may grant complete relief, though plaintiff does not allege and prove that he has both the legal title and possession which is essential to a decree quieting title as primary relief, since equity when acquiring jurisdiction of a case on equitable grounds, will grant complete relief.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 104-114; Dec. Dig. § 39.*]

2. INJUNCTION (§ 35*)—RESTRAINING TRESPASSES ON REAL ESTATE—TITLE.

A plaintiff suing to restrain a trespass on real estate involving irreparable injury need only show a prima facie title, and he need not allege that his title is undisputed, or has been adjudicated.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 77; Dec. Dig. § 35.*]

3. INJUNCTION (§ 46*)—RESTRAINING TRESPASS ON REAL ESTATE—TITLE.

One suing to restrain a trespass on his land consisting of the cutting and removing of the timber therefrom must show that the injury complained of is irreparable, or that his remedy at law is inadequate, and that the timber constitutes the land's chief value, or that it is essential to the enjoyment of the land, or how its removal will injure the inheritance.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 98, 99, 107; Dec. Dig. § 46.*]

4. INJUNCTION (§ 118*)—RESTRAINING TRESPASS ON REAL ESTATE—TITLE.

A bill to restrain a trespass on land which shows a prima facie title in plaintiff, and which alleges that a few months before defendants went on the land and cut and are now cutting timber, tan bark, and other materials and removing the same from the land, claiming the land as their own, that the injuries are irreparable, that the land is mainly valuable for the timber growing thereon, and that the destruction of the timber is equal to the destruction of the entire property, and that there can be no adequate compensation in damages, states a cause of action for equitable relief as against a demurrer.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 223-242; Dec. Dig. § 118.*]

5. VENDOR AND PURCHASER (§ 232*)—BONA FIDE PURCHASER—NOTICE.

Where the grantee in a deed was in the actual possession of a part of the land which was cleared and cultivated, and a cabin erected thereon, and fenced along a dividing line for a part of the distance in the direction of a corner marked, and the line of the fence was visible for several years and the grantee for years exercised the right of cutting, using, and selling the timber from the land and pointed out to purchasers of timber from him the di-

viding line, a subsequent purchaser was put on inquiry as to the title of the grantee, and he was not a bona fide purchaser without notice, and he could not claim the land, especially where he acknowledged the grantee's title and the boundary lines.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 540-562; Dec. Dig. § 232.*]

Appeal from Circuit Court, Lee County.

Suit by Byrd L. Johnson and others against M. T. Ely and others. From a decree for plaintiffs, defendants appeal. Affirmed.

J. C. Noel and B. H. Sewell, for appellants. Pennington Bros. and Duncan & Cridlin, for appellees.

WHITTLE, J. The property involved in this litigation is 20.9 acres of forest land situated in Poor Valley, in Lee county, Va., and comprises the northern portion of a tract of 78 acres, patented to Moses McAfee (the common source of title of the plaintiffs and defendants) June 30, 1849.

[1] Considering the original and amended bills of the appellees as a whole, they show a prima facie title to the land in question, and, among others, contain the allegations: "That a few months ago the said Marion T. Ely (one of the defendants) and his father, Robert B. Ely, have gone upon said tract of land, * * * and have cut, and are now cutting, considerable timber and trees, tan bark, and other material, and removing the same from said land, claiming the said land as their own and refusing to acknowledge the title of your orators in said property. Your orators allege that the said injuries are irreparable, that the said tract of land is mainly valuable for the timber that is growing thereon, and that the destruction of the said timber is equal to the destruction of the entire property, and they cannot be adequately compensated in damages for said injuries."

These allegations are followed by a prayer that the defendants be enjoined from trespassing upon the land, and from cutting and removing the timber and other materials therefrom. The bills also contain incidental prayers that the plaintiffs may be quieted in their title, and that the clouds may be removed therefrom. But the primary object of the suit is to enjoin trespasses involving irreparable injury to the very substance of the land itself. The quieting of the title and removal of clouds are incidental merely to the controlling ground for equitable jurisdiction and relief. If these subsidiary matters had been made the burden of the complaint, as the law was when this suit was brought, it would have been indispensable to allege and prove that the plaintiffs held both the legal title and possession of the land. But see Acts of Assembly 1912, p. 76.

Upon familiar principles, where a court of equity acquires jurisdiction of a case on equitable grounds, it will proceed to grant com-

plete relief, even through such redress may include the establishment of purely legal rights and the enforcement of legal remedies otherwise beyond its scope. This doctrine has been uniformly recognized by the decisions of this court.

[2] Upon the main question it was held in *Bledsoe v. Robinett*, 105 Va. 723, 54 S. E. 861, that a plaintiff in a suit to restrain a trespass need not allege that his title is undisputed or has been adjudicated. He must, however, show a prima facie title. "When he claims under a paper title, he should generally exhibit his title papers, * * * or such of them at least as will make out a prima facie case of title; if he relies on possession, he should state the facts upon which he bases his claim of possession, so that in either case the court can see from the title papers filed or the facts stated that he has a prima facie title."

[3] He must also allege such facts "as will show that the injury is irreparable or that the remedy at law is inadequate, that the timber on the land constitutes its chief value, or that it is essential to the enjoyment of the land, or how its removal would injure the inheritance." *Collins v. Sutton*, 94 Va. 127, 26 S. E. 415; *Miller v. Wills*, 95 Va. 337, 28 S. E. 337; *Callaway v. Webster*, 98 Va. 790, 37 S. E. 276; *Woolfolk v. Graves*, 113 Va. —, 69 S. E. 1039, 73 S. E. 721.

[4] Measured by the principles announced by these authorities, the bills set out a case for equitable jurisdiction and relief, and the demurrers were properly overruled.

[5] Upon the issues of fact submitted by the pleadings, the case may be thus summarized: In the year 1854 negotiations for the sale of the property were commenced by a letter from McAfee to Johnson Gibson, which culminated November 18, 1854, in a deed conveying the same to the three Gibsons from whom the plaintiffs derive their title. The original deed was found among the papers of Johnson Gibson in September, 1908, after his death, and on September 17, 1908, was admitted to record. The deed characterizes the transaction as a "swap or exchange," but the letter plainly shows that it was in legal effect an ordinary deed of bargain and sale. McAfee owed Johnson Gibson \$45, and the discharge of that indebtedness was the consideration for the deed.

The defendants claim title to the land mediately through the daughters of Moses McAfee, to whom, by deed of gift dated June 17, 1860, he conveys "all of my lands that I own in Lee county, lying on both sides of the main road, adjoining the lands of Thompson, Ely, Bates, and Edds, it being the same lands that China McAfee and William McAfee now lives on. No. of acres not known." On March 24, 1877, the grantees in the foregoing deed and China McAfee, widow of Moses McAfee, undertook, as the defendants assert, to include the 20.9 acres of land in a

deed to Robert B. Ely. If it be conceded that the general descriptions contained in the last named deed are sufficient to embrace the land in dispute, nevertheless, the plaintiffs admittedly have the older title. The controversy, therefore, in its essence, narrows itself down to the single proposition whether or not Robert B. Ely was an innocent purchaser for value and without notice of the prior title of the plaintiffs.

The defendants M. M. Ely and Marion T. Ely, the wife and son of the grantor, Robert B. Ely, are not purchasers for value, but are volunteers, and therefore must rely upon his title to maintain their contention.

We shall not attempt to rehearse the voluminous evidence or to reconcile the discrepancies in the testimony of witnesses. It is sufficient to give our conclusions.

The evidence sustains the allegation that the timber on the land constitutes its principal value, and that the defendants had cut and removed a considerable quantity of timber, tan bark, and other materials from the land during the year 1908. The fact that they were not actually engaged in cutting timber at the time suit was instituted loses its significance in view of the attitude of the defendants with respect to the litigation. There is no avowal on their part of a purpose to desist from further depredation, and their entire defense rests upon a denial of the plaintiffs' rights, and the claim of absolute ownership of the property on their part, with the consequent right to use it as they please.

The evidence also shows that, before Robert B. Ely became a complete purchaser of the land (if he ever became such purchaser), the circumstances were sufficient to put him on inquiry as to the Gibson title, as the law then was (1874), under the doctrine of *Chapman v. Chapman*, 91 Va. 397, 21 S. E. 813, 50 Am. St. Rep. 846. The rule laid down in that case continued to be the law until it was changed by a proviso added to the Code (section 2465) by Acts 1895-96, p. 842. By Acts 1897-98, p. 833, the proviso was omitted; but it was again restored by Acts 1899-1900, p. 89. See notes to Va. Code, 1904, § 2465.

The Gibsons had long been in actual possession of part of the land and had cleared and cultivated it and erected a cabin thereon, which remained in the occupancy of their tenants until it was finally pulled down and rebuilt on a different site. They also made a fence from the black oak corner, along the dividing line between the 20.9-acre tract and the southern end of the 78-acre survey, for part of the distance (but not extending all the way) in the direction of the corner marked by two white oaks, a dogwood, and a sourwood. This fence was partially destroyed by forest fires, but the remains of it, marking the old fence line, were visible for several years after the close

of the Civil War. In addition to these indicia of ownership, the Gibsons for years exercised the right of cutting, using and selling locust posts, board trees, barn logs, and other timber from the land. They also pointed out to purchasers of timber from them the dividing line from the black oak to the corner at the two white oaks, the dogwood, and the sourwood.

But the evidence, moreover, shows actual knowledge on the part of Robert B. Ely of these transactions, and his recognition of and acquiescence in the dividing line as claimed by the Gibsons. He showed this line to purchasers of timber on the 20.9-acre tract of land from the Gibsons, and also to purchasers of timber on the land south of the dividing line from himself; and in each instance notified the parties that they must confine their cutting to their respective boundaries. It was furthermore shown that the defendant Marion T. Ely had given similar instructions to purchasers of timber on the land south of the dividing line from him.

Upon these considerations we are of opinion to affirm the decree of the circuit court.

Affirmed.

(114 Va. 13)

**CLINCHFIELD COAL CORPORATION v.
OSBORNE'S ADMR.**

(Supreme Court of Appeals of Virginia. Sept. 9, 1912.)

1. PLEADING (§§ 192, 317*)—DEMURRER—BILL OF PARTICULARS.

Where a declaration states a cause of action, the remedy of defendant desiring a more particular statement of the grounds of complaint is not by demurrer, but by motion for bill of particulars under Code 1904, § 3249.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 408-427, 954-962; Dec. Dig. §§ 192, 317.*]

2. MASTER AND SERVANT (§ 291*)—INJURY TO SERVANT—CONTRIBUTORY NEGLIGENCE—INSTRUCTIONS.

Modifying defendant's instruction, in an action against a master for death of a servant, by changing it from one that verdict should be for defendant if deceased was negligent, and such negligence "contributed to" the injury, to one to so find if he was negligent, and such negligence was the "proximate cause of" the injury, was erroneous, as leaving out of view that the master is not liable where the servant's want of care was either wholly or partially the efficient cause of the injury, or if the accident was due to the mutual and concurrent negligence of both.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1133, 1134, 1136-1147; Dec. Dig. § 291.*]

3. MASTER AND SERVANT (§ 296*)—INJURY TO SERVANT—CONTRIBUTORY NEGLIGENCE—INSTRUCTIONS.

A master sued for injury to a servant is not entitled to an instruction that there can be no recovery if the servant was guilty of negligence which contributed "in the slightest degree" to the accident; this being calculated to mislead, and prevent recovery, though the serv-

ant's shortcoming was so trivial as to have been without appreciable effect.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1180-1194; Dec. Dig. § 296.*]

4. TRIAL (§ 260*)—INSTRUCTIONS—REPETITION.

An instruction is properly refused; the subject having been already sufficiently covered by instructions given.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 651-659; Dec. Dig. § 260.*]

5. EXECUTORS AND ADMINISTRATORS (§ 29*)—APPOINTMENT—PENDENCY OF ACTION.

One having sued as administrator, without in fact having been duly appointed such, and having acted in the interest of, and at the instance of, the only one interested in the estate, grant of letters of administration to him pending the action will relate back to its commencement for the purpose of preserving the right of action.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 177-182; Dec. Dig. § 29.*]

Error to Circuit Court, Wise County.

Action by J. B. Kiser, administrator of C. W. Osborne, deceased, against the Clinchfield Coal Corporation. Judgment for plaintiff. Defendant brings error. Reversed and remanded for new trial.

Bond & Bruce, E. M. & E. H. Fulton, and Phlegar, Powell, Price & Shelton, for plaintiff in error. Vicars & Peery, for defendant in error.

HARRISON, J. At the time of the accident out of which this litigation grows, C. W. Osborne was working as the hired servant of the defendant coal corporation in one of its coal mines, and was killed, while in the discharge of his duties as a miner, by falling slate, stone, etc., from the roof of the mine. This suit was brought in the name of J. B. Kiser, administrator of C. W. Osborne, deceased, to recover of the defendant coal corporation damages for the death of his intestate, which is alleged to have been caused by the negligence of the defendant. The trial in the circuit court resulted in a verdict and judgment for the plaintiff, to which judgment the present writ of error was awarded.

[1] There was a demurrer to the declaration, which we think was properly overruled. The declaration, read as a whole, states a good cause of action and sufficiently informs the defendant of the case it has to meet. If the defendant desired a more particular statement of the grounds of complaint, its remedy was not by demurrer, but by a motion for a bill of particulars under section 3249 of the Code. *Interstate R. Co. v. Tyree*, 110 Va. 38, 65 S. E. 500.

We are of opinion that the objection of the defendant to the court's modification of its instructions 4 and 7 is well taken, and should have been sustained.

[2] Instruction No. 4, as asked for, told the jury that if they believed the deceased

was negligent, and that such negligence contributed to the injury, then they must find for the defendant. The court struck out the words "contributed to," and substituted the words "proximate cause of," making the instruction read, "and that such negligence was the proximate cause of the injury," then they must find for the defendant. Instruction No. 4, as asked, was addressed to the defendant's claim that the plaintiff's intestate was guilty of contributory negligence in putting off, as he did, the shot which immediately preceded his death, and in going under the slate after the shot was fired, before its effect on the slate, which he had said was unsafe, was ascertained. The instruction correctly stated that the burden of proof was on the plaintiff to show that his intestate's death was due to some negligence of the defendant which was the proximate cause thereof, and further correctly stated that, if the jury believed the deceased was guilty of negligence and that such negligence contributed to the injury, they must find for the defendant.

Numerous decisions of this court show that it is the general, if not the universal, rule that, if the plaintiff in an action for negligent injuries has been guilty of contributory negligence, he cannot recover.

In *Richmond Traction Co. v. Martin*, 102 Va. 209, 213, 45 S. E. 886, 887, it is said: "The well-known rule in this class of cases is that a plaintiff seeking to recover damages for an injury caused by the negligence of the defendant must himself be free from negligence, and, if it appears that his negligence has contributed as an efficient cause to the injury of which he complains, the court will not undertake to balance the negligence of the respective parties for the purpose of determining which was most at fault. The law recognizes no gradations of fault in such case, and where both parties have been guilty of negligence, as a general rule, there can be no recovery."

As amended, the instruction left out of view the settled doctrine that the servant is not entitled to recover where his own want of care was either wholly or partially the efficient cause of the injury, and also ignored the established rule that the plaintiff cannot recover if the accident was due to the mutual and concurring negligence of the plaintiff and the defendant.

The amendment to instruction No. 7 was practically the same as that to No. 4. The instruction as offered told the jury that if the evidence showed that it was the duty of plaintiff's intestate to put props under the slate which fell, and also the duty of the company to put props under it, that both failed in their duty, and that failure of plaintiff's intestate contributed to the injury, they should find for the defendant. The court refused this, and amended the instruction by striking out "contributed to" and

inserting "was the proximate cause," thus making it essential that the defendant show, not simply a contributing or concurring negligent cause, but that the intestate's negligence was the "proximate cause." This was error, as already seen in considering the amendment to instruction No. 4.

[3, 4] Objection is taken to the action of the court in refusing instruction No. 13, asked for by the defendant. This instruction was directed to the doctrine of contributory negligence, and told the jury that if they believed that the plaintiff was negligent, and that such negligence contributed in the slightest degree to the accident, etc., there could be no recovery.

The language, "slightest degree," is a departure from that heretofore employed and approved by this court, and should not have been used. It was calculated to mislead and to visit upon the person injured all the consequences of the defendant's negligence, although the shortcoming of the plaintiff may have been so trivial as to have really been without appreciable effect. Further, the jury had already been sufficiently instructed as to the plaintiff's contributory negligence, and the instruction in question was properly rejected for that reason.

We deem it unnecessary to consider in detail the numerous objections taken in the examination of witnesses to questions asked and answers permitted. It is sufficient to say that after carefully considering these objections, which may not arise on another trial, we are unable to see that the court has abused its discretion in the matter, or that its action has been prejudicial to the defendant.

[5] It appears that after the trial had, upon the defendant's plea of not guilty, proceeded regularly to a verdict for the plaintiff, it was discovered for the first time that as the result of some mistake or inadvertence no order had been entered by the clerk, upon the motion before him, made prior to the institution of the suit, for the estate of the decedent to be committed to the sheriff of Wise county for administration. Upon this discovery the defendant filed its motion in writing, asking for a new trial upon the ground, among others, that the plaintiff J. B. Kiser had failed to prove his representative capacity, and was not in fact, at the time of the institution of the suit, the administrator of the estate of C. W. Osborne, deceased, and was not authorized to sue for said estate in any representative capacity. Thereupon the plaintiff filed his motion in writing, in which J. T. Osborne, the father and sole distributee of the deceased, united, asking that the estate of the decedent be committed to J. B. Kiser, sheriff of Wise county, as administrator. Upon the hearing of these motions the circuit court committed the estate to J. B. Kiser, sheriff of Wise county, as administrator, overruled the motion for a new

trial, and entered judgment upon the verdict of the jury.

This action of the court is assigned as error, it being insisted that no judgment could be entered until the administrator had been made a party to the suit, and that the plaintiff was never the administrator until after the verdict; that he did not profess to sue as a sheriff, to whom the estate was committed, but as a private person who was an administrator. It is contended that under these circumstances the suit should have been dismissed.

To turn the plaintiff out of court under the circumstances here disclosed would be to defeat, rather than further, the ends of justice. In 91 Fed. 845, 34 C. C. A. 103, is reported the case of *Hodges v. Kimball*, decided by the United States Circuit Court of Appeals. In disposing of this case numerous authorities are cited in support of the proposition, which seems to be well settled, that, if pending the action ancillary letters of administration are taken out, they relate back to the institution of the action for the purpose of preserving the plaintiff's right of action, and that the pleadings may be so amended as to show the facts as well at law as in equity.

Among other authorities cited is the case of *Doolittle v. Lewis*, 7 Johns. Ch. (N. Y.) 49, 11 Am. Dec. 389, in which Chancellor Kent says: "If the party sues as executor or administrator, without probate or taking out letters of administration, the taking them out at any time before the hearing will cure the defect and relate back so as to make the bill good from the beginning. In a light so merely formal is that omission viewed."

In this connection it may be said that generally a subsequent grant of letters testamentary or of administration relates back and renders valid all acts which come within the scope of a rightful executor's or administrator's authority, and which were in their nature beneficial to the estate, or at least such as the parties in interest had no reason to complain of. 7 Ency. L. (1st Ed.) pp. 193, 194.

In the case at bar, the plaintiff, who was supposed to be the duly appointed administrator of the deceased, was acting not only in the interest of, but at the instance of, the party who was alone interested in the estate.

As the judgment complained of must be reversed upon other grounds, it is unnecessary to consider the propriety of the court's action in entering the same at the time and under the circumstances that it did. When the case goes back, the plaintiff can, before another trial, amend his declaration so as to have the suit proceed in the name of J. B. Kiser, sheriff of Wise county, and as such administrator of C. W. Osborne, deceased.

For the errors pointed out in the instruc-

tions, the judgment must be reversed, the verdict set aside, and the case remanded for a new trial.

Reversed.

(114 Va. 103)

RAVEN RED ASH COAL CO., Inc., v. HER- RON.

(Supreme Court of Appeals of Virginia. Sept. 9, 1912.)

1. MINES AND MINERALS (§ 105*)—CORPORATIONS—OFFICERS—POWERS.

One acting as secretary, treasurer, and superintendent of a coal mining corporation, who is in charge of the mining of the coal without having his powers and duties defined, has only the right to enter into such contracts as are usual and necessary to carry on the business according to the general custom of the coal mining business in that territory, and the delegation of authority carries with it the full power to do the things which are necessary, proper, and usual, in the absence of an express limitation on such authority, and a contract made by him within the scope of his power is binding on the corporation.

[Ed. Note.—For other cases, see *Mines and Minerals*, Cent. Dig. §§ 229, 229½; Dec. Dig. § 105.*]

2. MINES AND MINERALS (§ 105*)—CORPORATIONS—OFFICERS—POWERS—QUESTION FOR JURY.

Whether one acting as secretary and treasurer of a mining corporation and employed by the month as superintendent of its coal mines has authority to let a contract to a contractor for a year for the mining and delivery of coal on the tipple at a specified price per ton *held*, under the evidence, for the jury.

[Ed. Note.—For other cases, see *Mines and Minerals*, Cent. Dig. §§ 229, 229½; Dec. Dig. § 105.*]

3. EVIDENCE (§ 241*)—DECLARATIONS OF AGENT—ADMISSIBILITY.

Declarations of an agent are admissible against his principal when they are within the scope of his authority and made in the course of the negotiation to which they refer, or in the discharge of his duty, but declarations made in casual conversations not involving any business of the agency, and which are mere narratives of past acts, are inadmissible.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 887-892; Dec. Dig. § 241.*]

4. CORPORATIONS (§ 428*)—NOTICE TO OFFICERS—NOTICE TO CORPORATION.

Notice to two of seven directors of a corporation that its secretary, treasurer, and superintendent had made a contract is not notice to the corporation where the information was not communicated to the board of directors or to the other directors.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. §§ 1748-1761; Dec. Dig. § 428.*]

5. CORPORATIONS (§ 432*)—CONTRACTS—ACQUIESCENCE.

Evidence *held* not to justify a finding that a corporation acquiesced in a contract made by an officer without authority to make the contract.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. §§ 1717, 1718, 1724, 1726-1737, 1743, 1762; Dec. Dig. § 432.*]

6. PRINCIPAL AND AGENT (§ 150*)—ACTS OF AGENT—SCOPE OF AUTHORITY—NOTICE TO PRINCIPAL.

In the absence of circumstances putting a reasonably prudent man on inquiry, a principal need not make any effort to discover whether his agent is doing unauthorized acts in his name, but he may assume that the agent will only act within the scope of his authority, and notice will not be imputed to a principal by the mere fact that he had reasonable opportunity to acquire knowledge of the acts of his agent.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 556-563; Dec. Dig. § 150.*]

7. MINES AND MINERALS (§ 109*) — CONTRACTS FOR MINING—CONSTRUCTION.

A contract employing for one year a contractor to mine coal and deliver the same on the tippie for a specified price per ton on a tonnage not exceeding a specified amount per month, and a specified sum in excess of that quantity, etc., does not make the amount which the contractor may mine and deliver dependent on the getting of sufficient cars to transport the coal mined or in finding a market for it, though the corporation is selling on the general market.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 214; Dec. Dig. § 109.*]

8. DAMAGES (§ 22*)—BREACH OF CONTRACT—MEASURE OF DAMAGES.

A party to a contract is entitled to recover for a breach thereof by the other party all such damages as are the natural and proximate results of the breach, but one may not recover profits unless loss of profits is a natural and proximate result of the breach, and the extent of the loss is satisfactorily proved.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 59-61, 63; Dec. Dig. § 22.*]

9. MINES AND MINERALS (§ 110*)—BREACH OF CONTRACT—MEASURE OF DAMAGES.

Where a coal mining corporation employing a contractor for a year to mine coal and deliver the same on the tippie for a specified compensation, including the free use of a house, coal for his family, and goods out of a store for his family at a specified sum below the sale price, breached its contract and prevented performance by the contractor, the latter could recover the difference between what he would receive for delivering the coal and the cost of doing it, together with the value of the free use of the house and other benefits given by the contract, less any sum earned in work elsewhere.

[Ed. Note.—For other cases, see Mines and Minerals, Dec. Dig. § 110.*]

Error to Circuit Court, Tazewell County.

Action by H. J. Herron against the Raven Red Ash Coal Company, Incorporated. There was a judgment for plaintiff, and defendant brings error. Reversed.

Harman & Pobst, for plaintiff in error. Bond & Bruce, W. H. Werth, S. D. May, and R. O. Crockett, for defendant in error.

BUCHANAN, J. H. J. Herron brought his action of assumpsit against the Raven Red Ash Coal Company, a corporation, to recover damages for breach of a contract which the plaintiff alleged existed between him and the defendant corporation. Upon the trial of the cause there was a verdict and judgment in favor of the plaintiff. To

that judgment this writ of error was awarded.

The grounds relied on for a reversal of the judgment are that McCorkle, who made the contract on the part of the defendant, had no authority to make it, either as the secretary and treasurer of the defendant company, or as superintendent of its mines; that the contract was of such a character that it could only have been made by the express authority of the board of directors; that no such authority was given to McCorkle, nor was his act ratified by the company; that, if the contract were binding upon the company, the damages sued for were not recoverable because of their uncertain and speculative character; and that, even if the plaintiff were entitled to recover any damages, the verdict of the jury could not be upheld because of errors of the trial court in the admission and rejection of evidence and in the giving and refusing of instructions.

It appears that McCorkle had been the secretary and treasurer of the company, and the superintendent of its mines, from its organization in the early part of the year 1906 down to the 1st of October, 1908, when the contract in question was executed. His duties in neither of the capacities named were defined by any by-law of the company, or by any resolution of its board of directors, but he had charge of mines during that period, hiring its employes, mine foreman, and power house men by the month, motor-men, track hands, blacksmiths and their helpers, bratticemen, and slatemen by the day; coal cutters in different ways—by the ton, by the man, by the room, and by the day, and coal miners by the ton. McCorkle, as superintendent, was employed by the month, and no one employed by him until the contract sued on was made was employed for longer periods than one month. The plaintiff, who had been in the service of the company for about one year as an electrician, was at first employed by the day and afterwards by the month, and knew the manner in which the work in the mine was being conducted when the contract sued on was entered into, which is in the following words:

"This agreement made and entered into this first day of October, 1908, by and between H. J. Herron, of Red Ash, Va., hereinafter called the Contractor, and the Raven Red Ash Coal Co., Inc., of Red Ash, Va., hereinafter called the Company, witnesseth:

"Whereas, the said Company has this day let to contract all the day labor connected with the mining of its coal at Mine No. 1, at Red Ash, Va., viz.:—Haulage of coal, cutting of coal, blacksmith and helpers, trackmen, bratticemen, slatemen on haulage ways and all other day labor incident to mining the coal, except as follows: Power house

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes 75 S.E.—48

and tippie labor. Therefore, for and in consideration of the sum of thirty (30) cents per ton on a tonnage not to exceed 4,000 tons per month, and twenty-seven and one-half (27½c) cents per ton on 500 tons in excess of 4,000 tons, twenty-seven and one-half (27½c) cents per ton on a tonnage not to exceed 4,500 per month and twenty-five (25c) cents on 500 tons in excess of 4,500 tons per month and twenty-five cents per ton on 5,000 tons per month and over, based on the present equipment, and should said Company put in more equipment then the price paid said Contractor is to be reduced in proportion to increase of tonnage in excess of 6,000 tons. Said Contractor is to remove only such slate as may fall on haulage ways.

"Said Contractor is to look after the mines in general, looking after the safety of the miners so far as furnishing the necessary timbers and supplies is concerned, is to work the mines in accordance with plans and specifications furnished by said Company.

"Said Company is to furnish all necessary supplies including ties, props, and etc., but said Contractor (is to) keep up necessary repairs and to take props and ties into the mines when required.

"Said Contractor is to give special attention to all entries and to advance them as fast as possible. Said Company agrees to keep the time of said Contractor, time to be turned in every night and to make payment to his men on regular pay day.

"Said Company is to put in repair all the mine cars which are now torn up, but any cars damaged or torn up by said Contractor is to be repaired by him.

"Said Company is to allow said Contractor \$50.00 in which to catch up with the track and trolley wire and other work which is now behind.

"Said Contractor is to use his judgment as to the necessary props required in a working place, but must furnish sufficient props to protect (protect) the top.

"Said Contractor is to deliver the coal on the tippie at the above-named price per ton, and is to receive payment for same on the first Saturday after the 20th of each month after deducting amount of labor chargeable against him on pay roll and store.

"Said Contractor is to receive goods for his family use at 10 per cent. off of selling price and is to have house rent and coal free, also, such furniture as he now has in the house belonging to the company, said furniture to be turned back to said Company at expiration of this contract.

"Said Contractor is to have full benefit of the present machinery now in use and any other machinery which the Company may purchase hereafter while this contract is in force.

"Said Contractor is not to dig, shoot or load any coal or take any yardage under this agreement. Prices for shooting, loading

or digging coal and yardage under this agreement, is to be subject to the approval of the Company.

"This agreement is to be in effect for one year from date, unless otherwise canceled by mutual agreement.

"Witness the following signatures this the day and year first above written:

"H. J. Herron.

"Raven Red Ash Coal Co., Inc.,

"M. R. McCorkle, Sec'y and Treas."

Prior to the making of the contract the defendant had employed its own hands and had the work done itself under its own supervision.

The plaintiff proceeded to perform the contract on his part, and did so for the months of October and November, 1908, when he stopped working, because, as he alleges, McCorkle refused to permit him to continue, or because, as McCorkle claims, the contract was canceled by mutual agreement. The damages sought to be recovered are the net profits which the plaintiff claims he would have made during the remaining ten months of the year, if he had been permitted to keep and perform the contract as he was ready and willing to do.

It does not appear that McCorkle was specifically authorized by the board of directors to make the contract; neither does it appear that the contract, after it was entered into, was ratified at any meeting of the board. The contention of the plaintiff is that the defendant is bound by the contract because it was within the authority or apparent scope of authority of McCorkle as general manager or superintendent of the defendant's mines; or, if not, that the contract became binding upon the defendant by its subsequent ratification or acquiescence in and receiving benefits under the contract.

Upon the question whether the contract was within the authority or apparent scope of authority of McCorkle as general manager or superintendent of the defendant's mines the evidence was conflicting. That question was submitted to the jury by three instructions, two offered by the plaintiff and the other by the defendant.

[1] Instruction No. 1, given upon motion of the plaintiff, told the jury, among other things, that if they believed that McCorkle was secretary and treasurer of the defendant company, and as such had charge and management of its mining operations, such as mining coal and hauling it to the tippie, the employment and discharge of men to do and perform the work in and about the defendant's mines, and that McCorkle was, in the making of the contract in question, acting within the general scope of his authority, then it was the contract of the parties. By the plaintiff's instruction No. 5 the jury were told "that every delegation of authority or creation of an agency, unless the extent of such authority or agency be expressly limited, carries with it the power to do all

those things which are necessary, proper, and usual to be done in order to perpetuate the purpose of the agency, and embraces all the appropriate means necessary to accomplish the desired ends."

Instruction No. 1, given at the request of the defendant, told the jury, among other things, that if they believed from the evidence that McCorkle, as secretary and treasurer, or as superintendent of the defendant, had been placed in charge of the mining of the coal at the company's plant by its board of directors, without having his powers and duties defined, then he only had the right as such officer or agent to enter into such contracts as were usual and necessary to carry on the said business according to general custom and usage of the coal mining business in that territory; and that, if they believed that the contract was a special and unusual one, then McCorkle as such officer or agent had no right to make the contract on behalf of the defendant.

[2] It cannot be said as a matter of law that McCorkle, as manager and superintendent of the defendant's mines, did not have the authority to make for his company the contract sued on. Whether he did or not was for the jury upon the evidence. The said instructions given by the court upon that question fairly submitted that question to the jury.

The court, upon motion of the plaintiff, gave the following instructions to the jury:

"(2) The court instructs the jury that if they believe from the evidence that the writing offered in evidence, signed with the name of the plaintiff and defendant, the latter by M. R. McCorkle, secretary and treasurer, was in fact so executed, that said M. R. McCorkle was in fact the secretary and treasurer of said defendant company, and was also superintendent of such company, and as such had charge of the mine of said company, with full power and authority to have the coal mined and hauled to the tipples, to employ and discharge men, that it was not within the scope of the authority of said M. R. McCorkle to enter into such writing on behalf of said company and thereby bind said company, still, if the jury should believe from the evidence that said company by acquiescing in and allowing him to so manage and control said mine, held out that said M. R. McCorkle had the right to bind said company by the writing filed in evidence, that the said plaintiff had the right to believe and did believe in good faith, from such holding out, that said McCorkle had the right to enter into said writing and bind the company, then you are instructed that said company is bound by said writing, and is liable as a party thereto.

"(3) The court instructs the jury that if they believe from the evidence that M. R. McCorkle was the secretary and treasurer of the defendant company on October 1, 1908, the date of the contract offered in evidence,

and as such secretary and treasurer executed said contract for said defendant company, and assumed to act as agent of said defendant company without legal authority and in excess of his proper authority, and that said company knowingly received the profits and benefits from such contract and made payments to said plaintiff under said contract, then so securing said profits and benefits, and so making payments, or either of them, was a ratification of the contract, and renders the defendant corporation liable as a party to it.

"(4) The court instructs the jury that if they believe from the evidence that the plaintiff, H. J. Herron, entered into the contract in the declaration mentioned in good faith, that he was unaware of any defect of authority or irregularity on the part of M. R. McCorkle, who acted for the defendant as its secretary and treasurer, and that there was nothing to excite suspicion of such defect or irregularity, and that the plaintiff in good faith entered upon the performance of said contract with the acquiescence of said company, and that said company received or accepted benefits from said contract, then the defendant is bound by such contract, although you should believe such defect or irregularity in fact existed."

Each of these instructions is objected to because there was no evidence upon which to base them.

Five of the seven members of the board of directors testified that they generally attended the meetings of the board of directors; that this contract was never brought to the board's attention or discussed by it before or after its execution so far as they knew; that they had never seen the contract until after this action was brought, and three of them stated that they had never heard of it until after the controversy over it arose, and two of them, to whom McCorkle, the superintendent, testified that he had mentioned the contract after it was entered into, stated they had no recollection of the superintendent's ever mentioning it to them, or that they had ever heard of it until long after it was entered into. The minutes of the board of directors do not show that it was ever brought to the board's attention or considered by it. The only evidence tending to show that the board had ever considered it was the testimony of the plaintiff and Drake, a mine foreman, that McCorkle had said to each of them, after the contract had been made and work was being done under it, that the board of directors had approved or ratified it. The evidence of these witnesses as to what McCorkle said the board of directors had done was excepted to by the defendant, and its admission is assigned as error.

As one of the objections to the instructions under consideration is that there was no evidence upon which to base them, it

will be necessary at this time to consider the admissibility of McCorkle's statement to these witnesses.

[3] The general rule is that relevant declarations of an agent are admissible against his principal, provided they are within the scope of his authority and made in the course of the negotiation to which they refer, or in the discharge of his duty. *Va. & Tenn. R. R. Co. v. Sayers*, 67 Va. 328, 350; *Reusch v. Roanoke Storage Co.*, 91 Va. 534, 537, 22 S. E. 358; *Traction Co. v. Booker*, 103 Va. 594, 50 S. E. 148; 1 *Greenleaf* on Ev. § 113; 1 *Elliott* on Ev. § 252; 16 *Cyc.* 1003.

Tested by this rule, the declarations of McCorkle were clearly inadmissible. They were not made when the contract in question was entered into, nor in the discharge of any duty, but seem to have been made in casual conversations not involving any business of the agency, and were mere narratives of what the board of directors had done.

The case of *Lynchburg Traction Co. v. Booker*, 103 Va. 594, 604-605, 50 S. E. 148, is relied on to sustain the ruling of the trial court, but manifestly it does not do so. In that case it appeared that shortly after the accident the president of the lighting company went to a point at or near the scene of the accident, where was also the manager of the telephone company. "These men," said the president of the court in delivering its opinion, "were upon the scene of the accident in the discharge of duties which devolved upon them as the officers of their respective companies; and the answer given to the question" (that the wire which did the injury was the wire of his company) "was, we think, admissible, not as a part of the *res gestæ*, but because made by an officer in the performance of his duty."

[4, 5] There was evidence tending to show that two of the directors, shortly after the contract was entered into, were informed of its existence and did not object to it. The information of these two directors, not communicated to the board of directors or to the other directors, as the evidence shows it was not, was not notice to the defendant of the existence of the contract. Nor does the evidence show that the defendant, with knowledge, acquiesced in what was done under the contract, or knowingly received any profit and benefit, or made any payments under it. All that was done under the contract in carrying out what it bound the defendant to do was done by McCorkle without the actual knowledge of the defendant so far as the record shows. Nor does it appear that there was any such change in the manner in which the work was being done in the mines after the contract was made as to give the defendant constructive notice of the contract. In operating the

mine before the contract was made, the defendant, through McCorkle, employed its own hands and controlled its own machinery. After the contract was made, the plaintiff was the employer of a large number of the hands and controlled a large part of the machinery, but there was little, if anything, in the work itself to show that it was being done during the months of October and November under a management other than that by which it had theretofore been carried on.

[8] In the absence of facts or circumstances sufficient to put a reasonably prudent man on inquiry, no duty rests upon the principal to make any effort to discover whether another is doing unauthorized acts in his name, and he has the right to assume, until otherwise advised, that his agent will act within the scope of his authority. Notice is not to be imputed to a principal by reason of the mere fact that he had reasonable opportunity to acquire knowledge. See 31 *Cyc.* 1256, and cases cited.

It is clear, we think, that there was not sufficient evidence in the case to justify or sustain a verdict upon the respective hypotheses of the said second, third, and fourth instructions, and those instructions for that reason, even if otherwise correct, should not have been given.

[7] The action of the court in holding that the damages sued for, although profits, might be recovered, is assigned as error. The several grounds upon which the defendant insists that damages were not recoverable, even if the contract sued on bound the defendant, are that they were uncertain, speculative, and contingent. Two specific grounds are relied on to show that the profits sought to be recovered were speculative and contingent, because the amount of coal that the defendant had the right to deliver at the tippie under the contract depended (1) upon getting sufficient cars to transport the coal, and (2) in finding a market for it, as the company was selling on the general market.

The trial court held that the amount of coal which the plaintiff had the right to deliver was not, under the terms of the contract, dependent upon either of the contingencies named, and refused to permit evidence to be introduced upon those points.

[8] This construction of the contract, we think, was correct, and, since those matters could not be considered by the jury, the evidence offered as to them, was, of course, properly rejected. The general rule in awarding damages is to give compensation for the pecuniary loss—to make amends or reparation for the injury inflicted. The plaintiff is entitled to recover all such damages as are the natural and proximate results of the wrongful act complained of. Ordinarily a plaintiff will not be entitled to recover profits or expected gains, for they are

generally conjectural and too remote. But if it be shown that the loss of profits or gains was the natural and proximate result of the wrongful act, and their extent is satisfactorily proved, they may be recovered. *Burruss v. Hines*, 94 Va. 413, 416, 26 S. E. 875, and authorities cited; *Alleghany Iron Co. v. Teaford*, 96 Va. 372, 31 S. E. 525; *Grubb v. Burford*, 98 Va. 553, 559-560, 37 S. E. 4.

[9] In this case the damages done the plaintiff by the defendant, if it was bound by the contract, was the difference between what the plaintiff was to receive for delivering the coal to the tippie as provided by the contract and the cost of doing it, and they were the natural and proximate result of the defendant's act. The compensation he was to receive was so many cents per ton on the coal delivered by the month in the quantities named, the free use of the house in which he was living and the furniture then in it, coal for his family, and goods out of the store for his family at 10 per cent. off the selling price. There was evidence showing, or tending strongly to show, how much coal the plaintiff had delivered at the tippie during the two months he worked under the contract and the cost of putting it there. It also appeared that about one month after he ceased working under the contract he obtained work elsewhere at \$100 a month. This item was, of course, to be considered in ascertaining his damages, since it is clear from the contract that he was to give the work under the contract his personal attention. The contract fixed the amount per ton he was to receive for delivering the coal at the tippie. There was evidence showing the rental value per month of the dwelling house he was entitled to occupy during the year the contract was to continue. There was also evidence tending to show that the plaintiff's profits during the unexpired ten months would have been greater than they were during the two months he was permitted to work under it. Whether this was true or not, or whether the plaintiff had satisfactorily shown what his profits would have been if he had been permitted to keep and perform his contract, were questions for the jury under proper instructions by the court.

At the conclusion of its petition for a writ of error the defendant assigns as error the action of the court in overruling its demurrer to the declaration. This assignment of error does not seem to be much relied on, and, if it were, the demurrer was properly overruled.

As the judgment must be reversed, the verdict set aside, and the cause remanded for a new trial, the assignment of error based upon the refusal of the court to set aside the verdict as contrary to the evidence will not be considered, as the evidence will be different at the next trial.

Reversed.

(113 Va. 134; 114 Va. 141)

TAZEWELL COAL & IRON CO. v. GILLESPIE et al

(Supreme Court of Appeals of Virginia. Jan. 18, 1912. On Rehearing, Sept. 9, 1912.)

**1. REFORMATION OF INSTRUMENTS (§ 25*)—
GROUNDS—OBJECTIONS TO RELIEF—CHANGED
CONDITIONS.**

Complainant corporation was organized to purchase and sell mineral lands, etc., all of the original stockholders, including defendants, having paid for their stock in land, and in 1888 defendants subscribed for a number of shares, intending to give therefor the whole of a certain tract, containing 1,980 acres, which the subscription recited should be taken at \$2.50 an acre, and provided that it should be surveyed, if required by either party, and paid for in stock according to the number of acres. The surveyor by mistake omitted a portion of the land, and made a report showing only 1,572 acres. The mistake was discovered by complainant in 1906, and it sued to correct the mistake and recover the omitted part. At the time the suit was brought the outstanding capital stock equaled the authorized capital of the corporation, and only 3,500 of the 23,000 acres originally conveyed to complainant remained undisposed of, and defendants' land, including the omitted part, had advanced in value to \$40 an acre. More than 142 per cent. dividends had been paid on the original stock, and the stock tendered to defendants in 1909 for the omitted land pursuant to the original subscription agreement will not pay over 50 or 60 cents on the dollar; its value having greatly depreciated. *Held* that, in view of the changed conditions, it would be inequitable to now correct the mutual mistake, and relief will be denied.

[Ed. Note.—For other cases, see *Reformation of Instruments*, Dec. Dig. § 25.*]

**2. REFORMATION OF INSTRUMENTS (§ 32*)—
DEFENSES—LACHES.**

In 1888 defendants subscribed to stock in a corporation organized to sell mineral lands, agreeing to convey in payment therefor a tract of land, supposed to contain 1,980 acres; but, owing to a mistake in the survey, a portion of the land was omitted. In 1906 the corporation first discovered facts arousing its suspicion that all the tract was not conveyed, and a committee, consisting of M. and G., one of the grantors, was appointed to have the land surveyed, and another of such grantors, upon being told the facts by M., replied that he would look into the matter, without stating that he had already learned that the whole tract had not been conveyed and was trying to procure a deed for the omitted part for the benefit of the grantors individually. In 1908 the grantors placed a tenant on the omitted tract, of which the corporation learned in the spring of 1908, when it proceeded to have its right to the land investigated, and in June, 1909, it demanded a conveyance thereof from the subscribers, and on their refusal sued on July 31, 1909, to correct the original mistake and to compel a conveyance of the omitted part. *Held*, that the corporation was not guilty of laches.

[Ed. Note.—For other cases, see *Reformation of Instruments*, Cent. Dig. §§ 119-121; Dec. Dig. § 32.*]

3. EQUITY (§ 6*)—JURISDICTION—MISTAKE.

A favorite subject of equity jurisdiction is the award of relief against mutual mistake.

[Ed. Note.—For other cases, see *Equity*, Cent. Dig. § 14; Dec. Dig. § 6.*]

**4. REFORMATION OF INSTRUMENTS (§ 25*)—
GROUNDS—FAIRNESS.**

The award of reformation of a contract on the ground of mutual mistake must be fair

and just to both parties without working special hardship to either.

[Ed. Note.—For other cases, see Reformation of Instruments, Dec. Dig. § 25.*]

5. SPECIFIC PERFORMANCE (§ 16*) — OBJECTIONS TO RELIEF—INJUSTICE.

Specific performance, as well as reformation of an instrument, for mutual mistake, will be refused, where the granting of the relief would work a hardship or injustice through change of circumstances not contemplated when the contract was made.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 35, 36; Dec. Dig. § 16.*]

6. REFORMATION OF INSTRUMENTS (§ 23*) — RELIEF—ESTOPPEL.

That stockholders of a corporation, who paid for their shares in land and were officers and directors of the corporation when the subscription contract was made, occupied a fiduciary relation to the corporation, would not estop them from claiming that the corporation was not entitled to have a mistake as to the land conveyed to it for their stock corrected because of changed conditions, making such relief inequitable.

[Ed. Note.—For other cases, see Reformation of Instruments, Dec. Dig. § 23.*]

On Rehearing.

7. SPECIFIC PERFORMANCE (§ 119*)—BURDEN OF PROOF.

The burden is upon one seeking specific performance of a contract to show that he is entitled to such relief.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 382, 383; Dec. Dig. § 119.*]

Appeal from Circuit Court, Tazewell County.

Suit by the Tazewell Coal & Iron Company against Joseph S. Gillespie and others. Judgment for defendants, and complainant appeals. Affirmed.

Henry & Graham and Phlegar, Powell, Price & Shelton, for appellant. Chapman & Gillespie, Henson & Bowen, and A. S. Higginbotham, for appellees.

CARDWELL, J. The appellant corporation was chartered by an act of the General Assembly of Virginia, approved April 28, 1887 (Acts Extra Session 1887, p. 122), and duly organized as a corporation May 31, 1887. Among the privileges granted the corporation by its charter was the right from time to time to purchase, lease, hold, and control in any manner, grant, bargain, sell and convey iron ore, mineral, and other lands and other rights and interests in lands situate in the counties of Tazewell, Wise, Dickinson, Buchanan, and Russell, and to receive real or personal property suitable to the business of the company in payment of subscriptions to its capital stock, the purpose of the incorporation being to take over, hold, and sell to the best advantage such lands as it might acquire in payment of subscriptions to its capital stock; and no stock seems to have been issued except for such lands or mineral rights. At the organization of the company, on May 31, 1887, A. J. May, S. D. May, J. V. Kelley, J. G.

Watts, Frank Huger, George W. Gillespie and J. S. Gillespie were made and constituted a board of directors, and the proceedings of this meeting were duly recorded in a book provided by the company for the purpose. Among the subscriptions made to the capital stock of the company by various persons at said meeting, in lands in fee and coal and mineral rights, was one made by J. S. Gillespie, A. P. Gillespie, and Henry Bowen, in these words: "Ben Johnson, Dismal, 1,980 acres at \$2.50 per acre, \$4,950"—the legal title to which at the time was vested in J. S. Gillespie for the benefit of himself and A. P. Gillespie and Henry Bowen, all of whom signed, along with all other subscribers to the stock, a paper setting forth a tabulated statement of the individual subscriptions spread in extenso on the record made and kept of the proceedings of the meeting.

The subscriptions of the lands for stock being in writing, signed by the parties, and accepted on the minute books by the stockholders and board of directors of the company, it commenced its operations, and all of the defendants to this suit, J. S. and A. P. Gillespie and Henry Bowen, appellees here, were directors of the company from its organization until in the year 1909, and for several years one of them was its president. It appears, however, that the subscription proposals and the resolutions accepting them, adopted by the directors and by the stockholders, provided that "the said lands should be surveyed, if required by either party hereto or the persons from whom said lands were purchased, and when surveyed the lands to be paid for, according to said survey, in stock at par to be issued by the said company, at the price per acre as herein set forth"; that the "Ben Johnson tract" subscribed by appellees was supposed to contain and had been theretofore treated as a 1,500-tract, but Peter Poston, from whom appellees purchased, and shortly before the subscription of the land to the stock of the appellant company, had caused a survey to be made of it, which showed 1,980 acres; that appellees, after the subscription, had a re-survey made by one P. H. Williams, who either fraudulently because of interest in lands adjacent, or from mistake, reported only 1,572 acres and 92 poles in the tract, by which survey Poston described the land in a second deed to J. S. Gillespie, dated November 25, 1887; and appellees, by deed dated December 20, 1888, but not delivered until November 19, 1891, conveyed the land to the appellant by the same description as that given in Poston's deed. It further appears that the land was the northeast corner of a 10,000-acre patent, owned by George Warder and others, the eastern and northern lines of the tract being parts of the corresponding lines of the patent, their courses being N. 23° W. and S. 67° W.; that the drafts-

man of the deed under which Poston claimed, dated January 12, 1859, made one line of the course of the eastern boundary and the distance of the northern boundary, writing it N. 23° W. 270 poles to two spruce pines on Harry's Branch, and omitted the northern, or back line altogether, when the calls should have been N. 23° W. 252 poles, and S. 67° W. 670 poles, which error made the deed inclose nothing, as appears from exhibits filed with the deposition of S. D. May in this cause.

Both parties to this controversy agree that Poston acquired all of the land to both of said boundaries of the patent, and by his first deed of March 14, 1887, he conveyed all to J. S. Gillespie for himself and his associates, A. P. Gillespie and Henry Bowen, and at the same time he and J. S. Gillespie entered into a contract to the effect that if on a resurvey there was more land than 1,500 acres, Gillespie would pay for the excess at \$1 per acre, and Poston would convey the land to him.

It was, as we have seen, by the Williams survey that Poston made his second deed, dated November 25, 1887, to J. S. Gillespie, conveying the Ben Johnson tract as containing 1,572 acres, and when appellant took its deed from appellees, dated December, 1888, the land was described as appeared in the Williams survey; but appellant knew nothing at that time nor for many years after, of the errors committed by Surveyor Williams, by which a triangular parcel of land was cut out of the Ben Johnson tract, containing 450.79 acres, which is the land here in dispute. Nor did appellant know when it took the conveyance of the Ben Johnson tract from appellees as containing only 1,572 acres, nor for many years thereafter, of the agreement between Poston and J. S. Gillespie, entered into the same date of the first deed made by Poston to Gillespie conveying the Ben Johnson tract as containing 1,500 acres.

It further clearly appears that appellees intended to subscribe the entire Ben Johnson tract for stock of the appellant company; that they intended to convey to the company the entire tract, and thought they had done so until one S. M. Graham, who had surveyed the Warder tract and other lands in that vicinity, showed them by a diagram and explanations that a part of said tract had been omitted from the Williams survey.

In the year 1905 for the first time, as it would seem clear, appellant had its suspicion aroused that the deed made to it by appellees December 20, 1888, did not convey all of the Ben Johnson land; such suspicion being aroused by information that Surveyor P. H. Williams and his associates were claiming land next to the Warder back line which the appellant company supposed was covered by its deed from appellees. Acting on this information, the board of directors of the company, at a meeting held June 8, 1905, ap-

pointed S. D. May and J. S. Gillespie (one of appellees) to have the land surveyed. May obtained all needed title papers prior in date to the deed to appellant, and after some examination of them discovered the omission of a part of the land intended to be conveyed, and at once disclosed his information to one of the appellees, who, instead of telling May that they had learned the facts from Surveyor Graham and were trying to get a deed from Poston, only replied with a promise to "look into the matter."

It further appears that at that time appellees had already begun efforts to obtain another deed from Poston for the omitted lands, claiming that he was bound to make such a conveyance by his contract of March 14, 1887; but these facts were never divulged to any one connected with the appellant company until J. S. Gillespie testified in this cause, and the deed from Poston to J. S. Gillespie dated April 1, 1908, conveying to the latter the disputed land by metes and bounds, for the consideration expressed in the contract of March 14, 1887, was not filed for record till April 19, 1909. The appellees had, however in the meantime and in the early part of 1908, claiming under their first deed, placed a tenant on the disputed land and had the timber thereon counted, which facts came to the knowledge of appellant in the spring of 1908, whereupon it proceeded to have its right to the land investigated and reported on by its attorney.

Upon consideration of the attorney's report by the stockholders and board of directors at meetings held June 7, 1909, a committee was appointed to confer with appellees and procure a conveyance of the title to the disputed land, which committee was authorized to settle with appellees by paying stock of the company at \$2.50 per acre of the disputed land and such sums as would have been paid as dividends on the stock had it been issued at the organization of the company, with interest on such dividends. This proposition was submitted to and rejected by appellees. Whereupon, the bill in this cause was filed July 31, 1909, and the said stock offered to appellees tendered with the bill; the object of the bill being to secure a conveyance from appellees of the 450.79 acres of land, part of the Ben Johnson tract, which at the time of the contract between appellant and appellees sought to be enforced was supposed to contain 1,980 acres, but which by subsequent survey was found to contain 2,023.365 acres, and which appellees sold and attempted to convey to appellant, though in fact they conveyed but 1,572 acres.

The bill sets out at length the facts stated above, and the further facts that the authorized capital of the complaining company was \$2,000,000, its actual capital \$194,233.63, but that the board of directors at a meeting of which appellees were three of five present on the 8th day of June, 1905, began pro-

ceedings which resulted in amending the charter so as to reduce the authorized capital to the amount of the outstanding capital stock; and that, in order to tender to appellees the stock owing for the omitted 450.79 acres of land, the company had purchased of S. D. May the necessary shares.

The bill does not charge specifically intentional fraud on the part of appellees, but reliance for the relief it asks is upon the ground of mutual mistake as to the number of acres in the Ben Johnson or Poston tract of land and the true boundaries thereof.

Appellees filed a demurrer (which is not insisted on) and an answer to the bill. The answer takes issue with a number of the statements of fact contained in the bill, denies concealment of facts which appellant was entitled to know, and sets out the following as facts justifying them in refusing to correct the mutual mistake charged in the bill, to wit:

"The transaction as to the Ben Johnson tract was closed in good faith by the parties in the year 1891, but under what now appears to have been a mutual mistake, and the parties then stood and have since remained in statu quo; that is, the defendants had conveyed the 1,572 acres and received stock for that amount of land, and the company has never paid any part of the consideration for the omitted land.

"The business of the plaintiff has been the holding, selling, and disposing of the 23,488 acres of land conveyed to the company by the promoters for the original stock. In the period between the stock subscription agreement and the discovery of the omitted land, the plaintiff had sold, conveyed, and disposed of its lands and timber to the extent of over 20,000 acres, and had reduced its holdings to about 3,500 acres. The original holdings were valued at \$202,000, for which that amount of the original stock of the company was to be issued at par on the fair valuation of the lands in 1887; the Ben Johnson tract being valued at \$2.50 per acre at that time. When the mistake was discovered and suit brought, the holdings of the company were about 3,500 acres, worth not over \$110,000, and the outstanding capital stock amounted to \$194,233.63, making the value of the stock tendered about 55 cents on the dollar. The omitted land is now worth about \$40 per acre. The plaintiff has disbursed, out of the proceeds from sales of its lands and timber, over \$275,000 in dividends upon the original stock subscribed for and issued to the promoters. This original stock has already received 142 per cent. and will receive in all, when the balance of the holdings are disposed of enough to make about \$2 for one of the par value of the stock. The 1909 stock tendered with the bill cannot pay over 50 or 60 cents on the dollar. The potential and actual value of the stock subscribed for by the defend-

ants has greatly depreciated. The land has increased in value 16 to 1.

"When the mistake was discovered and the company claimed the land, it had issued and had outstanding the full amount of its stock which under the law it was authorized to issue. By its charter, its maximum capital was fixed at \$2,000,000, but in 1905, desiring to avoid taxation on that amount, it had its charter amended and its maximum capital reduced and fixed at the exact amount of its outstanding capital stock on that date, which was \$194,233.63. For this reason, when the company decided to sue for the land, it was not in a position to issue any stock and had no power to do so. The company's attorneys and officers, knowing and recognizing this, devised a plan to obviate the difficulty, and to enable, as they conceived, the plaintiff to issue and tender stock. The plan was for S. D. May to turn over to the company 15 shares of his stock, the company agreeing to pay him any and all dividends which might thereafter accrue on that amount of capital stock; and the company, having canceled this stock turned over by Mr. May, undertook to issue and tender stock to the defendants."

Upon the hearing of the cause on the bill and answer and exhibits filed therewith and depositions taken on behalf of the respective parties, the circuit court denied the relief asked in the bill and dismissed the cause.

Were it charged and proven that appellees by intentional fraud prevented appellant from obtaining title to the whole of the Ben Johnson tract of land under its subscription by appellees to the capital stock of the company, and while the company's condition was such that it could perform its part of the contract, the case would be very different from that made by the record, viz., that the failure of appellant to obtain title to the whole of the land grew out of a mutual mistake not discovered by either party until conditions had so changed as to make it questionable, at least, whether or not a court of equity should undertake to correct the mistake. The facts set up in appellees' answer as to the changed conditions of the appellant quoted above are not seriously controverted.

[1] Whether the bill of appellant be treated as a bill for the specific enforcement of the contract of subscription by the appellees of the Ben Johnson land to the capital stock of the company, or as a bill seeking the reformation of the contract, on the ground of mutual mistake, the crucial question for determination is whether or not, under the facts and circumstances proven and going to show the condition of the contracting parties with respect to their ability to perform the contract according to its intent and purpose, or to correct the mutual mistake of which the appellant complains, it is in a condition to perform the contract on its part. In other words, can the contract be specifically en-

forced or reformed so as to correct the mutual mistake and thereby place the respective parties in the position they agreed to occupy by their contract with respect to the Ben Johnson tract of land?

[2] We do not think that laches, on the part of appellant, can, under the circumstances, disentitle it to the relief sought, and, if this relief has to be denied, it must be upon the ground that the appellant has not offered and is unable to offer to perform the contract so that appellees can receive substantially what they contracted for. Certainly, a court of equity could not rightly compel appellees to convey the omitted land to appellant unless the latter was in a position to substantially comply with the terms of the contract with respect to the consideration for the conveyance to which the former would be entitled.

The changed condition of appellant, with respect to its ability to carry out this contract, cannot be, under the facts and circumstances already stated, imputed to the appellees any more than to appellant, acting as a corporate body. All of the parties, doubtless, acted in the matters which brought the affairs of the company to the status they occupied when this suit was brought in good faith, for up to certainly 1905, and over 17 years after the company was organized, and after its authorized capital was reduced to the amount of the outstanding or actual capital stock, all parties concerned were ignorant of the fact that a part of the Ben Johnson land had been omitted from the conveyance by appellees, delivered to and accepted by the company in 1891. Had the sale of this tract of land to the company been as a whole, and not by the acre as it was, and the company had paid the whole purchase money, then the authorities cited for appellant in the argument for the proposition that courts of equity have jurisdiction to and in a great number of cases have, reformed instruments on the ground of mistake, would apply to this case. But that is not this case. Here the appellant has not performed as to the omitted land, and, by reason of changed conditions, for which appellees are not censurable, it cannot perform and pay for the land according to the original spirit and intent of the agreement.

In no view that we have been able to take of the case could the relief sought by appellant be granted without giving the company more and appellees less than the spirit and intent of their contract would justify. Appellant would get land that has appreciated greatly in value since the contract was entered into, while appellees would be compelled to take stock therefor that has materially decreased, and cannot, by reason of the changed conditions surrounding the situation of the appellant, appreciably increase in value. Such a result would not be justified

in view of the facts already stated; but, in an effort to correct what was a mutual innocent mistake on the part of both contracting parties, a hardship would be imposed on one of them.

[3, 4] Authority is abundant for the proposition that one of the highest prerogatives, and one of the favorite subjects of equity jurisprudence, is to give relief against the consequences of mistake and accident; but not only must the evidence be sufficiently cogent to satisfy the mind of the court to justify reformation of a contract on the ground of mutual mistake, but the relief afforded must be fair and just to both parties litigant—especially so in the absence of fraud or other inequitable conduct on the part of the party against whom the relief is sought. We have been cited to no case, and none has been found by us, where a court of equity has decreed the relief sought in this case where the facts were substantially as they are here.

"Courts of equity will not exercise jurisdiction in specific performance where it would impose hardship on people not censurable in conduct, and where the circumstances and conditions of things have been so changed as to work loss and hardship to them." *Dyer v. Duffy*, 39 W. Va. 159, 19 S. E. 544, 24 L. R. A. 339.

[5] Where specific performance is asked, as well as where reformation of an instrument is sought on the ground of mutual mistake, and where the element of hardship and injustice comes into the case through a change in circumstances not contemplated by the parties when the contract was entered into, the relief will not be granted. *Quick v. Stuyvesant*, 2 Paige (N. Y.) 84; *Fitzpatrick v. Dorland*, 27 Hun (N. Y.) 291; *Hale v. Wilkinson*, 62 Va. 90; *Garnett v. Macon*, 10 Va. 308, Fed. Cas. No. 5,245. This rule is fully sustained in *Newberry v. French*, 98 Va. 479, 36 S. E. 519.

In the case of *Garnett v. Macon*, supra, the opinion by Marshall, C. J., says: "A court of equity compels the specific performance of contracts because it is the intention of the parties that they should be performed. But the person who demands it must be in a capacity to do, substantially, all that he has promised, before he can entitle himself to the aid of this court."

The same subject is dealt with at page 617, 36 Cyc., and a number of cases cited. See, also, *Pom. Eq. § 1407*; *Cox et al. v. Cox*, 67 Va. 309.

"While, therefore, no positive rule can be laid down by which the action of the court can be determined in all cases, it may be stated, as a general rule, that specific relief will be usually granted when it is apparent from a view of all the circumstances of the particular case that it will subserve the ends of justice; and that it will be withheld where, from a like view, it appears that it

will produce hardship or injustice to either of the parties." Michie's Dig. vol. 12, p. 570, and cases cited.

Leaving out of view the plan by which appellant obtained the requisite stock from one of its stockholders to tender to appellees in payment for the omitted Ben Johnson or Poston land, we have stated enough of the facts to show that the changed conditions of the company are such that the relief asked in its bill, in view of the principles of equity to which we have adverted, could not be decreed without imposing an unwarranted hardship upon appellees.

[6] We are further of opinion that the authorities cited for appellant for the proposition that appellees' relations to the company, were of a fiduciary character, and for that reason they are estopped to deny the right of appellant to the relief it seeks against them, have no controlling influence as applied to the facts of this case.

The decree of the circuit court complained of has to be affirmed.

Affirmed.

On Rehearing.

HARRISON, J. This cause is before us solely for the purpose of having further argument upon the question whether or not the appellees can now be placed in substantially the same position they would have occupied if there had not been a mutual mistake, and the contract had been fully performed in March, 1889.

The facts of the case are fully and accurately stated in the opinion handed down in January last, and need not be repeated here. The conclusion then reached was that in no view of the case could the mutual innocent mistake of the parties be corrected and appellants granted specific performance of the contract alleged to have been made in 1889, without imposing an unwarranted hardship upon the appellees by giving, as a result of changed conditions, the appellants more and the appellees less than the spirit and intent of their contract entitled them to.

[7] The burden is upon the appellant company to show itself entitled to a decree for the specific performance of the contract it seeks to enforce. The circuit court held that it had not sustained this burden, and we are by no means satisfied, as we must be, that there was error in that conclusion. It is now more than 20 years since the innocent mutual mistake sought to be corrected was made. Many material changes have in the meantime taken place in the situation of the parties and in the subject-matter of the contract, so that the original intention of the parties cannot, at this late day, be enforced without grave danger of doing great injustice to the appellees.

We have carefully considered the arguments submitted upon the petition to rehear, and are of opinion that the appellees cannot

now be placed in substantially the same position they would have occupied if there had not been an innocent mutual mistake, and the contract had been fully performed in March, 1889; and therefore the decree pronounced by this court on the 18th of January, 1912, must, for the reasons then given, be adhered to.

Affirmed.

(114 Va. 70)

KILGORE v. BARR.

(Supreme Court of Appeals of Virginia. Sept. 9, 1912.)

BANKRUPTCY (§ 228*)—PREFERENCES—JURISDICTION BY CONSENT.

The bankruptcy court had jurisdiction by consent, so that its determination was conclusive, where at a meeting before the referee in bankruptcy of the creditors of D., the question of whether C.'s note to D. passed to R. by D.'s assignment, was raised, and to such proceeding C. and R. were made parties on their own motion, and after a hearing, the referee held it was a voidable preference, and did not pass, and C. and R. appealed to the district court on the merits only.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 387; Dec. Dig. § 228.*]

Error to Circuit Court, Wise County.

Action by E. L. Barr, trustee in bankruptcy, against Charles T. Kilgore. Judgment for plaintiff. Defendant brings error. **Affirmed.**

E. M. & E. H. Fulton, for plaintiff in error. Vicars & Peery, for defendant in error.

WHITTLE, J. This writ of error was awarded to a judgment in behalf of E. L. Barr, trustee in bankruptcy of D. A. Ramey, bankrupt, against Charles T. Kilgore, on his note to Ramey for \$373.21. The note was assigned by the payee to R. L. Kilgore for the benefit of the Wise County Bank, and two days after the assignment Ramey filed his petition in bankruptcy.

At a meeting of creditors before the referee for the purpose of examining the bankrupt, the question was raised as to whether or not Charles T. Kilgore's note passed by the assignment to R. L. Kilgore, or constituted an asset of the bankrupt's estate. To that proceeding the Kilgores were made parties on their own motion. They were represented by counsel, and, along with other witnesses, were fully examined in support of their contention. They undertook to sustain the validity of the assignment by proving an alleged parol agreement between themselves and Ramey, made more than four months before the filing of his petition in bankruptcy, by which a store account due by Charles T. Kilgore to Ramey was to be applied as a credit on a note to the Wise County Bank made by Ramey as principal and indorsed by the Kilgores, and that in pursuance of that agreement and for the purpose of carrying it into effect the note in controversy was

made by Charles T. Kilgore, and assigned by Ramey to R. L. Kilgore, to be collected by him and applied in part payment of the bank debt.

The referee, on consideration of the controversy upon the merits, overruled the pretension of the Kilgores, and held that the assignment was a voidable preference, and that the note did not pass thereby, but belonged to the bankrupt's estate. It was accordingly surrendered by the assignee to the trustee in bankruptcy, who was directed to collect it as an asset of the estate. Thereupon Charles T. Kilgore and R. L. Kilgore filed an exception in writing to the ruling of the referee, and presented a petition to the District Court to review and reverse his order; but the finding of the referee was approved and confirmed.

The sole question for our consideration is whether the bankruptcy court had jurisdiction to determine the issue thus voluntarily submitted to it for adjudication. If it had, it is clear that its judgment was a complete determination of the matter in controversy, establishing the title of the trustee to the note and the liability of the maker thereon.

In discussing the subject of jurisdiction of referees in bankruptcy, Professor Staples, in his excellent work, "A Suit in Bankruptcy," observes (page 102): "In general, referees are judicial officers, and their orders, made in the course of bankruptcy, including adjudications upon allowance and rejection of claims of creditors, are entitled in all courts, state and federal, to the respect and credit due to officers who act judicially. *Clendenin v. Red River Bank*, 11 Am. Bankr. Rep. 245 [12 N. D. 51, 94 N. W. 901]. Except when otherwise provided in the statute, the word 'court' may include 'referee,' and, subject to such limitation, the jurisdiction of the referee is commensurate with that of the court by which he is appointed. In *re* *Hudleston*, 1 Am. Bankr. Rep. 572.

Id. pp. 103, 104: "The power of the bankruptcy courts to take possession of or release the bankrupt's property has already been considered. (Pages 93, 97.) That power may be exercised by the referee before adjudication in only one case, and that is on 'the issuance by the clerk of a certificate showing the absence of a judge from the judicial district, or his sickness or inability to act. Act 1898, § 38, subd. 3. In *re* *Florcken* (D. C.) 107 Fed. 241, 5 Am. Bankr. Rep. 802. After adjudication he can act with reference to said property under the provisions of section 38, subd. 4. * * * With the exceptions of questions arising out of applications of bankrupts for compositions or discharges, it is believed that the court has no power over the bankruptcy proceedings that it may not, by reference, delegate to the referee, and his power would seem to be limited only by the terms of the reference. * * * Generally the District Courts have formulated and

adopted a rule by which the referees are empowered 'to do all acts and take all proceedings, make all orders and decrees, and perform all duties,' without specific delegation, which the courts are authorized to delegate by the act or the rules of the Supreme Court to empower the referees to perform."

Page 105: "The orders of the referee upon all questions are subject to review by the court." Section 38.

Let it be conceded as a general proposition that, where the judgment of a court of limited powers is relied on, its jurisdiction must be shown. Nevertheless, we do not admit the pertinency of that principle to courts of bankruptcy, which are not courts of limited, but of general, jurisdiction in respect to matters in bankruptcy. But whether the mere failure of the record to show the clerk's certificate, or an order of reference, general or special, to a referee in bankruptcy, in relation to a subject over which he has jurisdiction, renders his judgments amenable to collateral attack, need not be here determined. The circumstance that the plaintiff in error raised no objection to the jurisdiction of the referee, but invoked and submitted himself to that jurisdiction, and afterwards sought to review and reverse the decision on the merits on appeal, might perhaps be regarded a tacit admission that the matter was properly pending before that officer for adjudication. But it is not necessary in this instance to resort to inference merely on that subject. In the petition for appeal from the order of the referee to the district court, it was expressly conceded that the controversy arose in a proceeding in bankruptcy pending before D. F. Bailey, Esq., the referee in charge thereof, at a meeting of creditors and examination of the bankrupt and other witnesses. And the error assigned was, not that the matter had not been referred to the referee, or that he had no jurisdiction of the controversy, but that his ruling thereon upon the merits, or the law and the evidence, was erroneous, for which error (to which exception was specifically taken) the court was asked to review and modify the order of the referee, but not to dismiss the proceeding for want of jurisdiction. A similar admission was made in open court at the trial in the circuit court. These admissions are inconsistent with the contention, now made for the first time in this court, that the matter out of which the controversy arose does not appear to have been referred to the referee. If any such question had been suggested in the trial court, proof of the authority of the referee to act in the premises would no doubt have been promptly supplied.

The case of *In re Steuer* (D. C.) 104 Fed. 976, is strongly in point in support of the referee's jurisdiction. In that case it is said: "Evidence was taken and one or more hearings were had before the referee, at

which counsel for the respondents argued their case without making any question of the referee's jurisdiction. On January 12, 1900, the referee rendered a decree declaring that the transfer of the brick was a voidable preference, 'and that the trustees recover said property * * * as a part of said estate.' Upon appeal the court held the acts of the defendant amounted to consent to the jurisdiction in contemplation of section 23b of the Bankruptcy Act of 1898 (Act July 1, 1898, c. 541, 30 Stat. 552 [U. S. Comp. St. 1901, p. 3431]), and affirmed the order of the referee.

So, also, in *Re Connolly* (D. C.) 100 Fed. 620, it was held that the conduct of the parties amounted to consent to the jurisdiction; that though, as a general rule, consent cannot give jurisdiction, that principle has no application to cases arising under section 23b, which plainly implies that jurisdiction of a certain class of controversies may be given by consent. Otherwise, it is said, the statute would have no effect. 1 *Remington on Bankruptcy*, § 1696; *J. B. McFarlan Carriage Co. v. Solanas*, 106 Fed. 145, 45 C. C. A. 253, 5 Am. Bankr. Rep. 442; 5 Cyc. 253.

There can be no doubt that, if the decision of the referee, affirmed by the District Court, in the instant case, had been in favor of the plaintiff in error, it would have been conclusive upon the rights of the trustee. And, the plaintiff in error having elected to take chances, in a forum of his own selection with general jurisdiction of the subject, and lost, he cannot now be heard to complain, but must abide the result.

The judgment of the circuit court is without error, and must be affirmed.

Affirmed.

(114 Va. 90)

MUSE et al. v. GISH.

(Supreme Court of Appeals of Virginia. Sept. 9, 1912.)

EASEMENTS (§ 18*)—WAYS OF NECESSITY.

A private roadway having been established by testator during his ownership of an entire tract of land, it will, if reasonably convenient and necessary, be continued for the use and benefit of his devisees and those claiming under them upon a division of the tract under the will.

[Ed. Note.—For other cases, see *Easements*, Cent. Dig. §§ 50-55; Dec. Dig. § 18.*]

Appeal from Circuit Court, Roanoke County.

Bill by Sidney M. Muse and others against G. G. Gish. Decree dissolving a preliminary injunction and dismissing the bill, and plaintiffs appeal. Reversed.

Kime & Fox, for appellants. W. W. Ballard, J. E. Gish, and Jackson & Henson, for appellee.

WHITTLE, J. This is an appeal from a decree dissolving a preliminary injunction

and dismissing the bill in a suit brought by the appellants to enjoin the appellee from obstructing the plaintiffs in the use and enjoyment of a private roadway affording them means of outlet from their respective properties, which are entirely surrounded by the lands of private parties, through lot No. 1, the land of the defendant, to the "Vinton public road."

The obstructions complained of were occasioned by the defendant plowing up a portion of the private roadway and locking the gates opening into the same and into the public highway. The property affected consisted originally of 405 acres of land, situated in Roanoke county, near Vinton, and belonged to John B. McClung, who died testate in the year 1901. Shortly after the death of testator the land was partitioned amongst his devisees. Lot No. 1, containing 67 acres, was allotted to his granddaughter, a Mrs. Jones, and was afterwards purchased by the appellee, G. G. Gish.

For many years during the lifetime of John B. McClung there was a private roadway, known as the "old road," leading from the mansion house to the "Vinton public road" at the present outlet. The route of the old road was from the mansion house, passing a white oak at station 16 (on a map filed with the record) to Berkeley's corner, thence in part over and along Berkeley's line to station 15, and thence off through what is now lot No. 1, by station B, to station A, on the public highway. Several years prior to McClung's death a dispute arose between himself and Berkeley touching the correct location of the dividing line between them from station 16 to station 15, the latter claiming to the center of the road. The line was eventually surveyed, and Berkeley erected a line fence in the middle of the roadway from 16 to 15. Thereupon McClung discontinued the old road between those points, and from 15 to B, and established what is now known as the "new road," a straight road from 16 to B, thus providing a continuous road over his own land from the mansion house to the public road at station A. The portion of the old road from 16 by 15 to B, on McClung's side, was wholly discontinued and plowed up, and since that time has been under cultivation as other parts of the farm.

We have not undertaken to discuss the evidence in detail, but merely to give our conclusions therefrom. The foregoing summary is sustained by the preponderance of the testimony, and is an accurate presentation of the situation at the death of McClung, at the time the commissioners partitioned the land amongst his devisees, and at the date of appellee's purchase of lot No. 1.

When appellee bought lot No. 1, the new road had been established for several years, and was apparent and necessary, and in continuous and uninterrupted use by the ap-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

pellants. Moreover, the defenses relied on by the appellee show that he purchased lot No. 1 with actual knowledge of the existence of the new road. Thus, he proved by T. B. Jones, the husband of his vendor, that McClung discussed with him a purpose on his part to discontinue the new road and to open in place of it another road along the route of the old road. But, however that may have been, McClung did no act in furtherance of such intention, but continued to use the new road as long as he lived.

Gish also attempted to prove by Jones a parol agreement between them, which he says was acquiesced in by "the heirs," to change the location of the new road to its original position. Yet, if any such agreement was made, it was inchoate, and was never attempted to be consummated.

The remaining ground of defense involves the contention that appellants had another outlet to a public road by a private way over the land of W. G. Wood. But this allegation is wholly disproved and seems to have been abandoned.

The roadway in question having been established by John B. McClung during his ownership of the entire boundary of 405 acres of land, it will, if reasonably convenient and necessary, be continued for the use and benefit of his devisees (and those claiming under them) upon a division of the land under the provisions of testator's will. The rules of law governing ways of necessity apply to the facts of this case; and the decisions of this court abundantly sustain the rights of appellants to the unobstructed use of the roadway established by John B. McClung from the mansion house to the point of connection with the "Vinton public road" at station A. *Hardy v. McCullough*, 64 Va. 259; *Deacon v. Doyle*, 75 Va. 258; *Sanderlin v. Baxter*, 76 Va. 299, 44 Am. Rep. 165; *French v. Williams*, 82 Va. 462, 4 S. E. 591; *Bond v. Willis*, 84 Va. 796, 6 S. E. 136; *Scott v. Moore*, 98 Va. 668, 37 S. E. 342, 81 Am. St. Rep. 749.

For these reasons, the decree of the circuit court must be reversed, and this court will make such decree as the trial court ought to have made, perpetuating the injunction, with costs.

Reversed.

(114 Va. 20)

CLINCHFIELD COAL CO. et al. v. SUTHERLAND.

(Supreme Court of Appeals of Virginia. Sept. 9, 1912.)

1. SPECIFIC PERFORMANCE (§ 17*)—RIGHT TO COMPEL CONVEYANCE.

After a husband sold his undivided interest in land under provision for deferred payments, alimony was decreed against him, with provision that, upon the wife executing a deed releasing her contingent right of dower to the land, the purchaser should pay her the amount

fixed as alimony. The wife was not a party to her husband's contract to convey, nor to the deed, and refused to convey her dower right. *Held*, that an assignee of the claim for the fees of the wife's counsel in a suit in which the alimony was decreed is not entitled, though he has reduced the claim to judgment, to maintain suit against the husband and wife and the purchaser of the land to compel a conveyance by the wife to the purchaser of her contingent right of dower, and to compel the purchaser to pay the amount of the judgment to such assignee; it being optional with the wife to accept or reject the alimony on the terms prescribed.

[Ed. Note.—For other cases, see *Specific Performance*, Cent. Dig. §§ 38-46; Dec. Dig. § 17.*]

2. DOWER (§ 38*)—STIPULATIONS—PARTIES BOUND BY.

A married woman is not bound by a stipulation concerning her dower right, contained in a deed made by her husband in which she did not join.

[Ed. Note.—For other cases, see *Dower*, Cent. Dig. §§ 80, 94, 95, 132; Dec. Dig. § 33.*]

Appeal from Circuit Court, Dickinson County.

Bill by S. H. Sutherland against the Clinchfield Coal Company and others. Decree for plaintiff, and defendants appeal. Reversed.

Vicars & Peery, W. H. Rouse, and E. M. & E. H. Fulton, for appellants. Sutherland & Sutherland, for appellee.

WHITTLE, J. [1] This litigation had its origin in a suit for divorce instituted by A. J. Kiser against his wife Anna Kiser. Pending the trial of that case the court made an allowance of \$150 to the wife for temporary alimony, and upon final hearing held that neither party was entitled to a divorce, but awarded a gross sum of \$500 (inclusive of the sum of \$150 previously allowed as temporary alimony) as permanent alimony to the defendant.

It appeared that A. J. Kiser had sold his undivided interest, amounting to 210 acres, in a certain tract of land, to the Clinchfield Coal Company for \$1,680, \$420 of which was paid on the execution of the deed, and the residue of the purchase money was to be paid in three credit installments, of \$420 each. With respect to this transaction the court decreed as follows: "And it further appearing to the court that the complainant has sold the farm upon which they have lived, and the defendant has refused to sign said deed of conveyance, and that complainant has refused to provide for defendant, but has squandered a part of the money, the court doth adjudge, order, and decree that, upon the defendant executing a deed releasing her contingent right of dower to the farm which has been sold to the Clinchfield Coal Company, the said company do pay to the said defendant, Anna Kiser, * * * the sum of \$500, which sum shall be her permanent alimony, and is to include the sum of \$150, heretofore decreed by this court to the defendant."

From this decree A. J. Kiser appealed, and the decree was affirmed. *Kiser v. Kiser*, 108 Va. 730, 62 S. E. 936.

S. H. Sutherland, the appellee, became the owner by assignment of the fees of counsel for Anna Kiser in the divorce suit, amounting to \$350, and, having reduced the same to judgment, instituted this suit against A. J. Kiser, Anna Kiser, and the Clinchfield Coal Company to collect the same. The bill, after setting out the foregoing facts and others not material to be stated, prays: "That a commissioner be appointed to execute a deed conveying the contingent right of dower of the said Anna Kiser in said tract of land conveyed by her husband to the Clinchfield Coal Company, in case she refuses to execute the same, and that upon the execution of said deed said Clinchfield Coal Company be required to pay your orator the amount of his judgment against said Anna Kiser and the costs of this suit." There was a further prayer that the divorce suit be reinstated and reopened, and that the bill be treated as a petition therein.

On final hearing the circuit court entered the decree under review, directing that Anna Kiser should within 30 days convey all her interest in the land sold by her husband, either actual or contingent, to the Clinchfield Coal Company, and, if she should fail to execute and deliver such deed within the time prescribed, a special commissioner was appointed to make the conveyance. The decree, moreover, provided that, upon the execution of the conveyance, either by Anna Kiser or the commissioner, the Clinchfield Coal Company should pay to S. H. Sutherland the amount of his judgment, to go as a credit on the \$500 decreed against the company.

[2] It is apparent that this suit and the decree complained of are founded upon a misconception of the contractual relations of the parties with respect to the sale of the land from A. J. Kiser to the Clinchfield Coal Company, as well as of the force and effect of the decree for alimony in the divorce suit. Anna Kiser was not a party to either the contract for the sale of her husband's land to the Clinchfield Coal Company or to the deed executed by him in consummation thereof; hence her dower rights in the land were in no wise affected by that transaction. The deed, it is true, contains a stipulation that the last installment of purchase money should fall due 24 months from the date of the deed, "or so soon thereafter as the dower right, contingent or actual, of Anna Kiser * * * is released." But, not being a party to the instrument, the wife was not bound by the stipulation, and it affirmatively appears that she has steadfastly refused to consent to it. So, also, with regard to the decree in the divorce suit. The court did not undertake the impossible task

of requiring the wife to specifically execute a contract of sale to which she was not a party. To the contrary, the decree in terms recites that the sale was made by the husband, and that the wife "has refused to sign said deed of conveyance, and that complainant has refused to provide for defendant." Predicated upon that state of facts, the decree proceeds to declare that, upon Anna Kiser executing a deed releasing her contingent right of dower, the Clinchfield Coal Company shall pay to her the sum of \$500 for permanent alimony, thus leaving it optional with the wife to accept or reject permanent alimony on the terms prescribed, and the record shows that she has always refused to release her dower rights and accept the provisional allowance made for her in lieu thereof.

In these circumstances, the court exceeded its powers in attempting to compel the appellant, at the suit of a judgment creditor, to accept for his benefit the terms of a sale of her property which she never made, and to which she never assented. Such a suit cannot be maintained.

For these reasons, the decree must be reversed, and the bill dismissed. But this dismissal is without prejudice to the right of the appellee to resort to any remedy to which he may be entitled for the collection of his judgment against Anna Kiser, or to any right that A. J. Kiser may have against the Clinchfield Coal Company with respect to unpaid installments of purchase money on the land sold by him to that company.

Reversed.

(114 Va. 154)

WESTERN UNION TELEGRAPH CO. v.
DAVIS.

(Supreme Court of Appeals of Virginia. Sept. 9, 1912.)

1. TELEGRAPHS AND TELEPHONES (§ 78*) —
DELIVERY OF MESSAGE — PENALTY — STATUTES.

Code 1904, § 1294-h (6), which prescribes a penalty for delay in delivering a telegram, cannot be given extraterritorial force by agreement of the parties to a contract for transmission of a telegram.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. §§ 79-81; Dec. Dig. § 78.*]

2. TELEGRAPHS AND TELEPHONES (§ 78*) —
DELIVERY OF MESSAGES—PENALTY FOR DELAY.

Code 1904, § 1294-h (6), which prescribes a penalty for delay in delivering a telegram, does not authorize imposition of the penalty for neglect to deliver within the state a telegram sent from a telegraph office within the state to an office just outside the state, though the company customarily delivered messages from the latter office to the adjoining town within the state in which the addressee resided.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. §§ 79-81; Dec. Dig. § 78.*]

Appeal from Corporation Court of Bristol.

Action by one Davis against the Western Union Telegraph Company. Judgment for plaintiff, and defendant appeals. Reversed and dismissed.

George H. Fearons, Donald T. Stant, and Phlegar, Powell, Price & Shelton, for appellant. N. P. Oglesby and George M. Warren, for appellee.

WHITTLE, J. [1] This is an action under Va. Code, 1904, § 1294-h (6) to recover the penalty of \$100 prescribed for delay in delivery of a telegram.

The message was delivered to the company at 9:40 p. m. at its office in Glade Spring, Va., addressed to J. L. Davis, care of Susong Building, Bristol, Tenn., and was received at that office at 9:46 p. m. of the same day, but was not delivered to the addressee, who lived in Bristol, Va., until 3:05 p. m. of the following day. The company maintained an office in Bristol, Tenn., but had no office of any kind in the adjoining city of Bristol, Va. It is true that, both by regulation and custom, the company's habit was to deliver messages from the Tennessee office to addressees in Bristol, Va.; but, of course, no extraterritorial force can be imparted to the delivery statute by agreement of parties.

[2] Upon these undisputed facts, the sole question for our determination is whether or not the company can be penalized by authority of the Virginia statute for neglect of duty with respect to the delivery in this state of a message from its office in another state.

The case is readily distinguishable from Western Union Telegraph Co. v. Reynolds, 100 Va. 459, 41 S. E. 856, 98 Am. St. Rep. 971, Western Union Tel. Co. v. Hughes, 104 Va. 240, and Western Union Tel. Co. v. White, 113 Va. —, 74 S. E. 174. Those were all transmission cases under section 1294-h (5), where the duty rested upon the company promptly to transmit the messages from one Virginia office to another office in the same state; and for negligent failure to discharge that duty the company was subjected to the statutory penalty, though the line, in part, passed through the territory of another state. Those cases fall within the influence of decisions of the Supreme Court of the United States in Western Union Telegraph Co. v. James, 162 U. S. 650, 16 Sup. Ct. 934, 40 L. Ed. 1105, and Western Union Telegraph Co. v. Commercial Milling Co., 218 U. S. 406, 31 Sup. Ct. 59, 54 L. Ed. 1088, 21 Ann. Cas. 815, 38 L. R. A. (N. S.) 220. The controlling principle of that line of cases is clearly stated in Western Union Telegraph Co. v. White, supra, 113 Va. —, 74 S. E. 174, as follows: "It is not sought in this case to give effect to our statute outside of the limits of this state, as was held could not be done in the Chiles Case, 214 U. S. 274, 29 Sup. Ct. 613, 53 L. Ed. 994;

but the object of the suit is to give effect to the statute and to impose the penalty for the company's failure to transmit the message to Fredericksburg. If the message had never been transmitted at all from Staunton, it is clear, under the case of Western Union Telegraph Co. v. Crovo, 221 U. S. 364, 31 Sup. Ct. 399, 55 L. Ed. 498, the company would have been liable. If the point of delivery had been in Washington city, and the message had been duly transmitted to that place and never delivered, then there could be no recovery, as decided in the Chiles Case, supra. If the message had been duly relayed and transmitted from Washington city to Fredericksburg, and the only default had occurred there in failing to deliver the message to the sendee, it is clear that an action would lie to recover the penalty under the decision in the James Case."

To uphold the recovery in this case would give to the Virginia statute an extraterritorial effect, to which it is not entitled. Western Union Telegraph Co. v. Pendleton, 122 U. S. 347, 7 Sup. Ct. 1126, 30 L. Ed. 1187; Western Union Tel. Co. v. Chiles, 214 U. S. 274, 29 Sup. Ct. 613, 53 L. Ed. 994.

For these reasons, the judgment must be reversed, and the case dismissed.

Reversed.

(114 Va. 85)

MILLER et al. v. TOWN OF PULASKI.

(Supreme Court of Appeals of Virginia. Sept. 9, 1912.)

1. EMINENT DOMAIN (§ 9*)—RIGHT TO EXERCISE POWER—STATUTORY PROVISIONS.

Code 1904, § 1038, as amended by Acts 1908, c. 349, authorizing any city or town to acquire, maintain, and operate waterworks and other public utilities, and to acquire by condemnation or otherwise land necessary for the operation of such works, empowers a town to condemn land and water rights connected therewith.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 27-34; Dec. Dig. § 9.*]

2. EMINENT DOMAIN (§ 56*)—ACQUISITION OF PROPERTY—"NECESSITY."

The word "necessity" in Code 1904, § 1038, as amended by Acts 1908, c. 349, authorizing any city or town to acquire land necessary for the acquisition and operation of waterworks and other public utilities, but no property shall be condemned, unless the necessity therefor shall be shown to exist, does not mean absolutely necessary, but reasonably necessary for the greatest benefit to the public with the least inconvenience and expense.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 147-160; Dec. Dig. § 56.*]

For other definitions, see Words and Phrases, vol. 5, pp. 4726-4737.]

3. EMINENT DOMAIN (§ 58*)—EXERCISE OF POWER—EXTENT OF POWER.

Though the water power condemned by a town will furnish more power than it needs at the present time, or will need for years to come, but all the property must be condemned in case of any taking, the condemnation is valid.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 147-160; Dec. Dig. § 58.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

4. EMINENT DOMAIN (§ 238*)—COMPENSATION—INADEQUACY—REVIEW.

Damages awarded on conflicting evidence by commissioners in proceedings to condemn land will not be disturbed as inadequate where the inadequacy, if any, does not show prejudice or corruption.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 614, 619; Dec. Dig. § 238.*]

Error to Circuit Court, Carroll County

Proceeding by the Town of Pulaski to condemn for its purposes land and water rights connected therewith. There was a judgment of condemnation, and one Miller, trustee, and others bring error. Affirmed.

M. M. Caldwell, for plaintiffs in error.
John S. Draper and Robert E. Scott, of Richmond, for defendant in error.

BUCHANAN, J. This is a writ of error to a judgment of the circuit court for Carroll county, rendered in a proceeding instituted by the town of Pulaski to condemn for its purposes as a municipal corporation a parcel of land and water rights connected therewith, situated in Carroll county and owned by the plaintiffs in error.

[1] The first, second, and third assignments of error are as to the right or power of the town to condemn the defendants' property. It is insisted that it did not possess that right at common law, under its charter, or under any general statute. It is not claimed by the town that it had the right, either at common law or under its charter (see *Miller, Trustee, etc., v. Town of Pulaski*, 109 Va. 137, 63 S. E. 890, 22 L. R. A. [N. S.] 552), but that it did have such power under section 1038 of the Code as amended by an act approved March 14, 1908 (Acts 1908, c. 349, p. 623).

By that section as amended, which applies to towns generally, it is provided, among other things, that, in addition to the powers conferred by general statutes, the council of any city and town shall have power to acquire or establish, maintain, and operate waterworks, gasworks, electric plants, and other public utilities within or without the limits of the city or town; "to acquire within or without the limits of the city or town, by purchase, condemnation, or otherwise, whatever land may be necessary for acquiring, locating, establishing, maintaining, operating, extending, or enlarging, said waterworks, gasworks, electric plants and other public utilities, and the rights of way, rails, pipes, poles, conduits, or wires, connected therewith, or any of the fixtures or appurtenances thereof; provided that no city or town shall have the right to acquire by condemnation the steam and electric plants, gas and water works, or water power, and the fixtures and appurtenances or any part there-

of, owned and operated in whole or in part on the eighteenth day of February, nineteen hundred and eight, by any manufacturing corporation or public service corporation for the purpose of acquiring, establishing, maintaining, operating or enlarging its electric plant or waterworks; * * * provided that no property shall be condemned for the purposes specified in this section unless the necessity therefor shall be shown to exist to the satisfaction of the court having jurisdiction of the case."

It is clear, we think, that under the provisions of section 1038 of the Code, as amended, the town had the right, if the necessity for it existed, to condemn the land and water rights described in the record. The fact that "water power" is not in terms named in the "affirmative clause" of the statute, but only in the "proviso," does not show that the Legislature did not intend to give a city or town the right to condemn a water power—a right or interest annexed to land and parcel thereof. The right or power to condemn the whole, if owned by one person, would seem necessarily to give the right or power to condemn the parts that made up the whole, if owned by different persons, if necessary for the purposes of the municipality and done in the manner prescribed by statute.

[2] The next error assigned is that, even if section 1038, as amended, did give such right, no necessity for its exercise existed in this case.

That section provides that no property shall be condemned for the purposes specified in the section, unless the necessity therefor be shown to exist to the satisfaction of the court having jurisdiction of the case. The trial court, after investigation, held that the necessity for the condemnation of the said water power did exist. The plaintiffs in error, as we understand them, insist that the "necessity" for the taking contemplated by the statute does not mean that the property sought to be condemned must be reasonably necessary only, but must be absolutely or indispensably necessary for the uses and purposes for which it is to be taken.

The term "necessary," says Lewis on Eminent Domain (3d Ed.) p. 1058, "when applied to a public road, is used in the statutes and judicial decisions, not in the sense of being absolutely indispensable to communications between two points, but with relation to the purposes for which public highways are established, namely, the reasonable accommodation of the traveling public. This same observation would doubtless apply to any public improvement or work."

Again, on page 1062, he says: "When the law says that private property may be taken for public uses only when it is neces-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

sary for such use, it means a reasonable, not an absolute, necessity."

In 15 Cyc. p. 636, in discussing this question, it is said: "Nevertheless, necessity, within the meaning of this rule, does not mean an absolute, but only a reasonable, necessity, such as would combine the greatest benefit to the public with the least inconvenience and expense to the condemning party and property owner consistent with such benefit, although it does not include the taking of land which may merely render the improvement more convenient or less expensive, or for a necessity which is merely colorable."

These text-writers seem to be sustained in their statement of what is meant by the terms "necessity" or "necessary," as used in the eminent domain statutes, by the great weight of authority and the better reason. See cases cited in notes; also cases cited in note to *Wheeling, etc., Co. v. Toledo, etc.*, 2 Ann. Cas. 941, 946-948.

Applying this test, the evidence in this case sustains the conclusion reached by the court, even if the discretion vested in the trial court to determine that question could be controlled by this court (as to which we express no opinion), except in a case where there had been a clear abuse of the discretion vested in the court.

[3] It is also assigned as error that the water power condemned was much greater than was necessary for the purposes of the town.

Conceding that the property condemned will furnish more power than the town needs now, or will need for years to come, it does not appear that less than the whole could have been condemned; and the evidence tends to show that if there was any taking at all the whole property must be condemned.

[4] The remaining assignment of error to be considered is that the trial court "held, contrary to the preponderance of evidence, that \$475 was a fair compensation" for the property taken.

Conceding that the evidence taken by the commissioners was before the court when it passed upon the exceptions to their report (though this is denied by the defendant in error), this court could not disturb the finding of the commissioners. That evidence is conflicting, and there is nothing to show that the damages allowed, if inadequate at all, are so inadequate as to show prejudice or corruption, and without this the settled rule of this court, and of courts generally, is not to disturb the finding of the commissioners. See *Barnes v. Tidewater Ry. Co.*, 107 Va. 263, 266, 267, 58 S. E. 594, and cases cited.

Upon the case presented by the record, we are of opinion that the judgment of the circuit court should be affirmed.

Affirmed.

(114 Va. 1)

**BUCKEYE NAT. BANK OF FINDLAY,
OHIO, v. HUFF & COOK.**

(Supreme Court of Appeals of Virginia. Sept. 9, 1912.)

1. CARRIERS (§ 58*)—TRANSFER OF BILL OF LADING—CREDITORS OF SHIPPER—PROPERTY SUBJECT TO ATTACHMENT.

Where a bank takes by indorsement a bill of lading and pays the draft of the shipper for value of the goods, no attachable interest remains in the shipper.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 179-190; Dec. Dig. § 58.*]

2. EVIDENCE (§ 235*)—DECLARATIONS—ADMISSIBILITY.

A drawer of a draft with bill of lading attached cannot prejudice the rights of his assignee by subsequent admission or conduct.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 873-875; Dec. Dig. § 235.*]

3. TRIAL (§ 252*)—INSTRUCTIONS—ISSUES NOT SUPPORTED BY EVIDENCE.

In an action by a bank for damages resulting from attachment by defendant of grain, title to which had passed to the bank from the attachment defendant, it was error to submit an issue as to whether the transfer of the bill of lading to the bank was a mere colorable transaction, where there was no evidence of lack of good faith on the bank's part.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 613-623; Dec. Dig. § 252.*]

4. ATTACHMENT (§ 374*)—WRONGFUL ATTACHMENT—BURDEN OF PROOF.

The burden was on defendants to prove fraud in the transfer of the bill of lading.

[Ed. Note.—For other cases, see *Attachment*, Cent. Dig. §§ 1363-1372, 1392; Dec. Dig. § 374.*]

5. ATTACHMENT (§ 375*)—WRONGFUL ATTACHMENT—DAMAGES—MEASURE.

If defendants wrongfully attached an entire car load of oats as belonging to a firm, whereas the property had passed to plaintiff bank as bona fide assignee of the bill of lading covering the shipment, they are liable to the bank for at least the amount of the draft to which the bill of lading was attached, and not merely for the amount of the oats actually sold under the attachment.

[Ed. Note.—For other cases, see *Attachment*, Cent. Dig. §§ 1378-1385, 1387, 1393, 1394, 1398, 1399; Dec. Dig. § 375.*]

Appeal from Corporation Court of Roanoke.

Action by the Buckeye National Bank of Findlay, Ohio, against Huff & Cook. From the judgment, plaintiff appeals. Reversed.

William S. Snook, for appellant. Hall & Woods, for appellee.

CARDWELL, J. It appears that at the time of the transaction out of which this litigation arose, and prior thereto, W. E. Loomis and T. C. Linger were partners in the business of buying, selling, and shipping hay and grain at Wellsboro, Ind., under the firm name of the Ohio Hay & Grain Company. T. C. Linger was also a member of a firm composed of himself and his father, P. F. Linger, engaged in the same business at Findlay, Ohio, doing business under the

same firm name—Ohio Hay & Grain Company—T. C. Linger being the manager of the business at Findlay. For convenience these two firms will, in the statement of facts, be spoken of respectively as the "Wellsboro firm" and the "Findlay firm."

On or about September 11, 1908, the Wellsboro firm shipped, for account of the Findlay firm, a car load of oats in a Baltimore & Ohio Railroad car to Cambill & Davis, of Roanoke, Va., to whom the same had been sold by A. W. Howard, a merchandise broker at Roanoke. The car contained 1,675½ bushels of oats, and the Wellsboro firm attached a bill of lading to a draft on the Findlay firm for the purchase price of the oats, which draft was taken up by the drawees at Findlay, Ohio, and a new draft for the \$820.75 was drawn by that firm on said Gambill & Davis at Roanoke, Va., to which was attached the original bill of lading. On September 14, 1908, this new draft, with bill of lading attached, was presented by the Findlay firm to the Buckeye National Bank of Findlay, Ohio, and, upon the bill of lading being assigned by the Findlay firm to the bank, the amount of the draft was placed in full to the credit of said firm, and by the firm later checked against. The bank sent the draft forward on September 18, 1908, to a bank at Roanoke, Va., for collection, and on the 23d day of the same month the Findlay firm advised the freight agent of the Norfolk & Western Railway Company at Roanoke of the shipment of the said oats, and requested the delivery of the oats to Gambill & Davis upon presentation of a bill of lading, or in the event of the arrival of the car before the bill of lading, upon a certified check being deposited with the railway company for the amount of the draft.

Upon the arrival of the car load of oats at Roanoke, about the 25th of September, 1908, the delivering railroad (Norfolk & Western) placed it on the delivery track of Gambill & Davis, and on October 1, 1908, the firm of Huff & Cook, of Roanoke, who claimed to have an account due them from the Findlay firm, amounting to \$75, sued out before a justice of the peace for the city of Roanoke an attachment against the Findlay firm (Ohio Hay & Grain Company of Findlay, Ohio), under which attachment a constable, in whose hands the attachment was placed, levied the same upon said car load of oats and made a return of the attachment to the corporation court of the city of Roanoke, showing that the car load of oats then upon the delivery track of Gambill & Davis had been attached by him, and service thereof made only upon the Norfolk & Western Railway Company.

On the return day of the attachment—October 15, 1908—the corporation court entered its judgment thereon in favor of Huff & Cook for \$75, and directed the constable, upon the bond required by law being given by Huff & Cook, to proceed to sell so much

of the car load of oats in the hands of the Norfolk & Western Railway Company as would be sufficient to satisfy the debt of Huff & Cook, with interest thereon, the costs of the attachment proceedings, the costs of keeping the property, and the costs of sale. On November 11, 1908, the constable proceeded to sell 480½ bushels of the oats at 50 cents per bushel, amounting to \$240.25, and the proceeds of the sale were disbursed by the payment to Huff & Cook of \$91.20, being the amount of their alleged debt, interest, and costs; to the Norfolk & Western Railway Company \$133.29 for freight and demurrage charges on the car; and by the payment of \$15.72, the amount of court costs and the constable's fees. The Norfolk & Western Railway Company then, desiring to unload the car and get the use of its equipment, stored the balance of the oats in the warehouse of Huff & Cook, having failed to get storage room for them elsewhere. Upon the oats being stored, the railway company took from Huff & Cook the usual bond in such cases, and subsequently gave an order on Huff & Cook for the oats, and they were sold at public auction; but what disposition was made of the proceeds does not appear in the record.

In June, 1910, this action of trespass on the case was instituted by the Buckeye National Bank against Huff & Cook, the declaration filed setting forth the facts above mentioned, and alleging that it had been damaged by reason thereof in the sum of \$1,000. Later an amended declaration was filed, setting out more in detail the grounds upon which the plaintiff relied for the recovery against the defendants sought, and upon a trial of the cause on the issues joined therein a verdict was rendered by the jury for the plaintiff in the sum of \$215.96, with interest on \$185.96, part thereof, from November 11, 1908, until paid, upon which verdict the trial court entered judgment, and the plaintiff brings error.

The grounds upon which this court is asked to review and reverse said judgment are: First, because of the refusal of the trial court to give certain instructions asked by the plaintiff; second, because two other instructions for the defendant were given by the court over the objection of the plaintiff; and, third, because the damages awarded by the jury were inadequate.

The trial court, in giving plaintiff's instructions 1, 2, and 5, recognized the well-settled principles of law sanctioned in the case of Greensburg Nat. Bank v. Syer & Co., 113 Va. —, 73 S. E. 438, and in fact those principles are not controverted by the defendants in this case; so that the question for our determination, arising upon the rulings of the trial court in refusing plaintiff's instructions Nos. 6 to 11, inclusive, and in giving defendants' instructions numbered 3 and 4, is as to the effect of the levy of the

attachment upon that portion of the car load of oats which was not sold in the attachment proceedings.

The contention of the plaintiff is that the defendants, Huff & Cook, by suing out the attachment and having the same levied on the car load of oats, serving a copy thereof only on the Norfolk & Western Railway Company, wrongfully converted the entire car load of oats to their use, and took them from the possession and control of the plaintiff, and that by reason of this wrongful action the defendants became liable to the plaintiff for the value of the entire car load of oats, or for at least the amount of the draft which was drawn upon its value and credited to the drawers of the draft as cash, viz., \$820.25, notwithstanding the fact that only a portion of the oats were sold in the attachment proceedings. On the other hand, the defendants, though practically conceding that the plaintiff had not only title to the draft in question, but by the indorsement of the bill of lading acquired title also to the car load of oats, for the value of which the draft was drawn, contend that they are liable only in this action to the extent of the value of the oats actually sold in the attachment proceedings instituted by them; in other words, the defendants do not controvert the proposition that if the entire car load of oats had been sold in their attachment proceedings and the proceeds thereof, after paying their alleged debt against the Ohio Hay & Grain Co. of Findlay, Ohio, and the costs incurred, had not been turned over to the plaintiff bank, its theory as to the measure of recovery in this action, would be correct.

In the view we take of the case, the error assigned with respect to the court's ruling refusing to give as asked plaintiff's instructions 6 to 11, inclusive, need not be specially considered.

[1] The principle of law controlling in this case is analogous to that applied in a long line of decisions with respect to warehouse receipts issued for property stored in a warehouse, viz.: "The indorsement and transfer to a bona fide holder for value of a warehouse receipt for goods to be delivered upon the order of the depositor, or upon surrender of the receipt, operates to transfer to the holder the legal title to such goods and the possession thereof as effectually as if there were a physical delivery of the goods to a purchaser." *Millhiser Mfg. Co. v. Gallego Mills Co.*, 101 Va. 579, 44 S. E. 760, and authorities cited. And where a bank takes by indorsement a bill of lading and pays the draft of the shipper for value of the goods, no attachable interest remains in the shipper. *Walsh Bowles & Co. v. National Bank*, 228 Ill. 446, 81 N. E. 1067.

[2] It is equally as well settled that, after the drawer of a draft has parted with the title thereto to his bank, no subsequent ad-

mission or conduct of his can prejudice the bank's rights. *Greensburg Nat. Bank v. Syer & Co.*, supra; Cent. Dig. §§ 873-875.

[3, 4] There was some evidence offered in this case going to show that the plaintiff, as well as T. C. Linger, had notice of the attachment of the car of oats by the defendants upon its arrival at Roanoke, and that Linger conducted a correspondence having in view a sale of the balance of the oats after a sufficient portion of them had been sold in the attachment proceedings to satisfy the debt asserted therein, costs, etc.; but it is conclusively shown in the evidence that these efforts on the part of Linger were not made as the agent of the bank, but by reason of the fact that his firm was the indorser of the draft cashed by the bank and would have to make good the amount paid for the draft in the event it was not collected of the drawees.

Upon this state of the evidence it was error to give defendants' instruction No. 3, telling the jury that if they believed from the evidence that the transfer of the draft and bill of lading in question to the bank was a mere colorable transaction, and that it was mutually understood between the bank and the drawers of the draft that the property and money arising from the sale of the property was still the property of the drawers of the draft, or that the purpose of the transaction was to prevent creditors of the Ohio Hay & Grain Company, including the defendants, from taking legal steps to make their debts out of the property, and that the plaintiff was aware of such purpose, then the alleged transfer was void as to the defendants' debt, and the jury should find for the defendants. A finding by the jury for the defendants, under instruction No. 3, could only have been founded upon conjecture or suspicion, for there is no evidence whatever of knowledge on the part of the plaintiff of the fraudulent purpose suggested in the instruction. The burden was upon the defendants to prove fraud, if any, in the transaction by which the plaintiff bank acquired title to the draft in question, and no such proof is adduced. It will not do to say, in these circumstances, that the giving of instruction No. 3 was harmless error.

[5] There was some correspondence between T. C. Linger and certain parties in Roanoke, Va., about disposing of the balance of the car load of oats remaining after a part thereof had been sold under the attachment; but the uncontradicted statement of the cashier of the plaintiff bank, when examined as a witness in this cause, is to the effect that whatever Linger did or endeavored to do with respect to the balance of the oats was without any authority from the bank, and was done because he (Linger) was the indorser of the draft and would have to make good to the bank in the event it was unable to collect from the drawees.

Yet the court, by defendants' instruction No. 4, told the jury that, "if they believed from the evidence that the plaintiff bank was the bona fide owner of the draft in question, then they should find a verdict for the plaintiff for the sum of \$185.96, with interest, etc., and \$1 per day for storage on the oats," etc.; in other words, that if the jury believed the plaintiff bank to be the bona fide owner of the draft, the measure of the damages which it could recover in this action was the value of the oats sold in the attachment proceedings and the costs incident to the sale.

It is very true that there was an addendum to the instruction setting forth that the amount named therein, \$185.96, was the correct amount due under the theory of the case adopted by the court in the other instructions, to the effect that defendants were liable for the oats sold under the attachment with damages for the detention of the residue; but this concession on the part of the plaintiff was evidently intended only to facilitate the trial and could not rightly be construed as a waiver of the plaintiff's right to make proper objections to "the theory of the case adopted by the court." In fact, the bill of exceptions so states.

The court had, by the three instructions—1, 2, and 5—given for the plaintiff, correctly told the jury that when a bill of lading is transferred to a bank, and the bank discounts the draft attached to the bill of lading, the bank becomes the owner of the goods covered by the bill of lading until the draft is paid, and this is true although the transaction be not to give the permanent ownership, but to furnish security for advances of money or discounted commercial paper upon faith of it; that the law presumes that the transfer of a bill of lading, with draft attached, is for valuable consideration, and the burden of proof that such was not the case devolves upon the defendant; and that the Ohio Hay & Grain Company being indorser of the bill of lading in question, and ultimately liable to the plaintiff bank for the payment of the draft, had a right to do what was reasonably necessary to protect the property covered by the bill of lading and preserve its value. If therefore the jury found that the plaintiff bank was the bona fide owner of the draft and, by assignment, the bill of lading attached thereto, the attachment of the entire car load of oats by the defendants was plainly illegal, and they thereby became answerable in damages to the plaintiff for at least the amount of the draft which was drawn upon the value of the property covered by the bill of lading, and the court was not justified in limiting the assessment of the damages which the plaintiff was entitled to recover to practically one-fourth of the value of the shipment.

"One is liable in an action of trespass for causing an attachment against a debtor to be levied on a consignment of goods in the

custody of a common carrier, the title to which was in a third person to whom the bill of lading covering the shipment had previously been duly assigned by such shipper." *Farmers', etc., Bank v. Allen-Holmes & Co.*, 122 Ga. 87, 49 S. E. 816.

In that case the levy of an attachment was upon a shipment of corn under similar conditions obtaining when the levy of the attachment complained of in this case was made at the instance of the defendants, and in its opinion the court said: "This unlawful invasion of the plaintiff's right gave it a cause of action, and if, as alleged, the property was wholly lost by reason of the illegal levy and sale, the plaintiff would be entitled to recover at least the actual value of the corn. This was alleged to be the price which the defendant agreed to pay Heile & Sons on delivery at destination."

The question in this class of cases is not whether the plaintiff was divested of all or part of his property, but whether the wrongful seizure thereof amounted to a conversion of the property. Where such is the case, the owner of the property has several remedies, among which are an action for damages resulting from the wrongful seizure, and the action of trover, in each of which actions the measure of recovery would be practically the same, viz., the value of the property converted with interest, etc.

"Where the conversion has taken place, the owner is not bound to receive back the property if tendered, either before or after suit, and if he does take it back this does not bar his suit, but goes in mitigation of damages. Where the conversion is complete, the injury suffered, of course, is the value of what is converted." 2 Cooley on Torts, p. 878. See, also, note to same authority, p. 879.

"A plaintiff in execution procuring a levy to be made on a stranger's goods is guilty of conversion, whether he takes possession or not. Conversion is any wrongful exercise or assumption of authority, personally or by procurement, over another's goods, depriving him of their possession." *Hale v. Ames*, 2 T. B. Mon. (Ky.) 143, 15 Am. Dec. 150; *St. George v. O'Connell*, 110 Mass. 475; 28 Am. & Eng. Enc. L. (2d Ed.) 691 et seq.

In *McPheters v. Page*, 83 Me. 234, 22 Atl. 101, 23 Am. St. Rep. 772, the opinion says: "Any act of dominion wrongfully exerted over property in denial of the owner's right, or inconsistent with it, amounts to a conversion."

In the case in judgment, the defendants procured the levy of an attachment on the entire car load of oats, removed and sold a part and abandoned the residue, thereby not only interfering with, but wrongfully depriving the plaintiff bank of the possession of the property, and prevented a consummation of its sale and delivery to purchasers and consignees thereof.

The contentions of defendants: First, that their acts were not wrongful and did not amount in law to a conversion of the property attached; and, second, that because certain parties other than the plaintiff bank, *i. e.*, T. C. Linger and A. W. Howard, and Poindexter & Hopwood at Linger's instance, made efforts to sell the residue of the oats, the bank is to be held as unqualifiedly recognizing its ownership of the residue of the oats, and therefore responsible for whatever loss has resulted from delay in disposing of the oats, or from the manner in which they were disposed of—are wholly without merit.

"After the drawer of a draft has parted with the title thereto to his bank, no subsequent admissions of his can prejudice the bank's right." *Greensburg Nat. Bank v. Syer & Co.*, *supra*.

The instructions asked by the plaintiff at the trial, Nos. 6 to 11, inclusive, which were refused, as well as instructions Nos. 1, 2, and 5 given, expounded the law applicable to the facts which the evidence tended to prove, and in accordance with the views expressed in this opinion, therefore, the court erred in refusing instructions Nos. 6 to 11, inclusive.

For the foregoing reasons, the judgment of the corporation court of the city of Roanoke is reversed, the verdict of the jury set aside, and the cause remanded for a new trial not inconsistent with this opinion.

Reversed.

(114 Va. 76)

MILLER et al. v. BUCHANAN et al.

(Supreme Court of Appeals of Virginia. Sept. 9, 1912.)

1. WILLS (§ 439*)—CONSTRUCTION—TESTATOR'S INTENT.

In construing a will, testator's intent should be given effect, if possible; technical rules of construction being subservient thereto.

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. §§ 952, 955, 957; Dec. Dig. § 439.*]

2. WILLS (§ 184*)—CONSTRUCTION OF CODICIL.

Testatrix's will released certain claims to the debtors, made other specific bequests, and provided that the residue of her estate should be divided equally among her nephews and nieces. A codicil provided that, to dispose of personality, "not disposed of by my will above mentioned," "any and all money and notes I may have at my death, also my household property," should be turned over to W., except certain items. *Held*, that the will and codicil are irreconcilable, and that, since the latter must control, the codicil governs the disposition of the general residuum of the estate, without interfering with the specific bequests and directions mentioned in the will.

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. §§ 462-467; Dec. Dig. § 184.*]

3. WILLS (§ 184*)—CONFLICT WITH CODICIL—EFFECT.

A codicil controls irreconcilable provisions of the will.

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. §§ 462-467; Dec. Dig. § 184.*]

4. WILLS (§ 184*)—CODICILS—CONSTRUCTION.

Generally a codicil will be construed as operating upon some part of the estate, even when its terms, literally interpreted, would not so operate; but it will be construed as being consistent with the will, where the discrepancy claimed is not obviously intended by the testator.

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. §§ 462-467; Dec. Dig. § 184.*]

Appeal from Corporation Court of Bristol.

Bill by W. H. Buchanan, executor, and others, against Elizabeth A. Miller and others. From the decree, defendants appeal. Affirmed.

White, Penn & Penn, for appellants. B. F. Buchanan and John P. Buchanan, for appellees.

HARRISON, J. This suit involves a construction of the last will and testament of Nancy H. Buchanan. The learned judge of the corporation court of the city of Bristol, to whose docket the cause was transferred from the circuit court of Smyth county, has filed as part of the record a written opinion, which so fully and clearly discusses the law and facts, and so satisfactorily presents the views entertained by this court as to the proper construction of the will in question, that we cannot do better than adopt the same as an entirely sufficient disposition of the present controversy:

"On the 22d day of July, 1908, Mrs. Nancy H. Buchanan made her will, in which she directed the disposition of all her real and personal estate. The provisions of the will affecting the personality are as follows:

"6. I devise and bequeath to James C. and Thomas W. Buchanan the balance due me, as shown by settlement made between us by F. Grundy Buchanan, and stated in an account book in my possession.

"7. I give and devise to Rees H. Buchanan all the notes and debts due by him to Thomas W. Buchanan and which have recently been assigned to me by said Thomas W. Buchanan.

"8. All the rest and residue of my said estate, which I shall not dispose of by gift, during my life, and I expect to dispose of most of my household furniture in this way, I direct shall be taken into custody by my executor and out of same shall pay first to Thomas Raymond Buchanan and Nancy Buchanan, children of Thos. W. Buchanan, five hundred dollars each, and the balance shall go equally to all my nephews and nieces, share and share alike."

"On the 12th day of August, 1909, Mrs. Buchanan executed the following codicil:

"I, Nancy Buchanan, on this the 12th day of August, 1909, do hereby direct that my administrator appointed in my will, made about one year ago, make the following disposition of my personal property, not disposed of by

my will above mentioned, and my household effects as follows:

"1. I direct that any and all money and notes that I may have at my death, and also my household property, be turned over to my nephew, W. B. Clark, to whom I give the same forever, except the following items, which I direct him and my administrator to convey to the following persons:

"1 bureau to my niece, Nannie B. Clark; 1 sideboard with glass top to W. H. Buchanan; 1 yellow pitcher and one bureau to J. D. Buchanan; one candle stand and large dish to B. F. Buchanan.

"Remembering a promise made when R. W. Buchanan was born, and who was named for my father, I direct that the sum of fifty dollars be given him for the colt I promised to give him.

"Witness my name and signature this the 12 day of Aug., 1909.

"[Signed] Nancy H. Buchanan."

"We, the undersigned, have in the presence of the testator, Nancy H. Buchanan, on this day, Aug. 12, 1909, witnessed the above signature, which she has declared to us to be the disposition of her personal and household property.

"[Signed] J. B. Bittinger,

"Mary E. Painter."

"It appears, from an agreement of facts filed with the record, that when the codicil was written the testatrix did not have before her the original will, and that the money, notes, household, and other property referred to in the codicil were worth at least \$10,000, and constituted the whole of the personal property of the testatrix.

[1] "The executor brought this suit for a construction of the will as affected by the codicil, and the real contest in the case arises between the nephews and nieces, mentioned in the residuary clause, and W. B. Clark, the chief beneficiary named in the codicil. This contest raises a question of construction of more than ordinary interest, and the respective claims of these contestants have been presented with marked force and clearness by counsel, both orally and in the briefs. If, however, we bear in mind that the object of the interpretation of a will is to arrive, if possible, at the intention of the maker, and that technical rules of construction must always be treated as subservient and subordinate to this object, I do not think the question here presented will be found very difficult of solution.

[2, 3] "Under the will as originally written, the specific personal estate mentioned in clauses 6 and 7 would have gone to James C. and Thomas W. Buchanan, and to Rees H. Buchanan, respectively. Then, under clause 8, \$500 each would have first been paid to Thomas Raymond Buchanan and Nancy Buchanan, and the residue of the personalty would have gone to all the nephews and nieces, share and share alike. The

residuum thus to be divided would have consisted, as appears from the agreed facts, of money, notes, and household property—the same estate which is enumerated and the disposition of which is directed in the codicil. There is no room to doubt that Mrs. Buchanan intended to give this estate to her nephews and nieces when the will was written; but it is equally free from doubt that she intended to give it to W. B. Clark when the codicil was written. The language, 'I direct that any and all money and notes that I may have at my death, and also my household property, be turned over to my nephew, W. B. Clark, to whom I give the same forever,' is emphatic and significant. These words, when taken with the exceptions mentioned in the codicil, clearly indicate that the testatrix intended to give to W. B. Clark a very substantial interest in the personal estate. This, I think, in view of the admitted value and character of the personal estate, is the first and natural impression to be obtained from a reading of the will and codicil, and this impression is intensified on closer consideration. The clear result is an irreconcilable conflict between the residuary clause and the codicil, and the provisions of the codicil must prevail. 3 Min. Inst. 549; Bosley v. Bosley, 14 How. 390, 14 L. Ed. 468; Gordon v. Whitlock, 92 Va. 729, 24 S. E. 342.

"Nor do I think the conclusion here reached is affected by the words, 'not disposed of in my will,' which appear in the introduction to the codicil. The two instruments must be read and construed together in their entirety, and so as to give effect, as far as possible, to both. 'Ut res magis valeat quam pereat.' 2 Min. Inst. (4th Ed.) p. 1057; 30 A. & E. Enc. 663-665.

"The words above quoted from the codicil, taken literally, sustain the contention of the residuary legatees, for the will undoubtedly disposed of the very same property which W. B. Clark now claims under the codicil; but this literal interpretation leads to results which cannot be reconciled with the apparent intent of the testatrix. It leads, also, to the entire nullification of the codicil. Both of these results are at variance with elementary rules of construction.

[4] "'As a general thing, a codicil will be construed as operative upon some portion of the estate, even where its terms, literally interpreted, would be found to have no operation; but, as we have before said, the codicil will be construed as being consistent with the will, where the discrepancy claimed is not obviously intended by the testator.' 1 Redfield on Wills, p. 360.

"Applying the rule quoted from Redfield above, which is abundantly supported by the authorities, and which seems to me to embody in succinct form the rules of construction applicable to this case, I am of opinion that, under a correct interpretation of this will and codicil, the executor should follow

in his administration of the estate the directions in clauses 6 and 7 of the will, should next pay to Thomas Raymond Buchanan and Nancy Buchanan \$500 each, and then, after disposing of the specific articles of household use mentioned in the exceptions in the codicil, and paying to R. W. Buchanan the sum of \$50 as therein directed, he should account to W. B. Clark for the balance of any notes and money and household property belonging to the testatrix at her death. In other words, the codicil should be construed so as not to interfere with any specific bequests and directions of the testatrix mentioned in the will, but should only affect the general residuum. This construction avoids, on the one hand, a too literal interpretation of the words, 'not disposed of by my will,' which, as we have seen, would lead to a wholly inconsistent conclusion, and one that varies with the manifest general intent of the testatrix at the time the codicil was written. It would also, on the other hand, give effect to the specific bequests and directions in the will, which are always to be favored as against the taker of the residue. *Waring v. Bosher*, 91 Va. 291, 21 S. E. 464.

"I do not overlook the rule of construction, which is earnestly invoked on behalf of the residuary legatees under the original will, 'that a clear gift is not to be cut down by any subsequent provision, unless the latter is equally clear,' and that, where a gift has been clearly made in a will, the provision making the gift will not be revoked by a codicil, where there is any doubt as to the intention to revoke it. The case at bar, I think, does not fall within the influence of this rule, but is governed by the converse of it. The rule does not apply far enough to cover the specific bequests in the sixth, seventh, and eighth clauses, because the language of the codicil is not sufficient to clearly give to W. B. Clark, as the residuary general legatee, the personal estate previously directed in the will to be applied to these specific bequests (*Waring v. Bosher*, supra); and by giving effect to these specific bequests in the will we have something for the words, 'not disposed of,' to operate upon, and we also give some effect to the codicil. But as to the general residuum, while there was a manifest general intent on the part of the testatrix, at the time of making the original will, to give it to the nephews and nieces, there was also, at the time of the making of the codicil, an equally manifest general intent to give it to W. B. Clark. There is no way by which to reconcile these two general intents, and the later one, therefore, must prevail. *Dawson v. Dawson*, 37 Va. 635, and authorities cited supra.

"I have purposely omitted up to this point any reference to the case of *Earl of Hardwicke v. Douglas*, 7 Clark & Finnelly, 795, in which the majority opinion supports the construction which I have adopted in the case at

bar. It is only the decision to which I have been referred, and the only one which I have found, dealing directly with a conflict similar to the one involved here between the will and the codicil. It is not necessary to rest the decision in this case upon the authority of the decision just mentioned, but I think it nevertheless is strong authority for the conclusion here reached. Counsel for the residuary legatees under the original will seeks to distinguish the decision in question from the case at bar, for the reason that the testator in the former case, unlike the testatrix in the latter, had the original will before him at the time the codicil was prepared. This distinction is worthy of consideration; but I do not think it is entitled to as much weight as is claimed for it by counsel. The agreed facts show that the estate mentioned in the codicil was very valuable. The will had been written only about a year before the codicil was prepared. It hardly seems reasonable to conclude that the testatrix would have forgotten in so short a time the disposition previously made of so large a personal estate.

"The agreement of facts is not entirely clear as to the value of this estate. It might be construed to refer to the value of the entire personal estate, including the specific bequests. Inasmuch, however, as counsel for the nephews and nieces stated in argument that the purpose of fixing the value was to show the jurisdictional amount necessary on appeal, I assume that the third paragraph in the agreement refers to the general residuum. But in any event, regardless of the question of value, the fact that the testatrix enumerates in the codicil the same property which she had formerly directed to be differently applied raises, as we have already seen, a plain and irreconcilable conflict between the codicil and the residuary clause in the will. In the face of this conflict, there is no other legal course open than to give the general residuum of the estate to W. B. Clark."

The decree complained of, which carries into effect the conclusion reached in the foregoing opinion, must be affirmed.

Affirmed.

(114 Va. 24)

COLONIAL COAL & COKE CO. v. GASS.

(Supreme Court of Appeals of Virginia. Sept. 12, 1912.)

1. MASTER AND SERVANT (§ 185*)—FELLOW SERVANTS—EFFECT OF RULE.

A rule of a coal mining company requiring miners to examine the condition of their working places and to report any unsafe condition, ceasing work until the place is made safe, merely requires each employé to take precautions for his own safety, and does not constitute one miner a vice principal, as affecting liability for death of a fellow miner

caused by slate falling from the roof of the mine room.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 385-421; Dec. Dig. § 185.*]

2. DEATH (§ 86*)—WRONGFUL DEATH—DAMAGES—MEASURE.

In an action by a mother for negligent death of her 18 year old son, she is entitled to recover the amount of his probable earnings during what would have probably been his lifetime, and not merely during her probable lifetime, though, having a husband, she was not dependent upon her son for support.

[Ed. Note.—For other cases, see *Death*, Cent. Dig. §§ 112-114, 119; Dec. Dig. § 86.*]

Error to Circuit Court, Wise County.

Action by Pearl Gass, administratrix, against Colonial Coal & Coke Company. Judgment for plaintiff, and defendant brings error. Reversed.

Vicary & Peery and Bullitt & Chalkley, for plaintiff in error. William H. Werth and E. M. & H. E. Fulton, for defendant in error.

HARRISON, J. Paul Burnett, the plaintiff's intestate, a boy 18 years of age, was killed in the coal mine of the defendant company by a fall of slate from the roof of room No. 36, while engaged in the discharge of his duties as a mule driver. His death is alleged to have been caused by the negligence of the defendant company, and this suit was brought to recover the damages resulting from such negligent killing. There was a verdict and judgment in favor of the plaintiff, which is brought under review by the present writ of error awarded the defendant company.

[1] The plaintiff's third instruction, which is objected to, tells the jury that, "if they believe from the evidence that the defendant put upon Eugene Austin and Roy Shoemaker the duty of exercising ordinary care in providing and maintaining a reasonably safe roof at the place in question, then said Austin and Shoemaker were not fellow servants of Paul Burnett, with reference to this duty, but were the representatives of the defendant as to that duty, and the failure of either of them in the performance of this duty (if such failure there was) would be the personal failure of the defendant itself."

The record shows that Eugene Austin and Paul Shoemaker were ordinary laborers in the defendant's mine; the former operating a machine for cutting the coal, and the latter a coal digger. Independent of the company's rule No. 13, which is relied on by the plaintiff, there is no evidence tending to show that either of these parties was a vice principal of the defendant company.

Rule No. 13 is relied on as showing that it was Austin's duty to look after the roof at the place of the accident. So far as the rule concerns the roof of the mine, or imposes any duty upon Austin, it provides that the machine man "shall also examine the

condition of his working place, and, if found unsafe, report the same to the mine boss, and cease work at such place until the same is made safe." This language does not, and was manifestly not intended to, impose upon Austin the duty of providing and maintaining a reasonably safe roof. The whole duty put upon him was to examine the roof when he went to work thereunder, and, if found unsafe, to report the same to the mine boss and cease work until the same was made safe. In other words, so far as reporting a defect was concerned, or staying out of the place until the defect was cured, he was under no higher or further duty than any other employé would have been to report any discovered defect in the roof. Rule 13, so far as applicable to machine operators, meant that they should look out for the purpose of securing their own safety and guarding the machine against danger. It did not mean that they should be charged with the duty of discovering and remedying defects which might result in injury to others. This duty of inspection and having defects remedied rested upon the mine boss, who was the vice principal of the company. It is unquestionably to the interest of all engaged in the dangerous work of mining coal that the company should make it the duty of as many persons as possible to look out for defects and dangers and report the same to the mine boss as soon as discovered. It would, however, place upon the company a burden it could not well bear to hold that every miner was a vice principal of the company, whose duty it was to keep a lookout for defects and report them, when discovered, to the mine boss. The miner, who, for his own protection, is charged with the duty of looking out for defects and reporting them, is not the vice principal of the company, but is a fellow servant of all other employés.

We are of opinion that the instruction under consideration, being without evidence to support it, was erroneous, and should have been rejected.

Instruction No. 4, given for the plaintiff, is subject to the same objection that was urged to No. 3. It tells the jury that it was the duty of Austin and Shoemaker, as well as Draughn, the mine boss, to look after and discover defects in the roof, as mentioned in instruction No. 3, and that, if they failed in the performance of such duty the company was liable. For the reasons already given, this instruction should also have been refused.

Objection is taken to the action of the court in refusing to give for the defendant the following instruction: "The court further instructs the jury that under the rules of the defendant company, which were read in evidence to the jury, with reference to the duties of coal diggers and machine men, in looking after and making safe the roof of

the mine in their respective working places. the intent and meaning of the said rules was that said machine men and said coal diggers should look after the roof of the mine in their said places, and make the same safe in so far as it was necessary to protect themselves, respectively, from danger, but that the rules of the company, read in evidence as aforesaid, were not intended to mean, and did not mean, that the said machine men and coal diggers should be charged with the duty of making their respective working places safe for others to work in; that so far as other persons were concerned, that is, persons other than the said machine men and coal diggers, the duty rested upon the mine boss to use ordinary care to see that the said places were safe, and if the company, through its mine boss, did use ordinary care to see that the roof which caused the accident in this case was safe, then the company cannot be held liable for any negligence on the part of the said machine men, or coal diggers, if such there was, in failing to use ordinary care to see that such place was safe."

This instruction should have been given. It is supported by the evidence, properly interprets the rules of the company, and correctly states the law applicable to this phase of the case. Falling slate from the roof is one of the greatest dangers in mining, and one which requires constant watchfulness and care to guard against. The working place of the miner is constantly changing as he drives into the face of the coal, and what may be entirely safe at one hour may not be the next. Hence the rules of the company properly provide that not only the mine boss, its vice principal, shall make regular inspections, but that the machine cutter shall, as he proceeds with his work, for the protection of himself and the machine, look after the condition of the roof, and also that the miner should look after the roof in his own working place, and do what at the time might appear necessary to protect himself, or, if he were unable to remedy any defect he might discover, to go out of the mine and report the trouble to the mine boss, and remain out until the defect was repaired. These rules were never intended to make each miner the alter ego of the company. The law of self-preservation would demand of the miner as much care for himself as is required of him by the rules in question.

[2] The action of the court in giving for the plaintiff instruction No. 7, on the measure of damages, is assigned as error. Two objections are urged to this instruction: (1) That it allows the plaintiff to recover as damages the probable earnings of the intestate during what would have been his probable lifetime, whereas it is contended that the court should have limited the recovery to the probable lifetime of the beneficiary,

who was the decedent's mother; and (2) that the mother, having a husband, had no right to recover on account of the wages her son might have earned during his lifetime.

In support of these propositions numerous authorities from other jurisdictions are cited; but, whatever may be the law in other states, it has long been settled by the decisions of this court that both contentions are untenable. *B. & O. R. Co. v. Wightman*, 70 Va. 431, 26 Am. Rep. 384; *N. & W. Ry. Co. v. Phillips*, 100 Va. 362, 41 S. E. 726; *Pocahontas C. Co. v. Rukas*, 104 Va. 278, 51 S. E. 449.

In *Wightman's Case*, *supra*, it is said that "under the Virginia statute the damages, it is true, are given first to the husband or wife, parent or child; but, if neither of these is alive, the action then may be maintained and the damages will be assets to be disposed of according to law. In this respect the Virginia statute differs from that of all the other states."

In other words, the recovery with us is for the wrongful death, and not merely because there are dependent relatives, and therefore the right of recovery is not affected by the absence of relatives, or by the fact that surviving beneficiaries are wealthy or poor.

In *Wightman's Case*, in discussing the elements of damage recoverable, Judge Staples says they may be ascertained, first, "by fixing the same at such sum as would be equal to the probable earnings of the deceased, taking into consideration the age, business capacity, experience, and habits, health, energy, and perseverance, of the deceased during what would probably have been his lifetime, if he had not been killed."

The instruction under consideration appears to be practically a reproduction of instruction No. 3 in the *Rukas Case*, *supra*, which provides that the damages should be fixed at such sum as would be equal to the probable earnings of the deceased during what would probably have been his lifetime, had he not been killed, and no mention is made of the lifetime of the surviving beneficiary. That instruction was excepted to, and the giving of it assigned as error. In disposing of the exception this court says: "With regard to the instruction as to what constitute proper elements of damage in this class of cases, it is conceded that the instruction conforms to the decisions of this court; but a different rule is invoked as being, it is alleged, more in harmony with the weight of authority in other states. It is sufficient to say that this court has recently had occasion to consider that question, and no sufficient reason is perceived to justify a departure from our own precedents."

We do not deem it necessary to prolong this opinion with a detailed discussion of the remaining assignments of error. It is

sufficient to say that each of them has received due consideration, and that no error is thereby disclosed prejudicial to the rights of the defendant.

For the errors herein pointed out, the judgment complained of must be reversed, the verdict set aside, and the case remanded for a new trial.

Reversed.

(114 Va. 58)

KEYS PLANING MILL CO. v. KIRKBRIDE.

(Supreme Court of Appeals of Virginia. Sept. 9, 1912.)

1. EQUITY (§§ 119, 392*)—CROSS-ACTION—ENFORCEMENT OF LIEN.

A general contractor, made a party to a suit by a subcontractor to enforce a lien, and duly served with summons, is bound by a decree against him; but where he was not served with summons to answer a petition filed by another subcontractor to enforce his lien on the balance due from the owner, he is not bound by the decree against him, and is entitled to file a petition for rehearing, as authorized by Code 1904, § 3233.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 293-306, 834-851; Dec. Dig. §§ 119, 392.*]

2. APPEAL AND ERROR (§ 222*)—QUESTIONS REVIEWABLE—JURISDICTION OF TRIAL COURT.

Where a subcontractor filing a petition in a suit by another subcontractor to enforce a lien, and obtaining a decree without service of summons on the general contractor to answer, did not raise any question in the trial court as to the jurisdiction of the court to permit the general contractor to file a petition for rehearing under Code 1904, § 3233, but sought to set up facts by answer which would avoid the claim relied on by the general contractor in his petition for a rehearing, and all the defenses that the subcontractor professed he could make were made, and nothing remained to be done except to enter a decree, the subcontractor could not raise, on appeal, any question as to the jurisdiction of the trial court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1156, 1333-1336; Dec. Dig. § 222.*]

3. EQUITY (§ 249*)—PLEADING—EXCEPTIONS—EFFECT.

An exception to the sufficiency of an answer in a suit in equity is equivalent to an averment that the answer, if true, constitutes no defense.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 521; Dec. Dig. § 249.*]

4. EQUITY (§ 392*)—ELECTION OF REMEDIES (§ 6*)—ENFORCEMENT—RIGHT OF GENERAL CONTRACTOR TO REHEARING.

A general contractor, made a party to a suit by a subcontractor to enforce a lien, was not served with summons to answer a third person's petition in the suit to enforce his lien. The court entered a decree enforcing the liens. The general contractor conveyed real estate to the third person; but the deed did not set out the real consideration therefor. The third person, through his manager, executed, pursuant to a settlement, a release of an indebtedness specified due from the general contractor. The manager had no personal knowledge of the terms of the settlement. *Held*, that the release did not, as a

matter of law, constitute a release of the decree obtained by the third person; and the court must require the contractor to elect whether he would prosecute his action at law against the third person for the recovery of money paid pursuant to the decree, or prosecute his right to the money in a proceeding for a rehearing of the cause, as authorized by Code 1904, § 3233; and, where the general contractor elected to prosecute by petition for rehearing, the court must determine the issues on the pleadings and proof.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 834-851; Dec. Dig. § 392.* Election of Remedies, Cent. Dig. §§ 7-11; Dec. Dig. § 6.*]

Appeal from Circuit Court, Tazewell County.

Petition by T. W. Kirkbride for a rehearing of the cause of action of the Keys Planing Mill Company against him and for the recovery from the company of a sum paid by a receiver pursuant to the decree. From a decree granting the relief prayed for, the Keys Planing Mill Company appeals. Reversed and remanded.

Henry & Graham, for appellant. Henson & Bowen, for appellee.

CARDWELL, J. T. W. Kirkbride, a general contractor, engaged in the construction of buildings of various designs, undertook the construction of a bank and office building in the town of Graham, Tazewell county, Va., for the Bank of Graham, a corporation, which building Kirkbride completed in February, 1908. During the progress of the work, Kirkbride employed the McClamrock Mantel Company, a corporation, to furnish certain material for and to do certain work upon the building, all of which material was furnished and the necessary work in placing the same was done by that company in accordance with its employment, and for which it was to receive from Kirkbride, on or before December 12, 1907, the sum of \$308.15; but the same was not paid, and thereupon the McClamrock Mantel Company filed its mechanic's lien, pursuant to the statute in such cases made and provided, against the bank and its said building, for the purpose of securing itself for the debt owing by Kirkbride as general contractor.

To the first May rules, 1908, the McClamrock Mantel Company filed its bill in the circuit court of Tazewell county, the object of which was to subject the balance then due and owing by the bank to Kirkbride to the payment of the amount claimed to be due from Kirkbride to the complainant. Process was issued upon the bill, served on the bank, and accepted by Kirkbride on the 4th day of May, 1908. Various other creditors of Kirkbride, who had secured liens under the statute for materials furnished and work done for Kirkbride in the construction of the bank building, filed petitions in said cause, for the purpose of enforcing

their respective liens upon the balance due and owing by the bank to Kirkbride, among said petitioners being the Keys Planing Mill Company, a corporation, filing its petition by leave of court in an order entered in its chancery order book May 4, 1908, and upon its petition summons was at once issued and served upon the bank, but was never served upon Kirkbride, although required by statute and ordered by the court to be served upon him.

On the 29th day of May, 1908, the McClamrock chancery cause coming on to be heard upon the bill and exhibits filed therewith, taken for confessed as to the defendants T. W. Kirkbride and the Bank of Graham, upon the petition of the Keys Planing Mill Company and others was by decree then entered referred to Commissioner J. H. Stuart to take an account and make report of the enforceable liens against the property of the bank, and also to ascertain what was due from the bank to Kirkbride, the general contractor, for the construction of the bank's building, etc., at the time of the filing of the various liens thereon.

Pursuant to this decree, and after notice of the taking of the accounts ordered, by publication, Commissioner Stuart, on August 9, 1908, made his report, showing the balance due from the bank to Kirkbride to be \$1,613.60; and, among other items, he reported the debt and lien of the Keys Planing Mill Company to be \$3,124.85, including interest to the date of the report, September 21, 1908. The McClamrock cause came on to be heard on the report of Commissioner Stuart, and the report was confirmed and George W. St. Clair appointed to collect and disburse the said balance due from the bank; the distribution to be made pro rata among the reported debts against Kirkbride. On October 3, 1908, Receiver St. Clair filed his report, showing that in the disbursements made by him he paid to the attorneys for the Keys Planing Mill Company the sum of \$900, its pro rata share of the fund distributed; and at the November term, 1908, of the court the report of the receiver was confirmed, and the cause "ordered to be left from the docket."

It will be observed that service of summons to answer the bill filed by the McClamrock Mantel Company against Kirkbride and the Bank of Graham was accepted by Kirkbride, but that the summons to answer the petition filed by the Keys Planing Mill Company in that case, while served upon the bank, was never served upon Kirkbride, and that the notice of the taking of the account by Commissioner Stuart was by publication only.

Section 3233 of Va. Code 1904 provides: "Any unknown party, or other defendant, who was not served with process, and did not appear in the case before the date of such judgment, decree or order, or the rep-

resentative of any such, may, within three years from that date, if he be not served with a copy of such judgment, decree, or order, more than a year before the said three years, and if he be so served, then within one year from the time of such service, petition to have the case reheard, and may plead or answer, and have any injustice in the proceedings corrected."

At the August term, 1910, of the circuit court of Tazewell county, Kirkbride, by leave of court, filed his petition, the object of which was to have the decrees entered upon the petition of the Keys Planing Mill Company against him in the McClamrock cause reheard, and to recover from the Keys Planing Mill Company the said sum of \$900 paid to it by St. Clair, receiver, as above stated; and the Keys Planing Mill Company, by its attorneys, entered its appearance in answer to the petition, with leave to make such defense thereto as it might be advised.

There was some confusion of statement as to the style of the chancery cause in which the petition of Kirkbride was intended to be filed; but if this had been of any importance it was later made clear that the petition was intended to be filed, and was in fact filed and proceeded upon, in the cause of McClamrock Mantel Co. v. Kirkbride et al.

Kirkbride based his right to file his petition in said chancery cause upon section 3233 of the Code, supra; and the general grounds upon which he relied for a recovery of the \$900 from the Keys Planing Mill Company, paid to the latter by Receiver St. Clair, were that the decrees under which the said sum of money was received by the Keys Planing Mill Company were in a proceeding upon a petition filed in the McClamrock cause, of which he had no notice, and that, prior to the date of the decree under which the Keys Planing Mill Company became entitled to recover said sum of money, and before the same was paid to it by Receiver St. Clair, he (Kirkbride) had paid off in full his indebtedness to the Keys Planing Mill Company. In other words, Kirkbride's petition sets forth that as general contractor for the construction of the building, etc., for the Bank of Graham, he became indebted to the Keys Planing Mill Company in the sum of \$13,327.52, upon which sum he had paid \$5,050.23, and on the 25th day of August, 1908, six days after the filing of Commissioner Stuart's report in the McClamrock cause and before decree thereon, he, by conveyance of certain lots in Norfolk county, Va., paid the Keys Planing Mill Company the full amount of the balance due from him to it, which balance included the sum of \$2,993.16, decreed to the Keys Planing Mill Company upon the report of Commissioner Stuart, and upon account of which the company received from Receiver St. Clair the \$900 in question; that the Keys

Planing Mill Company, after having received in full the indebtedness of the petitioner to it, with fraudulent intent to collect further and additional sums upon the said debt, did not notify its counsel, who, ignorant of the fact that said debt had been paid off in full, procured the decree allowing said debt in full, and directing its pro rata share of the fund under the control of the court to be paid to it, and actually received the same through its counsel of record.

With this petition, as Exhibit No. 1, Kirkbride vouches the following release:

"In consideration of the execution and delivery by T. W. Kirkbride and wife of a certain deed, dated August 25th, 1908, conveying to the undersigned an undivided two-thirds interest in certain twelve lots of land in Coleman Place, Tanners Creek district, Norfolk county, Virginia, the undersigned doth hereby release and cancel the indebtedness now due by the said T. W. Kirkbride to it, the said debt being for the sum of \$13,327.52, upon which there is a credit of \$5,050.23, and for which a decree was obtained by the undersigned in the circuit court of the county of Mercer, state of West Virginia, on Tuesday, the 26th day of May, 1908.

"Witness the following signature this 25th day of August, 1908.

"Keys Planing Mill Company,
"By C. W. Pierce, Mgr."

Pursuant to a decree entered in the cause on December 8, 1910, the Keys Planing Mill Company filed its answer to Kirkbride's petition, to which Kirkbride replied generally, but later, and after amending his petition, by leave of court, he withdrew his replication to the answer of the Keys Planing Mill Company and filed exceptions thereto in writing.

The Keys Planing Mill Company's answer admits as true many of the statements of fact contained in the petition of Kirkbride, but in effect takes the ground that, even if the release (called a "receipt") relied on by Kirkbride does apparently cover the debt due from him to respondent, and upon which the \$900 was paid to respondent under decrees in the Tazewell county suit some time after the receipt was executed, it was a mistake, as the receipt was not intended to have that effect, and in fact had no reference to said litigation; that when the agent of respondent, one C. W. Pierce, who conducted the transaction by which the Norfolk county lots were taken over to respondent, and who really prepared the receipt in question, executed the same without advice of counsel he never thought about the debt of respondent involved in the proceedings in Tazewell circuit court, but only had in view a decree in Mercer county, W. Va., in favor of respondent against petitioner, Kirkbride; that said agent knew of the suit pending in Tazewell county, but his signing a receipt

covering a debt already decreed to respondent in that suit was a plain mistake and wholly unintentional on his part, and that to construe this debt and decree in Tazewell county as covered by said receipts would cause respondent to lose at least \$6,000 owing to it by Kirkbride; that as Kirkbride accepted process in person to answer the chancery cause of the McClamrock Mantel Company, and also accepted personally other summonses issued on some of the petitions filed in said cause, he had no right to complain that the proceedings upon the petition filed in said suit by respondent was upon publication of notice only; that Kirkbride knew all about the proceedings against him in Tazewell county and about the decree against him there, but never said anything about it at the time the receipt in question was executed, and never mentioned it to respondent until about the time he instituted an action of debt against respondent to recover the \$900 received by it from Receiver St. Clair, which was but a short time before he filed his petition in this cause.

The debt asserted by the Keys Planing Mill Company against Kirkbride in the McClamrock cause pending in Tazewell circuit court was evidenced by a decree rendered in the circuit court of Mercer county, W. Va.; and the balance due on said decree is the debt reported by Commissioner Stuart as owing by Kirkbride to the Keys Planing Mill Company, as above stated.

Exceptions filed by Kirkbride to said answer were sustained; but leave was given the Keys Planing Mill Company to amend its answer at the next term of the court, and accordingly, at the May, 1911, term, the respondent filed its amended answer, reiterating the statements contained in its original answer and relying thereon, except in so far as the same were explained or modified, to which amended answer Kirkbride again filed exceptions, which were sustained by decree entered June 7, 1911; and it was thereby adjudged and ordered that Kirkbride recover of the Keys Planing Mill Company the sum of \$900, with interest thereon from September 29, 1908, until paid and costs, from which decree and that entered in December, 1910, this appeal was allowed.

[1, 2] The first assignment of error presents the question whether or not the circuit court had jurisdiction to allow appellee's petition to be filed in the McClamrock cause.

We think this assignment is without merit. While appellee was a party to the McClamrock cause, and was bound by the decrees or orders entered therein which related to matters put in issue upon the bill of complaint, of which appellee is to be held as having had due notice, but, not having been served with process to answer the petition of appellant in said cause, he was not bound by the decrees against him upon said petition, and was clearly in a position to

avail himself of the benefits of the provision made for parties so situated by section 3233 of the Code, *supra*. Not only is this true, but appellant did not raise any question in the court below as to the jurisdiction of the court to permit the filing of appellee's petition, and sought by answer to make defense against the matters and things set up in the petition upon the merits of its defense, adding the request that the matters set up in the answer be treated as if set up as grounds of demurrer to the petition. In other words, there was no defense set up against the jurisdiction of the court to receive and consider the petition, but an attempt was made to set up facts by answer which would avoid the release pleaded by the petitioner. All the defense that appellant professed it could make was made by its answer to appellee's petition; and, if the court's views as to the answer were correct, nothing remained to be done, except to decree that appellant refund the money it had improperly collected of appellee in the McClamrock cause.

The vital and controlling issue made by the petition of appellee in the McClamrock cause, the answers of appellant thereto and appellee's exceptions to the answers, is whether or not the parties, by the transaction of August 25, 1908, intended that appellee was to be released from its entire indebtedness to appellant, including the debt the latter was then asserting against the former in the McClamrock cause pending in Tazewell circuit court, or was intended as a release only of the indebtedness of appellee to appellant, other than the latter's debt being asserted in said cause.

Appellee in his petition in the McClamrock cause, among others, makes these allegations: That he was a general contractor engaged in the construction of many houses, and as such bought large quantities of building material from various manufacturers, and that he became indebted to the Keys Planing Mill Company in the sum of \$13,327.16, which included the said sum of \$2,993.16, being the sum that said Keys Planing Mill Company was proceeding upon against him in the circuit court of Tazewell county in the McClamrock Mantel Company case; that upon this whole sum of his indebtedness to the Keys Planing Mill Company he paid \$5,050.23, and on the 25th day of August, 1908, by his conveyance of certain lots in Norfolk county, paid the Keys Planing Mill Company the balance of its said debt, which included \$2,993.16 being asserted by it in the Tazewell circuit court; and that he obtained from the Keys Planing Mill Company a receipt to this effect, which is filed as part of his petition.

The original answer of appellant to the petition attempts a full history of the transaction and the circumstances under which C. W. Pierce, appellant's manager, signed the receipt in question, and then says that its answer was framed wholly from information

furnished by Pierce, which information, as to the facts and circumstances under which the receipt was signed, when stated in the answer, are not materially different from the facts as stated in the petition; but it is insisted in the answer that if the receipt executed by Pierce was intended to cover the \$900 decree of appellant in Tazewell county, it was a mistake, etc. The amended answer makes the statement that one T. N. Fannin, vice president of the company, alone made and concluded the transaction between the company and Kirkbride, and that when the original answer was prepared Fannin was in a distant Western state, and could not be communicated with in respect to the transaction. The amended answer states other facts and circumstances going to show that the minds of the parties never met upon the proposition that the receipt in question was to operate as a release of appellant's right to receive its pro rata share of the fund under the control of the circuit court of Tazewell county in the McClamrock cause; that after the understanding between Fannin and Kirkbride as to the terms of settlement Fannin told Pierce to close it up, and Pierce, without any further conversation with Kirkbride with reference to the terms of the settlement, signed the receipt in question, which had already been prepared by some one. It further appeared from appellant's answer that appellee, Kirkbride, had instituted and was carrying on an action at law in the circuit court of Tazewell county for the recovery of the sum of money involved in this controversy from the appellant, and the court was asked to make him elect in which forum he would proceed, which request was denied. It is further stated in the answer that there was a plain mistake made by the parties in the execution of the receipt in question; it not having been intended that the decree in favor of appellant in the McClamrock cause was to be included in the receipt, if in fact the receipt can be so construed.

The case stated by the answer of the appellant was not predicated upon the idea that parol evidence was admissible to contradict or vary the terms of the deed of appellee to appellant, conveying the Norfolk county lots, but upon the theory that the true consideration for the conveyance did not include the decree in the McClamrock cause in favor of appellant; that the so-called "release" was but a receipt, which could be explained; and that, as the conveyance of the Norfolk county lots had for its consideration one dollar "and other good and valuable consideration," either party to the transaction had the right to show the true consideration for that conveyance.

[3] "An exception to the sufficiency of an answer is tantamount to an averment that the answer, if true, constitutes no defense to the complainant's demand." In other words, if the averments of the answer are

sustained by proof, they constitute no defense to the plaintiff's demand. *Kelly v. Hamblen*, 98 Va. 383, 36 S. E. 491.

[4] The deed conveying the Norfolk county lots did not pretend to set out the real consideration for the conveyance, and for that reason, doubtless, the receipt or release in question was prepared and signed by Pierce for the appellant company, Pierce, as appellant's answer states, having no personal knowledge as to what were the real terms of the settlement agreed on between Kirkbride and Fannin, vice president of appellant; and it does not seem to us that the receipt or release in question is sufficiently clear in its terms to have warranted the circuit court in construing it as a release, upon its face, of the money which had been decreed to appellant in the McClamrock case. Therefore we are of opinion that the circuit court should have required the appellee, first, to elect whether he would prosecute his action at law pending in that court for the recovery from appellant of the sum of money involved, or litigate his rights thereto in this chancery proceeding; and, second, if appellee elected to prosecute his alleged right to the money in this proceeding, the court should have overruled his exceptions to appellant's amended answer and allowed the case to be determined upon the pleadings and the proof adduced.

It follows that the decrees complained of on this appeal have to be reversed, and the cause remanded for further proceedings therein not in conflict with the views expressed in this opinion.

Reversed.

(114 Va. 144)

VIRGINIA COAL & IRON CO. v. ISONN et al.

(Supreme Court of Appeals of Virginia. Sept. 9, 1912.)

1. EJECTMENT (§ 15*)—COMMON SOURCE OF TITLE.

Where, in ejectment, both parties claimed under a common source of title, neither party need trace his title beyond the common source, though he was not their immediate grantor.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. §§ 59-62; Dec. Dig. § 15.*]

2. BOUNDARIES (§ 41*)—CALLS IN DEEDS—EVIDENCE—INSTRUCTIONS.

Where, in ejectment, the issue involved the location of a line pursuant to an ambiguous call in a deed, and the evidence failed to show any natural object or well-defined lines called for in the title papers tending to show the true location of the disputed line, but the line called for might be run in different places, a charge that, if the call in the deed could be located from the evidence, the jury must do so and uphold the deed, etc., was erroneous and misleading, necessitating the setting aside of a verdict sustainable only on the hypothesis that the evidence proved natural objects or well-defined lines called for in the deed.

[Ed. Note.—For other cases, see Boundaries, Cent. Dig. §§ 205-207; Dec. Dig. § 41.*]

3. BOUNDARIES (§ 9*)—DEEDS—CALLS.

While the call for quantity in a deed will not control where monuments or courses and distances are called for by which the land can be identified, yet where no known or established boundaries are named as describing the land, and the deed contains no other description sufficiently certain to define the land, the quantity may be used to ascertain the premises.

[Ed. Note.—For other cases, see Boundaries, Cent. Dig. §§ 77-89; Dec. Dig. § 9.*]

4. EVIDENCE (§ 508*)—OPINION EVIDENCE—EXPERT WITNESSES.

A surveyor may testify as an expert on matters with which he is peculiarly acquainted; but he cannot testify as to conclusions of fact or of law.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2311; Dec. Dig. § 508.*]

5. WITNESSES (§ 379*)—IMPEACHMENT—CONTRADICTORY STATEMENTS.

In ejectment involving the location of a boundary line, a witness for plaintiff was properly impeached by requiring him to testify if, in a conversation with a third person, he had not stated that defendant was entitled to the property sued for.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1209, 1220-1222, 1247-1256; Dec. Dig. § 379.*]

6. BOUNDARIES (§ 36*)—SURVEYS—EVIDENCE—ADMISSIBILITY.

A private survey, though admissible as evidence of boundary between the parties to it or those claiming under them, is inadmissible as independent evidence against strangers.

[Ed. Note.—For other cases, see Boundaries, Cent. Dig. §§ 160-162, 164, 166-176; Dec. Dig. § 36.*]

Error to Circuit Court, Wise County.

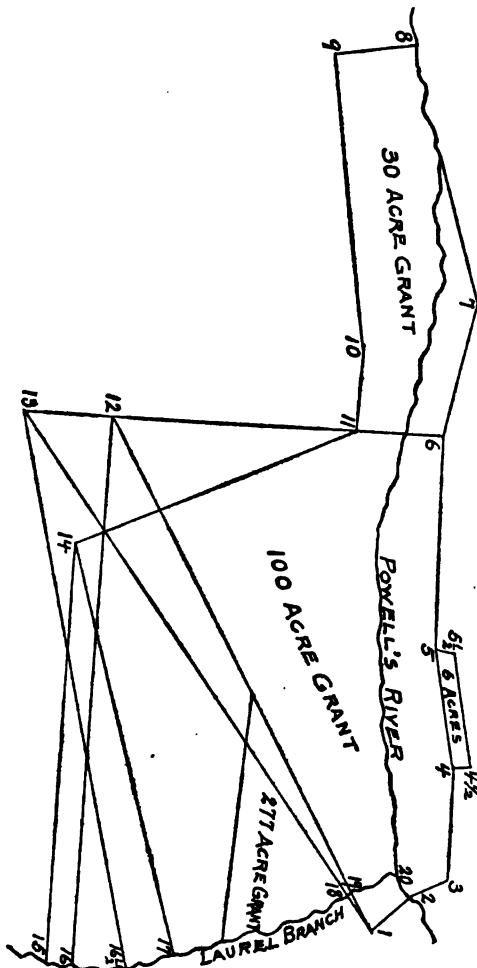
Action by the Virginia Coal & Iron Company against one Isonn and others. There was a judgment for defendants, and plaintiff brings error. Reversed, and new trial ordered.

R. A. Ayers, E. M. & E. H. Fulton, and Bulitt & Chalkley, for plaintiff in error. Vicars & Peery, for defendants in error.

BUCHANAN, J. [1] The plaintiff in error instituted its action of ejectment in the circuit court of Wise county to recover the coal and certain others minerals in and under a tract of land, the title to the surface of which and possession thereof were in the defendants in error. Both parties claim under a common source of title, and neither party was required or attempted to trace title beyond Arch Hunsucker, their common, though not immediate, grantor. The plaintiff derived its title to the mineral interest claimed by deed from Arch Hunsucker to Price and Steinman, dated December 9, 1874, by deed from Steinman to Price dated December 31, 1874, and by deed from Price to the plaintiff, dated January 1, 1908. The defendants derived their title to the interest in the land claimed by them by deed from Arch Hunsucker to John M. Robinett, dated November 12, 1878, and by deed from Robinett to John F. Isonn, dated February 19, 1886.

It is conceded by the defendants in error,

in the brief of their counsel, that the plaintiff is entitled to recover the coal and other minerals sued for in and on the land embraced in the deed of John Hunsucker to Archibald Hunsucker. There is no difficulty in identifying the boundary lines of the tract of land described by that deed, and which are indicated upon a rough diagram below, beginning at the figure 1, and running by the figures 2, 3, 4, 5, 6, and 7, and so on until the call from the figure 11 is reached.



From the corner at the point marked "11," which is established, the call is "thence S. 72 W. 94 poles to a stake; thence a southeast direction, crossing two ridges, to a laurel branch; thence down said branch to the river; thence down the river to the beginning." The controversy in the case is over the location of the corner in the call S. 72 W. 94 poles to a stake, and the line from that corner to the laurel branch.

The contention of the defendants is that said corner and line should be located in accordance with the seventh and eighth calls in the 100-acre grant, the boundaries of which are indicated on the diagram by the figures 1, 2, 3, 4, 5, 6, 12, and 1, as claim-

ed by them. The plaintiff, on the other hand, insists chiefly that the line from 6 does not end at 12, but at 13, and that the next call, whether it runs from 12 or 13, should be so run in a southeast direction to the laurel branch as that the whole area in the tract conveyed will be 230 acres, as called for by the deed.

The jury found in accordance with the defendants' contention, which limited the plaintiff's recovery to about 146 acres, instead of 230 as claimed by it.

The plaintiff insists that the verdict is contrary to the evidence, and that the finding of the jury was brought about by the erroneous action of the court in giving and refusing instructions.

[2] One of the instructions given, and that to which the plaintiff objects most, was in the following language:

"(3) The court further instructs the jury that if you believe from the evidence in this case that the line called for in the deed from Arch Hunsucker to J. D. Price and A. J. Steinman, from a stake 'thence in a southeast direction, crossing two ridges, to a laurel branch,' may be run in a number of ways, either of which will conform to the above said description in said deed, and for that reason said call is indefinite, but if said call can be located from the evidence in this case it is the duty of the jury to locate said call and uphold said deed. And, in locating said call, if the evidence does not show that there are natural objects or well-defined lines called for in the title papers in evidence in this case which would place the line at some other place, you will establish said line by commencing at the 'beech and cucumber standing near the mouth of a branch' (corner to the 30-acre patent) corner in said deed; thence running the bearing and distance called for in said deed, with the proper variation, and from the end of said distance; thence running in a southeast direction, crossing two ridges, to a point on Laurel branch, so as to make said deed from Arch Hunsucker and Steinman contain 230 acres."

The objection made to it is that "the jury could not under it settle the open line so as to include in the boundary 230 acres of land, if the evidence showed there were 'natural objects or well-defined lines called for in the title papers which would place the line at some other place;' whereas there was not even a scintilla of evidence (certainly none of any probative force) of any natural objects or well-defined lines called for in the title papers which could by any process of reasoning be construed as the line intended by the call, 'from thence a southeast direction to a laurel branch,' in the deed from John Hunsucker to Arch and subsequent deeds."

A careful examination of the evidence fails to show any natural object or well-defined line or lines called for in the title papers

which tend to show the true location of the disputed line. The call, "thence a southeast direction, crossing two ridges, to a laurel branch," is the same in the deed from John Hunsucker to Arch Hunsucker, from the latter to Price and Steinman, under whom the plaintiff claims, and in the deed from Arch Hunsucker to Robinett, under which the defendants claim. These deeds not only fail to show definitely where the disputed line was to reach the laurel branch, but they tend to show that such point was not where the closing line of the 100-acre grant crossed it. The boundary line in all these deeds, from the beginning corner at 1 to 6, clearly appears from the courses and distances, or corners called for, or from both, to be the same as the boundary line of the 100-acre grant to Rogers and of his deed to John Hunsucker. From the corner at 6, the call in the 100-acre grant is with the line of the 30-acre grant S. 72 W. 114 poles, crossing Powell's river to a stake on a spur of Rogers' ridge. The difference in the distances called for in the Rogers grant (114 poles) and in said deeds (94 poles) is explained by the fact that those deeds from the point 6 run around the 30-acre grant to 11, and from 11 in the next call do not, of course, include the distance between 6 and 11 (20 poles), the length of the line of the 30-acre grant between 6 and 11. The termination of the line in the call, S. 72 W. 114 poles (the call of the 100-acre grant), or S. 72 W. 94 poles (the call of the said deeds), whether it be at 12, as contended by the defendants, or at 13, as insisted by the plaintiff, fixes the point from which the line in controversy must be run to the laurel branch. The call in the deed from John Hunsucker to Arch Hunsucker from that point is "thence a southeast direction, crossing two ridges, to a laurel branch." As stated by the surveyors, that line might be run in accordance with that ambiguous or indefinite call, so as to reach the creek called for at any point between 15 and 18 on the diagram. There is nothing in that deed showing that it should be run by the closing line of the 100-acre grant. That call of the grant is "S. 42 E. 270 poles to the beginning." As before shown, all the calls from the beginning at 1 to the end of the 94-pole line, whether it be at 12 or at 13, showing that the boundary line of the land conveyed by John Hunsucker to Arch Hunsucker was located in accordance with the calls in the 100-acre and the 30-acre grants, and that those grants or copies of the calls in them must have been before the draftsman of that deed when it was written. If it had been intended that the line in controversy should be run with the closing line of the 100-acre grant, the reasonable presumption is that it would have called for that line or its course as given in the grant. Not only does that deed fail to do this, or to indicate with any certainty where the line is to be run, but, if the tract conveyed

contains the quantity of land called for, the line in question could not be run with the closing line of the 100-acre grant to the laurel branch; for if it were so run the tract conveyed, instead of containing 230 acres, as called for, would contain less than 150 acres.

[3] While the call for quantity is the least certain element of description, and will not control where monuments or courses and distance are called for by which the land conveyed can be identified, yet when no known and established boundaries are named as describing the land, and the deed contains no other description sufficiently certain to define the land intended to be conveyed, the quantity of land mentioned may be used for the purpose of ascertaining the granted premises, and in such a case may have a controlling force. 2 Devlin on Deeds (3d Ed.) § 1045; 5 Cyc. 923, 929; 4 Am. & Eng. Enc. L. (2d Ed.) 789-791; and cases cited in the notes of those works.

There can be no question that the land embraced in the deed from Arch Hunsucker, conveying the coal and other mineral interests therein to Price and Steinman, and the tract described as 230 acres in the deed from Arch Hunsucker to John M. Robinett, was the same land described in the deed from John Hunsucker to Arch Hunsucker. It further appears from the uncontradicted evidence of John M. Robinett that the 230-acre tract of land purchased by him from Arch Hunsucker embraced, outside of the Rogers 30-acre and 100-acre grants, and west thereof, other lands, estimated to be about 100 acres.

Without further discussing in detail the evidence, it is sufficient to say that the court is of opinion that the court's instruction No. 3, quoted above, is erroneous in the respect complained of, because there was no sufficient evidence upon which to base it, and that it must have misled the jury into finding a verdict which could not be sustained upon any other hypothesis than that the evidence proved there "are natural objects or well-defined lines called for in the title papers in evidence" which showed that the controverted line ran with the closing line of the 100-acre grant to the laurel branch.

Other errors are assigned to the action of the court in giving and refusing instructions; but they do not seem to be much relied on, as it is not pointed out in the briefs or oral argument in what respect the instructions given were erroneous, or why those rejected should have been given. We do not see that the court erred in refusing instructions offered or in giving instructions, other than No. 3.

The action of the court as to the admission and rejection of evidence is also assigned as erroneous.

[4] Mr. Wolfe, a surveyor introduced as a witness by the plaintiff, after stating that

the boundary lines called for in the deed from John Hunsucker to Arch Hunsucker were the same as those called for in the deed from Arch Hunsucker to John M. Robinett, was asked, "Where do you understand this [the latter] deed was intended to come to Laurel branch?" Upon objection, the court refused to permit the witness to answer the question.

The ruling of the court was proper. While surveyors may be asked, as expert witnesses, questions upon matters with which they are peculiarly acquainted, and which cannot be made known to the jury without such testimony, yet they cannot testify as to conclusions of fact or conclusions of law, since such matters are for the determination of the jury or the court, as the case may be. *Atlantic Coast Line R. Co. v. Caples' Adm'r*, 110 Va. 514, 519, 520, 66 S. E. 855, and cases cited; 5 Cyc. 968.

[8] The court permitted the defendants to ask John M. Robinett, a witness introduced by the plaintiff, if he had not had a conversation with one Adams, in which he in substance stated that the defendants were entitled to the mineral interests sued for, and could hold them if they would contend for them. The object of the evidence in question was to show that the witness had made statements inconsistent with the testimony he had given in the case. While the evidence may not have been entitled to much weight, yet it was admissible, we think, for the purpose for which it was offered.

[8] The remaining assignment of error is based upon bill of exceptions No. 4, which, omitting formal parts, is as follows:

"Q. You have heretofore testified, I believe, that the boundary described in the declaration and the deed from Archibald Hunsucker to Price and Steinman runs with these lines from chestnut and pine to the point shown as a white oak fallen on the map? A. Yes, sir.

"Thereupon plaintiff, by counsel, propounded to the witness the following questions, to which the witness made the following answers:

"Q. Mr. Wolfe, I show you a map marked 'Virginia Coal & Iron Company's Map No. 107,' and will ask you what it purports to be a map of, and if you made it.

"A. It is a map of the William Robinett, Sr., land. I made this map.

"Q. Did you do the surveying?

"A. Yes, sir.

"To which said questions and answers thereto defendants, by counsel, objected, on the ground that, if admissible at all, they were matter in chief, and thereupon counsel for plaintiff stated to the court that the purpose of the introduction of the said map was to show the location of the west line of the Hunsucker tract; and thereupon the court sustained the objection of the defendants,

and refused to allow the said answers to the said questions to go to the jury, and refused to allow the said map to be introduced in evidence. * * *

Even if the evidence were offered at the proper time, the court did not err in not permitting the map to be introduced as evidence, or in excluding the answers of the witness. While a private survey may be admitted as evidence of boundary between those who were parties to it, or who claim under them, it is not admissible as independent evidence against strangers, as were the defendants in this case. *Lee v. Tapscott*, 2 Va. 276; 5 Cyc. 965-967. The exclusion of the answers of the witness could not have prejudiced the plaintiff, since they did nothing more than show that the map offered was based upon a survey of the Wm. Robinett land, and that the witness had made the survey.

For the action of the court in giving instruction No. 3, its judgment must be reversed, the verdict of the jury set aside, and the cause remanded for a new trial to be had, not in conflict with the views expressed in this opinion.

Reversed.

(114 Va. 95)

NEWBERRY et al. v. DUTTON.

(Supreme Court of Appeals of Virginia. Sept. 9, 1912.)

1. JUDGMENT (§ 217*) — FINAL JUDGMENT — SUFFICIENCY.

Entry by the court, in its regular order book, under the style of the suit in ejectment, of the fact of the jury returning a verdict for defendants, followed by the words, "It is therefore considered by the court that the defendants recover of plaintiff their costs in this behalf," is a sufficient final judgment for defendants as to the lands described and involved in the case, to be determined by consultation of the pleadings.

[Ed. Note.—For other cases, see *Judgment*, Cent. Dig. § 394; Dec. Dig. § 217.*]

2. JUDGMENT (§ 461*) — SUIT FOR CORRECTION — CONTRADICTING RECORD.

Aside from the question of one having negligently failed to avail himself of his remedy in the action in which the judgment was rendered against him, barring him of right to maintain a suit in equity for its correction on the ground of mistake therein, he does not show mistake, but contradicts the record, which he may not do, by attempting to show that the issue in the action in which the judgment was rendered was different from what the record thereof shows it was.

[Ed. Note.—For other cases, see *Judgment*, Cent. Dig. §§ 892-895; Dec. Dig. § 461.*]

3. EQUITY (§ 427*) — CONFORMITY TO PLEADING.

There being no pleading asking for such relief, the decree, in a suit for correction of the judgment for defendants in ejectment, for all the land involved therein, is erroneous in awarding defendant affirmative relief by awarding him a writ of possession for the land.

[Ed. Note.—For other cases, see *Equity*, Cent. Dig. §§ 1001-1014; Dec. Dig. § 427.*]

4. COSTS (§ 234*)—COSTS OF APPEAL—REVERSAL IN PART.

The decree being erroneous in part, for correction of which appeal was necessary, appellants will be awarded costs, though otherwise the decree is affirmed.

[Ed. Note.—For other cases, see Costs, Cent. Dig. §§ 892-899; Dec. Dig. § 234.*]

Appeal from Circuit Court, Dickenson County.

Suit by Cora Newberry and others against George W. Dutton. From the decree for defendant, plaintiffs appeal. Affirmed in part, and reversed in part.

Chase & Daugherty and Sutherland & Sutherland, for appellants. Vicars & Peery and Columbus Phipps, for appellee.

HARRISON, J. The record shows that in September, 1903, Thomas Stone conveyed to Ross Self, by deed duly recorded, a tract of land described by metes and bounds as containing 160 acres. It further appears that afterwards, in September, 1904, Ross Self, the grantee in the deed mentioned, instituted an action of ejectment against George W. Dutton and others to recover from them the fee simple of the same tract of land that the deed from Stone purported to convey to him. The declaration in ejectment describes the land as it is described in the deed from Stone to Self, and as containing 160 acres.

The declaration was duly served upon the defendants, who pleaded not guilty, and filed, as required, their grounds of defense, in which they allege that the plaintiff never did have title to the premises in the declaration mentioned, that the legal title to the said premises was vested in others at the time of the institution of the action of ejectment, and that the defendants had acquired a perfect and indefeasible title to the lands described in the declaration by parol gift from George Reed, deceased, in his lifetime, and by adversary possession.

Upon the issue thus raised, after hearing all of the evidence, the jury found a verdict for the defendants, and the court entered judgment thereon and awarded costs to the defendants.

Ross Self, the plaintiff in the action of ejectment, made no motion for a new trial, and took no appeal from the judgment rendered therein.

The present suit in equity was brought by Cora Newberry and others, claiming to be the owners of a portion of the land involved in the ejectment suit under a deed from Thomas Stone, to whom the land was re-conveyed by Ross Self after the ejectment suit was decided. In their original bill they allege that of the 160 acres sought to be recovered in the ejectment suit the defendants did not claim 26½ acres, and that only the residue of the 160 acres, after deducting the 26½ acres, was claimed by them, and that through an oversight and mistake of the clerk and the jury the judgment was entered

in favor of the defendants for the premises in the declaration mentioned. The prayer of this bill was that the court direct an order correcting the verdict and judgment in the action of ejectment, so as not to include therein any part of the said 26½ acres. In their amended bill the complainants allege that, of the 160 acres sought to be recovered in the ejectment suit, the defendants only claimed 78 acres, that the plaintiff was entitled to the remaining 82 acres, and that the judgment of the court in favor of the defendants was a mistake in so far as it included the 82 acres. The prayer of the amended bill was that, if necessary to do justice, the ejectment suit of Self v. Dutton et al. be restored to the docket, and that an order be entered adjudicating that the title to the 82 acres belonged to Ross Self and his successors, and that the defendants therein be restrained from setting up as a bar, or res judicata, the judgment in the action of ejectment to any portion of the 82 acres claimed by them, and that they be granted a writ restoring to them the possession of such land.

There was a demurrer to each of these bills, and upon the hearing the demurrers were sustained and the bills dismissed, with costs to the defendants, and a writ of possession was awarded, requiring the sheriff of Dickenson county to put the defendants in possession of that portion of the land described in the original and amended bills as belonging to the complainants, which was included in the tract of 160 acres described in the ejectment suit. From that decree this appeal has been taken.

[1] It is contended by the appellants that there was no valid and final judgment in the suit in ejectment. This position cannot be sustained. After the verdict of the jury the court entered, under the style of the suit in ejectment, in its regular order book, the following: "This day came again the parties by their attorneys, and the jury adjourned over on yesterday appeared in court pursuant to their adjournment, and, after hearing the conclusion of the evidence of witnesses and argument of counsel, retired to consider of their verdict, and after some time returned into court with the following verdict: 'We, the jury, find for the defendants.' It is therefore considered by the court that the defendants recover of the plaintiff their costs in this behalf expended, and that execution may issue."

It is true this order does not follow the old English form of judgment; but it is enough to show that there was a final adjudication of the controversy between the parties, upon the issue joined, in favor of the defendants, which is all that was necessary.

In 1 Black on Judgments, § 115, after discussing the form of a judgment, the author says: "It may, therefore, be stated as the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

modern rule that the form of the judgment is not material, provided that in substance it shows distinctly, and not inferentially, that the matter had been determined in favor of one of the litigants, or that the rights of the parties in litigation had been adjudicated. In other words, the sufficiency of the writing claimed to be a judgment should always be tested by its substance, rather than its form."

The order in the ejectment case is, of itself, sufficient to constitute a final and binding judgment in favor of the defendants as to the land described and involved in that case. In determining the force and effect of that judgment, the pleadings must be consulted, to see what the matter in controversy was. The record of the ejectment case is made part of the original and amended bills, and the plaintiff's declaration, together with his bill of particulars, shows that he sought to recover the whole of the 160 acres, describing the same by metes and bounds. The defendants' plea of the general issue denied the whole of the plaintiff's claim, and the defendants' grounds of defense deny title in the plaintiff to any part of the land mentioned and described in the declaration. Upon the issue joined by these pleadings, the evidence was submitted to and passed upon by the jury, and their verdict was rendered finding for the defendants, which was followed by the judgment of the court awarding costs against the plaintiff and in favor of the defendants. It is clear from the record of the ejectment suit that the whole of the 160 acres of land described in the declaration was in controversy, and that upon the issue joined the jury rendered their verdict for the defendants, upon which a valid, final, and binding judgment was entered by the court in favor of the defendants.

[2] It is further contended by the appellants that, notwithstanding the validity and finality of the judgment in the ejectment suit, they were entitled to have corrected the alleged mistake in the verdict and in the judgment entered thereon.

The original bill alleges that the verdict of the jury should have been for the land in the declaration mentioned, exclusive of 26½ acres, and that the verdict and judgment was an oversight and mistake of the jury and the clerk, which should be corrected. The amended bill alleges that the verdict should have been for the land in dispute, exclusive of 82 acres, and that both the verdict and the judgment was a mistake, concurred in by all parties. In the petition for appeal it is claimed that the judgment was entered under such circumstances of accident and surprise as to call for relief in equity from the consequences thereof. There is no allegation of fraud, or that the verdict and judgment as rendered was not known to the plaintiff in the ejectment suit at the time

the verdict was found and the judgment entered.

If the verdict and judgment were, as alleged, inequitable, and an accident and surprise when rendered, the plaintiff could have moved the court to set the verdict aside, and, failing in that, could have applied for a writ of error to the judgment. This the plaintiff negligently failed to do, and now, after the lapse of more than four years, his successors in title come into a court of equity asking for the same relief that was open to him in the ejectment suit.

In *Gentry v. Allen*, 73 Va. 254, Judge Staples, speaking for this court, says: "No rule of law is better settled than that a court of equity will not relieve against a judgment, on the ground of its being contrary to equity, unless the defendant was ignorant of the ground of defense, or was prevented from availing himself of it by fraud or accident, unmixed with fault or negligence on his part."

The evidence in the case at bar does not explain or tend to explain the judgment, or the alleged mistake therein. Its only effect is to contradict the record, by attempting to make it appear that the issue was other than what the record shows it to have been.

In 1 *Freeman on Judgments*, § 275, it is said: "It is important that the evidence offered to explain a record should not contradict it; for it cannot be shown in opposition to the record that a question which appears by it to have been settled was not in fact decided, nor that, while a special cause of action was in issue, a different matter was in truth litigated. In other words, where it appears by the record that a particular issue was determined, all question of fact is excluded, and the court must, as a matter of law, declare such determination to exist and to be conclusive."

In *State v. Vest*, 21 W. Va. 796, Judge Green says: "It is certainly a rule, invariably recognized by the courts, that a record imports such absolute verity that no person against whom it is pronounced will be permitted to aver or prove anything against it."

In the case at bar the record shows that the title to the 160 acres of land was clearly in issue, and that such title was the only issue before the jury. The verdict and the judgment thereon settled and adjudicated that issue in favor of the defendants, and the record thus established cannot now be contradicted.

In view of the facts and circumstances of this case, and in the light of the authorities cited, we are of opinion that the appellants were conclusively bound by the record in the ejectment suit, and that there was no error in sustaining the demurrers, and dismissing the bills filed by them.

[3] It is properly conceded that it was

error for the decree complained of to grant the defendant affirmative relief, by awarding him a writ of possession to any part of the 160 acres involved in the ejectment suit. There was no pleading asking for any such relief, which was alone sufficient ground for denying it.

[4] The decree appealed from must be reversed, in so far as it grants the appellee a writ of possession to part of the 160 acres of land involved in the ejectment suit, and affirmed in all other respects, with costs in favor of the appellants, as their appeal was necessary to correct the error for which the decree complained of is in part reversed.

Reversed in part.

(32 S. C. 451)

GAMBLE v. METROPOLITAN LIFE INS. CO.

(Supreme Court of South Carolina. Sept. 20, 1912.)

1. INSURANCE (§ 291*)—LIFE INSURANCE—APPLICATION—MISREPRESENTATIONS—WANT OF KNOWLEDGE—ESTOPPEL.

Though the answer in an action on a life policy charges misrepresentation in the application by insured alone, and not by plaintiff, the beneficiary, yet he, having known of her fatal malady and concealed it while participating in procuring the insurance for his own benefit, may not say she was ignorant of the imposition or that he did not inform her, when common honesty and his duty to the company required him to inform her of her condition, that she might speak the truth in her application.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 681-690, 694-696; Dec. Dig. § 291.*]

2. INSURANCE (§ 668*) — LIFE INSURANCE—APPLICATION — MISREPRESENTATIONS—AGENCY.

Where the husband of insured, her beneficiary, became a participant in obtaining the insurance by signing the application, paying the premium and taking a receipt for it, it is open to the jury to infer that he was her agent in the transaction, so that on that ground his knowledge of her fatal malady should be imputed to her, when she stated in her application that she was in sound health.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1732-1770; Dec. Dig. § 668.*]

Fraser, J., dissenting.

Appeal from Common Pleas Circuit Court of York County; R. C. Watts, Judge.

"To be officially reported."

Action by James M. Gamble against the Metropolitan Life Insurance Company. Judgment for plaintiff. Defendant appeals. Reversed.

Elliott & Herbert, of Columbia, for appellant. Dunlap & Dunlap, of Rockhill, for respondent.

WOODS, J. The defendant company issued an insurance policy of \$500 on February 10, 1910, for the benefit of the plaintiff on the life of Maggie Gamble, his wife, who died June 14, 1910. The answer in this suit on the policy sets up the defense that the

policy was obtained by representations in the application which were false in several material particulars.

The plaintiff as beneficiary signed the application for insurance with his wife, and in the application the following declaration and agreement appears: "And it is further declared and agreed that the foregoing statements and answers, and also the statements and answers on the next page hereof in answer to the medical examiner, are correct and wholly true, that they shall form the basis of the contract of insurance if one be issued, and that, if they are not thus correct and wholly true, the policy shall be null and void." On the trial the specific untrue representations relied on were the statements made in the application for the policy that the insured was in sound health, and that the last medical attendance was in 1908 for miscarriage, whereas the evidence of her attending physician was that he attended her in November, 1909, that she was suffering not only from miscarriage, but an enlarged heart and Bright's disease. Dr. Kirkpatrick, the physician, further testified that he told the plaintiff at the time of the nature of his wife's disease, but refrained from telling her at her husband's request. The plaintiff testified that the physician did not inform him that his wife had heart disease or Bright's disease until some time after the policy was taken out. The circuit judge directed a verdict for the plaintiff, holding that the answer alleged fraud on the part of the insured and not the beneficiary, and therefore the fraud of the husband could not avail the defendant, and that there was no proof that the insured knew of any disease at the time she represented herself to be in sound health. If the answer be liberally construed, as all pleadings should be, to meet the justice of the case, we think the answer should be held to admit of proof of fraud, not only against Mrs. Gamble, but against the plaintiff also.

[1] But even if the answer be strictly construed as charging misrepresentation against Mrs. Gamble, and not against the plaintiff, and if it be conceded that Mrs. Gamble was not aware of the fatal disease from which she was suffering and was in fact innocent of intentional wrong, yet there is a deeper question which the plaintiff must meet. If he knew of his wife's fatal malady, and concealed it while participating in procuring the insurance for his own benefit, can he be allowed to say that his wife was ignorant of the imposition, when common honesty required him to inform her of her condition, if he wished to insure her life, so that she could speak the truth in her application? His request to the physician not to tell Mrs. Gamble of her condition was natural and commendable as a means of saving her from suffering, but it is not permissible that the plaintiff should pervert that sentiment by using it as a means of allowing his innocent

wife to impose on an insurance company for his benefit. The plaintiff is now seeking his own interests, and he cannot have the benefit of his wife's lack of knowledge of her malady when it was known to him. He cannot be allowed to willfully conceal, and then have the benefit of the concealment and the imposition innocently practiced by another because of his concealment. If he wished her life insured for his benefit, it was his imperative duty to inform her so that she could speak the truth. The law will not allow him to deny that his wife knew that which common honesty required him to tell her before procuring insurance. As between the plaintiff and the insurance company, the law imposed upon him the duty of informing his wife of her condition to the end that she should not impose upon the insurance company in his behalf, and it will not allow him to say, in enforcing his claim, that he did not perform the duty.

[2] In addition there was ground for the jury to infer that the plaintiff was the agent of his wife in the transaction, and on that ground his knowledge should be imputed to her. Mrs. Gamble was a very ill woman, the plaintiff became a participant in the insurance transaction by signing the application, paying the premium, and taking a receipt for it; and it is common knowledge that married women very rarely enter into such transactions except through the agency of their husbands. Under these principles, there was abundant evidence to go to the jury on the issue of false representations set up in the answer. The plaintiff testified that Dr. Kirkpatrick did not inform him that his wife had organic heart disease and Bright's disease until after the policy had been issued. Dr. Kirkpatrick, on the contrary, testified that he gave him the information in November or December, 1909. In addition to this, the physician testified that he attended Mrs. Gamble for this illness in November and December, 1909, whereas Mrs. Gamble stated in her application that she had not been attended by any physician since November, 1908.

For these reasons, the case should have been submitted to the jury.

Reversed.

GARY, C. J., and HYDRICK, J., concur. WATTS, J., disqualified.

FRASER, J. I cannot concur in the opinion of the majority of the court in this case. I know it is not always necessary to allege fraud in order to prove it, but when fraud is alleged, it ought to be proved as alleged. It seems to me that the fraud alleged here is the fraud of the insured, and the proof abundantly shows that Mrs. Gamble knew nothing of the two fatal diseases with which she was suffering. I see no proof, so easy

to have been made by the defendant, if true, that the plaintiff procured the insurance, whatever the probabilities may be.

(92 S. C. 445)

HILLER v. BANK OF COLUMBIA.

(Supreme Court of South Carolina. Sept. 18, 1912.)

1. PLEADING (§ 362*)—ACTIONS FOR DEPOSITS—ISSUES.

Where, under the undisputed evidence, the sole issue was whether a deposit had been drawn out by the depositor or her duly authorized agent, except a trifling amount, the striking out of allegations in the answer of the bank, charging that the depositor, as administratrix, had mingled funds of the estate with her own in her bank account, and had drawn them out from time to time, was not erroneous.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1147-1155; Dec. Dig. § 362.*]

2. BANKS AND BANKING (§ 138*)—DEPOSITS—WITHDRAWALS.

Where a depositor in a bank made two accounts, under an agreement that a third person should, as her agent have the right to draw on one of them, the bank could not charge checks drawn by the third person on the other account.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 898-905; Dec. Dig. § 138.*]

3. BANKS AND BANKING (§ 134*)—DEPOSITS—WITHDRAWALS.

Where a depositor in a bank having two accounts in his own right, kept separate merely for his own convenience, drew on one of them beyond the amount to his credit, without any arrangement with the bank that he should do so, the bank could charge the overdrafts on the other account; and, where the bank was sued for the balance due on the latter account, it could show that overdrafts on the former account were issued by the depositor's authority.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 353-374; Dec. Dig. § 134.*]

4. BANKS AND BANKING (§ 134*)—DEPOSITS—WITHDRAWALS—SET-OFF.

Where a depositor has not assigned his deposit by check or otherwise, his right to demand the balance is subject to the right of the bank to set off against it any debt due by the depositor to the bank; and this right extends to a demand of the bank for money paid on the depositor's debts without his authority, provided the depositor subsequently ratifies the payment by adopting it for his own benefit.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 353-374; Dec. Dig. § 134.*]

5. BANKS AND BANKING (§ 134*)—DEPOSITS—SET-OFF—BURDEN OF PROOF.

A bank, seeking to set off against the balance due a depositor money paid on the depositor's debts without his authority, must plead and prove that the depositor ratifies such payment by adopting it for his own benefit.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 353-374; Dec. Dig. § 134.*]

Appeal from Common Pleas Circuit Court of Richland County; T. H. Spain, Judge.

"To be officially reported."

Action by Nannie E. Hiller against the Bank of Columbia. From a judgment for plaintiff, defendant appeals. Reversed.

D. W. Robinson, of Columbia, for appellant. Tompkins & Lee, of Columbia, for respondent.

WOODS, J. [1] The complaint in this action alleges that the plaintiff deposited with the defendant bank \$200 on April 19, 1909, which the defendant refused to pay on demand. The answer admitted the deposit, but alleged that the deposit was drawn out by the plaintiff before the commencement of the action. The answer also contained a number of allegations charging that the plaintiff, as administratrix of her husband's estate or executrix of his will, had mingled funds of that estate with her own in her bank account, and had drawn them out from time to time. Most of these latter allegations were ruled out by Judge Spain. There was no reversible error in granting this order; for it clearly appears from the undisputed evidence adduced on both sides that the sole issue in the case was whether all the funds, except 13 cents, had been drawn out by the plaintiff or her duly authorized agent; and that issue was made by the single allegation of the answer that they had been so drawn.

All the money deposited by the plaintiff belonged to her individually; but she chose, for convenience, to keep two accounts, one in her individual name and the other in the name of "Nannie E. Hiller, Adm'x," although she was not administratrix. The latter account was used in the conduct of a mercantile business, owned by the plaintiff and conducted by her and her brother-in-law, John Hiller. On this account John Hiller was authorized to check, signing the checks "Nannie E. Hiller, Adm'x." Both John Hiller and the plaintiff issued checks against this account, which were paid and charged against it, until several checks were presented which would have overdrawn the account. Instead of refusing payment, the bank, by the direction of John Hiller, charged this overdraft to the account kept in the name of Nannie E. Hiller. No evidence was offered that John Hiller was authorized to use or control the latter account. In this state of the evidence, the circuit judge directed a verdict in favor of the plaintiff for \$158.54, the balance of the Nannie E. Hiller account after deducting a check for \$55.20, which the plaintiff admitted she had signed without the suffix "Adm'x."

[2] The court refused to allow the defendant to prove that the checks, which went to make up the overdraft transferred or charged to the Nannie E. Hiller account, were signed by the plaintiff herself. There is no escape from the conclusion that this was error. When Mrs. Hiller made two accounts with the bank, under an agreement that

John Hiller should have the right to draw, as her agent, on one of them, the bank had no right to charge checks drawn by John Hiller to the other account. Mrs. Hiller had the right to hold the funds deposited on the other account subject to her own control; and that right could not be defeated by the unauthorized action of John Hiller and the bank. This right of a depositor to separate and control his accounts is established in this state. *Fogarties & Stillman v. State Bank*, 12 Rich. 518, 78 Am. Dec. 468; *Simmons v. Bank*, 41 S. C. 177, 19 S. E. 502, 44 Am. St. Rep. 700; *Callaham v. Bank*, 69 S. C. 374, 48 S. E. 293, 2 Ann. Cas. 203; *Bank v. Mahon*, 78 S. C. 408, 59 S. E. 31.

[3] But when a depositor having two accounts in his own right, kept separate merely for his own convenience, draws on one of them beyond the amount to his credit, without any arrangement with the bank that he should do so, the bank is justified in the inference that he intends the check to be protected by the other account. Certainly it would be most unreasonable that the bank should be required, under such conditions, to pay to the depositor the credit on one account without deducting the debit on the other. There is nothing in the cases above cited opposed to this view. Under this principle the defendant had a right to prove that the plaintiff herself issued the checks, signed "Nannie E. Hiller, Adm'x," which made up the overdraft on that account charged to the account of Nannie E. Hiller, or that such checks were issued by her authority when she knew of the overdraft. For the error of the circuit court in excluding evidence on this point, there must be a new trial.

[4, 5] To avoid misunderstanding, we refer to another point not properly made by the appeal. When the depositor has not assigned his demand against the bank by check or otherwise, the right of the depositor to demand his balance is subject to the right of the bank to set off against the balance any debt due by him to the bank; and this right of the bank extends to a demand of the bank for money paid out on the depositor's debts without his authority, if the depositor subsequently ratifies the payment by adopting it for his own benefit. *Lowrance v. Robertson*, 10 S. C. 8; 27 Cyc. 838; *Crumlish's Adm'r v. Central Imp. Co. et al.*, 38 W. Va. 390, 18 S. E. 456, 23 L. R. A. 120 (note), 45 Am. St. Rep. 872. But the burden would be on the bank of properly pleading and proving such a defense. This subject is referred to in the exceptions, but the defense was not alleged in the answer; nor was evidence on the point offered.

Judgment reversed.

GARY, C. J., and FRASER, HYDRICK and WATTS, JJ., concur.

(92 S. C. 488)

KUHN et al. v. ELECTRIC MFG. & POWER CO. et al.

(Supreme Court of South Carolina. Sept. 21, 1912.)

1. APPEAL AND ERROR (§ 479*)—SUPERSEDING ORDER PENDING APPEAL.

Pending appeal from an order of injunction, a Supreme Court justice will not supersede it; it not being clearly shown that, pending the appeal, the order will result in irreparable injury or the miscarriage of justice.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2251-2256; Dec. Dig. § 479.*]

2. MANDAMUS (§ 6*)—CONFLICT WITH INJUNCTION.

Mandamus requiring the Secretary of State to issue a certificate of amendment of the charter of a corporation cannot be granted while an injunction, against the corporation and such officer taking an action towards amendment of the charter, stands.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. § 36; Dec. Dig. § 6.*]

Action by James S. Kuhn and another against the Electric Manufacturing & Power Company and two other corporations and R. M. McCown, Secretary of State, for injunction. Pending their appeal from an order of injunction, defendant corporations petition to have the order superseded and for a writ of mandamus.

Petition dismissed.

Chester B. Masslich, of New York City, and Joe Berry Lyles, of Columbia, for petitioners. J. Wright Nash, of Spartanburg, for respondents.

WOODS, J. On the 30th day of August, 1912, Hon. T. H. Sease, circuit judge, made an order enjoining the defendants "from taking any action looking to the amendment of the charter of either of the defendant corporations in the particulars shown by the resolutions and petitions of each defendant filed with the Secretary of State on the 23d of August and set forth in the record at this hearing." Pending their appeal from this order, the defendants have presented their petition to me, after due notice to the plaintiffs, asking for an order superseding the order of injunction and for a writ of mandamus requiring the Secretary of State to sign and issue certificates of the proposed amendments to the charter of the corporation.

[1] I express no opinion whatever as to the merits of the cause, which involves difficult questions of law, but refuse to supersede the order of injunction on the ground that petitioners have not clearly shown that, pending the appeal, it will result in irreparable injury or the miscarriage of justice. *Andrews v. Sumter C. & R. E. Co.*, 87 S. C. 301, 69 S. E. 604.

[2] The petition for mandamus requiring the Secretary of State to issue certificates

of amendments cannot be granted while the injunction stands.

It is therefore ordered that the petition be dismissed.

(92 S. C. 436)

BANKS v. WELLS, County Sup'r, et al.

(Supreme Court of South Carolina. Sept. 18, 1912.)

1. STATES (§ 46*)—APPOINTMENT OF OFFICER—STATUTORY AUTHORITY.

An appointment by the Governor under the Cary-Cothran Act of 1907 (Laws 1907, p. 463) of a detective to enforce the act regulating the sale of liquor conclusively determines the necessity for the appointment.

[Ed. Note.—For other cases, see States, Cent. Dig. § 51; Dec. Dig. § 46.*]

2. STATES (§ 61*)—STATUTES.

Laws 1903, p. 19, authorizing the chief constable under the advice of the Governor to appoint one or more state constables at a salary of not more than \$2 per day, and such expenses as the chief constable may deem proper when on duty, is repealed by the Cary-Cothran Act of 1907 (Laws 1907, p. 463), authorizing the Governor to appoint detectives to enforce the act regulating the sale of intoxicating liquor, and repealing all acts inconsistent therewith, and the Governor appointing a detective under the act of 1907 has no authority to fix his compensation.

[Ed. Note.—For other cases, see States, Cent. Dig. § 64; Dec. Dig. § 61.*]

3. STATES (§ 64*)—ENFORCEMENT—STATUTES.

Under Laws 1903, p. 19, authorizing the chief state constable with the advice of the Governor to appoint state constables at a salary of not more than \$2 per day and proper expenses, and providing that all accounts shall be approved by the Governor before payment, and the Cary-Cothran Act of 1907 (Laws 1907, p. 463), authorizing the Governor to appoint detectives to enforce the act regulating the sale of liquor without fixing any salary or per diem for any detective so appointed, the chief state constable must pass on the accounts and per diem of detectives appointed by him with the advice of the Governor, and the accounts cannot be paid until approved by the Governor.

[Ed. Note.—For other cases, see States, Cent. Dig. § 66; Dec. Dig. § 64.*]

4. MANDAMUS (§ 5*)—COMPELLING PAYMENT OF OFFICIAL SALARY AND EXPENSES.

Where a claimant submitted his claim itemized and sworn to the board of county commissioners, and they passed on it and rendered judgment adversely to the claimant, who appealed therefrom, mandamus does not lie pending the appeal to compel the issuance of a warrant for the payment of the claim.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. § 35; Dec. Dig. § 5.*]

5. COUNTIES (§ 204*)—CLAIMS—COUNTY COMMISSIONERS.

The board of county commissioners control the disbursement of ordinary county funds and are accountable to the people of the county for a proper disbursement thereof, and they may investigate the claim of any person, including the claim of a detective appointed by the Governor under the Cary-Cothran Act of 1907 (Laws 1907, p. 463) to enforce the act regulating the sale of intoxicating liquors, for services and traveling expenses, to determine whether the services have been rendered and the claim and expenses are just before paying

the same, and mandamus does not lie to compel payment.

[Ed. Note.—For other cases, see Counties, Cent. Dig. §§ 312, 316-321, 337; Dec. Dig. § 204.*]

Appeal from Common Pleas Circuit Court of Edgefield County; J. W. De Vore, Judge.

"To be officially reported."

Mandamus by Matthew Banks, as Dispensary Detective, against W. G. Wells, County Supervisor, and others, County Commissioners, composing the County Board of Commissioners for the County of Edgefield, and another, County Treasurer, to require defendants to issue a warrant for petitioner. From a judgment of dismissal, petitioner appeals. Affirmed.

The following is the opinion of the circuit court:

"This is an application for mandamus, heard by me, to require the respondents the county commissioners to issue their warrant for \$182, the amount claimed to be due petitioner for services rendered by him as dispensary detective, and to require the county treasurer, James T. Mims, to pay same out of the ordinary county funds.

"The substance of the petition and the whole record I have before me is: That on the 28th of February, 1911, Banks, the petitioner, was appointed by the Governor a detective of South Carolina, under the Cary-Cothran Act of 1907 (Laws 1907, p. 463). That he qualified and entered upon his duties thereunder. That his commission fixed his salary at \$2 per day and actual traveling expenses when away from his headquarters all to be paid out of the ordinary county funds in those counties where there is no dispensary. That there is no dispensary in this county. Under the terms of his commission he must file an itemized account of his expenses sworn to with the chairman of the board of county commissioners and be paid as provided by said act. The said petitioner was sent by the Governor to render services in and to the above county on March 1st, 1911. That he filed his account for the month of April, 1911, for services and traveling expenses. That said account was passed upon by said board and they refused to pay same, from which judgment or refusal an appeal was taken and is now pending, then he filed his itemized statement and account for the month of May, 1911, and the board duly notified him or his attorneys that they would pass upon it after hearing evidence as to its correctness, and would give him notice of the hearing, that he might be present and offer evidence in support of same or to do whatever in his judgment he might deem proper. That no hearing has ever been had on said claim and account, and same is still pending, and that the board is now and has been ready and willing to have and grant the hearing whenever it suited the petitioner to have same. Very

much has been injected in this proceeding which has no bearing upon the question involved, which is: Will a mandamus issue for the purpose prayed in the petition upon the facts stated above, either for the payment of petitioner's salary per diem of \$2 or his traveling expenses for services rendered the above county out of the ordinary county funds?

[1] There can be no doubt as to the right and power of the Governor to make the appointment, and this right cannot be questioned in so far as the necessity for such appointment is concerned; in other words, whenever the Governor makes such appointment, the necessity conclusively exists, and no one has the right to question or to inquire into the necessity for it.

[2] "But the act of 1907, and under which the appointment was made, does not fix any salary or per diem or other pay for a detective appointed by the Governor, and I know of no law or authority allowing the Governor to fix the same as was done in the commission issued to the petitioner herein by him, unless it be the Act of 1903 (Laws 1903, p. 19) § 1, which reads: "The chief state constable with the advice of the Governor, may appoint, one or more state constables at a salary of not more than two dollars per day and such expenses as the chief state constable may deem proper when on duty and also one or more detectives at reasonable compensation. All accounts for per diem and expenses allowed by the chief state constable shall be approved by the Governor before payment." The Act of 1907, § 47, repeals all acts and parts of acts inconsistent therewith. In my opinion section 1 of Act 1903 is repealed by the act of 1907.

[3] "But suppose it is not, the act of 1903 certainly makes it the duty of the chief state constable to pass upon the accounts and per diem for all those appointed by him with the advice of the Governor, and even after he had so passed upon them they could not be paid until approved by the Governor. Who is to pass upon this kind of claims now? Either they must be approved by the Governor before payment, or the county board must pass upon them. The record does not show that petitioner's claim was ever approved by the Governor. This of itself is sufficient to base a refusal of the writ upon.

[4] "But again the petitioner elected to submit his claim itemized and sworn to the board of commissioners, a quasi court, and they passed upon it and rendered judgment adversely to him, and he appealed therefrom, which appeal is still pending. This is sufficient upon which to base a refusal of writ of mandamus.

[5] "Then again the board of the county commissioners have under the law the control and disbursement of the ordinary county fund and are liable and accountable to

the people of the county for properly disbursing and paying out same, and it seems to me they have a perfect right to investigate the claim of any person including such claim as petitioner sets out for service and traveling expenses rendered the county in order to ascertain whether or not said services have been rendered and the claim and expenses a just and true one before paying same. It was certainly contemplated, and in fact so stated in the act of 1903, that no claim of this kind should be paid until investigated by chief state constable and approved by the Governor. If that act is not repealed, the petitioner has not complied with it.

"If it is repealed, then why submit an itemized sworn to account to board of county commissioners unless for the purpose of having them pass upon it. In my judgment the board would be guilty of a breach of duty did it fail to investigate and pass upon an account and claim like the one involved here, before paying it, and especially so when said account had not been approved by the Governor.

"For the reasons herein stated, it is ordered that the application for the writ of mandamus be and the same is hereby refused, and the petition herein be and the same is hereby dismissed."

S. McG. Simkins and P. B. Mayson, both of Edgefield, for petitioner. B. E. Nicholson, of Edgefield, for respondents.

WOODS, J. The judgment of this court is that the judgment of the circuit court be affirmed for the reasons therein stated.

GARY, C. J., and HYDRICK, WATTS, and FRASER, JJ., concur.

(92 S. C. 490)

IRBY v. SOUTHERN RY. CO. et al.
(Supreme Court of South Carolina. Sept. 26, 1912.)

1. RAILROADS (§ 345*)—INJURY TO PEDESTRIAN AT CROSSING—EVIDENCE—ADMISSIBILITY.

In an action against a railroad company for injury to a pedestrian who was struck at a street crossing by a hand car, testimony that the crossing was blocked by cars placed there by defendant was properly admitted to show the surroundings, that the jury might ascertain whether a given rate of speed of the hand car was negligent, though the complaint did not charge negligence in the obstruction of the crossing.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1113-1116; Dec. Dig. § 345.*]

2. RAILROADS (§ 345*)—INJURY TO PEDESTRIAN AT CROSSING—EVIDENCE—ADMISSIBILITY.

In an action against a railroad company for injury to a pedestrian who was struck by a hand car at a street crossing, it was error to admit in evidence an ordinance prescribing a penalty for blocking crossings, where no negligence in that respect was pleaded by plaintiff.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1113-1116; Dec. Dig. § 345.*]

3. APPEAL AND ERROR (§ 662*) — RECORD—CONCLUSIVENESS.

A record on appeal is conclusive upon the Supreme Court as to what allegations were contained in the pleadings.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2850-2852; Dec. Dig. § 662.*]

4. TRIAL (§ 194*)—INSTRUCTIONS—REFUSAL—CHARGES ON FACTS.

In an action against a railroad company for injury to a pedestrian who was struck at a street crossing by a hand car, an instruction that there is no rule or law which relieves a person from looking out for trains and lever cars in crossing tracks, and that a railroad company need not slacken the speed of a car upon seeing a pedestrian unless the circumstances indicate that he does not or cannot see or hear the car, was properly refused as constituting a charge on the facts.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 413, 439-441, 446-454, 456-466; Dec. Dig. § 194.*]

5. RAILROADS (§ 351*)—INJURY TO PEDESTRIAN AT CROSSING—INSTRUCTIONS.

In an action against a railway company for injury to a pedestrian who was struck by a hand car at a street crossing, it was not error to refuse to instruct that if the persons in charge of the car saw plaintiff on or near the track, and she appeared to be in possession of her senses, they had the right to assume that she would get out of the way in time to avoid injury.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1193-1215; Dec. Dig. § 351.*]

GARY, C. J., dissenting.

Appeal from Common Pleas Circuit Court of Richland County; John S. Wilson, Judge.

Action by Amanda Irby against the Southern Railway Company and another. Judgment for plaintiff, and defendants appeal. Reversed and remanded for new trial.

E. M. Thomson, of Columbia, for appellants. W. Boyd Evans and Hunter A. Gibbes, both of Columbia, for respondent.

FRASER, J. This was an action for damages brought by the plaintiff-respondent against the defendants-appellants for personal injuries received by the plaintiff at a public street crossing in the city of Columbia. It seems that at the place of the injury several railroad tracks cross the street quite near each other. Some of these tracks belong to the Columbia, Newberry & Laurens Railroad and some to the defendant company. When the plaintiff arrived, she found the street blocked by a passing train on the Columbia, Newberry & Laurens road having crossed the track of the defendant company. She waited for the passing train to go by. While standing between the tracks, she saw some acquaintances on the train, and waved to them. Her attention was engrossed with her greetings, and as she waved she went backwards upon the track of the defendant company, and did not see a lever car that was approaching the crossing on the track of the defendant company in charge of its codefendant, Davis. The

defendant Davis and those on the lever car with him saw the plaintiff while the lever car was some distance away, and saw her backing towards the track before she was struck. Those on the lever car called out to the plaintiff, but she did not hear or heed the warning. One of the employees on the lever car pushed her away from in front of the car, but in some way she was struck by the side of the car, or the back wheel caught her clothing, and she was thrown down and injured.

Judgment was rendered for the plaintiff for \$200, and the defendants appealed upon the following exceptions:

[1] 1. "(1) Because the court erred in permitting the witness James Rutherford to testify as follows: 'Q. How wide was the opening here? A. About 20 feet. Q. And blocked up on both sides? A. Yes, sir. Q. It was blocked up that afternoon? A. Yes, sir. Q. What about the cars? A. The Shand lumber yard runs here, is a line fence running along here, passed that line fence in the corner here one box car a few links over into the street. Q. How much opening was here? A. About 20 feet. Q. Twenty feet wide? A. Yes, sir; 20 feet wide.' The error being that there was no allegation in the complaint charging the defendants or either of them with blocking the crossings in question, nor with negligence, recklessness, or willfulness in so blocking the street, and the testimony, therefore, referred to no issue involved, and was irrelevant and incompetent.

"(2) Because the court erred in allowing this witness and other witnesses to testify as to the crossing in question being blocked by cars placed by the defendants when there was no allegation in the complaint charging negligence in this regard, and no such issue was made by the pleadings. Hence the testimony was irrelevant and incompetent."

Those exceptions cannot be sustained. The jury were entitled to know the surroundings in order to ascertain whether a given rate of speed was negligent or not. One may with due care travel at a rate in an open country where the view is unobstructed, and yet, if he should pass an obstruction or go round a curve in the road at the same speed, he might endanger himself and others and be guilty of negligence.

[2, 3] 2. (3) Because the court erred in admitting in evidence sections 516 and 518 of the Ordinances of the City of Columbia with respect to blocking street crossings, as follows:

"Sec. 516. It shall be unlawful for any railroad train, engine, car or part of a railroad train, to be stopped at the crossing of any street in the city of Columbia, or to be permitted to remain stopped at any crossing of any street of the city, under a penalty of not less than ten dollars nor more than forty dollars for each and every

offense, to be recovered before the recorder, evidence being given that this section is violated. Provided, a summons is served on the agent, president, secretary or treasurer of said company so violating.

"Sec. 518. It shall be unlawful for any railroad train, engine, or any portion of a railroad train, to pass any street crossing in the city at a rate of speed greater than four miles an hour, and before and during the passage of such crossing they shall ring the engine bell as notice to those approaching the crossing that a train is approaching. On failing to comply with the conditions of this section, the railroad company so offending shall be fined not less than ten dollars nor more than fifty dollars for each and every offense, on conviction before the recorder: Provided, that a summons is served on any of the officers of said company, as provided in section 516."

"The errors being: (a) That the said ordinances had no application whatever to the case at bar, since it was concerned with a lever or hand car, and not a railroad train or any part thereof. (b) Because there was no allegation in the complaint charging the company with negligence in blocking the crossing in question, and hence there was no issue to which the ordinance as to blocking the streets was applicable, and hence as testimony they were irrelevant and incompetent. (c) Because such ordinances were not proved as provided by law, neither the original being offered in evidence, nor was the copy thereof certified under the hand of the officer having custody of the records of the city of Columbia and under its corporate seal offered on 10 days' notice given defendants or their attorney."

This exception is sustained. His honor, the presiding judge, seems to have allowed the introduction of the city ordinance under the impression that the complaint alleged a violation of the city ordinance. He so stated both in his ruling and in his charge to the jury. We do not find such allegation in the complaint as printed in the case, and we are bound by the case. Besides both ordinances were read in the hearing of the jury. The case does not show that copies were offered, and we can make no finding on the production of copies.

[4] 3. "(4) Because the court erred in failing to charge defendants' fourth request as follows: 'There is no rule of law which relieves a person from looking out for trains and lever cars when he goes upon or to cross railroad tracks. I charge you that a railroad company is not bound to slacken speed of a lever car upon seeing one on or near its track, unless the circumstances indicate that such person does not or cannot see or hear such lever car.' The error being that the request stated a sound proposition of law applicable to the issues involved in the case, and defendants were entitled to have

it charged in its entirety." Exception 4 cannot be sustained. This would have been a charge on the facts. This exception is overruled.

[5] 4. "(5) Because the court erred in refusing to charge defendants' fifth request to charge as follows: 'If the section foreman or persons in charge of said lever car saw plaintiff upon or near the railroad track and she appeared to be in possession of her senses, such person or persons had a right to assume that plaintiff would get out of the way of the approaching lever car in time to prevent injury.' The error being that the request stated a sound proposition of law applicable to the issues involved in the case, and defendants were entitled to have the same charged.

"(6) Because the court erred in refusing to charge, upon defendants' request, that there was no evidence in the case which would warrant a verdict for punitive damages, the error being that there was absolutely no testimony tending to show reckless, wanton, or willful acts on the part of defendants or its or their employes, and hence no ground on which a verdict for punitive damages could be based."

These exceptions must be overruled. It would not be proper to discuss these exceptions, as the case must go back for a new trial.

The judgment of this court is that the judgment appealed from is reversed for the reasons above set forth and remanded for a new trial.

WOODS and WATTS, JJ., concur. GARY, C. J., dissents. HYDRICK, J., concurs in the result.

(159 N. C. 501)

MILLER v. WESTERN UNION TELEGRAPH CO.

(Supreme Court of North Carolina. Sept. 11, 1912.)

TELEGRAPHS AND TELEPHONES (§ 38*)—NON-DELIVERY OF MESSAGES—LIABILITY.

Where a telegraph company, delivering a message to the residence of the sendee, "Woodie M.," agreed, at the request of the sendee's wife, to forward it to the sendee at another town, but failed to deliver the same within a reasonable time, and made no effort to deliver nor to send a service message, nor any inquiry for the sendee at the latter town, it was liable for failure to promptly deliver the message to the sendee, though the address was changed to "Wood C. M.," probably by phonetic mistake.

[Ed. Note.—For other cases, see Telegraphs and Telephones, Cent. Dig. § 33; Dec. Dig. § 38.*]

Appeal from Superior Court, Chowan County; Bragaw, Judge.

Action by T. W. Miller against the Western Union Telegraph Company. From a judgment of nonsuit, plaintiff appeals. Reversed

Bond & Bond, for appellant. Pruden & Pruden and S. Brown Shepherd, for appellee.

CLARK, C. J. This is an action for failure to deliver promptly a telegram. It was in evidence that at 4 p. m., Saturday, November 19, 1910, a telegram from Norfolk, Va., addressed to "Woodie Miller, Edenton, N. C.," was delivered at his residence in that place, announcing the sudden death of his brother in Norfolk, and asking plaintiff to "come at once." His wife at once requested the company to forward it to her husband, "care Everett's Hotel, Jacksonville, Fla.," and guaranteed the charges. The defendant accepted the message, but did not deliver it. His wife sent a night letter that night to her husband, asking if he had received the message. He received this the next day about 10 o'clock a. m. He thereupon went to the telegraph office in Jacksonville and was handed the undelivered telegram, which was directed to "Wood C. Miller, care Everett's Hotel." The plaintiff testified that, if he had received the telegram at any time before 8 p. m. November 19th (which was four hours after the message was handed in to the office in Edenton), he could and would have reached Norfolk Sunday at 5:30 p. m. in time to have attended the funeral; that he left on the first train after he had actually received the message, but arrived in Norfolk too late to attend the funeral. The plaintiff further testified that the clerk at the Everett Hotel had known him a long time as T. W. Miller, or Woodie Miller, that he had been at the hotel on this occasion for several days, and was registered as T. W. Miller. The defendant offered no evidence.

It was error to grant the motion for a nonsuit. There is an unbroken line of cases, from *Hendricks v. Telegraph Co.*, 126 N. C. 304, 35 S. E. 543, 78 Am. St. Rep. 658, and *Cogdell v. Telegraph Co.*, 135 N. C. 431, 47 S. E. 490, down to the present, that on proof of the delivery of a message to a telegraph company and payment of the charges, or the acceptance of the message without such payment, and of failure to deliver to the sendee in reasonable time, there is prima facie proof of negligence, and the burden is upon the company to prove that it made all reasonable effort to deliver the message, and that upon failure to find the sendee it wired back a service message for a better address. Here the company showed no effort to deliver, nor any attempt to send a service message, nor any inquiry for sendee at Everett's Hotel, nor, indeed, any attempt to deliver, even when, through the night letter from the plaintiff's wife, it had notice that the sendee was at the hotel in Jacksonville. Though this last was directed to T. W. Miller, it was notice that a message of importance, which had been sent from Edenton, N. C., to a man named Miller, "care Everett's

Hotel," had not been delivered. It seems probable that the message was changed from "Woodie Miller" to "Wood C. Miller" by a phonetic mistake, as in *Cogdell v. Telegraph Co.*, supra. But, however that may be, the defendant has not met the burden of proof cast on it by reason of its failure to deliver the message in apt time.

The judgment of nonsuit must be reversed.

(159 N. C. 547)

ANGE & FOREST et al. v. ATLANTIC COAST LINE R. CO. et al.

(Supreme Court of North Carolina. Sept. 18, 1912.)

1. DRAINS (§ 66*)—ASSESSMENTS FOR MAINTENANCE—"CANAL."

Under Revisal 1905, § 4026, which provides for proceedings to assess among persons benefited, the cost of maintenance of a drainage canal, dug along any natural depression or waterway and maintained for seven years, an artificial drain of from two to five feet in width is a "canal," though, in the proceeding to assess the cost of maintenance, the evidence refers to it both as a "ditch" and a "canal."

[Ed. Note.—For other cases, see *Drains*, Cent. Dig. § 72; Dec. Dig. § 66.*

For other definitions, see *Words and Phrases*, vol. 1, pp. 947, 948.]

2. DRAINS (§ 76*)—ASSESSMENT FOR MAINTENANCE—SUFFICIENCY OF PETITION.

Under Revisal 1905, § 4026, which provides for proceedings to assess the cost of maintenance of a drainage canal which has been in existence for seven years, and directs the clerk of the superior court to appoint commissioners therefor upon the application of "any landowner who contributed to digging and is interested in maintaining" the canal, all of the petitioners need not have been contributors to the original construction, and the petition is sufficient where one of them is within the requirement.

[Ed. Note.—For other cases, see *Drains*, Cent. Dig. §§ 76-83; Dec. Dig. § 76.*]

3. DRAINS (§ 70*)—ASSESSMENT FOR MAINTENANCE—PARTIES WHO MAY BE ASSESSED.

Under Revisal 1905, § 4026, which provides for the appointment of commissioners to examine lands drained or intended to be drained by a drainage canal, and hear testimony as to "advantages and disadvantages to be shared by the parties to the action," in order to assess the cost of maintaining such canal among such parties, a railroad, which was a party and whose right of way was drained, was properly assessed a portion of the cost of maintenance.

[Ed. Note.—For other cases, see *Drains*, Cent. Dig. § 74; Dec. Dig. § 70.*]

Appeal from Superior Court, Pitt County; Foushee, Judge.

Proceedings by Ange & Forest and others against the Atlantic Coast Line Railroad Company and others to compel contribution to the maintenance of a drainage ditch. From a judgment for petitioners, defendants appeal. No error.

This is a proceeding, under section 4026 of the Revisal, to compel contribution to the maintenance of a certain artificial drain, sometimes referred to in the evidence as a ditch and at others as a canal. The drain

is in some places from three to five feet wide and from two to five feet deep, and in other places not so large. The town of Winterville and A. G. Cox are among the petitioners, and B. W. Tucker, W. L. House, and the Atlantic Coast Line Railroad Company are the defendants. The defendants filed a demurrer to the petition, which was overruled, and the defendants excepted. The defendants then filed answers, and upon issues raised the jury returned the following verdict:

"(1) Was the ditch described in the complaint constructed along a natural depression or waterway, and was it constructed seven years prior to the beginning of this action? Answer: Yes.

"(2) Who constructed said ditch? Answer: A. G. Cox.

"(3) Did either of the plaintiffs or the defendants contribute anything to construct or maintain said ditch, except A. G. Cox? Answer: No.

"(4) Are the plaintiffs the owners of the land described in the complaint? Answer: Yes.

"(5) Do the defendants claim under A. G. Cox? Answer: Yes.

"(6) Does the defendant the Atlantic Coast Line Railroad Company own any land on said ditch (except its right of way), inside the town of Winterville? Answer: No.

"(7) Is any of the right of way of the defendant the Atlantic Coast Line Railroad Company, outside of the corporate limits of the town of Winterville, drained by said ditch? Answer: Yes; 600 or 700 yards.

"(8) Is the land of the defendant B. W. Tucker, outside of the corporate limits of the town of Winterville, drained by said ditch? Answer: Yes.

"(9) Is the land of the defendant W. L. House, outside of the town of Winterville, drained by said ditch? Answer: Yes.

"(10) Is said ditch necessary to drain the streets of the town of Winterville? Answer: Yes.

"(11) Has the plaintiff A. G. Cox contributed anything to the maintenance of this ditch since its construction? Answer: No."

Judgment was rendered upon the verdict in favor of the petitioners, and the defendants excepted and appealed.

All of the defendants join in the contentions: (1) That section 4026 of the Revisal refers to canals and that the drain described in the petition is a ditch. (2) That said statute does not purport to confer a remedy, except in favor of those who contributed to the construction of the canal.

The defendants House and Tucker contend, further, that they ought not to contribute to maintain the drain because: (1) They acquired their land after its construction. (2) A part of their land is in the town of Winterville, and they are required to pay

taxes on such part to maintain the drainage of the town.

The defendant railroad company contends, further, that it owns no land which is drained, and that it is not liable to contribute on account of the fact that a part of its right of way may be benefited.

Harry Skinner, for appellants. S. J. Everett, for appellees.

ALLEN, J. The statute under which this proceeding is instituted is necessary for the cultivation and improvement of low lands, and should be construed to carry into effect its beneficent purposes, if practicable. It provides: "After a canal has been dug along any natural depression or waterway and maintained for seven years, it shall be prima facie evidence of its necessity, and upon application to the clerk of the superior court of any landowner who contributed to digging and is interested in maintaining the same, it shall be the duty of the clerk of the superior court to appoint and cause to be summoned three disinterested and discreet freeholders, who, after being duly sworn, shall go upon the lands drained or intended to be drained by said canal, and after carefully examining the same and hearing such testimony as may be introduced touching the question of cost of the canal, the amount paid and the advantages and disadvantages to be shared by each of the parties to the action, shall make their report in writing to the clerk of the superior court, stating the facts and apportioning the cost of maintaining said canal among the parties to the action, and the cost of the action shall be divided in the same ratio; and their report when approved shall be properly registered by the clerk. The collection of cost and proportion of work on the canal shall be as prescribed in this chapter."

[1] The statute is found in a chapter of the Revisal providing for drainage, and by reference to its various sections it will be seen that the term "ditch" and "canal" is used indiscriminately to designate an artificial drain. In the ordinary acceptance of the terms, both indicate a channel constructed for the purpose of conveying water, the only difference being that the word "canal" suggests a channel of larger dimensions than does the word "ditch," but as defined by the authorities a ditch may be natural or artificial (Black, L. Dic. 381; Cyc. vol. 14, p. 552; Goldthwait v. Bridgewater, 5 Gray [Mass.] 64), while a canal is an artificial trench for confining water to a defined channel (Black, L. Dic. 166), or a trench or excavation in the earth for conducting water and confining it to narrow limits (Cyc. vol. 14, p. 268; Bishop v. Seeley, 18 Conn. 394). Tested in either way, by the ordinary use of words or by legal definitions, the drain described in the petition, not being natural

and being of considerable dimensions, is a canal, although called a ditch.

[2] Nor does the statute require that all of the petitioners should have contributed to the original construction of the canal, and the reason for omitting this requirement is obvious. If such a provision had been inserted in the statute, its usefulness would have been largely destroyed, as a change in the ownership of the land, after the construction of a canal at great expense, would render it difficult, if not impossible, to maintain it. It directs the clerk, in plain language, to make the order appointing the commissioners, upon the application of "any landowner who contributed to digging and is interested in maintaining" the canal, and the verdict establishes the fact that at least one of the petitioners "contributed" and is "interested" in maintenance.

What has been said disposes of the first contention made separately by the defendants Tucker and House, and their second contention affects only the amount of the assessment, for which they may be liable, which is not before us on this appeal. The separate contention of the defendant railroad is also untenable.

[3] The statute requires the assessments to be made according to advantages and disadvantages, and the verdict finds that the railroad is benefited by the drainage of its right of way, and it is reasonable and just that it should contribute in proportion to its benefits. Nothing is more important to the maintenance of its roadbed than proper drainage, and it should not expect this to be maintained at the expense of others. If, however, the statute in express terms said that only owners of land should contribute to the maintenance of the canal, this would not necessarily relieve this defendant, as the term "owner of land" may not only include those who have an absolute ownership in fee, but those who have the proprietorship and control of the land. Cyc. vol. 29, p. 1549.

Upon an examination of the whole record, we find no error.

No error.

(159 N. C. 539)

EASON v. EASON.

(Supreme Court of North Carolina. Sept. 18, 1912.)

1. DEEDS (§ 93*)—CONSTRUCTION.

A deed will be construed so as to effectuate the intent as gathered from the entire instrument, when it can be done by any reasonable construction.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 231, 232; Dec. Dig. § 93.*]

2. HUSBAND AND WIFE (§ 14*)—CONVEYANCES —CONSTRUCTION—ESTATE CREATED.

Where a deed conveyed property to one and his wife, "each one-half interest," it must be construed to create a tenancy in common,

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

though the habendum and tenendum conveyed the property to both and their heirs and assigns.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 71-89; Dec. Dig. § 14.*]

Appeal from Superior Court, Greene County; Justice, Judge.

Petition for dower by Florence Eason against Joseph C. Eason. From a judgment for petitioner, defendant appeals. Reversed and remanded, with directions.

Geo. M. Lindsay and J. Paul Frizzelle, for appellant. W. F. Evans and L. I. Moore, for appellee.

BROWN, J. The plaintiff is the second wife of Nathan Eason, and as such claims dower in the whole of a certain tract of land described in a deed dated December 30, 1904, executed by Thomas Lassiter to Nathan Eason and his first wife, Carrie.

It is contended by the plaintiff that the deed in question conveys the land to Nathan Eason and his said wife Carrie jointly, and that the doctrine of survivorship, as between husband and wife, applies, inasmuch as Nathan Eason survived his first wife. *Ray v. Long*, 132 N. C. 895, 44 S. E. 852. The premises of the deed are as follows: "This deed, made this the 30th day of December, A. D. 1904, by Thomas U. Lassiter and his wife, Alice Lassiter, of Greene county and state of North Carolina, of the first part, to Nathan Eason and wife, Carrie G. Eason, each one-half interest, of Greene county and state of North Carolina, of the second part." It is unnecessary to set out the remainder of the deed. The habendum, as well as the tenendum, conveys the property to said Nathan and Carrie G. Eason and their heirs and assigns.

[1] We are of opinion that in construing the deed in question the language used in the premises, to wit, "to Nathan Eason and wife, Carrie G. Eason, each *one-half interest*," should be taken into consideration in construing the deed. We have said repeatedly in recent decisions that a deed will be construed so as to effectuate the intent as gathered from the entire instrument, when it can be done by any reasonable interpretation. *Acker v. Pridgen*, 158 N. C. 338, 74 S. E. 335; *Triplett v. Williams*, 149 N. C. 394, 63 S. E. 79, 24 L. R. A. (N. S.) 514; *Gudger v. White*, 141 N. C. 513, 54 S. E. 386.

[2] Giving the language quoted its ordinary significance, we are of opinion the deed created a tenancy in common, and that the plaintiff is entitled to dower in only one-half of the land described in the petition. The language used is too plain to admit of discussion as to its meaning. The evident purpose of the draftsmen was to convey one undivided half of the land to the husband and the other undivided half to the wife. This question

is very fully discussed by Mr. Justice Hoke in *Highsmith v. Page*, 158 N. C. 226, 73 S. E. 998, which we think is a case very much in point. See, also, *Stalcup v. Stalcup*, 137 N. C. 305, 49 S. E. 210; *Hodges v. Fleetwood*, 102 N. C. 122, 9 S. E. 640; 13 Cyc. 666.

The cause is remanded, with instructions to enter judgment in accordance with this opinion.

Reversed.

(159 N. C. 521)

BRIDGERS v. BEAMAN et al.

(Supreme Court of North Carolina. Sept. 18, 1912.)

RAILROADS (§ 72*)—CONSTRUCTION—"ON."

The location of a depot at a point within 300 feet of the northern boundary of a town, 100 feet of its eastern boundary, and 1,450 feet from its southern boundary at the nearest point, is not a location "on" the southern limits of the town within the terms of a deed delivered in escrow and conveying land in consideration of such location.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 168-178; Dec. Dig. § 72.*]

For other definitions, see Words and Phrases, vol. 6, pp. 4960-4966; vol. 8, p. 7737.]

Appeal from Superior Court, Greene County; Justice, Judge.

Action by Henry Clark Bridgers against J. I. Beaman and others. From a judgment for defendants, plaintiff appeals. Affirmed.

The plaintiff, having under consideration the building of a railroad from Farmville to Snow Hill or Hookerton, was offered inducements by parties at both places. Among them was J. I. Beaman, who offered and subscribed to pay \$1,100 in consideration that the road was constructed to Hookerton and a depot constructed on the southern limits of the town of Hookerton by March 29, 1908; that, in consideration of the inducements offered by the said Beaman and others, it was decided to build the road to Hookerton, and the subscriptions of the said Beaman and others were so accepted by the plaintiff, and, in consideration of the subscriptions of the said Beaman and others, the construction of the said railroad to Hookerton was undertaken and begun; that the said Beaman concluded to pay a part of his subscription in money and a part in land, and executed the deed set out in the pleadings, of date April 11, 1906, conveying land to plaintiff; that said deed was deposited with a committee, the defendants, to be delivered to plaintiff when he had constructed the railroad and established the depot he had agreed to. The grantor Beaman, to more fully protect himself and to insure the construction of the depot on the southern limits of Hookerton, put the following clause in said deed: "To be null and void if said Henry Clark Bridgers (the plaintiff) fails to construct a depot on southern town limits of Hookerton, and build a railroad

from Farmville to the depot in Hookerton by the 29th day of March, 1908." The said Beaman owned land on the southern limits of Hookerton. Under the foregoing circumstances the deed was executed and placed in the hands of the committee for future delivery, as events should determine. The plaintiff constructed a depot in Hookerton and built a railroad from Farmville to the depot in Hookerton before the 29th day of March, 1908, and demanded of the committee, the defendants, the possession of said deed. They refused to give plaintiff possession of said deed, and the plaintiff brings this action against them to compel them to do so.

The town of Hookerton has had two charters, one granted in 1867, and the other in 1907. According to the charter of 1867, the depot is located within 300 feet of the northern boundary of Hookerton, within 100 feet of its eastern boundary, about 1,450 feet of the southern boundary at the nearest point, and the surveyor, who was introduced as a witness by the plaintiff, testified that the depot was not on the southern limits at all according to the charter of 1867. The defendant paid the part of the subscription which was to be paid in money, but resisted the delivery of the deed, upon the ground that the plaintiff had not constructed the depot on the southern limits of Hookerton. At the conclusion of the plaintiff's evidence, his honor sustained a motion for judgment of nonsuit, and the plaintiff excepted and appealed.

J. L. Bridgers, for appellant. Jarvis & Blow, for appellees.

ALLEN, J. The plaintiff and the defendant have made the location of the depot on the southern limits of Hookerton material, because they have stipulated that the deed shall be void if it is not so located, and the reason the defendant insisted on this provision is apparent. The defendant owned land on the southern limits of Hookerton, which was a small town, and, as it was anticipated that its population and wealth would increase after the construction of the railroad, he was desirous of having the depot located on his side of the town, so that business might be attracted in his direction instead of away from him. The deed was delivered in escrow in 1906, and we agree with his honor that the southern limits of Hookerton, then in existence under the charter of 1867, are those referred to; but if it was otherwise, in our opinion, based upon the map, the southern limits under the charter of 1907 are, in so far as they affect the controversy between the plaintiff and the defendant, substantially the same as under the charter of 1867. The determination of the question presented to

us depends, therefore, on the location of the depot and whether it can be said to be on the southern limits.

The word "on" has various meanings, dependent upon the purposes for which it is used. Webster says: "The general significance of 'on' is situation, motion, or condition with respect to contact or support beneath; as: At or in contact with the surface or upper part of a thing and supported by it. To or against the surface of. At or near; adjacent to—indicating situation, place or position." And the Century: "In a position above and in contact with; used before a word of place indicating a thing upon which another thing rests or is made to rest. In a position so as to cover, overlie, or overspread. In a position at, near, or adjacent to; indicating situation or position, without implying contact or support. In or into a position in contact with and supported by the top or upper part of something." Adopting the definition most favorable to the plaintiff, "near to," we are of opinion, when all the circumstances are considered, that the plaintiff has not located the depot "on" the southern limits. The only witness introduced by the plaintiff, and who surveyed all the lines under an order of court, says that the depot is not on the southern limits as contained in the charter of 1867, and while, if distance alone controls, the depot may be said to be near those limits, it would not convey this impression when the size of the town and the location of the other limits are considered. The town of Hookerton is a small town, and the distance from the northern to the southern boundary is only about 1,750 feet. The depot is within 100 feet of the eastern boundary, within 300 feet of the northern boundary, and 1,450 feet from the southern boundary, which would seem to locate it in the northeastern part of Hookerton and not on its southern limits.

We conclude that the plaintiff, upon his own evidence, has failed to comply with the condition in the deed, and is not entitled to recover. No question is raised by either party as to the legality of the contract.

Affirmed.

(159 N. C. 552)

HARDEE et al. v. TIMBERLAKE et al.

(Supreme Court of North Carolina. Sept. 18, 1912.)

1. COURTS (§ 65*)—EXPIRATION OF "TERM OF COURT."

A "term of court" expired when the court left the bench, after sitting an extra day to sign judgments on the conclusion of all jury trials.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 230; Dec. Dig. § 65.*

For other definitions, see Words and Phrases, vol. 8, pp. 6918-6920.]

2. APPEAL AND ERROR (§ 564*)—SERVICE OF CASE.

Where, by consent, a party was allowed 30 days in which to serve the case on appeal, service 32 days after the close of the term was too late and a nullity.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2501-2506, 2555, 2556, 2559; Dec. Dig. § 564.*]

Appeal from Superior Court, Pitt County; Whidhee, Judge.

Action by Henry Hardee and others against H. A. Timberlake and others. From a judgment for defendants, plaintiffs appeal. Affirmed.

W. F. Evans, for appellants. F. G. James & Son, for appellees.

CLARK, C. J. This is a motion to dismiss because the "case on appeal" was not served on time. The facts found by his honor are that "on Friday, May 24, 1912, all jury trials being concluded, the court discharged the jury, but announced that he would come to the courtroom Saturday morning, May 25th, to sign judgments, which he did at that time, and then went to his home, which was in the same town. The case on appeal was served June 26th, 1912. By agreement, the appellant was allowed 30 days in which to serve case on appeal."

[1, 2] The term of the court expired Saturday morning, May 25th, when the court left the bench for the term. *Delafield v. Construction Co.*, 115 N. C. 21, 20 S. E. 167, where the subject is fully discussed. May having 31 days, the time allowed by consent (30 days) in which to serve case on appeal expired June 24th; and therefore service on June 26th was too late and a nullity. *Guano Co. v. Hicks*, 120 N. C. 29, 26 S. E. 650, and cases there cited.

There being no error upon the face of the record proper, and there being no case on appeal, the judgment below must be affirmed.

(159 N. C. 553)

TIMBERLAKE v. HARDEE et al.

(Supreme Court of North Carolina. Sept. 18, 1912.)

Appeal from Superior Court, Pitt County; Whidhee, Judge.

Action by H. A. Timberlake against Henry Hardee and others. From a judgment for plaintiff, defendants appeal. Affirmed.

F. G. James & Son, for appellants. W. F. Evans, for appellee.

PER CURIAM. On authority of *Hardee v. Timberlake*, 75 S. E. 799, this judgment is affirmed.

(160 N. C. 263)

WESTON et al. v. J. L. ROPER LUMBER CO.

(Supreme Court of North Carolina. Sept. 11, 1912.)

1. DEEDS (§ 84*)—RECORDING—NECESSITY.

Generally, a deed must, as provided by Revisal 1905, § 980, be recorded in the county

where the land conveyed is situated; the registration taking the place of livery of seisin, attornment, or other ceremony formerly required to pass title.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 222-224; Dec. Dig. § 84.*]

2. DEEDS (§ 86*)—PROBATE—REGISTRATION—VALIDATING STATUTES.

Revisal 1905, § 1009, providing that when the judges of the Supreme or superior courts "or the clerks or deputy clerks of the superior courts, or courts of pleas and quarter sessions," mistaking their powers, have essayed to take probate of deeds, and have ordered said deeds registered and the same have been registered, all such probates and registrations are valid, validates probate and registration erroneously done by officials having general or special powers and validates probates taken by the county court, and also registrations made on such probates.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. § 226; Dec. Dig. § 86.*]

3. DEEDS (§ 82*)—REGISTRATION—NECESSITY—VALIDITY AS BETWEEN PARTIES.

Under Revisal 1905, § 980, providing that no conveyance of land shall be valid to pass title to any property as against creditors or purchasers, but from the registration thereof, a deed is valid between the parties thereto without registration, and may be proved on the trial as at common law.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. § 217; Dec. Dig. § 82.*]

4. DEEDS (§ 83*)—REGISTRATION—EVIDENCE.

Revisal 1905, § 988, providing that a duly certified copy of any deed required to be registered may be registered in any county, and the registered or duly certified copy of any deed when registered in the county where the land is situate may be given in evidence, taken from Acts 1858-59, c. 18, allows certified copies of deeds erroneously registered to be recorded in the proper counties.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 218-221; Dec. Dig. § 83.*]

5. DEEDS (§ 81*)—REGISTRATION—EVIDENCE.

Rev. Codes, c. 37, § 29, and Acts 1858-59, c. 18, providing that any deed executed prior to 1830 and registered in a county adjoining to the county in which the land is situate may be registered in the proper county, etc., validate the registration of a deed recorded in 1821, in the county adjacent to the county in which the land conveyed is situate, and though omitted from the Revisal of 1905, are within section 5454 thereof, providing that the repeal of statutes not contained in the revisal shall not affect any act done or right accrued before the repeal takes effect, since the validation of the registry is an act done or a right accrued, and the machinery for transferring the registration to the proper county is prescribed in Revisal 1905, § 1599.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 214-216; Dec. Dig. § 81.*]

6. STATUTES (§ 236*)—CONSTRUCTION—REMEDIAL STATUTES.

The statutes validating defective probates and registrations of deeds are remedial, and must be liberally construed to embrace all cases fairly within their scope.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 317, 324, 325; Dec. Dig. § 236.*]

Appeal from Superior Court, Pasquotank County; Bragaw, Judge.

Action by C. P. Weston and another against the J. L. Roper Lumber Company.

From a judgment of nonsuit, plaintiffs appeal. Reversed, and new trial granted.

This is an action to recover a tract of land in Pasquotank county. The only question now presented is whether a deed from Enoch and Fred B. Sawyer to Cary Weston and Joseph Seguline, dated February 3, 1820, and offered in evidence by the plaintiff, was properly excluded by the court. The deed was proven in the court of pleas and quarter sessions of Camden county, and recorded on April 3, 1821, in the office of the register of deeds of that county. A duly certified copy of the registry of this deed was on January 29, 1910, ordered to registration by the clerk of the superior court of Pasquotank county and recorded by the register of deeds in said county April 21, 1910. This deed was a necessary link in the plaintiff's chain of title. The court having excluded the deed from the evidence and having held there was no sufficient proof of the original, the plaintiff excepted to the ruling, submitted to a nonsuit, and appealed.

Winston & Biggs, Ward & Thompson, and Meekins & Tillitt, for appellants. W. B. Rodman, W. M. Bond, and A. D. MacLean, for appellee.

WALKER, J. (after stating the facts as above). [1] The general rule undoubtedly is that a deed must be registered in the county where the land it conveys is situated, registration taking the place of livery of seisin, attornment, or other ceremony which the law formerly required to pass title. Rev. St. c. 37, § 1; Rev. Code, c. 37, § 1; Revisal 1905, § 980. But as probates were sometimes taken by officers who had mistaken their powers, or who, having the power, had exercised it in the wrong way, and because deeds, owing to the uncertainty as to the boundary lines of counties, and perhaps for other reasons, had, in many instances, been registered in the wrong counties, the Legislature, with its usual wisdom, deemed it proper to validate such void or defective probates and registrations by a series of enactments, many of which will be found in the Revisal of 1905. Laws 1858-59, c. 18, as well as the Rev. Code, c. 37, § 29, had provided for just such a case as we have before us, but the defendant's counsel contend that as they were omitted from the Code of 1883 and the Revisal of 1905, and as the plaintiffs had not caused the registration in Pasquotank county of a certified copy of the registry in Camden county until 1910, they lost their right, under those acts, to have the deed registered in the former county, where the land lies, the Code, by section 3867, and the Revisal, by section 5453, repealing all public and general statutes not contained therein; but by section 3868 of the Code, and section 5454, such repeal does not "affect any act done, or any right accruing, or accrued or

established, or any suit or proceeding had or commenced in any case before the time when such repeal shall take effect," and it may, perhaps, admit of doubt, under those sections, though we do not decide the question or intimate any preferential opinion in regard to it, whether it was intended that the Code and Revisal should operate as a repeal of the act of 1858-59 and the previous enactment in chapter 37, § 29, of the Revised Code.

[2] It is sufficient for our present purpose that we consider Revisal 1905, § 1009, which provides that "wherever the judges of the Supreme or the superior courts, or the clerks or deputy clerks of the superior courts, or courts of pleas and quarter sessions, mistaking their powers, have essayed previously to the 1st day of January, 1889, to take probate of deeds or any instrument required or allowed by law to be registered, and have ordered said deeds registered, and the same have been registered, all such probates and registrations so taken and had are validated." It must be conceded that our case is embraced by the words or terms of this statute; and, being within the letter, is it also within the spirit of the law? It is evident from the general scope of all the legislation upon this important subject that it was intended to ratify and validate what had erroneously been done by officials having general or special powers of probate and registration, so that the essence of what was done should not be sacrificed to the form of doing it, and to save rights of property where no substantial departure from legal requirements appeared, but merely an irregularity which could be cured without injury to the rights of others. The object of probate and registration in the county where the land lies was intended to give notice to creditors and purchasers for value, or others whose rights might otherwise be seriously and unjustly impaired by the deed, and this idea is emphasized in the act of 1885, c. 147, Revisal, § 980, which differs somewhat in phraseology from prior enactments relating to the same subject, viz., act of 1715, c. 7, Rev. Statutes, and Rev. Code, c. 37, § 1.

[3] A deed is good and valid between the parties thereto without registration, and may be proved on the trial as at common law. *Warren v. Willeford*, 148 N. O. 474, 62 S. E. 697; *Pells Rev.* 980, and note.

In view of these settled principles, we may the more easily construe section 1009 of the Revisal, with reference to the registration of a deed in the wrong county, upon a probate taken according to law, or which, though originally void, has been validated by the Legislature, but, before doing so, one position of the defendant requires attention. It is argued by counsel that section 1009, which was taken from the Laws of 1871-72, c. 200, as amended by Acts of 1889, c. 252, and Acts of 1891, c. 484, does not refer to

probates taken by the county courts, but to those of the clerks of said courts, but in our opinion the probates of the county courts were intended to be validated. The phraseology and punctuation, as well as the grammatical construction, of the statute, lead us to that conclusion. 36 Cyc. 1117. If the other meaning had been intended, the preposition "of" would have been inserted before the words "courts of pleas and quarter sessions." The section also validates registrations made upon such probates.

[4] It is provided by Revisal, § 988, that "a duly certified copy of any deed or writing, required or allowed to be registered, may be registered in any county; and the registry or duly certified copy of any deed or writing when registered in the county where the land is situate may be given in evidence in any court of the state." This section is taken from Acts of 1858-59, c. 18, and while its meaning, as it appears in the Revisal, is not very clear, when we refer to the original act and consider its context, we find no serious difficulty in construing it. The act of 1858-59 recites that wills, deeds, and other written instruments had been recorded in the wrong counties, and the act was passed to remedy the mischief by allowing certified copies of wills, deeds, and other writings thus erroneously registered to be recorded in the proper counties. This is expressly provided as to wills by the original act, and by clear implication the same rule is extended to deeds.

[5] But the Rev. Code. c. 37, § 29, provided that any deed for land made prior to the year 1830 and registered in any county where any part of the land is situated, or in any adjoining county, or a copy of such deed duly certified by the register of deeds of the county wherein it was recorded, may be registered in the proper county. This section is not in the Code of 1883 or the Revisal of 1906, and counsel of defendant contend that it is, therefore, repealed by section 3867 of the Code and section 5453 of the Revisal, but section 3868 of the Code and section 5454 of the Revisal provide that the repealing clauses shall not "affect any act done, or any right accruing, accrued or established," and we think that the Rev. Code, c. 37, § 29, and the act of 1858-59 c. 18, so far validated the registration of this deed in Camden county as to bring it within the protection of the saving clauses of the Code (section 3868) and Revisal (section 5454), and, even if the right to have the deed or a certified copy registered in Pasquotank county was lost by a repeal of that part of the Rev. Code, yet it may be registered in like manner under section 1599 of the Revisal. The validation of the registry in Camden, to the extent stated was "an act done or accomplished or a right accrued," and the machinery for transferring the registration to the proper county is found in the Revisal, § 1599, if otherwise it had been lost.

[6] A review of the legislation upon this matter satisfies us that it was intended to correct and remedy errors of registration as well as those of probate. They go hand in hand, and the one without the other would be of little or no avail. The statutes are highly remedial, and should be liberally construed, so as to embrace all cases fairly within their scope. It is constructive legislation. We are saving titles, and not destroying them. It has been said that "such acts are of a remedial character, and are the peculiar subjects of legislation. They are not liable to the imputation of being assumptions of judicial power." *McFaddin v. Evans Co.*, 185 U. S. 505, 22 Sup. Ct. 758, 46 L. Ed. 1012. It was further held that to validate defective probates and registrations is a proper exercise of legislative power and favored by the courts. Speaking to this question the court in *Webb v. Den*, 17 How. 576, 15 L. Ed. 35, said: "In the early settlement of most of our states, the forms of conveyances of land were very simple; and they were usually drawn either by the parties themselves, or by persons equally ignorant of the proper forms of certificates of acknowledgment required by law. In some states the statutes concerning acknowledgments and registry were stringent, while the practice was loose and careless, and in some the courts, by unnecessary strictness in their construction of the statutes, added to the insecurity of titles in a country where too many have acted on the supposition that every one who can write is fit for a conveyancer. The great evils likely to arise from a strict construction applied to the bona fide conveyances of an age so careless of form have compelled Legislatures to quiet titles by confirmatory acts in order to prevent the most gross injustice. The act in question is one of these. It is a wise and just act. It governs this case, and justifies the court in admitting this deed in evidence. * * * The registration being thus validated, copies of such deeds stand on the same footing with other legally registered deeds, of which copies are made evidence by the law." See, also, 6 A. & E. 939; *Barrett v. Barrett*, 120 N. C. 131, 26 S. E. 691, 36 L. R. A. 226; *Gordon v. Collett*, 107 N. C. 364, 12 S. E. 332; *Vanderbilt v. Johnson*, 141 N. C. 370, 54 S. E. 298.

The county of Camden adjoins the county of Pasquotank, and the copy of the deed duly certified by the register of the former county was properly registered in the latter county, and the certified copy of this final registry should have been admitted in evidence. What the legal effect of the deed will be in its bearing upon the facts of the case as they are disclosed by the evidence we cannot now decide. There was error in refusing to admit the deed.

Defendant's counsel contend that the nonsuit was taken in deference to the judge's decision that sufficient evidence of the loss

(160 N. C. 79)

of the original deed had not been introduced to let in parol evidence of its execution and contents, but it appears to us that the reason for the nonsuit should not be confined within such narrow limits, but extended to the entire adverse ruling. The exclusion of the deed was the real question involved, as it was a necessary link in the plaintiff's chain of title.

New trial.

(159 N. C. 541)

DICKERSON v. DAIL.

(Supreme Court of North Carolina. Sept. 18, 1912.)

1. APPEAL AND ERROR (§§ 692, 690*)—SUFFICIENCY OF EXCEPTIONS.

When exceptions complaining of the admission or rejection of testimony set out the question but do not show the answer of the witness when the question was admitted, nor the evidence sought to be elicited when it was excluded, they show no prejudice and are insufficient for review.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2905-2909, 2897-2899, 2902-2904, 2906, 2908; Dec. Dig. §§ 692, 690.*]

2. LIBEL AND SLANDER (§ 100*)—ISSUES, PROOF, AND VARIANCE—ADMISSIBILITY OF FACTS TO MITIGATE DAMAGES.

In slander in which the defendant did not allege matter in justification, evidence of facts in mitigation of damages was properly excluded.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 246-272; Dec. Dig. § 100.*]

Appeal from Superior Court, Pitt County; Allen, Judge.

Action by R. T. Dickerson against E. E. Dail. From a judgment for plaintiff, defendant appeals. Affirmed.

F. C. Harding and Harry Skinner, for appellant. W. F. Evans, for appellee.

ALLEN, J. [1] The exceptions set out in the record relate to rulings upon the evidence, and all belong to one of two classes. In the first class the questions are set out, but there is no statement as to the answer of the witness when the question was admitted, nor as to the evidence sought to be elicited when it was excluded; and, as we cannot see that the defendant has been prejudiced, the exceptions cannot be sustained. *State v. Leak*, 156 N. C. 643, 72 S. E. 567. If, however, the evidence was of the character indicated on the argument, we are of opinion that there was no error in the rulings of the court.

[2] The other exceptions relate to the exclusion of evidence as to facts in mitigation of damages, which are not alleged in the answer, and it is settled that such evidence is not admissible. *Upchurch v. Robertson*, 127 N. C. 127, 37 S. E. 157. We find no error. Affirmed.

PRITCHARD et al. v. SMITH.

(Supreme Court of North Carolina. Sept. 18, 1912.)

1. CANCELLATION OF INSTRUMENTS (§ 58*)—FRAUDULENT ACQUISITION OF TITLE—REMEDIES—JURISDICTION OF CHANCERY.

Where transactions between persons culminated in the fraudulent acquisition of the title to land belonging to one of them by the other, descendants of the grantor may elect to have and chancery will entertain an action for the value of the land or of their equity of redemption, instead of canceling the entire transaction for the fraud.

[Ed. Note.—For other cases, see Cancellation of Instruments, Cent. Dig. §§ 118, 120; Dec. Dig. § 58.*]

2. DEEDS (§ 196*)—FIDUCIARY RELATION OF PARTIES—ABSOLUTE DEED TO MORTGAGEE.

A mortgagee with power of sale occupies a fiduciary relation to his mortgagor, and, where such a mortgagee took a deed absolute to the property, a presumption of fraud in the transaction attached.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 587-593; Dec. Dig. § 196.*]

3. MORTGAGES (§ 372*)—RIGHTS OF SECOND MORTGAGEE—PURCHASE OF FIRST MORTGAGEE'S INTEREST—EFFECT.

A second mortgagee could not purchase the interest which a first obtained by purchasing at a foreclosure sale and hold it adversely to the mortgagor, but would thereby only increase the indebtedness of the mortgagor by the amount of the purchase price and acquire a lien on the land for the additional amount advanced.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 1102, 1103, 1105-1117; Dec. Dig. § 372.*]

4. CANCELLATION OF INSTRUMENTS (§ 58*)—FRAUD IN SECURING TITLE—ACTION FOR RELIEF—EFFECT OF BONA FIDE PURCHASE.

Where the title to land which was procured by fraud has passed to a bona fide holder without notice of fraud, those defrauded cannot recover the land in specie, but may have only a money judgment for the loss.

[Ed. Note.—For other cases, see Cancellation of Instruments, Cent. Dig. §§ 118, 120; Dec. Dig. § 58.*]

5. EVIDENCE (§ 138*)—ADMISSIBILITY OF SEVERAL ACTS OF A SERIES.

In an action for damages against one who obtained title to land by fraud, evidence of the fraudulent character of the different deeds under which the defendant obtained title was competent, where they were all parts of the same series of acts to effect the common object, to show the defendant's intent and aid in determining the true nature of the transaction.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 414, 414½; Dec. Dig. § 138.*]

6. DEEDS (§ 203*)—EVIDENCE—VALUE OF LAND TRANSFERRED.

Where mortgagee obtained an absolute deed to the premises from the mortgagor, the value of such land was competent evidence to show fraud.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 602, 604-611; Dec. Dig. § 203.*]

Appeal from Superior Court, Craven County; Foushee, Judge.

Action by Sherman Pritchard and others against I. H. Smith. From a judgment for plaintiffs, defendant appeals. No error.

This is a civil action brought by the plaintiffs, heirs at law of Benjamin Pritchard, deceased, to recover the sum of \$1,000 for the fraudulent purchase and subsequent sale of land, and for the cancellation of deeds alleged to have been fraudulently procured by the defendant from plaintiff's ancestor.

Benjamin Pritchard was an old and ignorant negro, who could not read or write. He had frequent dealings with the defendant in 1889 and in 1903; their relations in each instance being that of mortgagor and mortgagee. The defendant, as appears from his own testimony, is a money lender, and a man of intelligence and shrewdness, being far superior, in that respect, to Benjamin Pritchard. Benjamin Pritchard's land was advertised to be sold under a mortgage for \$90 to J. W. Stewart on April 22, 1903. On April 10, 1903, he executed a mortgage to Smith covering the same land. On the same day, after the execution of the mortgage, Benjamin Pritchard made a deed to defendant Smith for the same land. On April the 22d the land was sold under the Stewart mortgage and bought by Stewart's wife. On April 24th, two days later, Smith obtained from Stewart and wife a deed for the same land. On October 24, 1904, Benjamin Pritchard and wife executed to Smith a deed for 25 acres of land, which recited a consideration of \$100, which Smith said he paid for the dower right of the wife. This was a portion of the land covered by the deed from Stewart to Smith and by the mortgage and deed from Pritchard to Smith. Later, November 21, 1904, Benjamin Pritchard executed a mortgage to Mark Dissoway, covering this same land and containing a warranty against incumbrances. This mortgage was witnessed by S. F. Faison, Smith's confidential clerk, who had witnessed the mortgage of Pritchard to Smith on April 10, 1903, and the deed between the same parties on the same day. The note secured by the mortgage to Dissoway was indorsed by Smith, who afterwards paid it for Pritchard. Benjamin Pritchard died June 17, 1905, being about 70 years of age.

The mortgage from Pritchard to Smith, dated April 10, 1903, was probated on the evidence of the witness Faison, before the clerk of the court, on April 11, 1903; but it was not recorded until January 13, 1906, two years and nine months after its execution and nearly seven months after Pritchard's death. The deed executed the same day, covering the same land, was also probated April 11, 1903, before the clerk, on the evidence of the same witness. This deed was not recorded until January 15, 1909, five years after its execution and three years and six months after Pritchard's death. The defendant, in 1906, advertised the land for sale, under the power in the mortgage of April 10, 1903; but the sale was stopped by the attorney of one of the plaintiffs. Defendant conveyed the land to Lon M. Gilbert April 19, 1909, who

was a purchaser for value and without notice. The letters written by the defendant to the widow of Benjamin Pritchard, and other evidence, tended to show that the defendant claimed to hold the land as security for his debt. He demanded payment of the debt that she might save her land, and alluded to the other mortgage on the land, held by Dissoway. The letters to Pritchard and wife were written prior to the time that the land was advertised for sale by the defendant under his mortgage of April 10, 1903.

There was evidence by the defendant's witness that on April 10, 1903, after the mortgage of Pritchard to Smith was executed, Smith discovered that Stewart held a mortgage on the land and had advertised the land for sale, and thereupon requested Pritchard to cancel the mortgage and restore the money which he had received, which Pritchard declined to do, and it was then agreed that Pritchard should make an absolute deed for the land to Smith, which was done on that day, and the notes and mortgages given by Pritchard to Smith were then canceled; the consideration of this transaction being the surrender by Smith to Pritchard of certain personal property conveyed by the mortgage. There was evidence as to the amount advanced by Smith to Pritchard, from time to time, in the various transactions between them, covered by the notes, deeds, and mortgage, and also evidence that Smith had received payments from Pritchard by the collection of the latter's pension warrants. At the close of the evidence, the defendant moved to nonsuit the plaintiff. Motion denied, and defendant excepted. The court submitted to the jury an issue as to whether the deed for the land had been procured by the fraud of Smith, and as to the damages. The jury returned a verdict in favor of the plaintiff on both issues, and assessed the damages at \$170. The court charged the jury fully upon the question of fraud, and upon the issues as to the damages, but instructed them to ascertain how much had been advanced by the defendant to Benjamin Pritchard, and how much the defendant had received from him, and further to ascertain the value of the land and to deduct therefrom the amount, if any, due by Pritchard to Smith, and also the value of the interest of one of the heirs, which Smith had purchased, and other items mentioned in the charge, and strike the balance. Judgment was entered upon a verdict for the plaintiffs, and the defendant appealed.

R. W. Williamson, for appellant. H. C. Whitehurst and R. E. Whitehurst, for appellees.

WALKER, J. (after stating the facts as above). [1] The plaintiffs have elected, in this case, to sue for the value of the land or of their equity of redemption therein, instead of canceling the entire transactions which

culminated in the fraudulent acquisition of the title to the several tracts of land belonging to the ancestor, Benjamin Pritchard; but the settlement between the parties has been conducted, under the perfectly fair and benign charge of the learned judge, upon principles obtaining in chancery, where the jurisdiction exercised is more flexible and tolerant than it would be strictly at law. *Clements v. Nicholson*, 73 U. S. 299, 18 L. Ed. 786. Plaintiffs have acquiesced in this adjustment, and defendant certainly has no right of objection to it. It has the clear merit of being favorable and just to him and an exemplification of the advantage in the new procedure, under which the legal and equitable rights of litigants are more carefully guarded and enforced than under the former system. A close examination of the testimony in the case satisfies us that Benjamin Pritchard, at the time the deeds were executed, was enfeebled by old age and physical infirmities to such an extent that his mental faculties were greatly impaired, and he was not able to take care of his interests in any dealing with the defendant, and that the latter took advantage of his weakness and imbecility to effect an advantageous bargain for himself. He was evidently the master of the situation and held the will of his victim in complete subjection to his own. It further appears that the consideration for the deeds was not fair or adequate; the real value of the land far exceeding the outlay by Smith.

[2] It must be noted, also, that he held a mortgage with power of sale, executed by Pritchard to him, and stood therefore in a confidential relation toward Pritchard. By their verdict, the jury have found these facts, and others disclosed by the evidence, which show weakness and dependence on the one side, and shrewdness and unfettered domination on the other. "It is an established doctrine, founded on a great principle of public policy, that a conveyance obtained by one whose position gave him power and influence over the grantor, without proof of actual fraud, shall not stand at all, if without consideration, and that, where there has been a partial or inadequate consideration, it shall stand only as a security for the sum paid or advanced." *Bellamy v. Andrews*, 151 N. C. 256, 65 S. E. 963, citing the following cases: *Huguenin v. Basely*, 14 Vesey, Jr., 273; *Harvey v. Mount*, 8 Beavan, 487; *Dent v. Burnett*, 4 Myl. & Cr. 269; *Buffalow v. Buffalow*, 22 N. C. 241; *Mullins v. McCandless*, 57 N. C. 425; *Futrill v. Futrill*, 58 N. C. 64; *Id.*, 59 N. C. 337; *Franklin v. Ridenhour*, 58 N. C. 421. It has been said that a deed will be set aside on the ground of undue influence, which is a species of legal and moral fraud, only where the influence is such that the grantor has no free will, but stands in vinculis. *Conley v. Nailor*, 118 U. S. 127, 6 Sup. Ct. 1001, 80 L. Ed. 112. And this rule, if applied to

the facts of the case, would equally condemn the transactions assailed by the plaintiffs. But the defendant was mortgagee, with a power of sale, which added much to the power he held over his weak adversary. Approving what is stated in *Bigelow on Fraud*, p. 160, the court (by Justice Ruffin) said, in *McLeod v. Bullard*, 84 N. C. 516, that there are certain relations, termed *relations of confidence*, from the existence of which the law raises a presumption of fraud in any dealings that may take place between the parties, because of the undue advantage which the situation itself gives to one over the other. Of these "relations of confidence" he enumerates eight in number and in the following order: Attorney and client; principal and agent; partners; trustees and cestuis que trustent; guardian and ward; executors and administrators; mortgagor and mortgagee; parent and child. Thus he places the relation of mortgagor and mortgagee with the other well-defined and universally acknowledged *fiduciary relations*. Upon principle this should be so. It is due to good faith and common honesty that such a presumption should arise in every case where confidence is reposed and the property and interests of one person are committed to another. To every such person his trust should be a sacred charge, not to be regarded with a covetous eye. The court, in that case, adopted as a correct statement of the law the following language of Chief Justice Pearson in *Whitehurst v. Hellen*, 76 N. C. 99; "Courts of equity look with jealousy upon all dealings between trustees and cestuis que trustent; and, if the mortgagor had by deed released his equity of redemption to his mortgagee, we should have required the purchaser to take the burden of proof and satisfy us that the man whom he had in his power, manacled and fettered, had without undue influence and for a fair consideration released his right to redeem." The same principle was announced in *Lee v. Pearce*, 68 N. C. 76. The cases, therefore, have established this rule as to the fiduciary relation: "Where a mortgagee buys the equity of redemption of his mortgagor, the law presumes fraud, and the burden of proof is upon the mortgagee to show the bona fides of the transaction." *Jones v. Pullen*, 115 N. C. 465, 20 S. E. 624. It follows that when the defendant took a deed absolute for the property, on which, at the same time, he held a mortgage, there arose a presumption of fraud against him, which was evidence for the jury to consider in connection with the other circumstances, and the jury have found that the presumption has not been met by the defendant and the bona fides of the transaction shown, but that the very truth of the matter is in accordance with the presumption.

[3] The purchase by the defendant from the wife of Stewart, who sold under a prior

mortgage, does not help his case to the extent, as he contends, of vesting an unimpeachable title in him. It was held in *Taylor v. Heggie*, 83 N. C. 244, that a second mortgagee has no right to buy the estate of his mortgagor at a sale to satisfy a prior incumbrance, but he has a clear equity to be reimbursed for any expenditure, to relieve the estate of any incumbrances, and the property in his hands is charged therewith in preference to the trusts expressed in the mortgage deed. When defendant bought from the Stewarts, he only increased the indebtedness of Pritchard, the mortgagor, to him, by the amount of his payment to them for their interest, and acquired a lien upon the land for the additional amount so advanced. We find a felicitous statement of this doctrine in *Taylor v. Heggie*, supra, approving what is said by Judge Gaston in *Boyd v. Hawkins*, 37 N. C. 304: "We hold it to be clear," said Gaston, J., "that the defendant cannot take to himself the benefit of the purchase from Robards. A trustee, without the unequivocal assent of the cestui que trust, cannot act for his own benefit in a contract on the subject of the trust. It is established upon the soundest principles that, if he should so contract expressly for himself, he shall not be suffered to turn the speculation to his own advantage." While, then, the trustee is disabled from acquiring a paramount title in another to the trust estate for his personal advantage, and in disregard of the equitable interests of those represented by him, he has a clear right to reimbursement of the moneys expended in making the purchase or removing the incumbrance, and the estate in his hands is charged therewith in preference to the trusts expressed in the deed."

These principles fit into this case, when we recall the facts. Defendant took a mortgage on the land, subject to Stewart's prior mortgage. The same day he took an absolute deed for the property, upon the same consideration as expressed in his mortgage, with knowledge of the prior mortgage of Stewart and the fact that the latter had advertised the land for sale. He afterwards buys from the Stewarts and withholds all the deeds from registration until some time after Pritchard's death. He then buys other land from Pritchard and takes deeds therefor; there being evidence that the consideration for the several deeds was inadequate and for much less than the real value of the land. He offered the evidence of his confidential clerk to prove that the deed of April 10, 1903, to him was given with the understanding that he should surrender certain personal property belonging to Pritchard, upon which he had a lien, and cancel the mortgage of the same date, and yet in 1906 he has the mortgage registered and advertises the land for sale under it, and in

other ways he indicated by his conduct that he regarded the mortgage as still on foot and the relation of mortgagor and mortgagee as still subsisting. It is impossible to scan the evidence and not conclude from these facts, virtually uncontroverted, either that the defendant had practiced a fraud upon Pritchard by which he procured title to his land, or that he must be considered as still a mortgagee by his own words and conduct. Either view leads to substantially the same result and sustains the verdict and judgment, as to the cause of action.

[4] We have indicated that plaintiff could select to sue for damages at law, or proceed in equity to have the deed canceled. But it appears that the land had passed to a bona fide purchaser for value and without notice of the fraud, and in such a case it is clear that, as the plaintiff cannot recover the land in specie, he can have a money judgment for the loss caused by the defendant's fraud. *Sprinkle v. Wellborn*, 140 N. C. 163, 52 S. E. 666, 3 L. R. A. (N. S.) 174, 111 Am. St. Rep. 827. It was there said: "Wellborn having sold the land to a bona fide purchaser, and thereby deprived his vendor of the land itself, and having received the price, he must, by reason of his fraudulent disposition of property, which he is considered to have held in trust, and of its conversion into money, be held responsible for the amount of the consideration paid to him. The money in his hands stands for the land. *Wait, Fraud. Conv.* (3d Ed.) § 178; *Holland v. Anderson*, 38 Mo. 55; *Lawrence v. Bank*, 35 N. Y. 320; *Dilworth v. Carts*, 139 Ill. 508, 29 N. E. 861; *Hazen v. Bank*, 70 Vt. 543, 41 Atl. 1046, 67 Am. St. Rep. 680. But the administration of this relief is eminently proper under the reformed procedure, where the rights of parties are settled and determined in one action; the distinction between actions at law and suits in equity having been abolished. 1 Pom. Eq. Jur. § 242." The actual loss to plaintiff was ascertained upon equitable principles, all pertinent items having been brought into the account, leaving, therefore, no ground for complaint to the defendant.

[5, 6] The evidence as to the fraudulent character of the deeds, other than the mortgage, was clearly competent, as they were all but parts of one and the same series of acts to effect a common object. It was proper to consider all of them in order to arrive at the intent of the defendant and to determine the true nature of the transaction. *Gilmer v. Hanks*, 84 N. C. 317. The value of the lands was relevant evidence upon the question of fraud. There was no error in refusing the plaintiff's motion to nonsuit. This is a clear deduction from what we have already said in regard to the general question involved in this case.

No error.

(159 N. C. 542)

CITY OF NEW BERN v. ATLANTIC & N. C. RY. CO.

(Supreme Court of North Carolina. Sept. 18, 1912.)

RAILROADS (§ 75*)—MAINTENANCE OF CITY STREETS—CONTRACT OF FRANCHISE—"GOOD ORDER AND CONDITION."

A franchise by which a railway company obtained a right of way through a city street provided that such railroad would "keep and preserve in good order for the use of the citizens of the town" that particular street. *Held*, the obligation of the railroad will not be measured by the size and condition of the city at the time the contract was entered into, but by the new and improved methods of paving demanded by its growth and changing conditions, which must have been within the purview of the parties at the time of making the contract, so that the railroad must provide a permanent pavement, where it was necessary to provide the public with the same accommodations as were afforded by similar streets of the city (citing 4 Words & Phrases, 8125).

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 183-191; Dec. Dig. § 75.*]

Appeal from Superior Court, Craven County; Whedbee, Judge.

Injunction by the City of New Bern against the Atlantic & North Carolina Railway Company. From a judgment for plaintiff, defendant appealed. Affirmed.

The purpose of the action is to secure a mandatory injunction commanding the defendant to pave Hancock street in accordance with the terms of a written contract, entered into between the plaintiff and the defendant on the 12th day of April, 1856.

Moore & Dunn, for appellant. W. D. McIver and R. A. Nunn, for appellee.

BROWN, J. It appears in the statement of facts that, at the time this road was constructed, it was granted the franchise by the municipal authorities of New Bern, whereby it obtained the right of way for its railroad through Hancock street, with a right to construct its roadbed and run its cars thereon. The consideration of the franchise is expressed in the written contract entered into between the defendant and the municipal authorities as follows: "Said railroad company shall, under the supervision of the town authorities and their engineers or agents, grade said Hancock street and keep and preserve the same in good order for the use of the citizens of the town, except the sidewalks, and shall provide ample and convenient crossings of said railroad where the same may intersect any of the streets of the town, and build and construct all necessary aqueducts for the draining of said streets." It seems to be admitted that the decision of this case depends entirely upon the construction of this contract, and the determination as to what obligation the defendant assumed.

We are of opinion that, fairly construed under the terms of the said contract, in con-

sideration of the use of Hancock street as a right of way, granted to it by the city authorities, the defendant assumed and promised to perform in respect to said street, except the sidewalks, the obligations which the municipality owed to its citizens in respect to the keeping up of the street. This obligation is not to be measured by the size and condition of the city at the time when the contract was entered into. The increase of population and the consequent growth of the city must necessarily have been within the purview of the parties at the time the contract was made.

In a case very similar to the one at bar, the Supreme Court of Pennsylvania says: "The proposition that, because cobblestone was the kind of pavement ordinarily in use when defendant company was chartered, it is in no event bound to repave with any other and more expensive kind of material, etc., is wholly untenable. It cannot be entertained for a moment. It was never contemplated that the railway company would continue to exist and perform its corporate functions in a cobblestone age. It was called into being with the view of progress. The duties specified in its charter were imposed, with reference to the changes and improved methods of street paving, which experience might sanction as superior to and more economical than old methods. In other words, the company is bound to keep pace with the progress of the age in which it continues to exercise its corporate functions."

The phrase "keep and preserve in good order for the use of the citizens of the town" is to be construed with reference to the purpose to be accomplished, and to the character of the object to which the words apply. As has been said: "To keep the street in repair is to have it in such state as that the ordinary and expected travel of the locality may pass with reasonable ease and safety." *McMahon v. Railroad Company*, 75 N. Y. 236.

The Supreme Court of Massachusetts, in construing language very similar to that in the contract under consideration, says: "A provision in a charter of a toll bridge corporation that the bridge should at all times be kept in good, safe and passable repair, meant in such condition as befitted a public highway, and safe and convenient for all kinds of travel at all seasons and at all times, by day and night." *Commonwealth v. Central Bridge Corporation*, 12 Cush. (Mass.) 242, 244; 4 Words & Phrases, 3125.

The Supreme Court of Georgia, in *City of Atlanta v. Buchanan*, 76 Ga. 589, says: "'To keep,' applied to streets, sidewalks and bridges, might very reasonably include the idea expressed by the words 'to construct, to make,' especially when coupled with the words 'in a reasonably safe condition for travel.' To keep a street in such safe condition means to have it so, to make and re-

make it so, to construct that sort of bridge, and reconstruct it when rotten or out of repair."

But the defendant contends that, although it is obligated to preserve and keep Hancock street in good order, such obligation does not go to the extent of requiring it to pave the street, and the defendant cites a number of authorities in support of this contention. The defendant is confronted, however, in respect to this contention with an admission in the case agreed as follows: "It is further admitted that by reason of the increased travel over said Hancock street, and by reason of the growth of the city and increase of the traffic through its streets, it is impossible to keep and maintain the said Hancock street in good order as a dirt street, it being at the time of the execution of said contract a dirt street, and it has so remained up to this date; that, in order to insure the public a reasonable use of the same, it has become necessary that the same should be paved with some permanent material. It is also agreed that it has remained and been used as a dirt street from date of contract to this time."

In construing the language of an ordinance granting a franchise similar to this, the Supreme Court of Pennsylvania says: "That the franchise to occupy and the obligation to keep in repair are coextensive, and that whatever the duty of a municipality would have been in respect to the streets where the tracks are laid is now the duty of the railway company laying and using the tracks." *Philadelphia v. Railway Company*, 169 Pa. 270, 33 Atl. 126; *City of Atlanta v. Buchanan*, supra.

In a case somewhat similar, the Supreme Court of Minnesota says that this duty is a continuing one and has reference to future exigencies, and requires the railroad company from time to time to put the street in such condition as changed circumstances may render necessary for its proper enjoyment and use by the public. *Minneapolis v. Railway Company*, 35 Minn. 131, 28 N. W. 3, 59 Am. Rep. 313. In the opinion the learned Judge Mitchell goes on to say: "The condition of the street might be entirely adequate for the accommodation of the public under one condition of things, and entirely inadequate under another; and consequently a provision which at one juncture would be a discharge of this statutory duty would at another amount to its violation."

The learned counsel for the defendant has cited a number of authorities which apparently sustain his proposition that the defendant cannot be compelled to pave this street, but that its obligation is confined to keeping it in repair as a dirt street. While the cases appear on first view to be somewhat conflicting, yet all of the cases cited by the defendant seem to be founded upon the

leading case of *Chicago v. Sheldon*, 9 Wall. 50, 19 L. Ed. 594. An examination of that case discloses that the ordinance in question, by which the city of Chicago granted to the railway company the right to construct a railway, set out with minute particularity the duties which the railway company was to perform, and specified those duties as relating to the "grading, paving, macadamizing, filling, or planking of the streets or parts of the streets upon which they shall construct their railways."

The Supreme Court of the United States held that under the language of this ordinance the company could not be held liable for curbing, grading, and paving the streets with entirely new pavement, and that the obligation of the company extended to repairs only. We do not think the case is similar to the one under consideration. In our case the defendant has assumed an obligation to keep and preserve the street in good order for the use of the citizens of the town, except the sidewalks, and it is admitted in the case agreed that this obligation can only be kept in order to insure the public a reasonable use of Hancock street by paving it with some permanent material.

It is admitted that all the other streets of the city, with the exception of one, are paved with modern paving material, and that that street is not a very important street, and is paved with oyster shells. The public have the right to use Hancock street, and it is admitted that there is much passing and hauling upon it. Inasmuch as the defendant cannot keep it and preserve it in good order and condition as a dirt street so that the public may use it, we think its obligation can only be met by paving it with some substantial material.

The judgment of the superior court is affirmed.

(159 N. C. 612)

ELKS v. NORTH STATE LIFE INS. CO.

(Supreme Court of North Carolina. Sept. 25, 1912.)

1. CONTRACTS (§ 15*)—MEETING OF MINDS.

To create a valid contract, the minds of the parties must meet on a definite proposition.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 61-66; Dec. Dig. § 15.*]

2. CONTRACTS (§ 26*)—CONVERSATIONS AND CORRESPONDENCE.

Where an alleged contract is made by conversations and correspondence, the whole must be considered, and though parts, taken alone, appear to constitute a contract, yet if the whole shows that there were other terms contemplated by both parties as essential to the contract, on which they fail to agree, there is no contract.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 119, 120; Dec. Dig. § 26.*]

3. CONTRACTS (§ 32*)—REQUISITES—REDUCTION TO WRITING.

Where the minds of the parties meet on a proposition which is sufficiently definite to

be enforced, the contract is complete, though the parties contemplate it shall be reduced to writing; but where the parties are merely negotiating, and the writing is to be the contract, there is no contract until the writing is executed.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 159; Dec. Dig. § 32.*]

4. CONTRACTS (§ 16*)—OFFER—ACCEPTANCE.

Where an offer and acceptance are relied on to make a contract, the offer must be one which is intended of itself to create legal relations on acceptance; and the offer intended to create legal relations must be so complete that, on acceptance, an agreement containing all the necessary terms is formed.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 71-93; Dec. Dig. § 16.*]

5. CONTRACTS (§ 9*)—REQUISITES—DEFINITENESS.

Where the minds of the parties have met, and the terms have been agreed on, a contract, to be enforceable, must be definite and certain, or capable of being made so.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 10-20; Dec. Dig. § 9.*]

6. CONTRACTS (§ 9*)—REQUISITES—DEFINITENESS.

Plaintiff applied to an insurance company for a loan, to be evidenced by a note secured by a real estate mortgage. The finance committee of the company approved the application, and the attorney of the company, passing on the title, found it good. The terms of the loan were not agreed on. *Held*, that a contract to make a loan was not made.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 10-20; Dec. Dig. § 9.*]

Appeal from Superior Court, Pitt County; Foushee, Judge.

Action by J. L. Elks against the North State Life Insurance Company. From a judgment of nonsuit, plaintiff appeals. Affirmed.

This action is to recover damages for breach of an alleged contract to lend the plaintiff \$1,000. The plaintiff offered evidence tending to prove that he held a life policy in the defendant company, and that in 1910 he applied to the defendant to lend him \$1,000; that he told J. F. Stokes, an agent of the defendant, who had authority to solicit insurance and to collect premiums, but no authority to make loans or to take applications therefor, that he wanted some money, and that Stokes said he could get some; that most of the correspondence in reference to the loans was between the said Stokes and the defendant; that the security named for the loan by the plaintiff was a mortgage on real estate; that, before loans were made by the defendant, it was required by its by-laws that the title to the property offered as security should be passed on by its attorney, and the loan approved by its finance committee; that, prior to a written application for the money, the general manager of the defendant said to Stokes, in reference to the loan to the plaintiff, "Go, take his application, and get up his papers, and, if his security is all right, we will lend it to him right away;" that in a few days thereafter a written

application for the money and an abstract of the title to the real estate offered as security were forwarded to the defendant; that soon thereafter the said Stokes went to the home office of the defendant, and had a conversation with the president and general counsel of the defendant, whose duty it was to pass on the title, and asked him about the loan to the plaintiff, and he replied that he thought the loan was made; that the papers and everything left his office several days prior to that time, and all had been approved, and that the loan had been approved; that the said Stokes told the plaintiff of his conversation with the general manager and the president, but he was not directed to do so by either; that the plaintiff told the said Stokes that he wanted to pay some debts to rebuild his mill and to aid in cultivating his farm with the money, and that Stokes communicated this to the general manager; that by reason of his failure to get the money he was not able to pay his debts, and his credit was impaired, that his mill washed out, and the yield of his crops was decreased.

The application was not introduced in evidence, and there is nothing to indicate the terms of the loan, or the time when it was to be payable; nor is there any evidence that the plaintiff was not able to borrow the money elsewhere on the same security. There was much correspondence between the parties, and, soon after it closed, the plaintiff borrowed \$1,200 on the security offered to the defendant. The defendant, through its general manager, wrote the said Stokes the following letters in regard to the loan, the contents of which were communicated to the plaintiff; the parts of the letters not bearing on this controversy being omitted:

"Kinston, N. C., February 14, 1910.

"I have your favor of the 10th inst., inclosing abstracts of the Elks property, and write to say that I will push this through as rapidly as possible. Will turn it over to our finance committee to-day. If the security is all right—that is to say, satisfactory to them—I think we ought to be able to get it through within a week or ten days."

"Kinston, N. C., March 2, 1910.

"Replying to your favor of the 1st inst., concerning the Elks loan, I beg to say that the investigation and examination of title and preparation of papers, etc., has been about completed, I think. The fact is that I have been away from the home office so much that I have been unable to give it personal attention; and the further fact is that I have to leave to-night to attend Gaston court. I will not be able to return until the last of this week, and during the first two days of next week will be quite busy with the directors' meeting and the stockholders' meeting. Immediately after

that I will endeavor to get this matter closed up quickly, and think I can safely promise to do so."

"Kinston, N. C., June 24, 1910.

"Our executive committee has decided to grant Mr. Corey an extension to the 1st of December. This extension, and the extension of a much larger loan, which was to have been repaid, has made it out of the question for us to effect any new loans at the present time. However, I will say to you that we are endeavoring to be in shape to take care of the Elks matter in the not far distant future. It is impossible for me to tell you at just what time this can be done, but I assure you that it shall be done at the earliest possible moment. Regretting very much that there should ever have been any delay or misunderstanding about this matter, and with kindest regards and best wishes, I remain."

"Kinston, N. C., June 27, 1910.

"Now, as to your position with reference to the Elks matter, I beg to say that, while the income is exceedingly slim during the summer months, I shall watch it every day, and at the very first possible opportunity I shall see that the Elks matter is closed up and the money sent to him."

"Kinston, N. C., September 9, 1910.

"Replying to your favor of the 7th inst., in which you make inquiry as to whether or not we will be able to handle the Elks loan by October 1st, I beg to advise that it now appears impossible for us to do this by October 1st. Collections have been very dull during the summer, and so has business generally, while our outgo has been considerably larger than usual in every direction. As you say, collections are looking up very sharply now; but I have no idea they will be sufficient to justify me in promising to handle the Elks loan by October 1st. I wish I could do so. You can rest assured that both the Elks and the May loans will be taken up at the very first available opportunity—that is, so far as I am at liberty to make a promise in the matter."

"Kinston, N. C., November 2, 1910.

"Replying to your favor of 2d inst., in re loan to Mr. Elks, I am very sorry that I failed to write you promptly to the effect that our committee would not take any except regular action in this matter. You will recall that I promised you that, in so far as I could control the matter, the loan to Mr. Elks should be the first one made. That is as far as I can go now, except to express the hope that this matter will not have to 'hang fire' very much longer."

"Kinston, N. C., December 3, 1910.

"Replying to your favor of the 30th ult., in which you inclose abstract of title of lands of Mr. Z. T. Evans, I beg to say that I have submitted this and the Elks and May loan also, and am directed to say to you that the company will be compelled to

decline making these loans, because of expenditures that have been decided upon in connection with the extension of the company's business, and the Intermediate Department particularly."

At the conclusion of the evidence, his honor, being of opinion that the plaintiff had failed to prove a contract, entered a judgment of nonsuit, and the plaintiff excepted and appealed.

Julius Brown and S. J. Everett, both of Greenville, for appellant. Rouse & Land, of Kinston, for appellee.

ALLEN, J. This appeal presents one question for our decision, and that is whether the evidence introduced by the plaintiff, construed most favorably for him, establishes a contract between him and the defendant. Before considering the evidence, it is well to have in mind some of the elements that enter into a valid contract, so that we may see if the plaintiff has met the requirements of the law.

[1] It is elementary that it is necessary that the minds of the parties meet upon a definite proposition. "There is no contract unless the parties thereto assent, and they must assent to the same thing, in the same sense. A contract requires the assent of the parties to an agreement, and this agreement must be obligatory, and, as we have seen, the obligation must, in general, be mutual." 1 Pars. Cont. 475.

[2] If the alleged contract is made by conversations and correspondence, the whole must be considered; and although certain parts, taken alone, appear to constitute a binding agreement, if the whole correspondence and negotiations show that there were other terms contemplated by both parties as essential to the proposed contract, on which they fail to agree, there is no contract. *Hussey v. Horne-Payne*, 4 App. Cas. 312. The leading opinion in this case was written by Lord Cairns, and Lord Selborne, concurring, sums up the conclusion of the court as follows: "The observation has often been made that a contract established by letters may sometimes bind parties who, when they wrote those letters, did not imagine that they were finally settling the terms of the agreement by which they were to be bound; and it appears to me that no such contract ought to be held established, even by letters which would otherwise be sufficient for the purpose, if it is clear, upon the facts, that there were other conditions of the intended contract, beyond and besides those expressed in the letters, which were still in a state of negotiation only, and without the settlement of which the parties had no idea of concluding any agreement."

[3] If the minds of the parties meet upon a proposition, which is sufficiently definite to be enforced, the contract is complete, although it is in the contemplation of the

parties that it shall be reduced to writing as a memorial or evidence of the contract; but if it appears that the parties are merely negotiating to see if they can agree upon terms, and that the writing is to be the contract, then there is no contract until the writing is executed. *Winn v. Bull*, 7 Ch. D. 31; *Pratt v. Railroad*, 21 N. Y. 308; *Miss. Steam. Co. v. Swift*, 86 Me. 248, 29 Atl. 1063, 41 Am. St. Rep. 545; *Rankin v. Mitchem*, 141 N. C. 280, 53 S. E. 854. In the case from Maine, the authorities, English and American, are reviewed, and the court says: "From these expressions of courts and jurists, it is quite clear that after all the question is mainly one of intention. If the party sought to be charged intended to close a contract prior to the formal signing of a written draft, he will be bound by the contract actually made, though the signing of the written draft be omitted. If, on the other hand, such party neither had nor signified such an intention to close the contract until it was fully expressed in a written instrument and attested by signatures, then he will not be bound until the signatures are affixed. The expression of the idea may be attempted in other words; if the written draft is viewed by the parties merely as a convenient memorial or record of their previous contract, its absence does not affect the binding force of the contract; if, however, it is viewed as the consummation of the negotiation, there is no contract until the written draft is finally signed. In determining which view is entertained in any particular case, several circumstances may be helpful, as whether the contract is of that class which are usually found to be in writing, whether it is of such nature as to need a formal writing for its full expression, whether it has few or many details, whether the amount involved is large or small, whether it is a common or unusual contract, whether the negotiations themselves indicate that a written draft is contemplated as a final conclusion of the negotiations. If a written draft is proposed, suggested, or referred to, during the negotiations, it is some evidence that the parties intended it to be the final closing of the contract."

[4] Contracts are usually made by an offer by one party and an acceptance by the other, and it is in this way, the plaintiff contends, a contract was completed between him and the defendant. When an offer and acceptance are relied on to make a contract, "the offer must be one which is intended of itself to create legal relations on acceptance. It must not be an offer intended merely to open negotiations, which will ultimately result in a contract, or intended to call forth an offer in legal form from the party to whom it is addressed." 1 Page on Contracts, § 26. "The offer, even if intended to create legal relations, must be so com-

plete that, upon acceptance, an agreement is formed which contains all the terms necessary to determine whether the contract has been performed or not. An offer in which the price is not fixed, and yet is so specified that it is evidence that the parties did not intend merely whatever should be a reasonable compensation, is not definite enough." 1 Page on Contracts, § 27. "The offer must not merely be complete in terms, but the terms must be sufficiently definite to enable the court to determine ultimately whether the contract has been performed or not. If no breach of the contract could be assigned, which could be measured by any test of damages from the contract, it has been said to be too indefinite to be enforceable, and this vice is usually due to the form of the offer." 1 Page on Contracts, § 28. The same principle is declared in *Tanning Co. v. Telegraph Co.*, 143 N. C. 378, 55 S. E. 777, in which Justice Brown, speaking for the court, says: "The offer must be distinct as such, and not merely an invitation to enter into negotiations upon a certain basis. *Wire Works v. Sorrell*, 142 Mass. 442 [8 N. E. 332]; *Beaupre v. Telegraph Co.*, 21 Minn. 155; 24 Am. & Eng. Enc. 1029, and cases cited. Again, the offer must specify the specific quantity to be furnished, as a mere acceptance of an indefinite offer will not create a binding contract. *McCaw Mfg. Co. v. Felder*, 115 Ga. 408 [41 S. E. 664]; 24 Am. & Eng. Enc. 1030, note 1, and cases cited. 'The offer must be one which is intended of itself to create legal relations on acceptance. It must not be an offer merely to open negotiations, which will ultimately result in a contract.' 1 Page on Contracts, § 26, and cases cited; *Clark on Contracts*, § 29."

[5] If the minds of the parties have met, and the terms have been agreed to, it does not always follow that a contract is complete, and such a one as can be enforced, although not illegal, as the law demands that the terms shall be definite and certain, or capable of being made so. *Silverthorn v. Fowle*, 49 N. C. 363; *Spragins v. White*, 108 N. C. 453, 13 Pac. 171; *Thomas v. Shooting Club*, 123 N. C. 287, 31 S. E. 654; *Price v. Price*, 133 N. C. 515, 45 S. E. 855. In the first of these cases it was held that a contract to tow a raft of timber was void on account of indefiniteness, which provided that the raft was "to be ready when corn was done"; and in the last the court says: "That an agreement may be valid, it is necessary that the parties use language sufficiently clear for it to be understood with reasonable certainty what they mean; and if an agreement is so vague that it is not possible to gather from it the intention of the parties, it is void, for neither the court nor the jury can make an agreement for the parties." Having determined the elements entering into a completed contract under conditions existing between the

plaintiff and the defendant, let us see if the plaintiff has met the requirements of the law.

[8] We are of opinion he has not. (1) When all the evidence is considered, including the correspondence, it amounts to no more than negotiations for a contract, and the conduct of the plaintiff shows that he so understood it. He claims now that the finance committee of the defendant approved his application, and that this made the contract complete; but he made no such claim when the contents of the letters set out in the evidence were communicated to him. (2) No promise on the part of the defendant, express or implied, to lend the plaintiff \$1,000, is proven. The approval by the finance committee, if made, was not such. It is merely a safeguard adopted by the defendant as preliminary to a loan. The attorney passes upon the title, and the committee examines the security and the condition of the finances, and, if the reports of both are favorable, the defendant makes the loan. (3) The agreement, as contended for by the plaintiff, shows that the transaction was not completed, and that other terms were to be agreed to, or it is so indefinite that it cannot be enforced.

The plaintiff says he offered to borrow \$1,000 of the defendant, and that the defendant accepted his offer. It is agreed that a note and mortgage were to be executed by the plaintiff to consummate the contract; but he tendered neither to the defendant. The reason he did not is obvious. He did not know how to write the note and mortgage, and no lawyer could have prepared them, because stipulations necessary to a complete contract had not been discussed or agreed to, to wit, the time the loan was to run. It is certain the plaintiff did not intend to borrow \$1,000 payable one day after date, because he says he needed the money to use in payment of debts, in repairing a mill, and in cultivating crops, and, if not payable one day after date, when was it to be due? Suppose the defendant had said, "Prepare your note and mortgage, and I will lend you the money payable in two months," or three months, or six months, is it not certain that the plaintiff had the right to say, "I do not want the money on such short time, and have not promised to take it," and if the plaintiff had said the note must become due one year or two years from date, that the defendant could have declined to lend on such terms, because it had not promised to do so? If so, terms which were necessary to complete the contract had not been agreed to.

The right of action on contracts to lend money is considered in *Coles v. L. Co.*, 150 N. C. 188, 63 S. E. 736; but the discussion there is not material in this case, as the court was then dealing with the measure of damages, and not with the question whether a contract had been made. We are of opinion

that no contract has been established, and that the judgment of nonsuit was properly entered.

Affirmed.

(160 N. C. 1)

**WHITEHURST v. ATLANTIC COAST
LINE R. CO.**

(Supreme Court of North Carolina. Sept. 25, 1912.)

1. DEATH (§ 11*)—DEATH OF SERVANT—RIGHT OF PERSONAL REPRESENTATIVE TO SUE.

Where an employé died during the pendency of his action for injuries from his employer's negligence, his personal representative could sue for wrongful death from such injuries.

[Ed. Note.—For other cases, see *Death*, Cent. Dig. § 15; Dec. Dig. § 11.*]

2. MASTER AND SERVANT (§ 243*)—DEATH OF SERVANT—VIOLATION OF MASTER'S RULES.

That a servant was violating a rule of his employer, forbidding its station agents to ride on freight trains, at the time he was injured, would not prevent his personal representative from recovering for his death, where the rule was repeatedly broken by other station agents, with the knowledge of the defendant's conductors and trainmasters, as such rule will be considered abrogated and waived.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 682, 759-775; Dec. Dig. § 243.*]

Appeal from Superior Court, Pitt County; Foushee, Judge.

Action by J. R. Whitehurst, administrator, against the Atlantic Coast Line Railroad Company. From a judgment of nonsuit, plaintiff appeals. Reversed.

Julius Brown, of Greenville, and Ward, Grimes & Pierce, of Washington D. C., for appellant. Harry Skinner, of Greenville, for appellee.

CLARK, C. J. [1] The plaintiff's intestate began an action for injuries sustained by the negligence of the defendant. He died before the termination of that action, and, the complaint avers, as a result of said injuries. It was competent for his personal representative to bring this action for wrongful death. *Bolick v. R. R.*, 138 N. C. 372, 50 S. E. 689.

[2] There was evidence tending to show that the intestate was injured by the negligence of the defendant, in that the car was dangerous and antiquated, that the train was running at an unusually high rate of speed, and that the track was not in good condition. The defendant in its answer alleged that the plaintiff's intestate was riding on a freight train in violation of rules of the defendant. There was evidence that the plaintiff's intestate was assistant agent at Pactolus. The plaintiff offered evidence to show that other agents were repeatedly seen riding on the train, with the knowledge of the conductor or trainmaster, notwithstanding the allegation in the answer that it was contrary to the rules of

the company to permit any one to ride on such trains. This evidence was rejected by the court. In this there was error. In *Biles v. Railroad*, 139 N. C. 532, 52 S. E. 131, it is said: "When a rule has been violated so frequently and so openly and for such a length of time that the employers could, with the exercise of ordinary care, have observed its nonobservance, the rule is considered as waived and abrogated."

The nonsuit, we apprehend, was granted upon the ground that the plaintiffs' instigate was wrongfully on the train; but the above evidence, if admitted, would have tended to show that he was rightfully on the train, either as an employé or by permission of the conductor, and that it was the custom for conductors on said road to allow agents, assistant agents, and others to ride on freight trains. Indeed, this evidence was not contradicted, and, even if it had been against the rules of the company, there was no evidence of the fact, for the rule book was not introduced in evidence.

The judgment of nonsuit must be reversed.

(159 N. C. 628)

BRASWELL et al. v. PAMLICO INS. & BANKING CO. et al.

(Supreme Court of North Carolina. Sept. 25, 1912.)

1. CORPORATIONS (§ 320*)—ACTIONS AGAINST OFFICERS.

An action by a creditor or stockholder lies against officers, including directors, of a corporation, for losses resulting from their fraud or negligence, without first applying to the corporation to bring such action.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. §§ 1428-1439; Dec. Dig. § 320.*]

2. CORPORATIONS (§ 320*)—FRAUD OF OFFICERS—EVIDENCE—SUFFICIENCY.

Evidence held insufficient to show that officers of a corporation purchased and held stock in another corporation for their own personal ends and to the prejudice of their corporation.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. §§ 1426-1439; Dec. Dig. § 320.*]

3. CORPORATIONS (§ 310*)—DIRECTORS—LIABILITY TO CORPORATION.

Directors of a corporation are not liable for loss to the corporation resulting from honest mistakes made in the exercise of their authority, or for mistakes of subordinate officers; they being merely required to use reasonable care and business judgment.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. §§ 1352-1362; Dec. Dig. § 310.*]

Appeal from Superior Court, Edgecombe County; Carter, Judge.

Action by M. C. Braswell and others against the Pamlico Insurance & Banking Company and others. Judgment of nonsuit, and plaintiffs appeal. Affirmed.

Bunn & Spruill and Jacob Battle, all of Rocky Mount, for appellants. G. M. T. Fountain & Son and M. C. Staton, all of Tarboro, for appellees.

BROWN, J. Complaint in this case embodies several alleged causes of action, and asks for quite a variety of relief, and might strictly be regarded as multifarious. As the plaintiffs, however, have abandoned all their causes of action but one, it is not necessary that we should consider the character of the complaint, especially as no such point is made by the defendant. We merely advert to it, in order that it may not be regarded as a precedent.

[1] The cause of action upon which the plaintiffs now rely is founded in tort, and is based upon the allegation that the defendants Staton, Zoeller, and Cobb, officers and directors of the defendant bank, were guilty of fraud and negligence in the conduct of the business of the bank. It is settled that an action can be brought by a creditor or stockholder against the officers, including directors, of a corporation, for losses resulting from their fraud or negligence, without having first applied to the corporation to bring such action. *Soloman v. Bates*, 118 N. C. 311, 24 S. E. 478, 54 Am. St. Rep. 725; *White v. Kincaid*, 149 N. C. 415, 63 S. E. 109, 23 L. R. A. (N. S.) 1177, 128 Am. St. Rep. 663.

[2] In furtherance of this allegation, the plaintiffs offer to submit these issues: (1) Did the defendant corporation, under the control of the individual defendants, purchase, or continue to hold, the 175 shares of Tarboro Cotton Factory stock for their own personal ends and to the prejudice of the corporation? (2) If so, what damage has the corporation sustained? We are of opinion, upon a review of the evidence, that his honor properly sustained the motion to nonsuit. It appears that the defendants were stockholders in the Tarboro Cotton Factory, owning 150 shares together, and that the defendant bank owned 175 shares, which had been hypothecated by one Nash as collateral security for a debt of \$12,000, upon which he had made default in payment. It also appears that the bank had acquired this stock in consideration of said debt, and that at the stockholders' meeting of the Cotton Factory this stock was generally voted by Mr. Cobb as cashier of the bank, who voted uniformly with the Statons, and they could not control the policy of the Factory without voting the shares of the bank. It appears, furthermore, that the Tarboro Cotton Factory owed the bank \$35,000.

It is contended that the defendants refused to sell these shares to H. C. Bridgers, because they desired to retain them in order to protect their individual interests in the Cotton Factory, and that in so doing they were guilty of a fraud. We are unable to see anything in the evidence to support such contention. Bridgers was endeavoring to get sole control of the Cotton Factory. He testifies that he approach-

ed Cobb with a view to buying the bank's shares, and asked him to name a figure at which they would sell their holdings, and that Cobb replied that he would not name a figure, unless Bridgers would agree to take the holdings of all the Statons in addition. Bridgers does not say that he made Cobb any offer, but only asked him to name a figure. He states, however, that he was willing to pay par for the stock at that time. There is no evidence that Bridgers ever made a definite proposition to the board of directors to purchase the stock, and there is nothing to warrant the assumption that the directors were actuated by any sinister purpose.

[3] Inasmuch as the Cotton Factory owed the bank \$35,000, the directors may have thought that it was the part of wisdom to retain control of the management of the Factory, and not to put it absolutely in the hands of Bridgers. We see nothing in this which suggests a fraudulent purpose or a negligent disregard of the interests of the bank. Assuming that the sequel showed that the directors made a mistake, they are not infallible, and are not held liable for honest mistakes made in the exercise of their authority. 2 Cook on Corporations, pp. 2071, 2072. Directors of corporations are not guarantors that they will make no mistakes in the management of the corporate business. They do not insure the corporation against loss arising either from their own honest mistakes, or from the mistakes of subordinate officers. They are required to exercise reasonable care and business judgment, but nothing further than this. They generally serve without pay, and usually by reason of their interest in the company have a direct concern in its welfare. The law requires them to do no more than exercise ordinary diligence, intelligence, and judgment in the management of the corporate business. *Briggs v. Spaulding*, 141 U. S. 132, 11 Sup. Ct. 924, 35 L. Ed. 662; 3 Cook on Corporations, § 703; *Soloman v. Bates*, supra.

The judgment of the superior court is affirmed.

(11 Ga. App. 458)

MACINTYRE v. MASSEY. (No. 4,172.)
(Court of Appeals of Georgia. Sept. 17, 1912.)

(Syllabus by the Court.)

1. PARTNERSHIP (§§ 236, 239, 241*)—DISSOLUTION—LIABILITY OF RETIRING PARTNER.

After dissolution of a partnership by the retirement of one of the partners, the continuing partner has no power to bind the retiring partner by a new agreement, or, as to him, renew or continue a liability of the firm. In such case the retiring partner becomes a surety to his copartner as to the debts of the partnership before dissolution.

[Ed. Note.—For other cases, see *Partnership*, Cent. Dig. §§ 479½, 480, 484-488, 495-499; Dec. Dig. §§ 236, 239, 241.*]

2. PARTNERSHIP (§ 239*)—DISSOLUTION—LIABILITY OF RETIRING PARTNER—RELEASE.

A creditor of a partnership, with notice of its dissolution, and with notice of an agreement by the continuing partner to assume the debts of the partnership, is bound thereafter to accord to the retiring partner all the rights of a surety. If, without the knowledge or consent of the retiring partner, the creditor of the partnership, upon a sufficient consideration, extends the time of payment of the firm indebtedness, the retiring partner is released from the indebtedness, and the creditor must thereafter look only to the firm assets and to the individual assets of the continuing partner. The receipt from the continuing partner by the holder of the partnership note of any part of the principal of the note, or of any part of the interest in advance of the time when due, without the knowledge or consent of the retiring partner, as a consideration for an extension of the time of payment of the note would amount in law to a release of the latter's liability on the note.

[Ed. Note.—For other cases, see *Partnership*, Cent. Dig. §§ 495-499; Dec. Dig. § 239.*]

Error from City Court of Thomasville; W. H. Hammond, Judge.

Action by Mrs. S. A. Massey against W. I. MacIntyre and another. Judgment for plaintiff, and defendant MacIntyre brings error. Reversed.

Massey brought suit against Montgomery & MacIntyre, a firm composed of J. S. Montgomery, Jr., and W. I. MacIntyre, on a promissory note made in the firm name. Neither the copartnership nor Montgomery made any defense. MacIntyre filed a plea, in which he admitted the existence of the partnership prior to and up to January 15, 1910, but alleged that since that date there had been no such partnership, and that J. S. Montgomery, Jr., since that date had no authority to represent or bind him with reference to the said promissory note, and he denied that he was indebted to the plaintiff in any sum whatever. He alleged that he had never seen the note sued upon, but was informed that some such note was executed by J. S. Montgomery, Jr., in the manner described in the petition. He admitted the allegation as to notice with regard to the collection of attorney's fees. For further plea and answer he alleged that on January 15, 1910, the firm of Montgomery & MacIntyre was dissolved and the business sold to the Montgomery Drug Company, a corporation, which received the assets and assumed the liabilities of the copartnership; that the plaintiff knew of the sale and of the dissolution of the copartnership; that after the dissolution the plaintiff continued the said note unto J. S. Montgomery, Jr., or unto the Montgomery Drug Company, J. S. Montgomery, Jr., being president and managing officer, and the plaintiff collected payments on the note from J. S. Montgomery, Jr., or the Montgomery Drug Company, without the knowledge or consent of MacIntyre; that plaintiff renewed the note and extended the time of payment thereof, unto the said Montgomery or the Montgomery Drug Com-

pany, without the knowledge or consent of MacIntyre, thereby relieving MacIntyre from any liability on the note; and that neither MacIntyre nor any one for him has ever made any payment on the note or acknowledged any liability thereon. This plea was amended by alleging that "the Montgomery Drug Company undertook to perform its contract in the premises, and, through its president and manager, did pay interest in advance on said note, did place credits on the back of said note in writing, all of which was accepted by the plaintiff." A general demurrer to the plea as amended was sustained, and judgment was entered against the defendants for the amount sued for, and MacIntyre excepted.

W. C. Snodgrass, of Thomasville, for plaintiff in error. Fondren Mitchell, of Thomasville, for defendant in error.

HILL, C. J. (after stating the facts as above). [1] The only question raised by the record is as to whether or not the plea as amended set out a good defense. Section 3188 of the Civil Code of 1910 provides that, "after dissolution, a partner has no power to bind the firm by a new contract, or to revive one already for any cause extinct, nor to renew or continue an existing liability, nor change its dignity or its nature." In the case of *Preston v. Garrard*, 120 Ga. 689, 48 S. E. 118, 102 Am. St. Rep. 124, 1 Ann. Cas. 724, it is held: "Where a partnership is dissolved by the retirement of one of the partners, and the continuing partner agrees to assume the debts of the firm, the retiring partner becomes a surety for his copartner."

[2] "A creditor of the partnership, who has notice of the dissolution and of the agreement by the continuing partner to assume the debts, is bound thereafter to accord to the retiring partner all the rights of a surety. Hence if, without his knowledge or consent, the creditor, upon a sufficient consideration, extends the time of payment of the firm indebtedness, the retiring partner is released from the indebtedness, and the creditor must thereafter look only to the firm assets and to the individual assets of the continuing partner." Do the allegations of the plea as amended in the present case fall within the rule of law thus announced by the Supreme Court? There was no special demurrer filed to the allegations of the original plea, or the plea as amended, and in the absence of such special demurrer the general allegations contained in the plea and the amendments filed thereto must be accepted as sufficient. These allegations in substance are that, after the dissolution of the copartnership and the sale of its assets, the plaintiff, who was the payee and holder of the note sued upon, had continued the note unto J. S. Montgomery, Jr., or the Montgomery Drug Company, and had collected from Montgom-

ery payments of interest on the note in advance, and renewed and extended the time of payment of the note in consideration of the said payments, and that this was all done without the knowledge, authority, acquiescence, or consent of the defendant MacIntyre. It seems to us that these allegations are sufficient to bring the case within the principle of the decision above cited, as well as within the spirit of the Code section cited. The receipt of interest in advance, and the extension of the time of payment of the note, in consideration of such advance, would, if this was done without the knowledge of the retiring partner, relieve him from further liability on the note, and would relegate the payee, for further payment, to the partnership assets and the partner to whom the extension had been granted.

It is insisted by counsel representing the defendant in error that credits on the note, a copy of which is attached to the petition, show that only the interest due on the notes had been paid on the due dates. The dates when the credits were apparently entered upon the note would not be conclusive on that subject, and the defendant MacIntyre would be entitled to show that, notwithstanding these dates, the interest was nevertheless advanced. And, besides, he alleged that the time for payment of the principal of the note had been extended by the plaintiffs to the continuing partner, or to the successor of the partnership, without his knowledge or authority. If, on the trial, it appeared that the only payments that had been made on the note were simply the interest, and that this interest had only been paid when due, and that there was no agreement for any extension of time on account of the payment of interest, the defense on this ground would fail. But these were questions of fact, which were sufficiently put in issue by the plea, and should have been submitted to the jury, and we therefore think that the trial judge erred in striking the plea as amended.

Judgment reversed.

(11 Ga. App. 860)

WEBB v. STATE. (No. 3,785.)

(Court of Appeals of Georgia. May 7, 1912.
Rehearing Denied Sept. 20, 1912.)

(Syllabus by the Court.)

APPEAL AND ERROR (§ 1002*)—REVIEW—
QUESTIONS OF FACT.

There is evidence as to the identity of the accused which authorizes the conclusion reached by the jury, and this court is without jurisdiction to disturb their finding upon disputed issues of fact. None of the special assignments of error are of sufficient merit to warrant a reversal of the judgment refusing a new trial. It is not made to appear that any one of the matters of which complaint is made could have prejudiced the accused, or have contributed to the verdict against him. It is plain that the case depended entirely upon the identification of an assailant who was unknown to the prose-

cuting witness. The requests to charge, so far as appropriate, were sufficiently covered in the general charge, and, though the competency of some of the evidence admitted was prima facie doubtful, a review of the evidence as a whole shows that the statements to which objection were made can properly be considered as part of the res gestae of the transaction.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3935-3937; Dec. Dig. § 1002.*]

Error from Superior Court, Milton County; N. A. Morris, Judge.

L. K. Webb was convicted of crime, and brings error. Affirmed.

J. T. Howze, of Alpharetta, and Gober & Griffin, of Marietta, for plaintiff in error. J. P. Brooke, Sol. Gen., and G. B. Walker, both of Alpharetta, Howell Brooke, of Canton, and P. D. McClesky and J. Z. Foster, both of Marietta, for the State.

RUSSELL, J. Judgment affirmed.

POTTLE, J., not presiding.

(11 Ga. App. 477)

SOUTHERN RY. CO. v. PAYNE. (No. 3,172.)
(Court of Appeals of Georgia. Sept. 24, 1912.)

(Syllabus by the Court.)

MILITIA DISTRICTS—NOTARIES.

The Supreme Court having held, in response to questions certified to it by this court (Southern Ry. Co. v. Payne, 138 Ga. 18, 74 S. E. 697), that section 381 of the Civil Code of 1910 is not unconstitutional, for the reason that it is repugnant to article 6, § 8, par. 1, of the Constitution, and having further held that the commissioned notary public of a militia district which has been abolished may continue to discharge the functions of his office until the term for which he was appointed has expired, the affidavit of illegality in the present case was properly dismissed.

Error from Superior Court, Floyd County; J. W. Maddox, Judge.

Action by W. O. Payne against the Southern Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

For answers to questions certified to the Supreme Court, see 74 S. E. 697.

Geo. A. H. Harris & Son, of Rome, for plaintiff in error. C. I. Carey and Ennis & Shaw, all of Rome, for defendant in error.

RUSSELL, J. Judgment affirmed.

POTTLE, J., not presiding.

(11 Ga. App. 487)

A. F. GOSSETT & SON v. BISHOP.
(No. 3,728.)

(Court of Appeals of Georgia. Sept. 24, 1912.)

(Syllabus by the Court.)

AGRICULTURE (§ 7*)—FERTILIZERS—FAILURE TO REGISTER—ACTION FOR PRICE.

The evidence being undisputed that the plaintiff had not complied with the require-

ments of section 1774 of the Civil Code of 1910, relating to the registration of commercial fertilizers, before making the sale to the defendant, the verdict for the defendant was demanded, and the errors in the instruction to the jury, of which complaint is made in the amended motion for new trial, are immaterial. Penal Code 1910, § 643; Zipperer v. Doyle, 124 Ga. 895, 53 S. E. 505.

[Ed. Note.—For other cases, see Agriculture, Cent. Dig. §§ 13, 14; Dec. Dig. § 7.*]

Error from City Court of Zebulon; E. F. Dupree, Judge.

Action by A. F. Gossett & Son against H. G. Bishop. Judgment for defendant, and plaintiffs bring error. Affirmed.

E. M. Owen, of Zebulon, and Wm. H. Beck, of Griffin, for plaintiffs in error. J. Y. Allen, of Thomaston, for defendant in error.

RUSSELL, J. Judgment affirmed.

(11 Ga. App. 482)

R. L. MOSS & CO. v. POSTAL TELEGRAPH CABLE CO. (No. 3,591.)

(Court of Appeals of Georgia. Sept. 24, 1912.)

(Syllabus by the Court.)

APPEAL AND ERROR (§ 1195*)—LAW OF CASE.

In view of the decision of this court when the case was first before it (Postal Telegraph Cable Co. v. Moss, 5 Ga. App. 503, 63 S. E. 590), the trial judge did not err in directing a verdict for the defendant. The amendment offered on the second trial did not materially affect any feature of the case, and this case is fully within the principle of res judicata.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4661-4665; Dec. Dig. § 1195.*]

Error from City Court of Athens; H. S. West, Judge.

Action by R. L. Moss & Co. against the Postal Telegraph Cable Company. Judgment for defendant, and plaintiffs bring error. Affirmed.

T. S. Mell, of Athens, for plaintiffs in error. Anderson, Felder, Rountree & Wilson, of Atlanta, and Jno. J. Strickland, of Athens, for defendant in error.

RUSSELL, J. Judgment affirmed.

POTTLE, J., not presiding.

(11 Ga. App. 487)

ARNALL-COUCH-POWERS CO. v. NATIONAL DISCOUNT CO. (No. 3,724.)

(Court of Appeals of Georgia. Sept. 24, 1912.)

(Syllabus by the Court.)

SALES (§ 129*)—ENTIRE CONTRACT—RESCISION IN PART.

It appearing that the contract which was the basis of this suit was an entire contract, it devolved upon the defendant to either accept the contract as a whole or rescind it as a whole. He could not affirm the contract by accepting a part of the goods purchased, and

rescind it in part by rejecting another portion. For this reason, the verdict in favor of the plaintiff was demanded by the evidence.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 295; Dec. Dig. § 129.*]

Error from City Court of Newnan; W. A. Post, Judge.

Action by the National Discount Company against the Arnall-Couch-Powers Company. Judgment for plaintiff, and defendant brings error. Affirmed.

T. G. Farmer, Jr., and W. C. Wright, both of Newnan, for plaintiff in error. Hall & Jones, of Newnan, for defendant in error.

RUSSELL, J. Judgment affirmed.

(11 Ga. App. 473)

SPENCE DRUG CO. v. AMERICAN SODA FOUNTAIN CO. (No. 3,711.)

(Court of Appeals of Georgia. July 23, 1912. Rehearing Denied Sept. 20, 1912.)

(Syllabus by the Court.)

1. NO MATERIAL ERROR—VERDICT DEMANDED.

No material error of law appears, and the evidence demanded the verdict directed for the plaintiff.

(Additional Syllabus by Editorial Staff.)

2. SALES (§ 23*)—REQUISITES OF CONTRACT—OFFER AND ACCEPTANCE.

Where, upon receipt of a written order for a soda fountain, with an agreement by the purchaser to pay all setting-up, expenses stricken out, the seller wrote a letter accepting the order as per copy inclosed, though the copy did not have the agreement referred to stricken out, there was a completed contract; the seller having made no claim on the purchaser for setting-up expenses.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 44-48; Dec. Dig. § 23.*]

3. EVIDENCE (§ 441*)—PAROL EVIDENCE AFFECTING WRITINGS—SALES.

In an action for the price of a soda fountain sold upon written order, there was no error in refusing evidence of a parol agreement made by the seller's agent to take an old fountain as part payment.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2030-2047; Dec. Dig. § 441.*]

4. SALES (§ 359*)—REMEDIES OF PARTIES—EVIDENCE—FAILURE OF CONSIDERATION.

In an action for the price of goods sold, a plea of failure of consideration must be sustained by evidence not only of such failure, but of its extent.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1056-1059; Dec. Dig. § 359.*]

5. EVIDENCE (§ 441*)—PAROL EVIDENCE AFFECTING WRITINGS—SALES.

In an action for the price of a soda fountain sold upon written order, there was no error in excluding testimony that plaintiff had agreed to furnish an "iceless" soda fountain, and that the one furnished was not of that character; the written order having no such specification.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2030-2047; Dec. Dig. § 441.*]

Error from City Court of Camilla; H. C. Dasher, Judge.

Action by the American Soda Fountain Company against the Spence Drug Company. Judgment for plaintiff, and defendant brings error. Affirmed.

The American Soda Fountain Company brought trover against the Spence Drug Company, of Camilla, Ga., to recover a certain "Innovation soda water apparatus," and on the trial elected to take a verdict for the proved value of the apparatus, and a verdict was accordingly directed in its favor. The defendant's motion for a new trial was overruled. Besides the general grounds, the motion contains specific assignments of error as to the direction of the verdict and as to the admission and rejection of testimony. The defense originally relied upon was that the plaintiff had failed to carry out its contract, in that it had agreed to sell or take, as part of the purchase price for the new soda fountain apparatus, an old soda fountain of the defendant. The case went to trial on this defense alone, but by an amendment allowed at the trial the further defense of partial failure of consideration was set up.

The evidence for the plaintiff made in substance the following case: The Drug Company signed a written order, directed to the American Soda Fountain Company, for the purchase of one "special Innovation soda water apparatus" as therein described, specifying the price and terms. Across the face of the order was the following printed stipulation: "Price f. o. b. Boston. Freight to be paid by customer. This order is taken subject to the approval of the American Soda Fountain Company, Boston, Mass., and cannot be countermanded by the shipper[?]. There are no conditions or agreements with your salesman, except those herein stated, and no claim will be made by me for anything not specified herein. Plumbing cannot be either ordered or paid for by the American Soda Fountain Company." On December 23, 1909, the American Soda Fountain Company, referring to a letter of its agent inclosing this order, addressed the following letter to the Spence Drug Company: "Your contract for Innovation apparatus, as per copy inclosed, has been submitted by our salesman, Mr. George T. Smith, and the same is hereby accepted upon the terms and conditions specified." The copy referred to in the letter contained the following: "I agree to pay . . . all setting-up expenses and to insure said apparatus." But in the original contract, sued on and introduced in evidence, the words "all setting-up expenses" were stricken out. On February 10, 1910, the Soda Fountain Company wrote to the Drug Company as follows: "As per previous shipping notice, we are pleased to advise you that shipment of your Innovation outfit went forward on the 4th inst. Bill of lading cover-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes 75 S.E.—52

ing shipment is being forwarded to you under separate cover." The soda fountain arrived at Camilla, Ga., on or about February 10th, and the Drug Company notified the agents of the Soda Fountain Company of its reception. These agents immediately notified the Drug Company that they would send a mechanic to Camilla to install the fountain by the last of the week; and the mechanic did subsequently go to Camilla, and installed the fountain in the place pointed out by the Drug Company.

Previous to the arrival of the soda fountain at Camilla the Drug Company wrote the Soda Fountain Company that it wanted to cancel the contract, and stated in this letter that it would refuse to allow the soda fountain to be installed, unless the Soda Fountain Company would pay the freight bill of \$85.14, and deduct this amount from the "last series of notes" given to cover the deferred payments on the soda fountain, and added that settlement of the balance would be made according to contract. The Soda Fountain Company refused to permit the cancellation of the contract and insisted upon its performance according to its terms, one of which was that the order could not be countermanded. The salesman of the Soda Fountain Company, when notified of the refusal of the Drug Company to accept the fountain unless the freight was paid, agreed with the Drug Company that he would himself pay the freight bill. Then the Drug Company refused to accept the fountain unless the Soda Fountain Company would guarantee the sale of the old fountain. This refusal was made in a telegram sent to George T. Smith, the salesman of the Soda Fountain Company, who replied by telegram as follows: "This guaranty sale is a personal matter. No mention made in your contract to company." After receiving this reply, the Drug Company paid the freight and demurrage on the fountain and permitted its installation in its store by the agent of the Soda Fountain Company, who had been sent for that purpose by the seller. After the installation of the soda fountain, Smith, the salesman, endeavored to have the Drug Company comply with the stipulation of the contract as to payment of purchase price, to wit, 15 per cent. of the purchase price cash, and notes for the balance. The Drug Company refused to pay according to the terms of the contract, and thereupon Smith, in behalf of the Soda Fountain Company, demanded a return of the fountain; there being in the contract a reservation of title in the seller until payment of the purchase money. This demand was refused, and the Soda Fountain Company instituted the trover proceedings. The Drug Company refused to return the fountain. The evidence relating to the plea of partial failure of consideration will be referred to in the opinion, so far as material.

Pope & Bennet, of Albany, and E. M. Davis, of Camilla, for plaintiff in error. E. E. Cox, of Camilla, for defendant in error.

HILL, C. J. (after stating the facts as above). [2] 1. The Spence Drug Company in the first place, insisted that there was no completed contract, that the original order was a mere offer to contract, and that this offer had not been accepted as made, in that the American Soda Fountain Company had not accepted it with the words "all setting-up expenses" stricken out, and, therefore, that, the Spence Drug Company had the right to countermand the order before delivery of the soda fountain apparatus. Under the evidence we think the contract was completed. The copy of the order, attached to the letter, was simply a memorandum of the contract. No reference was made to any change, but the order as received was expressly accepted. The original contract, with the words "all setting-up expenses" stricken out, was the one sued upon and introduced in evidence. Besides, no claim was made upon the Spence Drug Company for any of the expenses connected with the installation of the fountain. The agent of the American Soda Fountain Company testified that these words were stricken out of the contract for the purpose of making it clear that the Spence Drug Company would not be called upon to pay the expenses of setting up the fountain. Performance by the plaintiff and the payment by it of the setting-up expenses prove clearly that the offer to buy was accepted as made. It follows, therefore, that the countermand was in direct conflict with the express stipulations of the contract, and could not avail. Even after the attempted countermand, the soda fountain was shipped to Camilla to the Spence Drug Company and was accepted by it. The shipping and installation of the fountain by the American Soda Fountain Company amounted to an acceptance of the order, and its acceptance of the fountain completed the contract and made the Drug Company liable for the price of the fountain as stipulated therein. *Harris v. Amoskeag Lumber Co.*, 97 Ga. 465, 25 S. E. 519; *Sheffield v. Whitfield*, 6 Ga. App. 765, 65 S. E. 807.

[3] 2. There was no error in refusing to allow the defendant to show by parol an agreement to take the old fountain as part payment. It is not contended that this proposition was made by the Soda Fountain Company, but it is claimed to have been made by its salesman. Not only was this an effort to vary the terms of the written contract, which expressly stipulated that the purchase price was so much cash and the balance in deferred payments, to be evidenced by notes, but it was also an effort to prove an agreement made with the agent of the Soda Fountain Company at variance

with the terms of that contract, wherein it was expressly stipulated that no agreement made by the agent, except as stated in the written contract, should be binding upon the Soda Fountain Company. Thus the contract put the Drug Company upon notice that the salesman did not have the right to bind the Soda Fountain Company by any promise in reference to the old fountain. But to show how groundless this defense is, the evidence does show that the salesman who made this promise had in fact complied with it, and had sold the old fountain for the Drug Company according to his agreement.

[4] 3. The defense of partial failure of consideration was not proved, except to the extent of \$25, which was allowed as a set-off in favor of the defendant. The witnesses introduced by the defendant for the purpose of supporting the plea of partial failure of consideration did state in general terms that there were certain defects in the installation of the fountain; but their testimony was not definite as to these defects, and they did not give any basis for a reduction of the purchase price on account of these defects. A plea of failure of consideration must be sustained by evidence showing, not only the failure of consideration, but the extent of the failure of consideration. The jury must have data presented by the evidence upon which to base a verdict sustaining a plea of this character. *Grier v. Enterprise Stone Co.*, 126 Ga. 17, 54 S. E. 806.

[5] 4. There was no error in excluding testimony to the effect that plaintiff had agreed to furnish an "iceless" soda fountain, and that the one furnished was not of this character. The fountain to be furnished was specifically described in the written contract, and it does not appear that it was to be "iceless." The effect of this testimony would be to vary the terms of the contract.

[1] We have carefully examined the numerous assignments of error contained in the amended motion for a new trial, and we fail to find any material error. The evidence demanded the verdict for the plaintiff as directed.

Judgment affirmed.

(11 Ga. App. 494)

JOHN v. THROWER. (No. 3,871.)

(Court of Appeals of Georgia. Sept. 24, 1912.)

(Syllabus by the Court.)

1. BROKERS (§ 40*) — COMPENSATION — CONTRACT OF EMPLOYMENT.

Under the evidence in this case, the broker, who sued to recover commission from the owner of the real estate, was apparently agent for the proposed purchaser, and not for the seller. The proposed purchaser of the real estate was not found by the broker in response to any request or desire of the owner of the real estate; but the broker, at the request of the proposed purchaser, submitted to the own-

er an offer, which the owner declined to accept. If, therefore, the broker was entitled to commission, it was from the proposed purchaser, and not from the seller.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. §§ 38-40; Dec. Dig. § 40.*]

2. BROKERS (§ 65*) — COMPENSATION — AGENCY FOR BOTH PARTIES.

Construing the evidence most favorably to the plaintiff, he assumed to be agent for both parties, and did not disclose to the defendant the fact that he represented the proposed purchaser. The existence of the undisclosed duality of agency is always a good defense against the payment of commissions. *Gann v. Zettler*, 3 Ga. App. 589, 60 S. E. 283.

The verdict in this case was without evidence to support it, and was therefore contrary to law, and a new trial should have been granted.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. §§ 48-50; Dec. Dig. § 65.*]

Error from City Court of Atlanta; H. M. Reid, Judge.

Action by M. L. Thrower against D. C. John. Judgment for plaintiff, and defendant brings error. Reversed.

Wimbish & Ellis, of Atlanta, for plaintiff in error. C. B. Reynolds, of Atlanta, for defendant in error.

RUSSELL, J. Judgment reversed.

(11 Ga. App. 497)

WEAVER MERCHANDISE CO. v. BRITT. (No. 3,895.)

(Court of Appeals of Georgia. Sept. 24, 1912.)

(Syllabus by the Court.)

APPEAL AND ERROR (§ 1094*) — REVIEW — OVERRULING CERTIORARI.

The evidence being conflicting, and no errors of law being assigned in the petition, the judgment of the superior court, overruling the certiorari, will not be disturbed.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4322-4352; Dec. Dig. § 1094.*]

Error from Superior Court, Upson County; R. T. Daniel, Judge.

Action between the Weaver Merchandise Company and A. A. Britt. From a judgment overruling a certiorari, the Merchandise Company brings error. Affirmed.

J. Y. Allen and Hugh Thurston, both of Thomaston, for plaintiff in error. W. Y. Allen, of Thomaston, for defendant in error.

RUSSELL, J. Judgment affirmed.

(11 Ga. App. 498)

PERRY v. INDEPENDENT DAUGHTERS OF BETHEL. (No. 3,907.)

(Court of Appeals of Georgia. Sept. 24, 1912.)

(Syllabus by the Court.)

1. APPEAL AND ERROR (§ 690*) — ASSIGNMENTS OF ERROR — SUFFICIENCY.

An assignment of error upon a ruling of the trial judge admitting documentary evidence cannot be considered by a reviewing court, when the evidence is not set forth in connec-

tion with the assignment of error in such a way as to enable the court to pass upon the questions sought to be raised.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2897-2899, 2902-2904, 2906, 2908; Dec. Dig. § 690.*]

2. SUFFICIENCY OF EVIDENCE.

The evidence demanded the verdict.

Error from City Court of Atlanta; H. M. Reid, Judge.

Action between the Independent Daughters of Bethel and Arren Perry. From the judgment, Perry brings error. Affirmed.

A. C. Corbett, of Atlanta, for plaintiff in error. Shepard Bryan, of Atlanta, for defendant in error.

RUSSELL, J. Judgment affirmed.

(11 Ga. App. 492)

CHARLESTON & W. C. RY. CO. v. ROBINSON. (No. 3,841.)

(Court of Appeals of Georgia. Sept. 24, 1912.)

(Syllabus by the Court.)

1. MASTER AND SERVANT (§ 227*)—INJURIES TO RAILROAD EMPLOYE—CONTRIBUTORY NEGLIGENCE.

Prior to the passage of the act of 1909 (Acts 1909, p. 160), relating to the liability of railroad companies for injuries to employes, the rule as to such liability was thus stated by the Supreme Court: "An employe cannot recover from a railroad company, if he is negligent and his negligence appreciably contributes to his injury." *Little v. Southern Ry. Co.*, 120 Ga. 347, 47 S. E. 953, 66 L. R. A. 509, 102 Am. St. Rep. 104. He could not recover if he "immediately or remotely, directly or indirectly, caused the injury, or any part of it, or contributed to it at all." *Prather v. R. & D. R. Co.*, 80 Ga. 427, 9 S. E. 530, 12 Am. St. Rep. 263; *W. & A. R. R. Co. v. Herndon*, 114 Ga. 168, 39 S. E. 911. Applying to the facts in the present case the principle laid down in these decisions, the petition should have been dismissed on general demurrer.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 668, 669, 672; Dec. Dig. § 227.*]

2. MASTER AND SERVANT (§ 224*)—INJURY TO RAILROAD EMPLOYE—CONTRIBUTORY NEGLIGENCE.

When an employe participates in the movement of standing cars in a railroad switchyard, so as to keep the tracks therein open for the passage of other engines and cars continuously and at all times, and such cars are moved and such track is left open for the passage of other cars, the employe is thereby put upon notice that such track may be so used, and of the danger of getting upon or near such track, where he might be hit by passing engines or cars, and if, shortly after the removal of such cars from such track, he stands upon or so near such track as to be hit by a passing engine, he cannot recover for the injury, which could have been avoided by the use of ordinary care and diligence.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 684-686, 706-709; Dec. Dig. § 224.*]

Error from City Court of Richmond County; W. F. Eve, Judge.

Action by Vander Robinson against the Charleston & Western Carolina Railway Company. Judgment for plaintiff, and defendant brings error. Reversed.

W. K. Miller, of Augusta, for plaintiff in error. Henry C. Roney, of Augusta, for defendant in error.

RUSSELL, J. Judgment reversed.

BUCK et al. v. DUVALL. (No. 3,793.) (Court of Appeals of Georgia. Sept. 24, 1912.)

(Syllabus by the Court.)

VENDOR AND PURCHASER (§ 208*)—REMEDIES OF PURCHASER—RECOVERY OF PURCHASE MONEY PAID.

This case is fully controlled by the decision rendered when the case was previously here. 9 Ga. App. 656, 72 S. E. 44. The defendant's answer failed to allege a rescission. The vendee under the bond for title, so far as appears from the answer, was entitled to cut and sell the timber, the value of which the defendants sought to set off against the plaintiff's demand for the purchase price. There could be no rescission, unless it had been alleged that the vendor notified the vendee of his purpose to rescind, and tendered him the amount he had previously paid. The vendor, holding the legal title, had the right to proceed against the vendee, the holder of the bond for title, and to recover the unpaid purchase price, by a sale of the premises under his judgment, or he could have recovered possession of the land in question by buying it in at the sale. In this event the vendor would have been discharged from any liability to repay the portion of the purchase price that he had received from the vendee, although he might have secured the property far below its value. But, having elected to totally disregard his bond for title and the rights of the purchaser thereunder, the sale effected by him must be treated as having been made by him as agent for the vendee, and he must account to the latter for the purchase price, less the amount due him by the vendee upon the purchase-money notes.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 424; Dec. Dig. § 208.*]

Error from City Court of Tifton; R. Eve, Judge.

Action by W. L. Duvall against E. A. Buck and another. Judgment for plaintiff, and defendants bring error. Affirmed.

L. P. Skeen, of Tifton, for plaintiffs in error. R. D. Smith and Fulwood & Murray, all of Tifton, for defendant in error.

RUSSELL, J. Judgment affirmed.

(11 Ga. App. 494)

MILLER v. MCKENZIE. (No. 3,859.) (Court of Appeals of Georgia. Sept. 24, 1912.)

(Syllabus by the Court.)

PLEDGES (§ 34*)—RECOVERY OF PROPERTY—RIGHT OF ACTION—TITLE OF PLAINTIFF.

The pledgee of collateral may maintain trover for its recovery. *Citizens' Bank v. Pea-*

cock, 103 Ga. 171, 29 S. E. 752. Under the testimony offered in behalf of the plaintiff, the jury would have been authorized to find that the title to the certificates of stock sued for had never passed out of the plaintiff, and that the defendant was not a bona fide holder of the collateral. It was therefore error to award a nonsuit.

[Ed. Note.—For other cases, see Pledges, Cent. Dig. § 90; Dec. Dig. § 34.*]

Error from City Court of Ashburn; R. L. Tipton, Judge.

Action by Henry Miller against G. C. McKenzie. Judgment for defendant, and plaintiff brings error. Reversed.

L. P. Skeen, of Tifton, and John B. Hutcheson, of Ashburn, for plaintiff in error. J. H. Pate and J. A. Comer, both of Ashburn, for defendant in error.

RUSSELL, J. Judgment reversed.

(11 Ga. App. 484)

WALDO v. CENTRAL OF GEORGIA RY. CO. (No. 3,605.)

(Court of Appeals of Georgia. Sept. 24, 1912.)

(Syllabus by the Court.)

MASTER AND SERVANT (§ 217*)—INJURIES TO SERVANT—ACTIONS—NONSUIT.

This being a suit brought by an employe's widow against the employer for the death of the employe, alleging defects in the employer's machinery which caused his injury, and it clearly appearing, by the undisputed evidence of the plaintiff's witnesses, that the defect complained of was actually known by the employe, and that, notwithstanding this knowledge, he assumed the risk of the defect, a nonsuit was properly awarded. Civil Code 1910, § 3131. Under the evidence, the plaintiff's husband, not only had the best opportunity of knowing the perilous position that he occupied at the time he lost his life, and a better opportunity than the master had, but, also, from the nature of his duties, as well as from his opportunity for knowing, he was charged with knowledge of the danger from the defect which caused his death. It was therefore not error to nonsuit. Civil Code 1910, § 3131. There is nothing in the evidence to show that this case falls within the decision of King v. S. A. L. Ry., 1 Ga. App. 88 (2), 58 S. E. 252.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 574-600; Dec. Dig. § 217.*]

Error from City Court of Savannah; Davis Freeman, Judge.

Action by Victoria Waldo against the Central of Georgia Railway Company. Judgment for defendant, and plaintiff brings error. Affirmed.

Twiggs & Gazan, of Savannah, for plaintiff in error. H. W. Johnson, of Savannah, for defendant in error.

RUSSELL, J. Judgment affirmed.

POTTLE, J., not presiding.

(11 Ga. App. 478)

MUTUAL FERTILIZER CO. v. HEATH.
(No. 3,549.)

(Court of Appeals of Georgia. Sept. 24, 1912.)

(Syllabus by the Court.)

APPEAL AND ERROR (§ 1002*)—TAKING CASE FROM JURY—DIRECTION OF VERDICT.

There being direct conflict in the evidence as to the material issue in the case, the issue should have been submitted to the jury, and the direction of a verdict was error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3935-3937; Dec. Dig. § 1002.*]

Error from City Court of Swainsboro; H. R. Daniel, Judge.

Action between the Mutual Fertilizer Company, for use, etc., and E. H. Heath. From the judgment, the Mutual Fertilizer Company brings error. Reversed.

Saffold & Larsen, of Swainsboro, for plaintiff in error. Williams & Bradley, of Swainsboro, for defendant in error.

RUSSELL, J. Judgment reversed.

POTTLE, J., not presiding.

(11 Ga. App. 478)

GAY v. MEDLOCK. (No. 3,554.)

(Court of Appeals of Georgia. Sept. 24, 1912.)

(Syllabus by the Court.)

SALES (§ 319*)—RIGHT OF ACTION—RIGHT TO POSSESSION.

This was an action in trover, and the evidence being undisputed that the plaintiff sold the horse which he sought to recover, and voluntarily parted with its possession after receiving the stipulated purchase price, it was not error to award a nonsuit. The plaintiff failed to show either title or right of possession, and either one or the other of these is essential to a recovery in trover. The fact that the plaintiff may have had a right of action, arising from a breach of the warranty of the title, as to the horse for which he swapped, would not entitle him to recover by trover the horse he traded; there being no evidence that the trade was rescinded.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 899-901; Dec. Dig. § 319.*]

Error from City Court of Swainsboro; H. R. Daniel, Judge.

Action by G. O. Gay against J. H. Medlock. Judgment for defendant, and plaintiff brings error. Affirmed.

Williams & Bradley, of Swainsboro, for plaintiff in error. Smith & Kirkland, of Swainsboro, for defendant in error.

RUSSELL, J. Judgment affirmed.

POTTLE, J., not presiding.

(11 Ga. App. 490)

ODOM v. COLEY et al. (No. 3,778.)
(Court of Appeals of Georgia. Sept. 24, 1912.)

(Syllabus by the Court.)

1. APPEAL AND ERROR (§ 227*)—OBJECTIONS TO BRIEF OF EVIDENCE.

The motion to dismiss the writ of error cannot be entertained, because there was no objection to the brief of evidence in the court below. "Where the judge has finally passed on the merits of a motion for a new trial, and parties have raised no question as to the sufficiency of the approval of the grounds of such motion, or of the approval of the brief of evidence, or of the filing of such motion or brief, * * * no question as to these matters shall be entertained by the reviewing courts unless first raised and insisted on before the trial judge." Acts 1911, p. 150, § 3.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 227.*]

2. NEW TRIAL (§ 71*)—SUFFICIENCY OF EVIDENCE.

Though there was conflict in the evidence as to the consideration of the note upon which the suit was brought, and as to whether the note in question had been paid, there was sufficient evidence to authorize the verdict of the jury; and it was therefore not error to refuse a new trial.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 144, 145; Dec. Dig. § 71.*]

Error from Superior Court, Gordon County; A. W. Flite, Judge.

Action between J. H. Coley and others, and J. W. Odom. From the judgment, Odom brings error. Affirmed.

Geo. A. Coffee, of Calhoun, for plaintiff in error. J. M. Lang, of Calhoun, for defendants in error.

RUSSELL, J. Judgment affirmed.

(11 Ga. App. 491)

DR. SHOOP FAMILY MEDICINE CO. v. CLIFFORD. (No. 3,819.)
(Court of Appeals of Georgia. Sept. 24, 1912.)

(Syllabus by the Court.)

EVIDENCE (§§ 448, 461*)—PAROL EVIDENCE AFFECTING WRITINGS—EXPLANATION OF AMBIGUOUS TERMS.

While parol evidence is inadmissible to alter or vary the terms of a written contract, still it is admissible for the purpose of explaining the true meaning of any portion of a written contract which is of itself unintelligible or ambiguous. The trial judge did not err in permitting evidence explanatory of what was meant by the stipulation in the present contract, under which the plaintiff agreed to furnish, in addition to the articles which were the subject-matter of purchase, "all advertising matter that goes with an order of this size." The superior court did not err in overruling the certiorari.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2066-2082, 2084, 2129-2133; Dec. Dig. §§ 448, 461.*]

Error from Superior Court, Columbia County; H. C. Hammond, Judge.

Action by the Dr. Shoop Family Medicine Company against C. J. Clifford. Judg-

ment for defendant, and plaintiff brings error. Affirmed.

Isaac S. Peebles, Jr., of Augusta, for plaintiff in error. Jno. T. West, of Thomson, for defendant in error.

RUSSELL, J. Judgment affirmed.

(11 Ga. App. 495)

JOHNSON & MURPHY et al. v. GLOBE DRY GOODS CO. et al. (No. 3,629.)
(Court of Appeals of Georgia. Sept. 24, 1912.)

(Syllabus by the Court.)

JUDGMENT (§ 314*)—AMENDMENT—GROUNDS.

Where it appeared from the record that the suit was filed 8 days after the maturity of the note sued on, and consequently that the plaintiff had not given and it was not possible to give the 10 days' notice required by law, to entitle him to recover for attorney's fees stipulated in the note, it was not error for the presiding judge, on proper motion at the same term in which a judgment by default had been rendered, in which attorney's fees had been included, to reopen the record and amend the judgment by default, so as to strike from it a recovery of attorney's fees. The decision is controlled by the ruling of this court in Mt. Vernon Bank v. Gibbs, 1 Ga. App. 665, 58 S. E. 269. Prior to the maturity of a note which provides for the payment of attorney's fees the right of the creditor to collect these fees is embryonic only. It can have no active existence until after the debtor fails to pay (after maturity of the contract and after notice), because prior to that energizing period the law denies it active life. The liability to pay attorney's fees upon a note is contingent upon the failure of the debtor to pay his obligation after 10 days' notice of an intention to sue is given him. Civil Code 1910, § 4252. The service of the 10 days' notice by the plaintiff clothes him with a right which he would not otherwise possess. Rylee v. Bank of Statham, 7 Ga. App. 500 (6), 67 S. E. 383.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 610-612; Dec. Dig. § 314.*]

Error from City Court of Waycross; T. A. Parker, Judge.

Action by Johnson & Murphy and others against the Globe Dry Goods Company and others. Judgment for defendants, and plaintiffs bring error. Affirmed.

Parks & Reed, of Waycross, for plaintiffs in error. Wilson, Bennett & Lambdin, of Waycross, for defendants in error.

RUSSELL, J. Judgment affirmed.

POTTLE, J., not presiding.

(11 Ga. App. 498)

COPLAN v. THOMPSON TRANSFER CO. (No. 3,755.)

(Court of Appeals of Georgia. Sept. 24, 1912.)

(Syllabus by the Court.)

PLEADING (§ 356*)—PLEA—WAIVER OF TORT.

The amendment to the plea was not objected to, and the plea as amended was practically a declaration of the defendant's election to waive the tort and to sue upon a breach of

contract. Civil Code, § 4407. The ruling of the court, therefore, in striking the plea on the ground that it was an effort to set off a tort against a suit arising ex contractu, and in thereafter directing a verdict, was erroneous. Even if the original action can be construed as set-off sounding in tort, the defendant had the right to waive the tort and sue upon the alleged breach of contract.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1111–1119; Dec. Dig. § 356.*]

Error from Superior Court, Polk County; Price Edwards, Judge.

Action by the Thompson Transfer Company against I. Coplan. Judgment for plaintiff, and defendant brings error. Reversed.

C. G. Janes and Bunn & Bunn, all of Cedartown, for plaintiff in error. W. W. Mundy, of Cedartown, for defendant in error.

RUSSELL, J. Judgment reversed.

(11 Ga. App. 464)

WILLINGHAM v. CEDARTOWN SUPPLY CO. (No. 4,213.)

(Court of Appeals of Georgia. Sept. 17, 1912.)

(Syllabus by the Court.)

APPEAL AND ERROR (§ 733*)—ASSIGNMENTS OF ERROR—JUDGMENT.

This was a suit on a promissory note, in which the plaintiff prayed for a general judgment against the defendant, and a special judgment against certain real estate, alleged to have been conveyed by him as security, for principal, interest, and attorney's fees as stipulated in the note. No defense was filed, and a judgment was entered by default, for principal, interest, and attorney's fees, and setting up a special lien on the described property. The bill of exceptions recites these facts, and makes the following assignment of error: "The defendant, W. B. Willingham, excepts to the said judgment, and assigns the same as error." A motion to dismiss the writ of error was made on the ground that there was no sufficient assignment of error. *Held*, under the repeated rulings of the Supreme Court, the motion must be granted. The language used is entirely too general. There are several things involved in the judgment rendered by the court below, and the assignment should be specific enough to clearly indicate the thing or things complained of. *Fidelity & Deposit Co. v. Anderson*, 102 Ga. 551, 28 S. E. 382, and cases cited; *Kimball v. Williams*, 108 Ga. 812, 33 S. E. 994; *Patterson v. Beck*, 133 Ga. 701, 66 S. E. 911, and cases cited.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3025–3027; Dec. Dig. § 733.*]

Error from City Court of Polk County; F. A. Irwin, Judge.

Action by the Cedartown Supply Company against W. B. Willingham. Judgment for plaintiff, and defendant brings error. Dismissed.

W. K. Fielder, of Cedartown, for plaintiff in error. W. W. Mundy, of Cedartown, for defendant in error.

HILL, C. J. Writ of error dismissed.

(11 Ga. App. 486)

MOUNTAIN CITY MILL CO. v. J. A. WOOD & CO. (No. 3,699.)

(Court of Appeals of Georgia. Sept. 24, 1912.)

(Syllabus by the Court.)

1. EVIDENCE (§ 460*)—PAROL EVIDENCE AFFECTING WRITINGS—EXPLANATION OF AMBIGUOUS TERMS.

Parol evidence is admissible to explain the meaning of terms of description arbitrarily used in a contract of purchase and sale, when, without such explanation, the contract would be unintelligible, or when the court would be unable to determine, without the aid of parol evidence, the nature or character of the subject-matter of the contract.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2115–2128; Dec. Dig. § 460.*]

2. APPEAL AND ERROR (§ 1066*) — REVIEW—HARMLESS ERROR—INSTRUCTIONS.

The evidence being undisputed that the defendant expressly warranted that the flour sold was of a given kind and quality, the error of the court, in misstating the contentions of the defendant as set forth in his plea, was immaterial and harmless.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4220; Dec. Dig. § 1066.*]

3. SALES (§ 442*)—BREACH OF WARRANTY—DAMAGES.

Where the seller warrants an article to be of a certain grade and quality, and the buyer claims a breach of this warranty in these respects, the vendor is liable to the purchaser, if the article is shown to be defective or damaged, for the difference between the contract price and the true market value of the subject of the purchase in its defective and damaged condition.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1284–1301; Dec. Dig. § 442.*]

4. NO MATERIAL ERROR — EVIDENCE SUFFICIENT.

No material error of law was committed, and the evidence authorized the verdict.

Error from City Court of Hartwell; W. L. Hodges, Judge.

Action by J. A. Wood & Co. against the Mountain City Mill Company. Judgment for plaintiffs, and defendant brings error. Affirmed.

A. G. & Julian McCurry, of Hartwell, for plaintiff in error. J. H. Skelton, of Hartwell, for defendants in error.

RUSSELL, J. Judgment affirmed.

(11 Ga. App. 499)

GEORGIA SOUTHERN & F. RY. CO. v. KNIGHT. (No. 3,760.)

(Court of Appeals of Georgia. Sept. 24, 1912.)

(Syllabus by the Court.)

1. CARRIERS (§ 92*)—DELIVERY BY CARRIER—EXCUSE FOR FAILURE TO DELIVER—LEVY OF PROCESS.

Ordinarily a common carrier who receives goods for shipment is not relieved from the duty of delivering them, unless prevented by "the act of God or the public enemies of the state." An exception to this rule is found where the carrier surrenders the goods in obedience to valid legal process, or such as is apparently valid; but the carrier is not relieved

from his duty to the shipper, even when he delivers a shipment in response to process, on demand of a levying officer, unless he has exercised due diligence to ascertain whether the process is in fact legal. *Morris Storage & Transfer Co. v. Wilkes*, 1 Ga. App. 751, 58 S. E. 232.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 343, 364-366; Dec. Dig. § 92.*]

2. CARRIERS (§ 92*)—DELIVERY BY CARRIER—EXCUSE FOR FAILURE TO DELIVER—LEVY OF PROCESS.

The goods were delivered to a common carrier for transportation, and an attachment was sued out for the purpose of seizing the goods. The affidavit and the attachment process were on a printed form, upon which also appeared a form for the bond required by law as a condition precedent for the issuance of the attachment; but the blanks in the bond had not been filled in, and no attachment bond had, in fact, been given. The record does not disclose that the agent of the carrier made any inquiry to ascertain whether or not the bond required by law had in fact been given. *Held*, that the carrier was lacking in diligence in failing to make inquiry to ascertain whether any bond had in fact been given. The attachment proceedings were absolutely void, and the carrier was not protected in surrendering the property to the levying officer. The case differs from that of *Southern Express Co. v. Sottile Bros.*, 134 Ga. 40, 67 S. E. 414, in that in that case the process was valid on its face, and the decision is authority only for the proposition that the carrier was not bound to know that the law was unconstitutional, until it had been judicially declared to be so.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 343, 364-366; Dec. Dig. § 92.*]

Error from City Court of Nashville; W. D. Buie, Judge.

Action by W. J. Knight against the Georgia Southern & Florida Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

John I. Hall, J. E. Hall, and M. P. Hall, all of Macon, and J. P. Knight, of Nashville, for plaintiff in error. Alexander & Gary, of Nashville, for defendant in error.

RUSSELL, J. Judgment affirmed.

(11 Ga. App. 483)

CITIZENS' BANK OF TIFTON v. FULWOOD & MURRAY. (No. 3,735.)

(Court of Appeals of Georgia. Sept. 24, 1912.)

(Syllabus by the Court.)

SUFFICIENCY OF EVIDENCE—NEW TRIAL PROPERLY REFUSED.

The controlling issue in this case being whether the employment of the attorney was joint on the part of the two banks, or where there were several undertakings of the attorney to represent each of said corporations in a proposed combination, which did not materialize, and there being evidence that the services were necessarily separate up to the time of the attempted consolidation, and that there was no contract of joint employment, the verdict is supported by the evidence. There being no error of law assigned, there was no error in refusing a new trial.

Error from City Court of Tifton; R. Eve, Judge.

Action between the Citizens' Bank of Tifton and Fulwood & Murray. From the judgment, the Bank brings error. Affirmed.

L. P. Skeen, of Tifton, for plaintiff in error. J. S. Ridgill, of Tifton, for defendants in error.

RUSSELL, J. Judgment affirmed.

(11 Ga. App. 479)

CARTER v. PEMBROKE NAT. BANK. (No. 3,578.)

(Court of Appeals of Georgia. Sept. 24, 1912.)

(Syllabus by the Court.)

PRINCIPAL AND AGENT (§ 22*)—EXISTENCE OF AGENCY—EVIDENCE—DECLARATIONS OF AGENT.

Agency cannot be proved by the mere declarations of a person purporting to act as agent for another; and one who deals with such a person is bound to inquire into his authority, or take the risk of ascertaining, when it is too late, that he was not authorized to bind the alleged principal. The evidence in this case fails to show, except by the declarations of the alleged agent, that he was authorized to sign the name of the alleged indorser to the note sued on.

[Ed. Note.—For other cases, see *Principal and Agent*, Cent. Dig. § 40; Dec. Dig. § 22.*]

Error from Superior Court, Bryan County; W. W. Sheppard, Judge.

Action by the Pembroke National Bank against Mattie R. Carter. Judgment for plaintiff, and defendant brings error. Reversed.

J. P. Dukes, of Pembroke, for plaintiff in error. E. C. Elmore, of Pembroke, and P. M. Anderson, of Claxton, for defendant in error.

RUSSELL, J. We think the judgment in this case is wrong for two reasons. In the first place it is apparent, from the testimony of all the officials of the bank, that the note sued on was given in lieu of one for which the bank looked to M. E. Carter for payment, and therefore any assumption of that debt by his wife could be repudiated by her at her option. In the next place, the evidence fails to support the verdict for a more serious reason. There is no proper evidence that Carter was authorized to indorse the note. In the evidence it is undisputed that the People's Supply Company was the name under which Mrs. Carter did business, and that she is a married woman. Granting that the officials of the bank knew, at the time that Carter indorsed the note in behalf of the People's Supply Company as its general manager, that Mrs. Carter was the People's Supply Company, still each person present knew that Carter was doing the signing. They knew that the note being executed represented no value or consideration to the People's Supply Company, whoever it might be, and therefore they were charged

with the duty of inquiring into the nature and extent of the authority under which Carter assumed to act. If in fact he had such authority, the note would be good. In the absence of express authority, the effort to have the People's Supply Company assume the debt of the M. E. Carter Company would be entirely abortive. Nothing is better settled than that agency cannot be proved by mere declarations of one who purports to be an agent. Suppose that A. B. desires to comply with the wishes of the officers of a bank, by renewing a note which represents his individual indebtedness to the bank. He goes to the bank, which is pressing him for renewal, and whose officers perhaps desire additional security, and tells them that he has power of attorney to sign the name of C. D., who is known by the bank to be a thoroughly solvent individual. The officers of the bank, charged with the conduct of the business, accept his statement that he has the authority to sign C. D.'s name, and, in exchange for his old note, accept a new note purporting to be indorsed by C. D., per A. B., as his agent. Will any one question that, in an action brought to recover upon the note, the plaintiff would be required to show, before he could recover against C. D. and subject his property to levy and sale, that A. B. was in fact duly authorized by C. D. to sign his name as an indorser? It is in this respect that we think the present plaintiff's case fails.

The jury, being the exclusive judges of the credibility of the witnesses, had the right to find that the bank did not know who composed the People's Supply Company, and did not know that "People's Supply Company" was merely the trade-name used by Mrs. Carter; that the bank did not know that Carter had no authority to indorse the note, and that it acted in perfect good faith. Concede, for the sake of the argument, that the jury had the right to find, from the evidence, that the M. E. Carter Company being a corporation, the original note (for which the note now involved was given in renewal) was not the debt of Mrs. Carter's husband, and that for that reason liability upon the note now before us did not involve an assumption of her husband's debt; still the plaintiff failed to make out its case, since it appears, from the uncontradicted evidence, that the only proof of Carter's agency (except an alleged admission of Mrs. Carter to which we will refer later) rests upon his declaration that he was agent for Mrs. Carter, doing business as the People's Supply Company. He denied even this, but we are bound to assume that he stated that he was authorized to indorse the note; for there was evidence to this effect, and the jury found this to be the truth of the transaction. Mrs. Carter's admission to the witness Mor-

gan that Carter had authority to sign for the People's Supply Company was coupled with the statement that Carter's authority was defined by a power of attorney, and there was no testimony that this instrument conferred upon Carter the right to bind Mrs. Carter for the pre-existing debts of the M. E. Carter Company or his own. The fact that Carter testified that he, as general manager of the People's Supply Company, was accustomed to transact business for his wife and sign notes for the People's Supply Company, promising payment for goods purchased by the People's Supply Company and for its benefit, would not authorize the inference that he was thereby authorized to pledge the credit of the People's Supply Company to secure debts of the M. E. Carter Company, or any debts other than those of the People's Supply Company itself. No reasonable man could infer that the scope of the agency extended so far. The Code expressly declares that it is the duty of those who are dealing with agents to inquire into the nature of the agency and the scope of the agent's authority; and when the Pembroke National Bank accepted the note involved in this suit, without inquiring of Mrs. Carter, or without being shown any written order or power of attorney, it assumed the risk of discovering later that there was no such binding authority. Civil Code, § 3595.

Judgment reversed.

POTTLE, J., not presiding.

(11 Ga. App. 452)

WRIGHTSVILLE & T. R. CO. v. MULLIS
(No. 3,595.)

(Court of Appeals of Georgia. Sept. 24, 1912.)

(Syllabus by the Court.)

RAILROADS (§ 454*)—OPERATION—INJURIES BY FIRE—INSTRUCTIONS.

The court did not err in the charge complained of. The evidence authorized the verdict, and there was no error in overruling the motion for a new trial.

(a) In charging the jury on the duty of a railroad company as to the use of appliances to prevent the setting out of fire by the operation of its engines, it is proper to instruct them that it is the duty of the railroad company to use "ordinary care and diligence to apply to its engines the best appliances in general use, the use of which is consistent with the practicable operation of its engines, and to use reasonable care and diligence in keeping same in good order." The words "in general use," etc., sufficiently qualify the words "best appliances," preceding them, to overcome the objection that the language used imposes too heavy a burden upon the defendant. The charge is in exact conformity with the ruling in *Southern Ry. Co. v. Thompson*, 129 Ga. 367 (7), 58 S. E. 1044.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1668-1671; Dec. Dig. § 454.*]

Error from City Court of Eastman; C. W. Griffin, Judge.

Action by Sarah Mullis against the Wrightsville & Tennille Railroad Company.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Judgment for plaintiff, and defendant brings error. Affirmed.

Daley & Daley, of Wrightsville, and Roberts & Smith, of Eastman, for plaintiff in error. J. A. Neese, of Eastman, for defendant in error.

RUSSELL, J. The plaintiff in error excepted to an amendment of the defendant's petition; but, as this exception is not mentioned in the brief of counsel, it will be treated as abandoned.

Complaint is made that the judge charged the jury that "it would be incumbent upon the defendant to show that it not only used an improved spark arrester, or other appliance for the prevention of fires, but that it used ordinary care and diligence to apply to its engines the best appliances in general use, the use of which is consistent with the practicable operation of its engines, and to use reasonable care and skill in keeping the same in good order." The exception to this charge is that it is not a correct statement of the law applicable to the issues involved, and placed upon the defendant the burden of rebutting the presumption against it by proof, not only of ordinary care and diligence, but also that it had equipped its engines with the best appliances in general use for the purpose of preventing fires, which charge is too stringent, and placed upon the defendant a burden not legally required. We do not think that the charge of the court, under the evidence in this case, imposed any hardship upon the defendant, or subjected it to any different burden than that which is placed there by law.

There was conflict in the evidence as to the origin of the fire which burned the plaintiff's property. Witnesses for the defendant company testified that there had been a fire in the woods for some time, and that this fire caused the injury of which the plaintiff complained; that the fire was not caused by sparks thrown out by the engine. On the other hand, the plaintiff introduced witnesses who testified that they saw the fire start from sparks thrown out by the engine as it passed. This testimony, if credited by the jury, cast upon the railroad company the burden of satisfying the jury that the company was not liable for the damage; that although the fire might have been occasioned by sparks from its engine, still there was no liability, because the company had provided itself with such appliances, and had so used them as that the casualty could not have been prevented if the trains were operated at all; in other words, that the prevention of the fire, under the circumstances, would have necessitated the total abandonment of its public duty by the common carrier.

The charge complained of follows literally the ruling in *Southern Ry. Co. v. Thompson*, 129 Ga. 367, 58 S. E. 1044; but, under the testimony in the present case, the in-

structions of the court as to the "best appliances" could not have been harmful, even if the law was different, because the defendant's witnesses who testified upon that subject both swore that the defendant had the very best appliances known to American master mechanics. And even if they had not so testified, to say that the company has the "best in general use" does not import that it is required to have the best that are made, or the best that have been discovered, but merely that in exercising due diligence the company has procured, as it should do in the exercise of even ordinary diligence, such appliances as are shown by experience and usage to be the best suited for the purpose intended. A charge that the company should show that it had provided itself with the "best appliances" would have been subject to the objection raised; but the words "in general use," etc., qualify this meaning, so that the requirement merely conforms to the rule of ordinary diligence.

The case at bar is distinguished from those of *Southern Railway Company v. Pace*, 114 Ga. 712, 40 S. E. 723, Gainesville, etc., R. Co., v. Edmondson, 101 Ga. 747, 29 S. E. 213, and *Southern Ry. Co. v. Myers*, 108 Ga. 165, 33 S. E. 917, in that in those cases, not only was the evidence of the fire wholly circumstantial but the great preponderance of the evidence tended to show, not only that the appliances were the best in general use, but that they were in proper condition and properly handled in the present case. While the evidence is undisputed that the appliances conformed to the law, the testimony as to the origin of the fire, given by the witnesses for the plaintiff, as well as other circumstances in the case, authorized the inference on the part of the jury that, although the company may have had the best appliances in general use, they were either not in good condition at the time of the fire, or that they were not properly handled at that time.

Judgment affirmed.

POTTLE, J., not presiding.

(11 Ga. App. 493)

CHARLESTON & W. C. RY. CO. v. BROWN.
(No. 3,842.)

(Court of Appeals of Georgia. Sept. 24, 1912.)

(Syllabus by the Court.)

MASTER AND SERVANT (§§ 210, 258*)—INJURIES TO SERVANT—ASSUMPTION OF RISK—PLEADING.

Two railway companies, hereinafter designated as company A and company B, were sued jointly for damages for personal injuries. The petition alleged substantially the following facts: The two companies maintain and operate a common railroad yard, through which two parallel tracks extend. Plaintiff was a flagman in the employment of company B, and at the time of his injury was standing between the two tracks and engaged in giving signals to the engineer in charge of an engine of company B. While he was thus

engaged, an engine of company A came along the parallel track, adjoining the one upon which the engine of company B was moving, and the plaintiff was struck by the running board of the engine of company A and injured. The allegations of negligence are that both companies were negligent in maintaining the parallel tracks too near together, and that the servants in charge of the engine of company A were guilty of negligence in using one of the parallel tracks at the time when the adjoining track was being used by company B, and in failing to give the plaintiff any warning or signal of the approach of the engine of company A. There was no allegation that the servants of company B, in charge of its engine, knew of the approach of the engine of company A and failed to warn the plaintiff thereof. The petition was dismissed as to company A, and the general demurrer of company B was overruled. *Held* that, even if it was negligence to maintain the two parallel tracks too close together, this was, relatively to company B, an assumed risk, and was not the proximate cause of plaintiff's injury. *Held*, further, that no actionable negligence was alleged against company B, and as to it the petition should have been dismissed on general demurrer.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 554-556, 816-836; Dec. Dig. §§ 210, 258.*]

Error from City Court of Richmond County; W. F. Eve, Judge.

Action by Edgar Brown against the Charleston & Western Carolina Railway Company and another. Judgment for plaintiff, and the Charleston & Western Carolina Railway Company brings error. Reversed.

W. K. Miller, of Augusta, for plaintiff in error. J. C. C. Black, Isaac S. Peebles, Jr., and C. H. & R. S. Cohen, all of Augusta, for defendant in error.

RUSSELL, J. Judgment reversed.

(11 Ga. App. 491)

STEPHENS v. BARNES.
(No. 3,783.)

(Court of Appeals of Georgia. Sept. 24, 1912.)

(Syllabus by the Court.)

1. JUSTICES OF THE PEACE (§ 205*)—REVIEW OF DECISIONS—CERTIORARI—DISMISSAL.

It was not error to dismiss the certiorari. Where the answer does not verify the allegations of error made in the petition, and no steps are taken to perfect the answer, the superior court can, of its own motion, dismiss the certiorari. *Southern Ry. Co. v. Leggett*, 117 Ga. 31, 43 S. E. 421. "Points made in the petition for certiorari, but not verified by the answer of the magistrate, are not properly before the court for decision." *Ridgway v. Bryant*, 8 Ga. App. 564 (3), 70 S. E. 28.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 793-799; Dec. Dig. § 205.*]

2. JUSTICES OF THE PEACE (§ 205*)—REVIEW OF DECISIONS—CERTIORARI—RECORD.

A certificate by the justice of the peace that "true copies of all the proceedings in said cause are herewith sent up" is not a verification of the correctness of the statements contained in the petition for certiorari. *Southern Ry. Co. v. Leggett*, supra.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 793-799; Dec. Dig. § 205.*]

Error from Superior Court, Richmond County; H. C. Hammond, Judge.

Action between Mrs. J. W. Stephens and A. J. Barnes. From a judgment dismissing certiorari, Mrs. Stephens brings error. Affirmed.

I. S. Peebles, Jr., and T. F. Harrison, both of Augusta, for plaintiff in error. J. S. Watkins, of Augusta, for defendant in error.

RUSSELL, J. Judgment affirmed.

(11 Ga. App. 498)

GEORGIA BROKERAGE CO. v. J. D. FRAZIER & CO. (No. 3,910.)

(Court of Appeals of Georgia. Sept. 24, 1912.)

TRIAL (§ 253*)—CHARGE—CONTENTIONS—CONTENTIONS OF PARTIES ON MATERIAL ISSUES.

Where, in an action for rebate on account of the damaged condition of corn shipped to plaintiffs, and also for an alleged shortage in weight, the rescission of the first contract of purchase and the making of a second contract were in issue, the court should have presented in its charge the contentions of each party thereon.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 613-623; Dec. Dig. § 253.*]

Error from Superior Court, Fulton County; W. D. Ellis, Judge.

Action by J. D. Frazier & Co. against the Georgia Brokerage Company. From a judgment for plaintiffs, defendant brings error. Reversed.

Payne, Little & Jones, of Atlanta, for plaintiff in error. Walter C. Hendrix, of Atlanta, for defendants in error.

RUSSELL, J. J. D. Frazier & Co. brought suit against the Georgia Brokerage Company to recover a certain sum, alleged to be a rebate allowed on a car of corn on account of its damaged condition and its failure to come up to sample, and to recover, also, for an alleged shortage in the weight of the corn. The defendant relied upon two defenses: (1) That the sale was made with the knowledge of the buyers that the defendant was acting therein simply as agent for other parties, and was not the seller; (2) that there was no guaranty of the quality of the corn. The plaintiff relied, for evidence of the guaranty, upon an agreement in reference to the corn, made, as the plaintiff contended, after the trade under the first contract had been rescinded. This rescission, and the existence of any second contract, was denied in toto by the defendant; and, under the evidence and the pleadings, this conflict presented a material issue in the case. As an inspection of the charge of the trial judge shows that the contention of the defendant as to this material point was not referred to, a new trial should have been granted. The contentions of both parties should be presented with equal fullness, and no material contention of either plaintiff or defendant should be omitted.

Judgment reversed.

(11 Ga. App. 497)

TRAYLOR v. EPPS. (No. 3,903.)

(Court of Appeals of Georgia. Sept. 24, 1912.)

*(Syllabus by the Court.)***1. EVIDENCE (§ 175*)—BEST AND SECONDARY EVIDENCE—RECORD OF JUDICIAL PROCEEDING.**

An original petition and order, filed in the superior court, was not admissible in evidence on the trial of a case in a city court, over the objection that a certified copy of such petition and order should have been introduced. *Whitaker v. State*, 11 Ga. App. —, 75 S. E. 259 (15).

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 561, 565, 568, 569; Dec. Dig. § 175.*]

2. EVIDENCE (§ 158*)—BEST AND SECONDARY EVIDENCE—RECORD OF JUDICIAL PROCEEDING.

The highest and best evidence that a named person is a duly authorized trustee in bankruptcy is a certified copy of the order approving the bond given by him as such trustee, and it is incompetent to prove by parol evidence that such a person is trustee in bankruptcy, over the objection that there is higher and better evidence.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 471-526; Dec. Dig. § 158.*]

3. EVIDENCE (§ 175*)—BEST AND SECONDARY EVIDENCE—RECORD OF JUDICIAL PROCEEDING.

The original minutes of a superior court are not admissible in the trial of an action in a city court over the objection that such minutes are not primary evidence. Civil Code 1910, § 5753.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 561, 565, 568, 569; Dec. Dig. § 175.*]

Error from City Court of Covington; W. H. Whaley, Judge.

Action between E. C. Traylor and C. C. Epps, Jr., receiver. From the judgment, Traylor brings error. Reversed.

Phil W. Davis, Jr., of Atlanta, for plaintiff in error. C. C. King, of Covington, for defendant in error.

RUSSELL, J. Judgment reversed.

(11 Ga. App. 487)

ROGERS v. NATIONAL CASH REGISTER CO. (No. 3,709.)

(Court of Appeals of Georgia. Sept. 24, 1912.)

*(Syllabus by the Court.)***APPEAL AND ERROR (§ 639*)—RECORD—BRIEF OF EVIDENCE.**

There being no bona fide attempt to make a brief of the evidence as required by law (the purported brief containing all the questions of counsel and the answers of witnesses in full, as well as the rulings of the court in extenso, and including colloquies between the court and counsel), and all the assignments of error being dependent, for their determination, upon a consideration of the evidence, in accordance with the ruling of the Supreme Court in *Whitaker v. State*, 138 Ga. 139, 75 S. E. 254 (see, also, *Whitaker v. State*, 11 Ga. App. 208, 213, 75 S. E. 258), the judgment of the lower court must be affirmed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2787; Dec. Dig. § 639.*]

Error from City Court of Atlanta; H. M. Reid, Judge.

Action between W. W. Rogers and the National Cash Register Company. From the judgment, Rogers brings error. Affirmed.

Morris Macks, Lamar Hill, J. H. & J. A. Dodgen, and Jackson & Smith, all of Atlanta, for plaintiff in error. W. S. Dillon and Anderson, Felder, Rountree & Wilson, all of Atlanta, for defendant in error.

RUSSELL, J. Judgment affirmed.

(11 Ga. App. 486)

EDERHEIMER, STEIN & CO. v. CARSON. (No. 3,683.)

(Court of Appeals of Georgia. Sept. 24, 1912.)

*(Syllabus by the Court.)***1. ESTOPPEL (§ 68*)—EQUITABLE ESTOPPEL—POSITION IN JUDICIAL PROCEEDING.**

This case is controlled in principle by the decision of this court in *Haber-Blum-Block Hat Co. v. Friesleben*, 5 Ga. App. 123, 62 S. E. 712. The defendant having invoked and obtained from the referee a ruling that the plaintiffs' claim was not provable in bankruptcy, and the plaintiffs having acquiesced in such ruling to their prejudice, the defendant is now estopped from assuming an inconsistent position, and from asserting that the plaintiffs cannot recover on account of the defendant's discharge in bankruptcy.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. §§ 165-169; Dec. Dig. § 68.*]

2. FORMER DECISION CONTROLLING.

As to the plaintiffs' right to recover, the decision is controlled by the ruling of this court in *Ederheimer, Stein & Co. v. Carson*, 7 Ga. App. 304, 66 S. E. 814.

Error from Superior Court, Tift County; W. E. Thomas, Judge.

Action by Ederheimer, Stein & Co. against Keith Carson. Judgment for defendant, and plaintiffs bring error. Reversed.

J. B. Murrow, of Tifton, and J. F. Murray, of Nashville, for plaintiffs in error. Fulwood & Skeen and R. D. Smith, all of Tifton, for defendant in error.

RUSSELL, J. Judgment reversed.

(11 Ga. App. 501)

SOUTHERN TOBACCO CO. v. ARMSTRONG. (No. 4,234.)

(Court of Appeals of Georgia. Sept. 24, 1912.)

*(Syllabus by the Court.)***1. CORPORATIONS (§ 80*)—STOCK—RECOVERY OF SUBSCRIPTIONS.**

An insolvent corporation cannot enforce payment of a stock subscription from one who was induced by the fraud of the authorized agent of the corporation to make the subscription, if the subscriber was not guilty of laches in discovering the fraud, did not in any manner waive the fraud, and within a reasonable time after the discovery of the fraud repudiated his subscription contract before the corporation

became insolvent and the rights of bona fide creditors had intervened.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 244-265; Dec. Dig. § 80.*]

2. CORPORATIONS (§ 80*)—STOCK—RECOVERY OF SUBSCRIPTIONS.

Where a stock subscription has been induced by fraud, it is not necessary, in order to prevent rescission of the contract, that insolvency proceedings be actually instituted, or some act of insolvency be committed by the corporation; but where the effect of the rescission would be to diminish the security of the bona fide creditors of the corporation, becoming such after the contract of subscription had been made, the rescission will not be allowed. What fraud creates, justice will destroy, provided that in the destruction greater injustice is not done to innocent third persons.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 244-265; Dec. Dig. § 80.*]

3. CORPORATIONS (§ 80*)—STOCK—RECOVERY OF SUBSCRIPTIONS.

Where the president of a corporation, while holding an unrecorded mortgage covering the assets of the corporation, induces one, by falsely stating that there is no debt or lien against the corporation, to subscribe to its stock, he cannot be heard, when the subscriber discovers the fraud and endeavors to rescind his contract of stock subscription, to object to the rescission, on the ground that it would affect his rights as a creditor of the corporation. The rule is universal that no man can take advantage of his own wrong.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 244-265; Dec. Dig. § 80.*]

4. CORPORATIONS (§ 80*)—STOCK—RECOVERY OF SUBSCRIPTIONS.

Whether a subscriber to the stock of a corporation, who is endeavoring to rescind his subscription on account of fraud, has been guilty of laches in discovering the fraud, or delinquent in repudiating his subscription contract after discovering the fraud, or has waived his right to rescind after knowledge of the fraud, are all questions to be determined by the jury, under the facts of the particular case.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 244-265; Dec. Dig. § 80.*]

Error from City Court of Richmond County; W. F. Eve, Judge.

Action by the Southern Tobacco Company against James P. Armstrong. Judgment for defendant, and plaintiff brings error. Reversed.

This was a suit brought by the Southern Tobacco Company against James P. Armstrong on a promissory note for \$3,750. The note was given by Armstrong in part payment for 50 shares of the capital stock of the Southern Tobacco Company; he having paid for the stock \$1,250 in cash in addition to the note. The defendant resisted payment of the note, on the ground that his subscription was procured by false and fraudulent representations, made to him by the president and the secretary of the corporation; the specific representations being that the total liability of the corporation consisted of preferred capital stock amounting to \$250,000, and common stock amounting to \$100,000, and that other than this stock liability the corporation had no lia-

bilities of any character. He alleges that, relying upon the truth of the representations so made by the authorized agents of the corporation, he subscribed for and purchased 50 shares of the preferred stock of the corporation, paying therefor on account the sum of \$1,250, and executed the note sued on for the balance; that before the note matured he discovered that the representations made by the president and secretary of the company to him to induce him to buy the stock were false and fraudulent; that, while the president stated to him specifically that there were no liens or mortgages on the property, he, the president, held an unrecorded mortgage for \$150,000 against the company, payable to himself, which covered the entire assets of the company; that, if he had known of the existence of this mortgage, he would not have subscribed for the stock; and that the failure of the president to disclose to him the existence of the debt secured by the mortgage, when specifically asked in reference thereto by him, amounted to such fraud as would release him from all liability on the note. In his plea he asked judgment against the plaintiff corporation for the \$1,250 obtained from him through the perpetration of the fraud as set forth.

On the trial of the case the plaintiff amended his petition, by way of replication, by specifically denying all the allegations of fraud, and alleged that the defendant had been guilty of such laches in setting up the alleged fraud as would estop him from setting up that defense; also that after his subscription to the stock, and after the time he claims to have discovered the alleged fraud and misrepresentations, he ratified his subscription by continuing to act as a stockholder of the corporation; that subsequently to the giving of the note sued on, for the balance owing on subscription for the stock, the corporation created a large amount of debts, many of which were outstanding and unpaid, approximating as follows: Bonds, \$100,000; banks, \$10,388; other obligations, \$9,615; and that the assets owned by the corporation were not sufficient, when the stock subscription was made by the defendant, to pay this outstanding indebtedness, and the corporation was then, since, and now is, insolvent, and it was necessary, for the benefit of the creditors of the corporation, to collect the amount owed by the defendant on this note, and that even, therefore, if the allegations of the defendant as to fraud and misrepresentations, as set out in his answer, were true, it would amount to no legal defense to this suit.

The defendant offered testimony to prove that the corporation was insolvent at the time of the stock subscription and at the time suit was brought on the note; and this testimony was excluded by the court, on the ground that, as the suit was brought by the corporation, and not by its creditors, and as

the corporation was a going concern, such evidence was immaterial; that this defense could only be material in a suit brought by creditors of the corporation, either by an assignee or a receiver. Error is assigned as to this ruling. The jury returned a verdict for the defendant for \$1,250, and the plaintiff's motion for a new trial was overruled.

Wm. H. Barrett, of Augusta, for plaintiff in error. C. H. & R. S. Cohen, of Augusta, for defendant in error.

HILL, C. J. (after stating the facts as above). [1] The principal question raised by the record has been well settled by frequent adjudications, both in England and in this country. Mr Justice Lumpkin, in the recent case of *Gress v. Knight*, 135 Ga. 60, 68 S. E. 834, 31 L. R. A. (N. S.) 900, after reviewing different adjudications on the subject, and especially the decisions of the Supreme Court of this state relating thereto, lays down the following legal principles: (1) "As between a stockholder and the corporation, unless special circumstances alter the case, the general rule that contracts obtained by fraud may be avoided by the party defrauded applies to a stock subscription induced by the fraud of the company through its authorized agents; and so, likewise, where only the rights of other shareholders are affected, the company being solvent and a going concern." (2) "If a person subscribes for stock in a corporation, and thereupon the company proceeds to do business upon the basis of the stock subscribed, and incurs indebtedness, the subscriber cannot, after insolvency of the company and the appointment of a receiver, obtain relief on the ground of fraudulent representations of the agents of the company in securing his subscription, as against creditors thus obtaining rights, or a receiver representing them." (3) "Where a subscriber for stock in a corporation seeks to set aside the subscription on the ground of fraud in its procurement, after a receiver has been appointed for the company, in determining whether he can do so it is to be considered what length of time has elapsed since the subscription was made; whether the subscriber has actively participated in the management of the affairs of the corporation; whether there has been any lack of diligence on his part, either in discovering the fraud, or in taking steps to rescind after its discovery, and whether any considerable amount of corporate indebtedness has been created since the subscription was made, which remains outstanding and unpaid."

It will be seen, from Mr. Justice Lumpkin's résumé of the decisions, that all the cases cited by him were cases in which the proceedings were instituted against the stockholder in favor of creditors of the corporation. In each case the plaintiff was either a receiver, an assignee, or trustee, or the corporation

had ceased to be a going concern, or the subscriber had paid his money into the corporation treasury, and subsequently brought suit to recover the money so paid in on the ground that it was procured from him by fraudulent representations made by authorized agents of the corporation. It may be stated, then, as a well-settled principle, founded in equity, justice, and law, that where the suit is between the corporation and a subscribing stockholder, and no invasion of rights of creditors is involved, the defense of fraud would be a good defense to recovery on a note given for the stock subscription; but where the rights of creditors are involved, and debts have been incurred by the corporation after the subscription, and on the faith of the subscription credit has been extended to the corporation, that as against such creditors the defense of fraud would not be good.

[2] This leaves in the present case only one general question to be decided, which is not fully controlled by the decision of the Supreme Court in *Gress v. Knight*, supra; and this question is as to the meaning of the term "insolvency of the corporation." It will be noted that in that decision Mr. Justice Lumpkin states the proposition that a subscriber cannot, after the insolvency of the company and the appointment of a receiver, obtain relief on the ground of fraudulent representations of the agents of the company in securing his subscription, as against creditors thus obtaining rights, or a receiver representing them. The question is: Can a subscriber obtain relief on the ground of fraud, although the corporation may be in debt, where no insolvency proceeding of any kind has been instituted against it, and where the corporation is still a going concern? In the case of *Newton National Bank v. Newbegin*, decided by the United States Circuit Court of Appeals of the Eighth Circuit, and reported in 74 Fed. 135, 20 C. C. A. 339, 33 L. R. A. 727, the learned judge uses the following language in discussing this subject: "There are obvious reasons why a shareholder of a corporation should not be released from his subscription to its capital stock after the insolvency of the company, and particularly after a proceeding has been inaugurated to liquidate its affairs, unless the case is one in which the stockholder has exercised due diligence, and in which no facts exist upon which corporate creditors can reasonably predicate an estoppel. When a corporation becomes bankrupt, the temptation to lay aside the garb of stockholder, on one pretense or another, and to assume the role of a creditor, is very strong, and all attempts of that kind should be viewed with suspicion. If a considerable period of time has elapsed since the subscription was made, if the subscriber has actively participated in the management of the affairs of the corporation, if there has

been any want of diligence on the part of the stockholder, either in discovering the alleged fraud, or in taking steps to rescind when the fraud was discovered, and, above all, if any considerable amount of corporate indebtedness has been created since the subscription was made, which is outstanding and unpaid, in all of these cases the right to rescind should be denied, where the attempt is not made until the corporation becomes insolvent. But if none of these conditions exist, and the proof of the alleged fraud is clear, we think that a stockholder should be permitted to rescind his subscription as well after as before the company ceases to be a going concern." See, also, *Hinkley v. Sac Oil & Pipe Line Co.*, 132 Iowa, 396, 107 N. W. 629, 119 Am. St. Rep. 564; *Fear v. Bartlett*, 81 Md. 435, 32 Atl. 322, 33 L. R. A. 723. In the case of *Fear v. Bartlett*, supra, it was held that the doctrine that unpaid subscriptions to the capital stock of a corporation were a trust fund for the creditors has no application until the corporation becomes insolvent, and in the course of the opinion the learned judge said that the right to rescind may be exercised (assuming diligence) unless "proceedings of insolvency, voluntary or involuntary, have been instituted, or some act done that in law is regarded as an act of insolvency." Not until then does the entire property of the corporation, including unpaid subscriptions to its capital stock, become a trust fund for the payment of its debts, and not until then are the creditors entitled to the payment of their debts before there can be any distribution among the stockholders.

Unquestionably the rule is the same in England as in America, that a stockholder cannot, after bankruptcy or insolvency, rescind his subscription for fraud. 10 Cyc. 441. Can a subscriber rescind for fraud if the fact of insolvency exists, where no proceedings of insolvency have begun, or payment of debts of the corporation has not been stopped by reason of its insolvency? While some of the decisions which we have just cited seem to indicate that this cannot be done, yet we are inclined to the view that the sounder rule is that wherever a corporation incurs debts after the subscription to the capital stock has been made, and the fact of insolvency, by reason of these debts, exists, the right of the creditor would be superior in dignity to the right of a subscriber to rescind for fraud. Indeed, some authorities go to the extent of holding that where the debts of the corporation, even though it is a going concern, exceeded the amount of the subscription, the defrauded stockholder cannot rescind. This seems to be the decision of the Supreme Court of Georgia in *Turner v. Grangers' Insurance Co.*, 65 Ga. 649, 39 Am. Rep. 801, where it is expressly held that, though a subscription to stock may have been induced by fraud, the subscriber could not recover the amount paid, if there

were debts contracted after his subscription. The underlying principle for the rule here discussed is that creditors of corporations have superior rights to the assets of the corporation, including its capital stock; and as expressed by Mr. Morawetz, in his admirable work: "It has been settled that, if a corporation is insolvent, a shareholder whose contract of subscription was obtained by fraud of the company's agents cannot diminish the security of bona fide creditors by rescinding his contract to contribute to the amount of capital stock subscribed to by him." Morawetz on Private Corporations (2d Ed.) § 595. And see 1 Thompson on Corporations, § 737, and cases there cited.

On the trial of this case the plaintiff offered evidence to show that debts were incurred by the corporation subsequently to the defendant's subscription to the capital stock, and that these debts were still in existence, and that by reason thereof the corporation was insolvent, and that it was necessary to collect the subscription sued for and represented by the note, in order to pay these debts. The learned trial judge repelled this testimony, on the ground that the suit was by the corporation itself, and that there was no proof that when the subscription was made the corporation had ceased to be a going concern, and that, to constitute a bar to the rescission, suit should be brought by a creditor, through an assignee or receiver. In other words, he ruled out the testimony as to the fact of insolvency. We think the testimony was admissible, for we are clearly of the opinion that the sounder rule, as above indicated, is that, wherever the fact of insolvency exists, there can be no rescission for fraud; or, as expressed by Judge Lumpkin in *Gress v. Knight*, supra, as to creditors whose claims arose after the stockholders became such, their rights are superior to any rights of rescission. The reason for the rule is that, when a person subscribes to the capital stock of a corporation, he must be held to contemplate that the corporation shall incur debts and pledge its capital, including the liability of its members for unpaid capital, as security; that the creditors who in good faith trust the corporation upon the faith of this security stand in the position of innocent purchasers for value, to the extent of their equitable lien; and that it would be unjust to permit a shareholder to disaffirm his contract and refuse to pay his share of the capital stock after it had been thus pledged with his knowledge and consent to innocent third persons. 1 Thompson on Corporations, § 737. What fraud creates justice will destroy, provided that in the destruction greater injustice is not done to innocent third persons.

[3] It is insisted by learned counsel for defendant that the special facts of this case entitle him in equity and good conscience to rescind his contract of subscription and

to be paid back the amount of cash paid on his subscription, notwithstanding the rule as above stated. It is claimed that the corporation was rendered insolvent by reason of the existence of a debt of \$100,000, which was secured by a mortgage on all its assets, and that this mortgage was held by the authorized agent, to wit, the president of the corporation, who had induced him, by false representations of the company's solvency, to purchase the 50 shares of the company's capital stock; in other words, that the outstanding debts of the corporation were due to the very party, acting as agent of the corporation, who committed the fraud against him, and that it would be inequitable and unjust, in view of these facts, to permit the creditor who stood in such relation to him to prevent a rescission of his contract of subscription. The argument strikes us with great force, and, if the testimony offered was limited to this debt of \$100,000 held by the president, we would be inclined to hold in favor of the contention of the defendant. But the testimony offered included, in addition to this debt of \$100,000, other debts amounting to \$20,000. These debts are much greater in amount than the subscription made by the defendant to the capital stock of the company, and it is alleged that these debts were incurred after the subscription had been made. If these facts were shown, and it was further shown that by reason of this \$20,000 debt the company was insolvent, the principle of the rule which we have discussed would apply, and there could not be, legally and equitably, a rescission by the defendant; and for this reason we reverse the judgment of the court below, in order that these questions may be determined.

[4] It was insisted on the part of the plaintiff that, even conceding that the alleged fraud was perpetrated on the defendant, yet his long delay in asserting his rights, and his active participation in the affairs of the corporation after he discovered the existence of the debts, would estop him from now setting up his rights. This was a question of fact for the jury to determine, and, as the evidence was in conflict, both on the question as to diligence and the question as to participation by the defendant as a stockholder in the management of the affairs of the corporation after the discovery of the fraud which he claimed had been perpetrated

against him, this court cannot say that on these points the verdict in favor of the defendant was not authorized.

We grant a new trial in the case because of the error of the trial judge in excluding the evidence offered to prove the insolvency of the corporation. The exceptions to the charge of the court, and to the refusal to charge as requested, are, we think, without merit.

Judgment reversed.

(11 Ga. App. 538)

KIRKLAND v. SOUTHERLAND et al.
(No. 3,738.)

(Court of Appeals of Georgia. Sept. 27, 1912.)

(Syllabus by the Court.)

1. SHERIFFS AND CONSTABLES (§ 157*)—LIABILITIES ON BONDS.

Construing sections 12 and 13 in connection with section 298 of the Civil Code of 1910, any person aggrieved by the failure of a sheriff to pay over to him the overplus remaining from the sale of his property, after the satisfaction of the *f. fas.* under the levy of which it was brought to sale, may maintain an action against the sheriff and the sureties upon his bond, where it appears that the sheriff acted under the bond, gave no other official bond, and that the cause of action originated in the breach by the sheriff of his official duty.

[Ed. Note.—For other cases, see *Sheriffs and Constables*, Cent. Dig. §§ 354-371; Dec. Dig. § 157.*]

2. ACTION NOT BARRED.

It does not appear from the petition that the action was barred by the statute of limitations.

3. SHERIFFS AND CONSTABLES (§ 168*)—LIABILITIES ON BONDS—ACTIONS—PARTIES.

It was error to sustain the demurrer and dismiss the petition upon the ground that the bond was payable to the ordinary and that the suit was brought by the person aggrieved.

[Ed. Note.—For other cases, see *Sheriffs and Constables*, Cent. Dig. §§ 398-404; Dec. Dig. § 168.*]

Error from City Court of Douglas; J. G. McCall, Judge.

Action by K. Kirkland against W. W. Southerland and others. Judgment for defendants, and plaintiff brings error. Reversed.

M. D. Dickerson, of Douglas, for plaintiff in error. F. Willis Dart and O'Steen & Wallace, all of Douglas, for defendants in error.

RUSSELL, J. Judgment reversed.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

(11 Ga. App. 517)

MYERS v. HOOK. (No. 3,563.)

(Court of Appeals of Georgia. Sept. 27, 1912.)

(Syllabus by the Court.)

1. APPEAL AND ERROR (§ 966*)—CONTINUANCE (§ 13*)—DISCRETION OF TRIAL COURT—REVIEW.

Motions for continuance are addressed to the sound discretion of the court, and the discretion of the court will not be controlled, unless clearly abused. Generally an amendment to the plaintiff's petition, which merely amplifies the statement of the plaintiff's case, will not require the grant of a continuance; and the facts of the present case do not place it within an exception to the general rule.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3837; Dec. Dig. § 966;* Continuance, Cent. Dig. § 13; Dec. Dig. § 13.*]

2. PLEADING (§ 218*)—DEMURRER.

The demurrer was properly overruled, because the petition asserted with sufficient particularity an individual liability on the part of the defendant, and did not set forth, as insisted by the demurrer, a partnership liability.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 549-566; Dec. Dig. § 218.*]

3. PLEADING (§ 392*)—VARIANCE.

The plaintiff having alleged in his petition that the defendant was indebted to him as an individual, and having proved that the indebtedness, if there was any, was due by a partnership, he failed to prove his case as laid, and the motion to award a nonsuit should have been granted.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1812-1819; Dec. Dig. § 392.*]

Error from City Court of Tifton; R. Eve, Judge.

Action by L. T. Hook against I. W. Myers. Judgment for plaintiff, and defendant brings error. Reversed.

Hendricks & Christian, of Nashville, and Jas. H. Price and R. D. Smith, both of Tifton, for plaintiff in error. C. C. Hall, of Tifton, and Claude Payton, of Sylvester, for defendant in error.

RUSSELL, J. It appears from the record that Hook brought suit against Myers upon an open account for \$525, with interest from January 1, 1906, alleging in his petition an individual indebtedness on the part of Myers, consisting of an item of \$400 for a third interest in mules and log carts (alleged to be worth \$1,200), and \$125 as the "balance of one-third payment" for 3½ months' wages. The defendant specially demurred to the plaintiff's petition as not setting forth the plaintiff's demand with sufficient particularity, and also because the liability of the defendant for the \$125 (if the defendant was liable at all) was a liability of the partnership of Parker, Hook & Co., and not chargeable to the defendant as an individual. The plaintiff filed two amendments to the petition, the court overruled the demurrers, and the exceptions pendente lite were duly filed to this judgment. Thereupon the defendant moved for a continuance, based

upon the ground that he was surprised by the contentions of the amendment to the plaintiff's petition, and by the amendment less prepared to proceed to trial, and unable to produce proof to disprove plaintiff's cause of action as amended. The motion to continue was overruled. At the conclusion of the testimony in behalf of the plaintiff the defendant moved to nonsuit the plaintiff, and this motion was overruled. The defendant again moved to continue the case; but, this motion being again overruled, the trial proceeded, and resulted in a verdict in favor of the plaintiff.

[1] 1. It is not necessary to discuss in detail the various assignments of error, for our ruling upon two of the points is controlling. In so far as the motion to continue (which was twice presented) is concerned, we need only say that all motions for continuance are addressed to the sound legal discretion of the court, and the discretion of the court will not be interfered with, except where there is a manifest abuse of discretion. In the present case it cannot be said that the amendment (which appears to us merely to amplify the statement of the plaintiff's case, and does not present any new state of facts) should necessarily have found the defendant less prepared for trial than he was under the original petition. It seems to us that in ordinary prudence he might as reasonably have anticipated that the testimony of the absent witness would be necessary before the amendment was filed as after it was allowed.

[2] 2. We think the demurrer was properly overruled, because upon the face of the petition the plaintiff asserted an individual liability on the part of the defendant, and the overruling of the demurrer at least protected the defendant from any other than an individual liability.

[3] 3. We are of the opinion that the court erred in not granting a nonsuit. The testimony, reasonably construed, if it establishes anything, establishes the fact that the partnership of Parker, Hook & Co. owed Hook \$1,200 for mules and \$375 for salary. According to the testimony of the plaintiff himself, Parker, Hook & Co. bought the mules. It is true that he (the plaintiff) stated that Parker was to pay him \$400, and Wood (who was then a partner) was likewise to pay him \$400, and that his \$400 was already paid. But this purely arbitrary placing of liability cannot be supported, in view of the fact that the plaintiff states in the same connection that the partnership bought the mules and log carts, and used them, and finally sold them to the Tallahassee Lumber Company, and that Myers, at the time he purchased Wood's interest in the partnership, found the mules and log carts among the assets of the partnership. Furthermore, if the partners, without striking a balance or undertak-

ing to effect a settlement, as pointed out in the case of *Paulk v. Creech*, 8 Ga. App. 738 (5), 70 S. E. 145, were treating the sale of the mules as an individual matter, and for that reason Myers agreed to pay Hook \$400, which Wood owed him as an individual, then in that case it would have been necessary, in order for Myers to assume the indebtedness of Wood to Hook, that the obligation should have been assumed in writing. The verbal promise of Myers to pay Wood's debt could not be enforced, and there could not be a part payment, because the mules were already in the possession of the partnership at the time Myers bought Wood's interest. While it is perhaps true that Hook thought that the matter could be treated as an individual transaction, the whole matter was clearly a partnership affair. Parker testified, as Hook had done, that the mules were put into the partnership—they became partnership property; and even if, at the outset, there was an individual liability on the part of Parker and Wood, each to pay Hook \$400, this liability could not be transferred to Myers, so as to bind him, unless it had been assumed in writing, because, according to the testimony of the plaintiff himself, the debt of Wood was already a subsisting debt.

What we have said upon the motion for nonsuit practically disposes of the errors assigned upon the charge of the court, and obviates the necessity of any further reference to them. The plaintiff may have a good cause of action in a proper equitable proceeding to require Myers to account to him; but under his testimony in the present case, after pleading a right of action against Myers as an individual, he proved an indebtedness to himself on the part of the partnership known as Parker, Hook & Co. For this reason, a nonsuit should have been awarded.

Judgment reversed.

POTTLE, J., not presiding.

(11 Ga. App. 536)

KNIGHT v. LANDIS. (No. 3,690.)

(Court of Appeals of Georgia. Sept. 27, 1912.)

(Syllabus by the Court.)

1. EVIDENCE (§ 171*)—BEST AND SECONDARY EVIDENCE—COLLATERAL MATTERS.

Where the tenure of office is only collaterally involved, the statement by a witness that he was president of a named corporation was not objectionable, on the ground that the minutes of the corporation, showing his election, constituted higher and better evidence of the fact.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 460, 523; Dec. Dig. § 171.*]

2. FORMER DECISION CONTROLLING.

The material questions presented by the present writ of error are controlled, adversely to the plaintiff in error, by the ruling of this court in *Sheffield v. Johnson County Savings Bank*, 2 Ga. App. 221, 58 S. E. 386.

Error from City Court of Quitman; J. G. McCall, Judge.

Action between C. I. Knight and W. H. Landis. From the judgment, Knight brings error. Affirmed.

Bennet & Long, of Quitman, for plaintiff in error. Branch & Snow, of Quitman, for defendant in error.

RUSSELL, J. Judgment affirmed.

(11 Ga. App. 536)

PETERSON & LOTT v. LOTT. (No. 3,715.)

(Court of Appeals of Georgia. Sept. 27, 1912.)

(Syllabus by the Court.)

TRIAL (§ 28*)—CONDUCT IN GENERAL—INSPECTION BY JURY.

There being no statute in this state permitting a trial judge to authorize the jury to leave the courtroom and inspect personal property which is the subject-matter of the action, it is error to permit such an inspection to be made, over the objection of counsel for one of the parties. This case is distinguished from that of *Jones v. Royater Guano Company*, 6 Ga. App. 506, 65 S. E. 361, by the fact that the right of trial by view in real and mixed actions existed at common law.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 77-79; Dec. Dig. § 28.*]

Error from City Court of Baxley; A. V. Sellers, Judge.

Claim case between Peterson & Lott and John M. Lott. From the judgment, Peterson & Lott bring error. Reversed.

Parker & Highsmith, of Baxley, and F. Willis Dart, of Douglas, for plaintiffs in error. O'Steen & Wallace, of Douglas, and Wade H. Watson, of Baxley, for defendant in error.

RUSSELL, J. This was a claim case. The property involved was personal property. It is assigned as error that the court permitted the jury, over the objection of plaintiff in *fi. fa.*, to go out into the courtyard and view the mule which had been levied on and which was claimed. At common law an inspection is permitted where the subject-matter of the suit is real or mixed property, but the jury could not view personal property, if such was the subject of litigation. Inasmuch as by our adopting statute of 1784 the common law became of force in this state, it would seem that a trial court is not authorized, as a matter of judicial discretion, to have personal property, when such personal property is the subject-matter of the action, inspected by a jury. Perhaps the consent of both parties will be such a waiver of the error that neither could except. But it is our opinion that, if either party objected, it would be ground for a new trial. At common law the right to demand a view appertained only to real and mixed actions. "In the United States," as said by Mr. Thompson, in his

work on Trials (section 881), "the subject is one generally of statutory regulation, and it has been held not competent for the court to order a view against the objection of a party, except in cases where the view is authorized by statute." It is further pointed out by Mr. Thompson that the courts proceed upon the conception that it is more in consonance with the theory and method of judicial trials that the jury should base their finding solely upon sworn testimony, taken in open court, or upon depositions taken as provided by law. Only four states in the Union (one of which is Georgia) have failed to regulate the matter by statute; Alabama, Louisiana, and Maryland being the other three.

The Supreme Court, in the case of *Broyles v. Prisco*, 97 Ga. 643, 25 S. E. 389, seemed to be doubtful if it was within the discretion of the trial judge, over the objection of either party, to allow an inspection of the premises in an action for damages, and would not reverse his action in refusing to do so, basing this ruling upon the ground that it affirmatively appeared that material physical changes had occurred in the character of the premises between the time of the injury and the time of the trial. We may assume from this that the ruling might have been different if it had appeared that the premises were in practically the same condition at the time the motion was made that they were in at the time of the injury. Upon this ruling in the *Broyles* Case, Judge Cobb held, in the case of *Johnson v. Winship Machine Co.*, 108 Ga. 555, 33 S. E. 1014: "It is doubtful whether an application to allow the jury to inspect the property which is involved in a suit is allowable at all, except by consent of all the parties to the case." However, in *County of Bibb v. Reese*, 115 Ga. 346, 41 S. E. 636, a ruling was made upon authority, and Chief Justice Simmons, delivering the opinion of the court, said: "At common law this right of the judge to permit the jury to view the premises existed only in real and mixed actions, and did not extend to personal actions and criminal cases without the consent of both parties. The Legislature of this state having in 1784 adopted the common law of England as it existed prior to 1776, including this right of trial by view in the discretion of the trial judge, and no repealing statute ever having been passed, that law is still in force in Georgia, as much so as if the Legislature had expressly enacted it. The present case being an action to recover damages to land, the trial judge had the right, with or without the consent of the parties, to direct the jury to view the premises."

As the case of *Jones v. Royster Guano Company*, 6 Ga. App. 506, 65 S. E. 361, in which this question was involved, was, like

the case of *County of Bibb v. Reese*, supra, an action to recover damages to land, the ruling in the latter case was followed. But in the present case the property (which one party desired the jury to view, and to the view of which the other party objected) was personal property (a mule), and as a view of personal property was not permitted by the common law, the judge erred in overruling the objection and in permitting the view. It would seem to be, in the interest of justice, that all avenues for the entry of truth should be permitted, and that the jury should be given the very fullest opportunity to know the exact truth in regard to every material matter involved in a legal investigation, and, for ourselves, we see no reason for any valid distinction between a view of real property and personal property, other than the greater liability of the latter to be subject to alteration and change, and even this could be controlled by evidence as to whether there had been any alteration of the subject-matter or not. But, as was remarked by Chief Justice Simmons, in the *Reese* Case, the adoption of the common law fixed the status of the law of Georgia upon the subject, and in the absence of any legislation authorizing the court to permit a view of personal property which is the subject of dispute, it is error to direct the jury to view the property, especially if either party objects.

Judgment reversed.

(11 Ga. App. 521)

ATKINSON v. F. S. DISMUKE & BRO.

FITZGERALD, O. & B. R. CO. v. F. S. DISMUKE & BRO.

(Court of Appeals of Georgia. Sept. 27, 1912.)

(Syllabus by the Court.)

1. RAILROADS (§ 482*)—OPERATION—INJURIES BY FIRES—EVIDENCE.

There was no error in overruling the demurrers or in declining to dismiss the petition on oral motion, or in refusing to award a nonsuit. The defendant introduced no testimony. The evidence in behalf of the plaintiffs was sufficient to authorize the jury to find that the plaintiffs' personal property was destroyed by fire set out by an engine of the Fitzgerald, Ocilla & Broxton Railroad Company, and that its codefendant, the receiver of the railroad company from which it had leased the railroad, had elected to adopt the lease. The evidence, therefore, authorized a finding for the plaintiffs.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1730-1736; Dec. Dig. § 482.*]

2. RAILROADS (§ 256*)—OPERATION—COMPANIES LIABLE.

"A corporation charged with a duty to the public cannot, by sale or otherwise, dispose of its property or franchises so as to relieve itself from acts done or omitted, without legislative sanction expressly exempting it from liability." Civ. Code 1910, § 2228.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 789-792; Dec. Dig. § 256.*]

3. RAILROADS (§ 265*)—OPERATION—PERSONS LIABLE—RECEIVER.

While "the receiver of a corporation, without the permission of the court which appoint-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

ed him, cannot be sued for any acts of negligence of the corporation prior to his appointment as receiver" (Harrell v. Atkinson, 9 Ga. App. 150, 70 S. E. 954), still, as to torts committed after his appointment as receiver, if the receiver of a lessor railroad corporation has elected to adopt an outstanding lease, by the terms of which a portion of the railroad of which he has been appointed receiver is operated by another railroad corporation, and the election is evidenced by unequivocal acts, the receiver is liable for the tortious acts of the lessee corporation committed after his appointment as receiver and after a reasonable time has been allowed him in which to make an election, in the same manner and to the same extent as the corporation for which he is receiver would have been liable if there had been no receivership.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 838-853; Dec. Dig. § 265.*]

4. TRIAL (§ 267*)—INSTRUCTIONS—REQUESTS—INSTRUCTIONS ALREADY GIVEN.

While a party who presents an appropriate request therefor is entitled to have the court give to the jury instructions applying the law of the case to the particular facts in evidence, and, while a presentation of the law concretely applied to the facts directly at issue is greatly preferable to a mere statement of an abstract legal proposition, still, without charging in the terms of the request, the request may be sufficiently complied with (as in the present case) to render harmless the omission to give in charge the language of the request. In the present case the court, after stating all the material contentions of both parties, instructed the jury that the plaintiffs could not recover unless they proved every material allegation in the petition.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 668-672, 674; Dec. Dig. § 267.*]

5. RAILROADS (§ 265*)—OPERATION—INJURIES BY FIRE—DAMAGES.

The liability of the receiver being statutory, and depending upon the proof of his relationship as lessor of the railroad company which was alleged to have set out the fire, the quantum of the liability of the receiver, if he was liable at all, would be fixed by the amount of damages, if any, found by the jury against the lessee railroad company, and the court did not err in instructing the jury to this effect.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 838-853; Dec. Dig. § 265.*]

Error from City Court of Ocilla; H. E. Oxford, Judge.

Actions by F. S. Dismuke & Bro. against H. M. Atkinson and another, as receivers of the Atlanta, Birmingham & Atlantic Railroad Company, and by the same plaintiffs against the Fitzgerald, Ocilla & Broxton Railroad Company. Judgments for plaintiffs, and defendants bring error. Affirmed.

F. S. Dismuke & Bro. brought a suit in the city court of Ocilla against the Fitzgerald, Ocilla & Broxton Railroad Company and Atkinson and Parrott as receivers of the Atlanta, Birmingham & Atlantic Railroad Company, alleging that the Fitzgerald, Ocilla & Broxton Railroad Company, by negligence in the operation of a locomotive engine, set fire to and destroyed a stock of goods belonging to the plaintiffs, and that the receivers of the Atlanta, Birmingham & Atlantic Railroad Company had leased to the codefendant the line of railroad upon which the latter negligently

operated the engine which destroyed the stock of goods. Parrott having died, the action proceeded against Atkinson as sole receiver. The plaintiffs' petition alleged that both of the corporations mentioned owned and operated lines of railroad in Irwin county, and that each had an office and an agent in that county. The petition alleged that the fire which destroyed the plaintiffs' stock of merchandise, worth \$15,000, was a result of the carelessness and negligence of the Fitzgerald, Ocilla & Broxton Railroad Company, in the following respects: (1) In not having its engines equipped with a spark arrester of the proper make and kind and in the proper state of repair, and with other appliances designed to prevent the escape of fire from the engine; (2) in that the spark arrester on the said engine was defective in having holes through which coals, sparks, and particles of fire were constantly thrown out while the engine was in operation; (3) in not managing, operating, and handling said engine with the proper care and diligence as it passed the building in which the plaintiffs' goods were stored. By amendment the plaintiffs alleged that the Atlantic & Birmingham Railroad Company on November 20, 1905, leased the line of railroad, near which the plaintiffs' store was situated, to the Ocilla & Valdosta Railroad Company, which thereafter assigned and transferred the lease in writing to the Broxton, Hazlehurst & Savannah Railroad Company, and at a later day the lease was assigned and transferred by the last-named company to the Fitzgerald, Ocilla & Broxton Railroad Company, and that on April 12, 1906, the original lessor, the Atlantic & Birmingham Railroad Company, sold and conveyed by deed to the Atlanta, Birmingham & Atlantic Railroad Company all of its property and franchises, including the line of railroad from Ocilla to Irwinville, Ga., which it had previously leased as above stated. It is alleged in the original petition, and admitted in the answer, that H. M. Atkinson was duly appointed receiver of the Atlanta, Birmingham & Atlantic Railroad Company. Atkinson, as receiver, demurred to the petition upon the grounds (1) that no cause of action was set forth; (2) that the allegations in the petition constitute in law no reason why the plaintiffs should have judgment against the receiver jointly with the defendant railroad company; (3) that the facts alleged do not show that the court has jurisdiction of the subject-matter of the suit or of the receiver, nor is any right to institute action on account of the alleged damage made to appear. There were further special grounds of demurrer, complaining that the property destroyed was not sufficiently described nor its value identified, and that an invoice or bill of particulars should have been attached to the petition. The Fitzgerald, Ocilla & Brox-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

ton Railroad Company demurred specially upon the grounds that the various allegations in the petition, said to be material, were too vague and indefinite, and that certain paragraphs of the petition, specifically referred to, set forth mere conclusions of the pleader. The demurrers were overruled, and exceptions pendente lite were duly filed.

At the conclusion of the testimony for the plaintiffs, the defendants moved a nonsuit, which was refused, and exceptions to this ruling were duly preserved. In addition to the motion to nonsuit, the defendant receiver, at the conclusion of the plaintiffs' testimony, made an oral motion to dismiss the plaintiffs' petition, on the ground that it set forth no cause of action, and that the facts therein showed no reason why the plaintiff should have judgment against the receiver. This motion the court likewise overruled, and the receiver filed exceptions pendente lite. The defendants introduced no testimony, and the trial resulted in a verdict in favor of the plaintiffs, for \$4,500. In separate bills of exceptions the defendants complain of the overruling of their motions for a new trial.

With the exception of two grounds of the receiver's amended motion for a new trial, one of which complains of certain instructions to the jury, and the other of the refusal of the court to give certain instructions which were timely requested, the receiver's various assignments of error seek to raise the same questions presented by the demurrer and the motion to dismiss. The grounds of the motion for a new trial presented by the Fitzgerald, Ocilla & Broxton Railroad Company complain that the verdict was without evidence to support it, especially in view of the fact that the plaintiffs did not introduce evidence that would authorize any certain verdict, and that the verdict was excessive, and that the court erred in certain instructions to the jury and in refusing to charge as requested.

McDonald & Grantham, Elkins & Wall, all of Fitzgerald, Rosser & Brandon, of Atlanta, and Bolling Whitfield, of Brunswick, for plaintiffs in error. L. Kennedy, of Fitzgerald and H. J. Quincey, of Ocilla, for defendants in error.

RUSSELL, J. (after stating the facts as above). [1] 1. We will decide the points raised in these two separate writs of error together, pointing out, as we go along, those exceptions which are made in the one and not in the other. We shall deal first with the evidence, for the reason that in both motions for a new trial it is insisted that the evidence was not sufficient to authorize the plaintiffs to recover, and that, even if the plaintiffs were entitled to recover some amount, the amount could not be definitely ascertained from the evidence, and that, even if it be granted that a definite amount could be arrived at, the verdict was excessive. If

either of the first two of these contentions were sustained, the defendants would be entitled to a new trial, regardless of the other points in the case. We will deal with the evidence first for the further reason that some of the positions most strenuously maintained, so far as the receiver is concerned, and which were presented after the conclusion of the evidence, in the motion to dismiss and in the motion to nonsuit, were also raised by demurrer at the beginning of the trial.

So far as the evidence relates to the Fitzgerald, Ocilla & Broxton Railroad Company (which we will hereafter designate the "lessee company"), it appears that it was operating a line of railroad the track of which ran within a few feet of the storehouse in which the plaintiffs' goods were stored, and the breaking out of the fire in the vicinity almost immediately after the passing of one of its engines, under circumstances which almost necessarily enforce the conclusion that the fire was caused by sparks from this engine and nothing else, in the absence of any explanation, would have authorized the jury to impose upon the lessee company liability for the resulting damage. We bear in mind that under the ruling in the case of Gainesville, etc., Railroad Company v. Edmondson, 101 Ga. 747, 29 S. E. 213, liability does not necessarily follow from the destruction of personal property of another by sparks emitted from a passing engine, if it be shown that the appliances, agencies, and instrumentalities used by the railroad company were of the kind in general use and were used with due care; but in the present case the nature of the fire was such as to support the inference that the engine used by the lessee company was not equipped with such appliances as were and should be in general use, and there was no testimony on the part of the defendant, nor was there evidence introduced by the plaintiffs which would rebut this inference. We conclude that the liability of the lessee company was established by some evidence, and, if it was enough to satisfy the jury, we cannot, in the state of the record, say it was too little.

As to the indefiniteness of description in the testimony as to the articles described, and the lack of definite proof of their value, while more specific identification of the stock of goods, and more definite testimony as to its value, might have been produced, still we cannot say that the jury would not have the right to believe the witness if he had sworn that his stock was one of general merchandise, with the fixtures usual for such stock, and that its value was \$15,000. Such a general statement might tend to affect the credibility of a witness, and yet, if the jury were satisfied that it was the absolute truth, the objection that the testimony was vague and indefinite would amount to nothing. It was, no doubt, for this reason, among others, that the court overruled the demurrer ad-

dressed to the same point; and we find no error in this ruling.

[3] Having reached the conclusion that the evidence is sufficient to fix liability upon the lessee company, the liability or non-liability of the receiver of the lessor company must depend upon one of two facts—the lease must have been made by the receiver, or it must have been adopted by him. As already ruled by this court in *Harrell v. Atkinson*, 9 Ga. App. 150, 70 S. E. 954, in accord with what we deemed to be the uniform current of authority, a receiver cannot be held liable for a tort of the corporation of which he is receiver which was committed prior to his appointment as receiver; but in the present case the tort, if it was committed at all, was inflicted 17 months after the Atlanta, Birmingham & Atlantic Railroad Company was placed in the hands of the receiver. There is no contention that the receiver made the lease, but it is undisputed, in the evidence, that the Atlanta, Birmingham & Atlantic Railroad Company bought all of the assets of the Atlantic & Birmingham Railroad Company, the original lessor, and that during the 17 months subsequent to the appointment of the receiver he had the right to collect \$559.60 each month as rental from the Fitzgerald, Ocilla & Broxton Railroad Company, and that the receiver had made, so far as it appears from the record, no effort to have himself relieved from the contract of rental, or to call the attention of the United States court to the fact that he was exposed to the liability for the negligence of the lessee company imposed by the Code upon any railroad company which occupies the relation of lessor. The documentary evidence sustained the allegations of the petition that the Atlantic & Birmingham Railroad Company, prior to the sale of its property and franchises to the Atlanta, Birmingham & Atlantic Railroad Company, had leased the branch railroad upon which the damage here involved was occasioned to the Ocilla & Valdosta Railroad Company, which, in turn, after the Atlantic & Birmingham Railroad Company had been purchased by the company now represented by the receiver, transferred that lease to the Broxton, Hazlehurst & Savannah Railroad Company, which, in turn, transferred it to the Fitzgerald, Ocilla & Broxton Railroad Company. Each of these transfers must be presumed to have been known to the Atlanta, Birmingham & Atlantic Railroad Company and to its receiver, because the deed of conveyance from the Atlantic & Birmingham Railroad Company to the Atlanta, Birmingham & Atlantic Railroad Company specifically refers to it, and knowledge of the assets of his cestui que trust must always be imputed to a trustee or receiver, where there is evidence of such circumstances as would put an ordinarily reasonable man on notice. Under our view of the law, the lia-

bility of the lessee company was established; and, the lease being proved, and the adoption of this lease by the receiver satisfactorily if not incontestably established, it follows that the verdict is not without evidence to support it, and the grounds assigning various reasons why such is not the case were none of them sustained.

2. Our conclusion that the verdict is authorized by the evidence effects a disposition of the case, but in view of the fact that this conclusion is at variance with the contentions of the receiver, as insisted upon by demurrer (both general and special), by motion to dismiss, and by various assignments of error in his motion for a new trial, and as it is our duty to rule upon all of the points presented, we shall briefly state the reasons why, in our judgment, the trial court did not err in overruling the demurrer or in refusing to dismiss the petition, or in charging the jury upon the precise point to which the exceptions relate. The contention of the receiver that in no event can he be held liable for damage resulting from fire set out by an engine of the Fitzgerald, Ocilla & Broxton Railroad Company rests upon two propositions: (1) That the fire was not due to the act of the receiver or the act of any of his agents or servants in carrying on the business connected with the Atlanta, Birmingham & Atlantic Railroad Company; and (2) that, if he can be held liable at all, no liability can attach in the present case, because the lease was made, not by himself, as receiver, nor even by the railroad company which he is operating and whose estate he is administering under orders of the United States court, but by the predecessor in title of that corporation. To quote from the brief, "such act or transaction took place long before his appointment, and was in no sense an act or transaction of his in carrying on the business of the Atlanta, Birmingham & Atlantic Railroad Company." and counsel rely upon the rulings in *Hollifield v. Wrightsville & Tennille Railroad Company*, 99 Ga. 365, 27 S. E. 715, *Glover v. Thayer*, 101 Ga. 824, 29 S. E. 36, and *Harrell v. Atkinson*, 9 Ga. App. 150, 70 S. E. 954, in support of his position. These cases are not on the point now before us, because in each of them there was a distinct absence of any affirmative act on the part of the receiver. In the *Harrell Case*, supra, we held that the receiver could not be held liable for a tort committed by the corporation before his appointment as receiver, and that, where it appeared that the cause of action arose before the receivership, the point might be raised by general demurrer or motion to dismiss. But, under the allegations in the present petition, the cause of action arose 17 months after the receiver was appointed.

A correct decision of the vital question raised in this case must turn upon the issue as to whether the receiver of a corporation

being operated under the orders of the court is subject (just as was the corporation itself prior to the receivership) to the provisions of section 2228 of the Civil Code (1910), and, in the next case, upon whether the facts set up in the petition and its amendment are sufficient to evidence an affirmative act on the part of the receiver prior to the alleged tort, whereby he voluntarily assumed liability for torts of the leasing company imposed by law upon a railroad company which leases to another a portion of its line of railroad. We confess we have not reached a conclusion without some difficulty, largely on account of some of the language used in the case of *Glover v. Thayer*, supra. It is to be borne in mind, however, that in that case the receiver was in possession of the property of a telegraph company as an officer of the court, and it was not liability for tort which was sought to be fixed upon him, but rather the effort was made to apply a debt alleged to be due by the receiver to the telegraph company, in payment of a judgment which Thayer had obtained against the latter. In the case at bar the pleadings allege and the evidence showed that the railroad company which the receiver is operating is the owner of another railroad, which the receiver permitted to be operated, without objection, by a corporation which holds it under a contract of lease, entered into between its predecessor in title and the railroad company which sold it, subject to the lease, to the railroad corporation operated by the receiver; and if the mere fact that a railroad is being operated by a receiver will relieve a railroad corporation, which has disposed of a portion of its railroad, from the general operation of section 2228 of the Civil Code (1910), and from liability for torts committed by the lessee or leasing company, then it would only be necessary for a railroad corporation to lease its unprofitable lines to insolvent railroad companies (which might be created for the very purpose of leasing them), and thereafter, in a friendly suit, have itself placed in the hands of a receiver, with the knowledge that, so long as the receivership continued, the leasing railroad company would be immune from any liability for the torts of the nominal lessee, no matter how great might be the negligence and carelessness with which the latter was operated to the jeopardy of the traveling public.

[2] "A corporation charged with a duty to the public cannot, by sale or otherwise, dispose of its property or franchises so as to relieve itself from liability for acts done or omitted, without legislative sanction expressly exempting it from liability." Civ. Code (1910) § 2228. Under this section, if the Atlanta, Birmingham & Atlantic Railroad Company had not been placed in the hands of a receiver, it would clearly be liable for any torts shown to have been com-

mitted by the Fitzgerald, Ocilla & Broxton Railroad Company as its lessee; for, under its purchase of the railroad and franchises of the Atlantic & Birmingham Railroad Company, it became as much the owner of that portion of the railroad from Ocilla to Irwinville (which had been leased) as of any other portion of the line which it purchased, and would have been primarily chargeable for all of the duties of such a corporation to the public, as if the road had not been leased; and, as the railroad was purchased subject to the lease, the provisions of section 2228 were nevertheless applicable. As was well said by the Supreme Court in *Gregory v. Georgia Granite Railroad Company*, 132 Ga. 590, 64 S. E. 687: "In accepting the grant of rights and franchises from the state a railroad impliedly assumes the duty of a common carrier. The consideration of the grant is the undertaking of the corporation to perform this public duty. 4 Elliott on Railroads, § 1392. A railroad cannot divest itself of these public duties, nor shirk its liabilities, by simply allowing another corporation to take possession of its track and operate cars thereon. *Ga. R. Co. v. Haas*, 127 Ga. 193, 56 S. E. 313, 119 Am. St. Rep. 327, 9 Ann. Cas. 677; Civil Code, § 1864." In view of the reason for this rule, it is immaterial that there is a contract of lease. The effect upon the carrier which owned the railroad and had been granted the franchise would be the same even if the tort was the act of a mere licensee. Ruling upon the liability of the railroad company which owns the track, Chief Justice Bleckley used the following language: "There is no less skepticism in law than in theology. This court is called upon again and again for a further revelation of some legal truth which has already been revealed. After the cases of *Macon & Augusta R. R. Co. v. Mays*, 49 Ga. 355 [15 Am. Rep. 678], *Singleton v. Southwestern R. R. Co.*, 70 Ga. 464 [48 Am. Rep. 574], and *Chattanooga, Rome & Columbus R. R. Co. v. Liddell*, 85 Ga. 482 [11 S. E. 853, 21 Am. St. Rep. 169], it would seem that there could be no reasonable doubt of the liability of a chartered railroad company permitting another company to run trains over its railway, and thus use its franchise, to respond for any damage occasioned by negligence, whether its own or that of its lessee or licensee." *Central R. Co. v. Phinazee*, 93 Ga. 488, 21 S. E. 66. Under our statutes, a corporation which owns a railroad and the franchises may be exempted by express legislative sanction from liability, but no such statute has been passed in behalf of the company whose receiver is the plaintiff in error in the present case. There can be no reasonable doubt that, as a general rule, a receiver of a railroad company, while not suable for torts committed prior to his appointment, in this state stands in the shoes of the corporation whose franchis-

es he is operating, subject to all liabilities which may be created subsequent to his appointment.

3. It is insisted, however, by the learned counsel for the plaintiff in error that, in order for liability to attach to a receiver, he must do some affirmative act. Under our construction of section 2228, the receiver in this case was liable for any negligence of the company exercising the franchises of the Atlanta, Birmingham & Atlantic Railroad Company, subsequent to his appointment, though not liable (for the reasons stated in *Harrell v. Atkinson*, supra) for the results of any acts of negligence prior to that time, though the corporation itself might be liable. But if we are wrong in this, and the receiver was unable to set aside or breach the contract, still it appears that for 17 months he made no effort to obtain the intervention of the court by which he was appointed and relief from the situation in which he found himself. We think, therefore, that it could be assumed from the allegations of the petition, and that the jury were authorized to infer from the proof, that the receiver adopted the contract entered into between the Atlantic & Birmingham Railroad Company and the lessee company. Even if we narrow the matter to this view of the case, it is well settled that where a receiver has a reasonable time in which to adopt or to rescind a contract, and does not adopt the latter course, he will be presumed to have elected to adopt the contract, and will be subject to the same liabilities as if the contract had been originally his own act.

So much in response to the argument and citations of the learned counsel for the plaintiff in error. In our opinion the receiver stood in the shoes of the lessor company, and he is liable, not because of the lease (the existence of which, for reasons which we have stated, is immaterial), but because the company of which he is receiver owns the railroad over which the engine which caused the damage was operated, and because the law puts upon the lessor the burden of responsibility for the acts of the lessee. As receiver he was liable to the same extent that the Atlanta, Birmingham & Atlantic Railroad Company was liable, because, under the provisions of section 2788 of the Civil Code, "the liability of receivers, trustees, assignees, and other officers operating railroads in this state, or partially in this state, for injuries or damages to personal property, shall be the same as the liability now fixed by law governing the operation of railroad corporations in this state for like injuries and damages." If any affirmance, ratification, or other act on the part of the receiver, in approval of the alleged lease, was necessary as is contended by the plaintiff in error, we think such an affirmance can reasonably be inferred from the fact that the receiver permitted the Fitzgerald, Ocilla & Broxton Railway Company, whose road con-

nects with the railroad which he is operating and is a part of it, to operate its trains under his very eyes for 17 months, without protest or objection, over tracks owned by the company of which he is receiver.

[4] 4. The fact that the judge declined to charge the jury as requested is not in our opinion sufficient ground for reversal, although we think the charge requested should have been given substantially in the language in which it was presented. A party is entitled to have the law applied to the particular facts in testimony, and the presentation of the law concretely applied to the points directly at issue is greatly preferable to a mere statement of the law in the abstract. This court has frequently pointed out that instructions of the former character are much more intelligible to a jury of laymen than the mere statement of an abstract legal proposition. We think, therefore, that the jury should have been told that *Dismuke & Bro.* were not entitled to any amount, unless they had proved that the Fitzgerald, Ocilla & Broxton Railroad Company actually caused the fire by the negligent acts, or some of them, set out in their petition, and the jury should further have been told, as requested, that a railroad company is not responsible, and cannot be made to pay, for causing a fire, unless the fire was the result of its negligent acts or omission. However, although these instructions, which apply the law directly to the evidence in the case, should have been given, still we think the request was substantially complied with when the judge instructed the jury, more than once, that the plaintiffs could not recover unless they proved every material allegation in the petition; this statement, too, being made after the judge had read to the jury the material portion of the petition and stated the material contentions of both parties.

[5] 5. It is insisted on the part of the receiver that the court erred in charging the jury as follows: "In passing upon this case. I charge you that you should determine what your verdict is as to the Fitzgerald, Ocilla & Broxton Railroad Company, and, when you have done this, determine whether or not the allegations as to the other defendants have been established. If they have, then you will be authorized to find a verdict against them also, of course, for whatever you determine to find against the Fitzgerald, Ocilla & Broxton Railroad Company." This instruction is not subject to the objection made to it, that the jury were thereby instructed that, if they found the Fitzgerald, Ocilla & Broxton Railroad Company liable, then the receiver would be liable also, or that the jury were instructed that the receiver was liable without regard to the special defenses set up by him. The meaning of the charge (and we are certain the jury must have so understood it) was that in no event would the receiver be liable, unless the

Fitzgerald, Ocilla & Broxton Railroad Company was found to be liable; and that, if liable at all, the amount of the receiver's liability would be the same as that found against the Fitzgerald, Ocilla & Broxton Railroad Company. Moreover, in another part of his charge the judge gave a clear instruction to this effect; so that the jury could not have been misled by this instruction, which in no event conveyed the meaning stated in the assignment of error.

Judgment affirmed.

POTTLE, J., not presiding.

(11 Ga. App. 530)

ATLANTIC COAST LINE R. CO. v. STEPHENS. (No. 3,567.)

(Court of Appeals of Georgia. Sept. 27, 1912.)

(Syllabus by the Court.)

1. CORPORATIONS (§ 665*)—FOREIGN CORPORATION—ACTION—JURISDICTION.

It being alleged in the petition that the tort was committed in the state of Florida, and that the defendant railroad company was a foreign corporation, with an office and place of business in the county in which the suit was brought, there was no error in overruling the demurrer, based upon the ground that the court did not have jurisdiction. *S. F. & W. Ry. Co. v. Evans*, 121 Ga. 391 (2), 49 S. E. 308. The statutory rule confining suits against railroad companies for torts to the county in which the cause of action arose does not apply to torts committed beyond the limits of the state by a nonresident railway company. *Cincinnati, etc., Ry. Co. v. Pless*, 3 Ga. App. 400, 60 S. E. 8. [Ed. Note.—For other cases, see *Corporations*, Cent. Dig. §§ 2595-2600; Dec. Dig. § 665.*]

2. CARRIERS (§ 277*)—TRANSPORTATION OF PASSENGERS—BREACH OF CONTRACT—DAMAGES.

There are no facts in the record which take this case out of the general rule that damages are given as compensation for the injury done. The plaintiff was not entitled to recover substantial damages. According to the evidence, the agent of the defendant company, at Homosassa, Fla., sold to the plaintiff a ticket different from that which he requested, in that the plaintiff had asked for a ticket via the Georgia Southern & Florida Railway from Jacksonville, while the ticket sold him was routed over the Atlantic Coast Line Railroad from Jacksonville, and he boarded a train of the Georgia Southern & Florida Railway at Jacksonville, when, according to the ticket he had purchased, he should have boarded a train of the Atlantic Coast Line Railroad. According to the plaintiff's evidence, this latter mistake was due to the misdirection of a gatekeeper at the Jacksonville station, who, on looking at the plaintiff's ticket, pointed out a passenger train of the Georgia Southern & Florida Railway and permitted him to enter it. The conductor of the train, upon the plaintiff's refusal to pay fare, and after notifying him that the ticket presented by him was only good for passage over the Atlantic Coast Line Railroad, ejected him from the train. It does not appear, however, that the plaintiff was subjected to any humiliation or indignity. It is undisputed that he returned to Jacksonville without charge, that he had no expense for lodging or meals (these being paid for by the gatekeeper who made the mistake), and that, at an expense of \$3.80 for railroad fare, he reached his destination at 2

o'clock p. m. on Sunday, when, if he had been sold the ticket he actually requested, he could not have reached his home earlier than 2 a. m. of the same day. The day of his return being Sunday, he lost no time from his business, and the evidence does not disclose that there was any exigency of a personal or domestic character demanding his earlier presence at his home. In view of these facts, a recovery of \$400 cannot be treated as nominal damages.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 1082-1084; Dec. Dig. § 277.*]

3. CARRIERS (§ 277*)—TRANSPORTATION OF PASSENGERS—BREACH OF CONTRACT—DAMAGES.

The plaintiff, having the right to elect the route he preferred to take, is entitled to recover the amount he expended for a ticket over the Georgia Southern & Florida Railway from Jacksonville to his home, regardless of the fact that he had been erroneously supplied with a ticket over a different route, which he could have used. The sum which may be disclosed by the evidence as necessary to comply with the original request of the plaintiff, that he be carried to his home over the Georgia Southern & Florida Railway from Jacksonville, may be recovered by him, in addition to such a sum (sufficient to carry the costs) as nominal damages as the jury may award in establishing and declaring the plaintiff's right to maintain his action for tort due to the carrier's breach of its public duty in not selling the plaintiff a ticket over the route that he had selected, if, upon another trial, the evidence satisfies the jury that there was a breach of this duty.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 1082-1084; Dec. Dig. § 277.*]

Error from City Court of Tifton; R. Eve, Judge.

Action by W. H. Stephens against the Atlantic Coast Line Railroad Company. Judgment for plaintiff, and defendant brings error. Reversed.

Geo. E. Simpson, of Tifton, and Bennet & Branch, of Quitman, for plaintiff in error. F. G. Boatright and W. H. Dorris, both of Cordele, and J. J. Murray, of Tifton, for defendant in error.

RUSSELL, J. Judgment reversed.

POTTLE, J., not presiding.

(11 Ga. App. 495)

RITCHEY v. PENDLEY et al. (No. 3,874.)

(Court of Appeals of Georgia. Sept. 24, 1912.)

(Syllabus by the Court.)

CONTINUANCE (§ 19*)—GROUNDS—ABSENCE OF PARTY.

Where it is uncontradicted that the absence of a party to a cause is due to the fact that he is at home, where his presence is necessary, for the reason that "his wife is liable to be confined at any minute," and his counsel makes the requisite statement that he (counsel) cannot safely go to trial without the presence of the absent party, and especially when it is shown, in addition, that the absent party is a material witness, the ends of justice require that a continuance be had. Civil Code 1910, § 5717. Under such circumstances, the continuances of such a party are not exhausted, although the case may previously have been continued by reason of the absence of his counsel

in the General Assembly, and in another instance continued by agreement. The judge erred in refusing to continue the case, and the subsequent proceedings in the trial were therefore nugatory.

[Ed. Note.—For other cases, see Continuance, Cent. Dig. §§ 41, 43-48; Dec. Dig. § 19.*]

Error from Superior Court, Whitfield County; A. W. Flte, Judge.

Action between M. L. Ritchey and J. A. Pendley and another. From the judgment, Ritchey brings error. Reversed.

M. C. Tarver, of Dalton, for plaintiff in error. C. D. Rivers, of Summerville, and Maddox, McCarny & Shumate, of Dalton, for defendants in error.

RUSSELL, J. The first exception to the judgment of the court below, which was adverse to the plaintiff in error, depends on the correctness of the lower court's ruling upon the motion for continuance. Upon the call of the case counsel for the plaintiff in error moved for a continuance, on account of the absence of his client (as well as on account of the absence of another witness, as to whom the ruling was correct). The father-in-law of the absent party testified: "He is not here this morning, and will not be here. His wife is about to be confined; likely to be confined at any minute. His presence there is necessary." It appears from the bill of exceptions that counsel made the statement, required by section 5717 of the Civil Code of 1910, that he could not safely go to trial in the absence of his client, and it further appears that, if Ritchey had been present, he would have been a material witness in his own behalf. We think that, under these facts, the ends of justice required that the case should have been continued. We cannot conceive of a more pressing obligation than that which binds the husband to care for his wife in sickness, and we can see no reason why the sickness incident to confinement and the travail of childbearing should be an exception. The general rule is to permit a husband to minister to his wife in her illness, and to excuse his absence from court if his presence at his home is necessary.

It is urged by counsel that the witness (who appears from the record to have been the father of the sick wife) was incompetent to testify as to her condition, and the consequent necessity of her husband's presence at home. It is apparent that this point is without merit, because a physician who is attending a wife "likely to be confined at any minute" should, if he is performing his duty as a physician, be with his patient, and cannot be in court to testify. Furthermore, the nature of the illness which was made the basis of the motion for a continuance in this case is a matter of common knowledge. Any witness can testify to the facts, if he knows them; and we apprehend

there would be few witnesses better able to state the necessity for the husband to be at home than his father-in-law, who was presumably familiar with all of the circumstances surrounding the wife—the number of small children, if any, who required the attention of the father in the sickness of the mother, the amount of domestic help, the temperament and disposition of the sick wife, etc.

The learned trial judge, in overruling the motion to continue, does not seem to have placed his decision upon the ground advanced by the defendants in error, but rather upon the fact that the movant's continuances had been exhausted. Section 5717 is as follows: "If either party shall be providentially prevented from attending at the trial of any cause, and the counsel of such absent party will state in his place that he cannot go safely to trial without the presence of such absent party, such cause shall be continued, provided his continuances are not exhausted." Taking into consideration the nature of the showing in the present instance, we do not think that the movant's continuances had been exhausted, merely because at a prior term of the court the case had been continued by agreement of parties, and at the July term, 1911, had been continued because of the absence of his counsel in the General Assembly. The latter was a continuance by law, designed primarily, not for the benefit of parties, but for their counsel. It was not, strictly speaking, a continuance for Ritchey, because, if his counsel thought it his duty to remain in attendance on the Legislature, he could have done so, and Ritchey could not have gotten a trial, even if he had desired to have the case tried, unless he had gone to the expense of employing other counsel. The continuance by agreement of parties was not, strictly speaking, a continuance by this movant, and therefore was not wholly chargeable to him.

Judgment reversed.

(11 Ga. App. 499.)

WESTERN UNION TELEGRAPH CO. v.
CARTER. (No. 4,230.)

(Court of Appeals of Georgia. Sept. 24, 1912.)

(Syllabus by the Court.)

1. JUSTICES OF THE PEACE (§ 7*)—EX OFFICIO JUSTICES—JURISDICTION AND PROCEEDINGS.

Under the statutes of this state, a justice's court and the court of a commissioned notary public, ex officio justice of the peace, are identical, having the same jurisdiction, powers, proceedings, and practice.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. § 10; Dec. Dig. § 7.*]

2. JUSTICES OF THE PEACE (§ 87*)—PROCEEDINGS—GARNISHMENT—RETURN TO OTHER JUSTICE.

Where a suit is pending, or judgment has been obtained, in either a justice's court or the court of a notary public, ex officio justice of the peace, and, in compliance with the require-

ments of section 4754 of the Civil Code of 1910, garnishment based thereon is sued out and served on a person residing in a militia district of the same county, different from the militia district in which the suit is pending or the judgment was obtained, the garnishment may be returned to and tried in either the justice's court or the court of a notary public, ex officio justice of the peace, of the district in which the garnishee resides.

[Ed. Note.—For other cases, see *Justices of the Peace*, Cent. Dig. §§ 295-306; Dec. Dig. § 87.*]

Error from Superior Court, Fulton County; Geo. L. Bell, Judge.

Action between the Western Union Telegraph Company and George A. Carter. From the judgment, the Western Union Telegraph Company brings error. Reversed.

J. D. Greene, of Atlanta, for plaintiff in error. Geo. A. Carter, of Atlanta, pro se.

HILL, C. J. The only point at issue in this case was as to the construction of section 4754 of the Civil Code of 1910; the plaintiff contending that a garnishment based upon a judgment obtained in the court of a notary public and ex officio justice of the peace could be sued out in, returned to, and tried in the court of the *justice of the peace* of a different militia district of the same county, in which district the garnishee resided, and the garnishee contending that the garnishment should have been returned to and tried in the court of a notary public and ex officio justice of the peace, and not the court of a justice of the peace. The judge of the superior court held in favor of the garnishee's contention; the plaintiff's petition for certiorari being overruled and final judgment rendered in favor of the garnishee.

The Code section referred to provides that, "when any person or persons, sought to be garnished, reside in a militia district in the same county, different from the militia district in which suit is pending or judgment was obtained," garnishment may be sued out "in the militia district where the person or persons sought to be garnished reside, * * * requiring such person or persons to appear at the next notary public's or justice's court of the district of the garnishee's residence, according as such suit was pending, or judgment was obtained, in the notary public's or justice's court, then and there * * * to depose and answer," etc.

[1] We think that, under the statutes of this state, a court of a justice of the peace and that of a notary public, ex officio justice of the peace, are identical and of the same grade and class, having the same jurisdiction, powers, proceedings, and practice. The only difference is that a justice of the peace is elected by the people of the district, and a notary public, ex officio justice of the peace, is appointed by the judge of the superior court upon the recommenda-

tion of the grand jury. Justices of the peace and notaries public, ex officio justices of the peace, are commissioned by the Governor for a term of four years, and the statute expressly declares that commissioned notaries public, appointed by the judge of the superior court upon recommendation of the grand jury, shall be ex officio justices of the peace, and shall be removed from office for malpractice in office. In *Childers v. State*, 3 Ga. App. 449, 60 S. E. 128, it is said by this court that "a commissioned notary public is ex officio a justice of the peace," and this is the declaration of the statute. In *Pool v. Perdue*, 44 Ga. 454, the Supreme Court holds that under the Constitution of 1868 (article 5, § 6, par. 4)—and as to this the Constitution of 1877 makes no change—a commissioned notary public is a justice of the peace of the district in which he is appointed, with all the powers and functions of such office. *Lynes v. State*, 46 Ga. 208; *Ormond v. Ball*, 120 Ga. 919, 48 S. E. 383. The Constitution of this state also provides that "the jurisdiction, powers, proceedings, and practice of all courts or officers invested with judicial power (except city courts), of the same grade or class, so far as regulated by law, and the force and effect of the process, judgment, and decree by such courts, severally, shall be uniform. This uniformity must be established by the General Assembly." Const. art. 6, § 9, par. 1 (Civil Code 1910, § 6527). And section 4722 of the Civil Code of 1910 provides that "the proceedings of the justices' courts shall be uniform throughout the state."

[2] The confusion on the point arises out of the following language of section 4754 of the Civil Code of 1910: "Requiring such person or persons to appear at the next notary public's or justice's court of the district of the garnishee's residence, *according as such suit was pending, or judgment was obtained, in the notary public's or justice's court.*" We do not think that the language emphasized means that if the suit was pending, or the judgment obtained, in a notary public's court, only a notary public's court could be resorted to in trying the garnishment, or that if the suit was pending or the judgment was obtained in the court of a justice of the peace, the garnishment must be returned to and tried in the court of a justice of the peace. Such an interpretation would necessarily create a difference between the powers and jurisdiction of these two classes of courts, in direct violation of the provision of the Constitution above cited (Const. art. 6, § 9, par. 1; Civil Code, § 6527), and would make this part of section 4754 unconstitutional. We are clear that the only reasonable construction of this section, notwithstanding the apparent confusion in its language, is that when suit is pending, or when judgment has been obtained, in either a justice's court or a notary

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

public's court of one militia district, and garnishment based thereon is sued out and served on a person residing in another district of the same county, in compliance with the provisions of section 4754, the garnishment may be returned to and tried in either the justice's court or a notary public's court of the district in which the garnishee resides.

Judgment reversed.

(11 Ga. App. 509)

MISENHEIMER v. GAINNEY. (No. 4,038.)

(Court of Appeals of Georgia. July 23, 1912.

Rehearing Denied Sept. 27, 1912.)

(Syllabus by the Court.)

1. PLEADING (§ 302*)—VERIFICATION—AUTHORITY OF ATTORNEY.

Where an amendment to a plea or answer is offered after the time allowed for answer has expired, the verification prescribed by section 5640 of the Civil Code of 1910 must be made by the defendant in person, and cannot be made by his attorney.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 898-903; Dec. Dig. § 302.*]

2. PLEADING (§ 380*)—ISSUES AND PROOFS—EVIDENCE ADMISSIBLE UNDER PLEADING.

Testimony which is not relevant to the issues made by the pleadings is not admissible as evidence.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1237, 1239-1252; Dec. Dig. § 380.*]

3. LOGS AND LOGGING (§ 33*)—LIENS—FORECLOSURE.

The counter affidavit did not call in question the legality of the lien as claimed in the affidavit for foreclosure, and, the amendment offered for that purpose having been properly rejected, the testimony tending to prove that the plaintiff was not entitled to the lien was properly excluded, and the court did not err in refusing to dismiss the foreclosure proceedings, on the ground that the plaintiff was not entitled to the statutory lien as claimed.

[Ed. Note.—For other cases, see Logs and Logging, Cent. Dig. §§ 89-103; Dec. Dig. § 33.*]

Error from City Court of Bainbridge; W. M. Harrell, Judge.

Action by Mrs. E. D. Gainney against C. O. Misenheimer. Judgment for plaintiff, and defendant brings error. Affirmed.

This was a proceeding to foreclose a lien on a sawmill and on lumber for logs furnished the mill, under section 3358 of the Civil Code of 1910. The defendant, through his agent, filed a counter affidavit, alleging: (1) He was not indebted to the plaintiff in the sum sued for. (2) He admitted an indebtedness of \$40, and tendered this amount, but denied any indebtedness in excess of this sum, contending that the balance sued for was not yet due. (3) No demand for payment of the debt was ever made upon him as required by law. (4) He denies that the plaintiff had "faithfully performed and completed her contract as required by law." (5) "At the time that said lien was foreclos-

ed the amount sued for was not yet due, and the plaintiff was not entitled to the same." On the hearing the defendant sought to amend the counter affidavit by alleging that the plaintiff was "not entitled to any lien whatever under the laws of Georgia." This amendment was verified by the defendant's attorney at law. The court refused to allow the amendment, and the refusal is assigned as error.

The case proceeded to trial, and the plaintiff, by her agent, proved that she sold to the defendant, who was operating the sawmill in question, the logs described in the affidavit of foreclosure. On cross-examination this witness testified that at the time the timber was sold to the defendant it was standing upon the land and had not been cut, but that it was cut and removed after the contract was made; that the plaintiff did not cut and deliver any of the timber, but that all of it was cut by the defendant and hauled by him to his sawmill. The defendant offered in evidence the contract for the sale of the timber, but it was excluded, on objection made by the plaintiff, on the ground that there was no plea which made the contract material or relevant evidence. The court also, at the instance of the plaintiff, excluded from evidence the testimony of the defendant that there were no logs or cut timber sold, but that it was all growing at the time of the contract, and was subsequently cut and hauled to the mill by the defendant; this testimony being objected to on the ground that there was no plea that made it relevant or material evidence.

The defendant, at the conclusion of the plaintiff's evidence, made a motion to dismiss the levy, on the ground that the plaintiff was not entitled to any lien under the statute of the state, in that the evidence disclosed the fact that the timber was growing at the time the contract was made, and was not personalty, but was a part of the realty. The motion was overruled, and this ruling is assigned as error.

J. R. Wilson, of Bainbridge, for plaintiff in error. E. S. Longley, of Muskogee, Okl., and Russell & Custer, of Bainbridge, for defendant in error.

HILL, C. J. (after stating the facts as above). [1] 1. The first question to be decided is whether the court erred in refusing to allow the amendment to the plea as verified by the defendant's attorney at law. The general rule is that attorneys are not authorized to make affidavits required to be made by the parties unless specially permitted by law. Civil Code 1910, § 4955. Section 3366, par. 6, relating to the foreclosure of liens on personal property, declares: "If the person defendant in such execution, or any creditor of such defendant, contests the

amount or justice of the claim, or the existence of such lien, he may file his affidavit of the fact, setting forth the ground of such denial, which affidavit shall form an issue to be returned to the court and tried as other causes." Section 5810 provides that the affidavit of illegality may be filed by an attorney in fact; but an attorney in fact is not necessarily an attorney at law. And section 5640, relating to the verification of an amendment to an answer or plea, is as follows: "The defendant, after the time allowed for answer has expired, shall not in any case by amendment set up any new facts or defense of which notice was not given by the original plea or answer, unless at the time of filing such amended plea or answer containing the new matter he shall attach an affidavit that at the time of filing the original plea or answer he did not omit the new facts or defense set out in the amended plea or answer for the purpose of delay," etc. It would seem from this section of the Code that the counter affidavit to the foreclosure of the lien is required to be made by the defendant in person. In this case, however, no objection seems to have been made to the original counter affidavit which was made by the agent of the plaintiff; but the objection was interposed and sustained as to the amendment verified by the defendant's attorney at law, which brought into question the validity of the lien claim, and this section of the Code explicitly declares that the verification of the amended plea or answer, after the time allowed for plea or answer has expired, must be made by the defendant. The "defendant" must make affidavit that the matter of defense set up in the amendment was not omitted from the original answer or plea for the purpose of delay; in other words, that he, as the defendant, did not omit these facts in the original plea for the purpose of delay. It would seem to be immaterial whether they had been omitted from the original plea by the attorney representing the defendant.

The attorney for the plaintiff in error relies upon section 5642 of the Civil Code in support of his position that the amended plea was sufficiently verified by the attorney. This section provides as follows: "In all civil cases founded on unconditional contracts in writing, where there is an issuable defense, and where the defendant does not reside in the county in which the suit is pending, it shall and may be lawful for the agent or attorney at law of such defendant to make oath to the plea, and the same shall be as good and sufficient as if made by the defendant himself." It will be seen that the authority given by this section is confined to unconditional contracts in writing, where there is an issuable defense, and where the defendant does not reside in the county in which the suit is pending. The amendment to the plea offered in the present case alleged that the defendant did not re-

side in the county but was beyond the jurisdiction of the court. Manifestly a statutory lien for furnishing logs for a sawmill is not within the class of unconditional contracts in writing referred to, and this section of the Code has no application to the present case. The cases of *Fort v. West*, 53 Ga. 584, and *Poullain v. Pigg*, 60 Ga. 263, cited by counsel for plaintiff in error, where an amendment to the original plea was verified by the attorney at law, were suits on unconditional contracts in writing and squarely within the provisions of the statute embodied in section 5642. In view of the fact that section 3366, par. 3, allows an attorney for the plaintiff to make the affidavit foreclosing a lien claim, we do not see any substantial reason why a similar right relating to counter affidavits should not be granted to the defendant; but the law is explicit that the defendant shall make the counter affidavit, and also that the amendment to the answer or plea, filed after the time for making a defense, shall be verified by the affidavit of the defendant in person. We therefore conclude that the trial judge committed no error in refusing to allow the amendment to the counter affidavit or answer of the defendant, which was verified by his attorney at law.

[3] 2. It is next insisted by the plaintiff in error that the original counter affidavit was sufficient to traverse each and every fact contained in the affidavit of foreclosure, especially in view of the fact that there was no special or general demurrer filed to the counter affidavit. In *Slappey v. Charles*, 7 Ga. App. 796, 68 S. E. 303, this court held that a counter affidavit stating that the defendant was "not indebted to the plaintiff in the sum named, nor in any sum whatever, for which the plaintiff has a lien," in the absence of a special demurrer, was sufficient to raise an issue that the items claimed to have been furnished by the plaintiff to the defendant did not fall within the class as to which the law allows a lien. A comparison of the counter affidavit in the present case with the one filed in the *Slappey Case* shows a marked difference in the allegations of the two affidavits. In the *Slappey Case* there was an express denial of the plaintiff's right to the lien claimed; in the present case the counter affidavit contained no denial of the right to the lien claimed, but simply a denial of the allegation that the defendant was indebted to the plaintiff in the sum sued for. It was admitted that the defendant did owe the sum of \$40; but it was alleged that the balance claimed in the affidavit was not yet due, that no demand had ever been made upon defendant for payment, and that the plaintiff had not performed or completed her contract, and that for this reason the plaintiff was not entitled to recover the amount claimed by the foreclosure proceeding. But the counter

affidavit, which constitutes the answer, nowhere denies the right to the lien claimed.

[2] It follows, therefore, that, no denial of this right having been contained in the original counter affidavit or plea, and the amendment to the original plea having been disallowed because of improper verification, the question of the plaintiff's right under the statute was not in issue at all, and the trial court did not err in excluding from evidence the testimony going to show that the plaintiff was not entitled to a lien, because there were no logs furnished to the sawmill, but the contract of sale was for growing timber which was attached to the realty upon which there was no lien. It is true that the testimony of the plaintiff's witness on cross-examination disclosed this fact; but, since there was no issue under the plea which made this testimony relevant or material, the defendant could not take advantage of it. Evidence is never admissible, unless relevant or material to the issues made by the pleadings. While the contention of plaintiff in error, that under the statute of this state no lien is given for growing timber which is a part of the realty, is in conformity with the repeated rulings of this court and of the Supreme Court, yet, since this question was not put in issue by the pleadings, the court did not err in refusing to dismiss the foreclosure proceedings on this ground.

Judgment affirmed.

(11 Ga. App. 547)

KALMON v. SCARBORO et al. (No. 3,882.)
(Court of Appeals of Georgia. Sept. 27, 1912.)

(Syllabus by the Court.)

1. GUARANTY (§ 85*) — ACTION AGAINST GUARANTOR—PLEADING.

Under the decision of this court in *Small Company v. Claxton*, 1 Ga. App. 83, 57 S. E. 977, following the decision of the Supreme Court in *Sims v. Clark*, 91 Ga. 302, 18 S. E. 158, the allegations of the petition are sufficient to withstand the general demurrer, and the dismissal of the petition on demurrer was therefore error.

[Ed. Note.—For other cases, see *Guaranty*, Cent. Dig. § 99; Dec. Dig. § 85.*]

2. GUARANTY (§ 53*)—RELEASE OF LIABILITY—CHANGE OF CONTRACT.

Even if it could be inferred from the petition that the contract of purchase originally created an indebtedness on account, instead of by note as one of the original terms of the sale, still a guarantor is not, as a matter of law, released by reason of the mere fact that an account which he guaranteed has been reduced to a note, when it appears that the account was for goods furnished "in pursuance of the contract of guaranty," and when it appears that the note represents the same amount, and stands in lieu of the account. It is plain, from the allegations of the petition, that the action is based upon the guaranty, and not upon the notes; and the statements in regard to the notes may be treated as a recital of the history of the case.

[Ed. Note.—For other cases, see *Guaranty*, Cent. Dig. § 64; Dec. Dig. § 53.*]

3. GUARANTY (§ 77*) — ACTION AGAINST GUARANTOR—CONDITION PRECEDENT.

The liability of the guarantors in the present case depends upon the failure of the original debtor to pay the debt at maturity. It is not necessary that the creditor should obtain a judgment against the original debtor before suit against the guarantor.

[Ed. Note.—For other cases, see *Guaranty*, Cent. Dig. §§ 87-90; Dec. Dig. § 77.*]

4. GUARANTY (§ 53*)—RELEASE OF LIABILITY—CHANGE OF OBLIGATION.

It does not appear from the allegations of the petition that the guarantors' risk was increased or their liability enlarged. The execution of the notes merely evidenced in writing an admission, on the part of the principal debtor, of an indebtedness to the plaintiff, which (according to other allegations of the petition) was the subject of the guaranty; and although the note contained a stipulation for attorney's fees and for interest at the rate of 8 per cent. (instead of 7 per cent., which the account would have drawn), still the petition did not ask for a recovery of attorney's fees, or for interest at the higher rate.

[Ed. Note.—For other cases, see *Guaranty*, Cent. Dig. §§ 64; Dec. Dig. § 53.*]

Error from City Court of Tifton; R. Eve, Judge.

Action by E. H. Kalmon against Frank Scarboro and another. Judgment for defendants, and plaintiff brings error. Reversed.

C. W. Fulwood, of Tifton, for plaintiff in error. L. P. Skeen and J. M. Kent, both of Tifton, and J. J. Murray, of Nashville, for defendants in error.

RUSSELL, J. Kalmon filed a suit in which it was alleged that Frank Scarboro, W. L. Yeomans, and J. M. Kent entered into a contract with him whereby they became guarantors of the account of J. M. Kent Company. He attached to the petition a copy of the contract, and alleged that in pursuance of the contract he sold J. M. Kent Company goods and merchandise, whereby that company became indebted to him in the sum of \$300, with interest; that the indebtedness is evidenced by two promissory notes, for \$150 each, one due April 15, 1910, and the other May 15, 1910; that these notes are due and unpaid; that the Kent Company has failed and refused to pay them, and that this corporation is insolvent and unable to respond to a judgment for the amount of the debt, and has ceased to do business. On demurrer the judge dismissed the petition, and this judgment is the ground of the bill of exceptions.

The defendants, Yeomans and Scarboro, filed separate demurrers. Each demurred generally, and Scarboro demurred upon the ground that the petition failed to show that the plaintiff had liquidated his demand against the J. M. Kent Company by a suit to judgment, insisting that there can be no liability upon the guaranty until the plaintiff has obtained judgment against J. M.

Kent Company or joined J. M. Kent Company as a defendant in the suit. The demurrer of Yeomans, in addition to urging that the petition set forth no cause of action, objected to it as being duplicitous. Yeomans demurred also upon the ground that it is impossible to determine judicially whether the plaintiff bases his action upon the alleged contract of guaranty, or whether it is the notes attached to the petition that are sued upon; also upon the ground that no recovery can be had, except upon the notes, which are made a part of the petition, and that it does not appear that the defendants, Yeomans and Scarboro, in any way obligated themselves for the payment of these notes. A further special demurrer set up the contention that the liability of the defendants rests solely upon the following stipulation of the contract of guaranty: "We do hereby guarantee to the said E. H. Kalmon the payment at maturity, in accordance with the terms of sale, of the price and value of all goods, wares, and merchandise sold by them to the said J. M. Kent Company"—and it is insisted that the petition fails to show what goods (or whether any) were ever sold to the J. M. Kent Company, or the price and value of such goods, or when they were sold, or the terms of sale, or the maturity of the debt.

[1] The question of first importance raised by the demurrers is whether the suit is an action on the contract of guaranty, or on the promissory notes executed by the original debtor. If the petition can be construed as a suit upon the notes, its dismissal upon the demurrer was proper. If, upon the other hand the recovery is sought upon the liability imposed by the contract of guaranty, the action should not have been dismissed, and for the purpose of another trial, we should next inquire into the merits of the special demurrers. We hold that the petition sets forth a good cause of action, which we construe to be a suit on the contract of guaranty, to recover \$300 of a possible liability for \$1,000 (which was assumed by the guarantors), with interest upon the \$300 at the rate of 7 per cent. Without any relaxation of the rule which requires pleadings to be most strongly construed against the pleader, it is apparent that the plaintiff relies entirely upon the contract, because he sets out the contract and pleads it. He alleges that the goods which he sold were sold in pursuance of the contract, and that the indebtedness of the J. M. Kent Company depended upon this, and he asks for no more than the value of the goods, with lawful interest. It is true that he says the amount which the Kent Company owes him, and which he alleges the defendants are due to pay him by reason of the terms of their contract of guaranty, is evidenced by two promissory notes, and that these are attached to the petition; but he does not seek to recover according to the stipulations of the promis-

sory notes, for he does not ask a judgment for interest at the rate of 8 per cent. per annum, nor any recovery of the attorney's fees provided for in the notes. The main point is that he alleges that the liability of the defendants to him depends upon the fact that the goods were sold to the Kent Company in pursuance of the contract. It is well settled that the liability of a guarantor is distinct from that of the original debtor. There is no liability on the part of the guarantor until the original debtor fails to pay. It is equally well settled that any change of the contract without the consent of the guarantor relieves him, and also that any act that is done by the party guaranteed, which will increase his risk, will likewise void the contract of guaranty. According to the allegations of the petition, reasonably construed, the plaintiff sold to the principal debtor, J. M. Kent Company, \$300 worth of goods, and the debt is evidenced by \$300 worth of notes. It is not alleged that the goods were sold upon an account. It is possible that they were sold in exchange for the principal debtor's notes, possibly at the dates fixed for the maturity of each. So far as appears from the petition, this may have been the course of the matter, for the contract of guaranty places no restriction upon the terms of sale which might be agreed upon between Kalmon and the Kent Company.

[2] If we should assume that the goods were sold on account, and that, in order to avoid misunderstanding and to liquidate the account, the Kent Company gave its notes; would this be any change of the contract of guaranty under which these guarantors undertook to guarantee to the said E. H. Kalmon the payment at maturity, in accordance with the terms of sale, of the price and value of all goods sold to the Kent Company, from time to time, on and after September 22, 1909, until Kalmon should be given 10 days' written notice of the withdrawal of the guaranty? There is nothing on the face of the petition to show that the notes were the result of any extension of time to the Kent Company of an overdue demand, and so we are not required to hold whether this would be a novation of the contract, such as would release the guarantors, or such an act as, by increasing the liability of the guarantors, would relieve them. So far as appears from the petition, Kalmon preferred for his sales to the Kent Company to be evidenced by notes (which are admissions of indebtedness), rather than by accounts, which are subject to dispute. However, we incline to the opinion that the mere fact of taking the notes in lieu of open accounts, the payment of which has been guaranteed, would not in any way change the relation of the parties or subject the guarantors of the account, under the contract involved in this case, to any greater liability. The contract bespoke a continuing guaranty, until the

guarantors should notify Kalmon to sell to the Kent Company no further. It extended a continuing credit of \$1,000 to the Kent Company.

Civil Code 1910, § 3543, declares that "a change of the nature or terms of a contract is called a novation; such novation, without the consent of the surety, discharges him." The sense of the contract entered into by the guarantors in this case is that they assume liability up to \$1,000 for whatever goods Kalmon might sell to the Kent Company, until such time as the guaranty might be withdrawn. How can the nature of this contract be affected, or its terms exceeded, by mere failure to collect promptly, or failure to collect at all? When the Kent Company fails to pay, the guarantors become liable, says this contract of guaranty. True it is that "the undertaking of a surety is stricti juris, and he cannot be bound further than the very terms of the contract, and if the principal and the obligee change the terms of the contract without his consent the surety is discharged." *Bethune v. Dozier*, 10 Ga. 235. But what are the terms of the present contract? There is no stipulation as to the terms of payment which Kalmon shall impose on the Kent Company; no provision that he shall not, by deed or mortgage, take security for its payment; no requirement that he shall not take from the Kent Company an admission of its indebtedness. The contract does not speak of any of these things; and therefore it cannot be said that its terms are varied because Kalmon's debt is represented by notes, instead of an account. The terms of the contract of guaranty in the instant case are that Kalmon shall not, on the faith of the guaranty, sell to the Kent Company such an amount of goods as will cause their indebtedness to Kalmon, at any one time, to exceed \$1,000. This is manifest from the language used, "Our liability shall not at any time exceed \$1,000." The guarantors reserved in the contract the right to withdraw their guaranty upon ten days' notice, and they waived notice of nonpayment on the part of Kalmon. They guaranteed that the Kent Company would pay at maturity in accordance with the terms of sale. To our minds the waiver of the notice of nonpayment implies an understanding and agreement on the part of the guarantors that Kalmon was not required to promptly enforce the payment at its maturity of any demand he might have against the Kent Company for goods sold it

in pursuance of the guaranty, and this view is strengthened by the stipulation of the contract to the effect that the liability of the guarantors shall not at any time exceed \$1,000.

Construing the contract as a whole, there is no term or provision of the instrument which, in our opinion, would have forbidden Kalmon, if the Kent Company owed him less than \$1,000, to take a note for the pre-existing account, and certainly this mode of procedure would not have subjected the guarantors to any additional risk upon their contract of guaranty.

[4] Coming to the special demurrers: It is plain that the suit was upon the contract of guaranty, because the petition asks only for the \$300 alleged to be the value of the goods sold (as evidenced by the notes), with interest. If the suit had been proceeding upon the notes, the plaintiff would have been entitled to judgment for 8 per cent. interest, and in the event of the nonpayment of the notes, after service of the 10 days' notice, would have been entitled to attorney's fees. The disclaimer of the higher rate of interest and the avoidance of any reference to attorney's fees are of themselves sufficient to indicate that the plaintiff elected to pursue his action upon the contract of guaranty; and this point is strengthened by the reference to the contract. It is plain that the notes are referred to as part of the history of the case; and they can properly be referred to as admissions on the part of the original obligee of his indebtedness for the sum which the plaintiff is seeking to recover from the guarantors upon their collateral liability.

[3] The contention set up by demurrer, as to failure to show that the plaintiff had obtained a judgment against the Kent Company, is without merit. See *Sims v. Clark*, 91 Ga. 802, 18 S. E. 158. The plaintiff is not required to reduce to judgment his claim against the principal debtor, if the contract of guaranty guarantees payment of the debt at maturity; and unless the principal debtor participates in the execution of the contract of guaranty, he will not, of course, be a proper party to a suit in which the instrument is the basis of the action.

In view of our opinion as to the nature of the action, the court erred in sustaining the general demurrer; and, for the reasons stated, the special demurrers should be overruled.

Judgment reversed.

(159 N. C. 632)

PRITCHARD v. BOARD OF COM'RS OF ORANGE COUNTY.

(Supreme Court of North Carolina. Sept. 26, 1912.)

COUNTIES (§ 183*)—ROAD BONDS—VALIDITY.

Since Const. art. 7, § 7, and Revisal 1905, § 1318, subsec. 27, authorize a county to contract indebtedness without a vote of the qualified electors to cover necessary expenses, bonds issued by a county for public roads under Pub. Loc. Laws 1911, c. 600, are not invalid, even if that act was not passed in the manner prescribed by Const. art. 2, § 14.

[Ed. Note.—For other cases, see Counties, Cent. Dig. §§ 275-281, 283, 284; Dec. Dig. § 183.*]

Appeal from Superior Court, Orange County; Whedbee, Judge.

Action without controversy between W. N. Pritchard and the Board of Commissioners of Orange County. Judgment for plaintiff, and defendant appeals. Reversed.

Frank Nash, of Hillsboro, for appellant. Manning & Everett, of Durham, for appellee.

CLARK, C. J. This is an action submitted without controversy to determine the validity of the proposed issue of \$250,000 bonds by the county of Orange for the public roads of said county. An election was held March 19, 1912, in pursuance of chapter 600, Pub. Local Laws 1911, at which, as required by the terms of said act, a majority of the votes cast approved the issue of said bonds, though not a majority of the qualified voters.

The validity of the bonds is contested, upon the ground that the bill which passed its several readings in the Senate in the manner required by Const. art. 2, § 14, was changed in substantial and material respects on the passage of the bill through the House, and that, as amended by the House, the bill was not re-enacted in the Senate in the manner required by Const. art. 2, § 14. Glenn v. Wray, 126 N. C. 730, 36 S. E. 167; Com'rs v. Stafford, 138 N. C. 453, 50 S. E. 862; Bank v. Lacy, 151 N. C. 4, 65 S. E. 441; Russell v. Troy, 159 N. C. —, 74 S. E. 1021.

But we need not consider this ground of objection, because, under Const. art. 7, § 7, the county is authorized to contract indebtedness without the vote of the qualified voters, when it is for the necessary expenses thereof. Vaughn v. Com'rs, 117 N. C. 432, 23 S. E. 354. Rev. 1905, § 1318, subsec. 27, authorizes county commissioners to borrow money for necessary expenses, and in such case no vote of the people is necessary. Board of Trustees v. Webb, 155 N. C. 388, 71 S. E. 520. The court has repeatedly held that the public roads are a necessary expense. Board of Trustees v. Webb, supra, and numerous cases there cited.

It is true that, "where the Legislature has interposed its will and plainly declared it, where it has by its act prescribed the limit of expenditure, even for a necessary expense for the county, the county commis-

sioners cannot, under the decision of this court herein cited, set at naught the legislative will by setting up a general power of contracting debts for necessary expenses, restrained only by the constitutional limitation of taxation." Burgin v. Smith, 151 N. C. 568, 66 S. E. 607. But here the county commissioners have not attempted to exceed the limitations in the special act of the Legislature, and have consulted the popular will at the ballot box, as required by said act, and its terms, approval by a "majority of the votes cast," have been complied with.

The act itself does not come under the requirements of section 14, art. 2, of the Constitution; and hence, even conceding that the amendments made in the House to the Senate bill were substantial and material, and though the conference report was adopted by each house without conforming to article 2, § 14, the act is valid as an act of ordinary legislation. If there had been no such act, the county could have contracted a debt for its necessary expenses without a vote of the people. The proposed bond issue will therefore be a valid indebtedness of the county of Orange. Jones v. New Bern, 152 N. C. 64, 87 S. E. 173.

The judgment of the court below is reversed.

(159 N. C. 632)

HARRINGTON v. TOWN OF GREENVILLE.

(Supreme Court of North Carolina. Sept. 25, 1912.)

MUNICIPAL CORPORATIONS (§ 739*)—CIVIL LIABILITY—NEGLECT OF GOVERNMENTAL DUTIES.

Under the rule that, unless a right of action is given by statute, a municipal corporation is not liable to an individual for neglect to perform, or negligence in performing, a duty governmental in its nature, it is not liable for the burning of one's property through its failure to exercise its powers, under Revisal 1905, §§ 2929, 2981, et seq., to abate nuisances and condemn buildings, or its negligent default in equipment and operation of fire department.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1556, 1557; Dec. Dig. § 739.*]

Appeal from Superior Court, Pitt County; Foushee, Judge.

Action by W. H. Harrington against the Town of Greenville. Judgment for defendant; plaintiff appeals. Affirmed.

Civil action heard on demurrer to the complaint before his honor, H. A. Foushee, judge, at February term, 1911, of the superior court of Pitt county. The material portions of the complaint are as follows: "That from time to time, for a number of years prior to February 23, 1910, this plaintiff repeatedly called the attention of the governing body of said town of Greenville to, and requested them, as members, both personally and in meeting, of said board of alderman, to exam-

ine, the dangerous condition of the property known as King's stables, the buildings of Sam Cherry, and the old Flanagan buggy shops as a source of danger from fire, which buildings were unoccupied and worthless, being mere hulls and fire traps. (4) That the plaintiff repeatedly requested said board of aldermen to condemn and have removed said buildings, because they were dangerous as a source of fire; and that the defendant, under its powers, authorities, and duties conferred and imposed upon it by the general law and by special acts of the General Assembly, had full power and authority to condemn and remove the same. (5) That the defendant negligently, disregardful of the interest and rights of its property holders and residents, permitted said property to stand as fire traps and gambling dens for negroes, to the great jeopardy and peril of adjacent property owners. (6) That as a result of said negligence on the part of the defendant, and permitting said property to stand as a source of fire, owing to its rotten, decayed condition and dry, accumulated material, on the night of the 23d of February, 1910, it became the source of a fire which destroyed the adjacent property of this plaintiff, to his great damage. (7) That as a result of said fire, and as a result of an inadequate supply of water with sufficient force and quantity, and an inadequate supply of hose, hydrants, and fire equipments and force, this plaintiff suffered the loss of his above-described property, to wit, one brick stable and one brick store and the contents of the same, consisting of lumber, one buggy, and other property, in the sum of \$2,000." The court entered judgment sustaining defendant's demurrer, and the plaintiff excepted and appealed.

Col. Harry Skinner and S. J. Everett, both of Greenville, for appellant. F. M. Wooten, of Greenville, for appellee.

HOKE, J. As we interpret the complaint, plaintiff states and intends to state his grievance in two aspects: (1) That his property was destroyed by reason of negligent failure of the city of Greenville to abate a nuisance which threatened the result. (2) That the injury arose, in whole or in part, from negligent default in equipment and operation of a fire department maintained by the city for the public benefit, and under our decisions both questions must be resolved against him.

It is well recognized with us that, unless a right of action is given by statute, municipal corporations may not be held civilly liable to individuals for "neglect to perform or negligence in performing" duties which are governmental in their nature, and including generally all duties existent or imposed upon them by law solely for the public benefit. *McIlhenney v. City of Wilmington*, 127 N. C. 146, 37 S. E. 187, 50 L. R. A. 470; *Moffitt v. City of Asheville*, 103 N. C. 237, 9 S. E. 695,

14 Am. St. Rep. 810; *Hill v. City of Charlotte*, 72 N. C. 55, 21 Am. Rep. 451. The general power to abate nuisances conferred on municipalities by section 2929 and other sections of the Revisal, and the powers to regulate, inspect, and condemn buildings contained in sections 2981 et seq., are clearly governmental in character, and for negligent default on the part of the city and its officers and agents no action lies; none having been given by the law. Applying this principle, the well-considered case of *Hull v. Roxboro*, 142 N. C. 453, 55 S. E. 351, 12 L. R. A. (N. S.) 638, is an authority directly against the first proposition contended for by plaintiff, and *Peterson v. Wilmington*, 130 N. C. 76, 40 S. E. 853, 56 L. R. A. 959, is equally decisive on the second. In *Hull's Case* it was held: "A municipal corporation is not civilly liable for the failure to pass ordinances to preserve the public health or otherwise promote the public good, nor for any omission to enforce the ordinances enacted under the legislative powers granted in its charter, or to see that they are properly observed by its citizens, or those who may be resident within the corporate limits." And in the *Peterson Case*: "That an employé of a fire department of a city cannot recover for injuries caused by a hose reel of the city fire department being knowingly allowed to be and remain in unsafe and dangerous condition." The ruling in this last case was made to rest on the principle that in maintaining and operating a fire department for the benefit of the public the city was engaged in the exercise of governmental duties, and therefore not liable to individuals, unless made so by statute—a position in accord with the general current of authority. *Wild v. Paterson*, 47 N. J. Law, 406, 1 Atl. 490; *Fisher v. City of Boston*, 104 Mass. 87, 6 Am. Rep. 196; *Jewett v. City of New Haven*, 38 Conn. 368, 9 Am. Rep. 382; *Torbush v. City of Norwich*, 38 Conn. 225, 9 Am. Rep. 395; *Long v. City of Birmingham*, 161 Ala. 427, 49 South. 881, 18 Ann. Cas. 507; *Mayor of New York v. Workman*, 67 Fed. 347, 14 C. C. A. 530.

We are not called on to decide whether the cases of *Coley v. Statesville*, 121 N. C. 301, 28 S. E. 482, and *Lewis v. Raleigh*, 77 N. C. 229, are in strict adherence to the principle. We have no disposition to disturb the responsibility as established on the particular facts of those cases and others of similar import, and the liability of such municipalities by reason of defective streets, if in any way inconsistent, is too firmly established to permit of further question.

In more especial reference to the negligence alleged in the proper maintenance of the fire department and the failure of the water supply for the same, we deem it well to refer to a class of cases which hold that, where municipal corporations are engaged in a business enterprise for profit, they will not

be considered and dealt with as in the exercise of governmental functions, though their work may inure to some extent to the public benefit, and in such case the corporation is held subject to the ordinary burdens and liabilities arising in the course of the business, as in *Woodie v. North Wilkesboro*, 159 N. C. —, 74 S. E. 924; *Terrell v. Washington*, 158 N. C. 281, 73 S. E. 888; *Harrington v. Wadesboro*, 153 N. C. 437, 69 S. E. 399; *Fisher v. New Bern*, 140 N. C. 506, 53 S. E. 342, 5 L. R. A. (N. S.) 542, 111 Am. St. Rep. 857. But this modification of the general principle, if it be such, must be held to extend only to those burdens and liabilities incident to the business features of the enterprise, and does not obtain where, as in this case, the municipality, in the exercise of powers and duties imposed by the law, is maintaining and operating a fire department solely for the public benefit.

There is no error, and the judgment sustaining the demurrer must be affirmed.

Affirmed.

(159 N. C. 612)

PENDER v. SPEIGHT et al.

(Supreme Court of North Carolina. Sept. 25, 1912.)

1. CORPORATIONS (§ 542*) — SALES OF MERCANTILE STOCK.

Regardless of the Bulk Sales Law (Pub. Acts 1907, c. 623), a sale of an insolvent mercantile corporation's stock to one of the directors for 60 per cent. of its actual value is void as in fraud of creditors.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. §§ 2154-2160; Dec. Dig. § 542.*]

2. CORPORATIONS (§ 307*) — DIRECTORS — TRUST RELATION.

Directors of a corporation are trustees of its property for the benefit of the corporate creditors as well as shareholders; it being their duty to administer the trust for the benefit of all parties interested.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. §§ 1350, 1351; Dec. Dig. § 307.*]

3. CORPORATIONS (§ 547*) — DIRECTORS — KNOWLEDGE OF CORPORATE MATTERS.

Since the directors of a corporation are presumed to know its financial condition, it is not necessary, in order to defeat a conveyance of an insolvent corporation's property to one of its directors at less than actual value, to show that they knew of such insolvency.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. §§ 2178-2181; Dec. Dig. § 547.*]

4. CORPORATIONS (§ 542*) — INSOLVENCY — RIGHT TO BUY OWN STOCK.

An insolvent corporation cannot buy its own stock, and, if it becomes insolvent after such purchase, the stockholder is liable to the corporate creditors for the purchase money received by him; the corporation not being empowered to retire stock until it has first discharged all of its liabilities, and an agreement looking to such retirement being void as to creditors.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. §§ 2154-2160; Dec. Dig. § 542.*]

Appeal from Superior Court, Edgecombe County; Carter, Judge.

Action by James Pender, receiver of the Edgecombe Hardware Company, against W. L. Speight and others. Judgment for plaintiff, and defendants appeal. **Affirmed.**

The plaintiff moved for judgment upon the admissions in the pleadings. The court gave judgment that the plaintiff recover of the defendants Speight and Murdock all the stock of goods, etc., described in the complaint, and further that the plaintiff recover of the defendant Murdock the sum of one thousand dollars (\$1,000) with interest from January 9th, 1912, and that the cause be retained for further orders. The defendant appealed.

G. M. T. Fountain & Son, of Tarboro, for appellants. W. O. Howard, H. A. Gilliam, and J. M. Norfleet, all of Tarboro, for appellee.

BROWN, J. It appears from the admissions in the complaint and answer that the Edgecombe Hardware Company was a corporation with a capital stock of \$6,000; that the defendant Speight was the president, Riddick the vice president, and Murdock secretary, and all were directors; that on January 9, 1912, the said corporation was insolvent; that on the 27th of March, 1912, the next and last meeting of the directors the entire stock of goods, furniture, and fixtures and all the property of the corporation were sold to the defendant Murdock for \$4,144.70, purporting to be 60 per cent. of their actual value, and this was done by resolution of the directors; the said Murdock being present and participating. It further appears that the said directors passed a resolution on January 9, 1912, to retire a portion of the capital stock of this insolvent corporation, and, in pursuance thereof, the defendant Speight surrendered 10 shares of the capital stock standing in the name of Ethel Speight, and credited his account with \$1,000, he then owing the Hardware Company \$1,161; that F. G. Davis on said date surrendered 5 shares of the capital stock held by him, and caused the account of F. G. Davis and wife, Addie, which amounted to over \$600, to be credited with the sum of \$317.63; and that on said date the defendant Murdock surrendered 10 shares of the capital stock held by him, and received therefor \$1,000. These are the salient facts admitted in the pleadings.

[1] We will first consider the judgment of the court for the recovery of the stock of goods. It is not pretended that the defendants made any pretense to comply with the provisions of chapter 623, Acts of 1907, entitled "An act to prohibit the sale of merchandise in bulk in fraud of creditors." The learned counsel for the defendant argued with much earnestness that the said act was unconstitutional and void as an unwarranted limitation of the right to sell and dispose of

property. We think this point has been decided adversely to him by the Supreme Court of the United States in *Lemleux v. Young*, 211 U. S. 489, 29 Sup. Ct. 174, 53 L. Ed. 295, in which a statute very similar to ours was upheld. The states of Mississippi, Michigan, Washington, Indiana, and Nebraska have statutes similar to ours which have been sustained by the highest courts of these states. But it is not necessary to consider the statute in this case. The conduct of the defendants was such as to render the sale to one of the directors of the company absolutely void under the general principles of law. In this case the bargainer and the bargainee were officers and directors of the company, and they knew that the company was heavily in debt, and that they were disposing of its entire property without reference to the interest of creditors or stockholders at 60 per cent. of its actual value.

[2] Directors of a corporation are trustees of the property of the corporation for the benefit of the corporate creditors, as well as shareholders. It is their duty to administer the trust assumed by them not for their own profit, but for the mutual benefit of all parties interested, and, when such directors receive an advantage to themselves not common to all, they are guilty of a plain breach of trust. 1 Beach, Pr. Corp. § 241; 2 Story, Eq. Jur. § 1252; *Drury v. Cross*, 7 Wall. 299, 19 L. Ed. 40; *Hill v. Lumber Co.*, 113 N. C. 173, 18 S. E. 107, 21 L. R. A. 560, 37 Am. St. Rep. 621; *Harvey's Rights of Minority Stockholders*, 13; and *McIver v. Hardware Company*, 144 N. C. 485, 57 S. E. 169, 119 Am. St. Rep. 970. In the *Hill* Case it was held that a confession of judgment by an insolvent corporation in favor of a director who is a creditor, and upon a debt theretofore existing, is void as against other creditors.

[3] It is said in behalf of these defendants that they did not know on January 9, 1912, that the corporation was insolvent. The sale of the goods was made on the 27th of March, 1912, when it is perfectly patent from the defendants' answer that they knew that the corporation could not pay its debts, and the means that they were devising for paying off the indebtedness of the company was to sell out its entire assets at 60 per cent. on the dollar to one of their number. The answer discloses the fact that even on January 9, 1912, these defendants knew that the corporation was not in a healthy condition, and that it was about to expire from inanition. The treatment which these financial doctors undertook to give to the patient soon put an end to it. They were evidently physicians of the old school, and, as said by the counsel for the plaintiff, believed in curing disease by purging and bleeding, instead of nourishment. After this drastic treatment insolvency and death naturally followed. The defendants were evidently not educated in the modern

school of high finance, and the crudeness of their methods would have made a high priest of that school blush. They went at the thing in a very direct manner, and appropriated to their own use without any scruples the entire property of the corporation, whose interests they had undertaken to guard. But it is not necessary that they should admit knowledge of insolvency. The law charges them with actual knowledge of the financial condition of the corporation (*Soloman v. Bates*, 118 N. C. 311, 24 S. E. 478, 54 Am. St. Rep. 725), and holds them liable for damages sustained by stockholders and creditors by reason of their negligence, fraud, or deceit.

[4] The defendant Murdock appeals because his honor gave judgment against him for \$1,000, the cash he had taken out of the treasury of the company in payment for his apparently worthless stock. The resolution to retire the stock of an insolvent corporation and to take money out of its treasury for that purpose was a very novel method of sustaining the credit of the corporation, to say the least. But, as this money found its way from a depleted treasury into the pockets of the directors, the motive for passing the resolution at the January meeting is very apparent. An insolvent corporation cannot buy in its own stock, and, if it becomes insolvent after such purchase, the stockholder is held liable to the creditor for the purchase money received by him. *Heggle v. Building & Loan Ass'n*, 107 N. C. 581, 12 S. E. 275.

It is generally held that a corporation cannot settle with its members by the application of assets to the retirement of their stock until it has first discharged all of its liabilities, and any agreement looking to such arrangement among its shareholders is void as to creditors. It will be the duty of the receiver to proceed against the other directors and stockholders who have undertaken to retire their stock by having it credited on their debts to the corporation. Such transaction is fraudulent and void on its face, and cannot be sustained.

The judgment of the superior court is affirmed.

(161 N. C. 209)

**CHADWICK v. NORFOLK-SOUTHERN
R. CO. et al.**

(Supreme Court of North Carolina. Sept. 25, 1912.)

APPEAL AND ERROR (§ 77*)—APPEALABLE ORDER—PREMATURE APPEAL—DISMISSAL.

An order of the superior court reversing an order of the clerk dismissing a processioning proceeding and remanding the same to him for a proper order of survey was not appealable; defendant's remedy being to note an exception and permit the cause to proceed to a hearing, and then, if dissatisfied with the final result, to appeal therefrom on the exceptions so taken.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 444-463; Dec. Dig. § 77.*]

Appeal from Superior Court, Carteret County; Foushee, Judge.

Processioning proceeding by W. S. Chadwick against the Norfolk-Southern Railroad Company and others. From a judgment of the superior court reversing a judgment of the clerk, dismissing the proceedings and remanding the same to him for an order of survey, defendants appeal. Dismissed.

E. H. Gorham, of Morehead City, C. R. Thomas, of New Bern, and J. F. Duncan, of Beaufort, for appellants. Guion & Guion, of New Bern, for appellee.

PER CURIAM. The plaintiff moves to dismiss this appeal in this court upon the ground that the same is premature. The clerk of the superior court dismissed the proceedings. Upon appeal at chambers, the judge presiding in the Third judicial district reversed the judgment of the clerk, and remanded the same to him, to the end that the proper order be made of survey, etc., in accordance with the statute. Rev. § 326.

We are of opinion that the motion to dismiss this appeal because it is premature should be allowed. It was the duty of the defendant to have noted every exception and let the cause proceed to the hearing under the statute, and then, if dissatisfied with the final result, upon exceptions properly taken, the cause can be heard in the superior court, and thence by appeal to this court.

Appeal dismissed.

(159 N. C. 617)

STANCILL v. JOYNER.

(Supreme Court of North Carolina. Sept. 25, 1912.)

INJUNCTION (§ 163*)—TEMPORARY INJUNCTION—RIGHT TO.

An order restraining defendant from constructing a drainage ditch so as to overflow plaintiff's upper land is properly continued until final hearing, where it appears that the ditch has been used to drain plaintiff's land for many years, and that defendant's threatened obstruction would render plaintiff's land unfit for cultivation and cause irreparable damage to it.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 357-371; Dec. Dig. § 163.*]

Appeal from Superior Court, Pitt County; Whedbee, Judge.

Action by J. T. Stancill against O. L. Joyner. From a judgment continuing a restraining order until final hearing, defendant appeals. Affirmed.

Albion Dunn, of Greenville, for appellant. W. F. Evans, of Greenville, for appellee.

HOKE, J. In *Tise v. Whitaker*, 144 N. C. 510, 57 S. E. 211, the court said: "It is the rule with us that in actions of this character the main purpose of which is to obtain a permanent injunction, if the evidence raises serious question as to the existence of

facts which make for plaintiff's right, and sufficient to establish it, a preliminary restraining order will be continued to the hearing. *Hyatt v. De Hart*, 140 N. C. 270 [52 S. E. 781]; *Harrington v. Rawls*, 131 N. C. 39 [42 S. E. 461]; *Whittaker v. Hill*, 96 N. C. 2 [1 S. E. 639]; *Marshall v. Commissioners*, 89 N. C. 103."

The verified complaint and affidavits on the part of plaintiff in the present case tend to show: That plaintiff and defendant are owners of adjoining tracts of land, and that plaintiff, the proprietor of the upper tract, and those under whom he claims, for 30 years have held and exercised the right of drainage over the lands of defendant through a certain ditch of specified dimensions, and that plaintiff has acquired and holds an easement over said lands. "That said ditch is cut and constructed along the natural water flow, and is the only way through and along which the lands of the plaintiff can be successfully drained, and that the lands of the plaintiff are now, and have been for more than 30 years, drained through and along said ditch; and that the plaintiff has been for 20 years, and is now, keeping up and maintaining said ditch through his own lands, and also from where the ditch crosses the dividing line between the plaintiff and defendant, on through the lands of defendant, about 130 yards, to a point where said ditch empties into another ditch. (6) That the defendant is threatening and attempting to dam, close up, and obstruct said ditch, above referred to, at a point immediately on or within a few feet of the dividing line between the lands of the plaintiff and defendant for the purpose of preventing and hindering the flow of water through said ditch. (7) That if the defendant is permitted to dam, fill up, or obstruct said ditch, as set out in the sixth paragraph of this complaint, it will stop the flow of the water from the lands of the plaintiff, thereby causing the water, which has heretofore drained off through said ditch, to back up and stand upon the lands of the plaintiff, and will thereby render said lands unfit for cultivation, and will cause said lands of the plaintiff to become water-sodden and soured, and will thereby greatly injure said lands, and the plaintiff will thereby be irreparably damaged."

The answer and affidavits on the part of the defendant controvert many of the essential features of plaintiff's complaint and the affidavits tending to support it, and material issues are raised as to the ultimate rights of the parties. As the cause goes back for further investigation, we do not consider it desirable to make more extended reference to the facts in evidence; but we are of opinion that these facts clearly bring the controversy within the principle of the case referred to and others of like import, notably

the well-considered case of *Cobb v. Clegg*, 137 N. C. 153, 49 S. E. 80. The judgment continuing the restraining order to the hearing is therefore affirmed.

Affirmed.

(160 N. C. 20)

ELKS et al. v. HEMBY et ux.

(Supreme Court of North Carolina. Sept. 25, 1912.)

1. JUDGMENT (§ 256*)—CONFORMITY TO VERDICT.

Where, in foreclosure of a mortgage for \$3,800, the jury found, on conflicting evidence, that the loan secured was \$1,900, with interest, a decree directing a sale if \$1,900 and interest were not paid within a specified time, and that such payment should be in satisfaction of the mortgage, was in accordance with the verdict.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 446-454; Dec. Dig. § 256.*]

2. TRIAL (§ 25*)—RIGHT TO OPEN AND CLOSE—ISSUES.

Where, in a foreclosure of a mortgage for \$3,800, plaintiff contended that he had bought the land for \$1,900 and resold it to defendant for \$3,800, secured by the mortgage, while defendant claimed that the transaction was a purchase of the land by him for \$1,900 and a loan of the price by plaintiff, and admitted the execution of the mortgage and note, defendant had the burden of proof; and he was properly permitted to open and close.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 44-75; Dec. Dig. § 25.*]

3. APPEAL AND ERROR (§ 106*)—QUESTIONS REVIEWABLE.

Under superior court rule No. 6 (140 N. C. 679), a ruling that defendant has the right to open and close is not appealable.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 726-734; Dec. Dig. § 106.*]

4. MORTGAGES (§ 461*)—FORECLOSURE—ISSUES.

Where, in foreclosure of a mortgage for \$3,800, plaintiff claimed that he had bought the land for \$1,900 and resold it to defendant for \$3,800, secured by the mortgage, while defendant alleged that the transaction was a purchase of the land by him and a loan of the price, \$1,900, by plaintiff, evidence that the vendor contracted to sell the land to defendant, and of the circumstances of the conveyance to plaintiff and the understanding of the parties at the time, was relevant.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 1353-1360; Dec. Dig. § 461.*]

5. MORTGAGES (§ 480*)—ISSUES.

Issues as to whether the real transaction was as stated by defendant, and, if so, the amount of the loan by plaintiff, properly submitted the questions involved.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 1399; Dec. Dig. § 480.*]

6. JUDGMENT (§ 199*)—JUDGMENT NON OBSTANTE.

Where, in a suit to foreclose a mortgage for \$3,800, the issue was whether the mortgage secured a debt for \$3,800 or a debt for \$1,900, and the jury, on conflicting evidence, found that the loan was for \$1,900, a judgment of foreclosure for \$3,800 non obstante veredicto was properly denied.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 367-375; Dec. Dig. § 199.*]

Appeal from Superior Court, Pitt County; Foushee, Judge.

Action by W. H. Elks and another against Adam Hemby and wife. From a judgment granting insufficient relief, plaintiffs appeal. Affirmed.

Jarvis & Blow, of Greenville, for appellants. H. Skinner and F. G. James & Son, all of Greenville, for appellees.

CLARK, C. J. This is an action to foreclose a mortgage. The defendant Adam Hemby, who is an ignorant colored man, applied to the plaintiffs, who owned a store in the neighborhood, to lend him \$1,900 to assist in purchasing a tract of land. The plaintiffs agreed to do so, but required, as defendants allege, a bonus of \$1,100 and a mortgage for the \$3,000, payable in 10 annual installments, with interest. Subsequently the vendor, on the suggestion of the plaintiffs and with the assent of the defendant, conveyed the land directly to the plaintiffs, with an understanding, as the defendants contend, that the plaintiffs were to convey same to Hemby and receive back the mortgage for \$3,000, as aforesaid; and the defendants went into possession of the land. But subsequently the plaintiffs declined to make the arrangements, unless the mortgage was executed for \$3,800. This was given, and when the first note fell due the plaintiff brought this action to foreclose the mortgage. The defendants immediately applied for a restraining order and asked an accounting, and alleged that all of the debt in excess of \$1,900 was void, because usurious. The injunction was continued to the hearing.

[1] The plaintiffs contended that the transaction was a straight sale of the land to the plaintiffs for \$1,900 and a resale by them to the defendants for \$3,800, secured by mortgage. The jury found, upon the conflicting evidence, on the issues submitted to them as follows:

"(1) Was the real transaction stated in the pleadings a purchase of land by Adam Hemby and wife from Mark Wilkes and a loan of money by plaintiffs to defendant Adam Hemby to pay for such land? Answer: Yes.

"(2) If so, how much money did plaintiffs loan to Adam Hemby? Answer: \$1,900, with 6 per cent. interest from January 8, 1910."

Thereupon the court rendered judgment for that sum and appointed commissioners to advertise and sell, if said amount and interest was not paid in 60 days. It was further decreed that the payment of such sum, with interest, should be in full payment and satisfaction of the debt, and all in excess thereof was declared null and void, and canceled. This decree is in accordance with the verdict. *Riley v. Sears*,

154 N. C. 516, 70 S. E. 997; *Doster v. English*, 152 N. C. 339, 67 S. E. 754; *Bennett v. Best*, 142 N. C. 168, 55 S. E. 84; *Ervin v. Morris*, 137 N. C. 50, 49 S. E. 53; *Ward v. Sugg*, 113 N. C. 489, 18 S. E. 717, 24 L. R. A. 280. If there is any error, it is not in favor of the defendants.

[2, 3] Exceptions 1 and 13 are to the opening and conclusion, which were properly held to be upon the defendant. The defendant having admitted the execution of the notes and mortgage, the burden was upon him to show the matters alleged in avoidance. Besides, as to the argument, the ruling was not appealable. Rules of superior court No. 6 (140 N. C. 679).

[4] Exceptions 3, 5, 6, and 8 were to the admission of evidence, which was offered to show that the vendor Mark Wilkes, contracted to sell his land, not to plaintiffs, but to Hemby, and under what circumstances he conveyed to plaintiffs, and the understanding of the parties at the time. This evidence was both pertinent and relevant.

[5] The exception to the form of the issues cannot be sustained. They properly presented the issues which arose upon the pleadings as to the "true inwardness of the transaction," and, if found with the defendants, then the amount of the money loaned. *Williamson v. Bryan*, 142 N. C. 81, 55 S. E. 77; *Gray v. Jenkins*, 151 N. C. 80, 65 S. E. 644.

[6] The court properly refused to nonsuit the defendant as to the matters set up in his counterclaim, and also properly refused a motion non obstante veredicto. *Doster v. English*, 152 N. C. 339, 67 S. E. 754; *Shives v. Cotton Mills*, 151 N. C. 291, 66 S. E. 141. The other exceptions are abandoned.

No error.

(160 N. C. 113)

HARDY et al. v. HINES BROS. LUMBER CO.

(Supreme Court of North Carolina. Sept. 25, 1912.)

1. RAILROADS (§ 482*)—FIRES—NEGLIGENCE—EVIDENCE.

Evidence, in an action for damages from fire set by defendant's locomotive held sufficient to establish negligence, in that the engine was not properly equipped to prevent emission of sparks or fire, and that the track and right of way was foul with combustible material.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1730-1736; Dec. Dig. § 482.*]

2. RAILROADS (§ 480*)—FIRES—NEGLIGENCE—BURDEN OF PROOF.

The setting of fire by sparks from defendant's locomotive, damaging plaintiff, being shown, makes a prima facie showing of negligence, requiring defendant to overcome it.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1709-1716; Dec. Dig. § 480.*]

3. RAILROADS (§ 465*)—FIRES—PROXIMATE CAUSE.

Neither the distance traversed by a fire before it reached plaintiff's property, nor the

time elapsing between the initial fire and that which destroyed plaintiff's property, is conclusive for or against the initial fire being the proximate cause of the destruction, though it may be properly considered on the question.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1690-1693; Dec. Dig. § 465.*]

4. NEGLIGENCE (§ 136*)—PROXIMATE CAUSE—PROVINCE OF COURT AND JURY.

While the question of proximate cause may be one of law, it is generally a question of fact for the jury, under instructions as to what the law requires to constitute it.

[Ed. Note.—For other cases, see *Negligence*, Cent. Dig. §§ 277-353; Dec. Dig. § 136.*]

5. RAILROADS (§ 464*)—FIRES—PROXIMATE CAUSE.

The identity of a fire set by defendant as the proximate cause of the burning of plaintiff's property was not lost, because it died down and for several days smoldered in stumps and other combustible material, if it finally revived and broke out afresh by reason of contact with dry leaves, which carried it at once to plaintiff's property.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1687-1689; Dec. Dig. § 464.*]

6. TRIAL (§ 256*)—INSTRUCTIONS—NECESSITY FOR REQUEST.

A charge, though general, being in itself correct, a party desiring some other view presented, or that it be more pointed or addressed more closely to the particular facts, should make a specific request therefor.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 628-641; Dec. Dig. § 256.*]

7. RAILROADS (§ 482*)—RIGHT OF WAY—EVIDENCE.

Testimony in an action for fire, alleged by the complaint to have been set on defendant's track and right of way, that the fire was seen on the right of way and track implies, necessarily, that there was a right of way, and is some evidence of defendant having a right of way.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1730-1736; Dec. Dig. § 482.*]

Appeal from Superior Court, Greene County; Whedbee, Judge.

Action by W. B. Hardy and another against Hines Bros. Lumber Company. Judgment for plaintiffs, and defendant appeals. Affirmed.

Rouse & Land and Loftin & Dawson, all of Kinston, and J. P. Frizzelle, of Snow Hill, for appellant. Langston & Allen, of Goldsboro, and J. G. Anderson, for appellees.

WALKER, J. These actions were brought by W. B. Hardy and B. T. Hardy against the defendant to recover damages for negligently burning their timber. The allegations as to the burning, they being substantially the same in the two cases, are that the defendant's locomotive engine set fire to combustible material on its track and right of way, which was covered with dry leaves, pine straw, and wood mould, and in a very foul condition, and that the fire spread to the adjoining land, burning over a considerable area; that an effort was made to extinguish the flames, plaintiffs taking some part in it, but that some days afterwards the fire, which had been left smoldering in

the woods, broke out afresh, extending to the lands of plaintiffs and burning some of their timber. The cases, by consent of all parties, or rather without objection, were consolidated by order of the court and tried together; the facts being practically alike.

[1,2] The fire, as testified by at least two of plaintiffs' witnesses, L. C. Turnage and W. C. Carlyle, was first seen on the track and right of way, just after the train had passed; and there was evidence that the smokestack of the engine was defectively constructed, so that large and live sparks could be emitted therefrom, and that the same engine had before caused fires along the track. It is true that there was evidence to the effect that the engine was properly constructed and supplied with an efficient spark arrester, and a good ash pan, save when bad wood was used; but the facts we have stated were fully deductible from some of the evidence by the jury, and they seem, under a perfectly correct charge, to have accepted them as proven to their satisfaction. It cannot be disputed that there was evidence sufficient to establish the charge of negligence in either of two aspects—a defective engine and a foul and dangerous track and right of way—either of which would constitute actionable negligence if it caused the fire in the beginning, and was the proximate cause of the damage. We said recently, in *Kornegay v. Railroad*, 154 N. C. 389, 70 S. E. 731: "When it is shown that the fire originated from sparks which came from the defendant's engine, the plaintiff makes out a prima facie case, entitling him to have the issue as to negligence submitted to the jury; and they were justified in finding negligence, unless they were satisfied, upon all the evidence in the case, that, in fact, there was no negligence, but that the defendant's engine was equipped with a proper spark arrester or ash pan, and otherwise to prevent the emission of sparks or fire, and had been operated in a careful or prudent manner." This was but a summary of what had been so often decided in former cases. *Williams v. Railroad*, 140 N. C. 623, 53 S. E. 448; *Craft v. Timber Co.*, 132 N. C. 151, 43 S. E. 597; *Knott v. Railroad*, 142 N. C. 238, 55 S. E. 150; *Cox v. Railroad*, 149 N. C. 117, 62 S. E. 884; *Deppe v. Railroad*, 152 N. C. 79, 67 S. E. 262; *Currie & McQueen v. Railroad*, 156 N. C. 419, 72 S. E. 488. We early stated the proposition, which seems to be a clear logical syllogism, that "when the plaintiff shows damage resulting from the act of the defendant, which act, with the exercise of proper care, does not ordinarily produce damage, he makes out a prima facie case of negligence, which cannot be repelled but by proof of care, or some extraordinary accident which makes care useless." *Ellis v. Railroad*, 24 N. C. 138; *Chaffin v. Lawrence*, 50 N. C. 179; *Aycock v. Railroad*, 89 N. C. 321; *Haynes v. Gas Co.*, 114 N. C. 203, 19 S. E.

344, 26 L. R. A. 810, 41 Am. St. Rep. 786; and more recently in *Mizzell v. Manufacturing Co.*, 158 N. C. 265, 73 S. E. 802. The rule may be justified, not only on the ground that negligence is a fair and reasonable deduction from the fact of casting the spark from the engine, as ordinarily, when care is exercised, such a result does not follow, but for the further reason that the proof of care can more easily be produced by the defendant, who has control of the engine and should know its true condition, than by the plaintiff, who may be ignorant of it. *Aycock v. Railroad*, supra. We do not say that there is no exception to or qualification of the rule; but it applies in this case, and that is sufficient for our purpose.

Referring to this subject in *Deppe v. Railroad*, 152 N. C. at page 82, 67 S. E. 263, Justice Manning thus states the rule applicable to the state of facts here presented: "In considering the origin of the fire, it is immaterial whether the fire caught on or off the right of way. The place of ignition is important on the second question. The second question presented is, Could the jury find from this primal fact that the plaintiff's property was negligently burned by the defendant? In *Shearman and Redfield on Negligence* (section 676), the learned authors say: 'The decided weight of authority and of reason is in favor of holding that, the origin of the fire being fixed upon the railroad company, it is presumptively chargeable with negligence, and must assume the burden of proving that it had used all those precautions for confining sparks or cinders (as the case may be) which have already been mentioned as necessary.'" He adds that this is the common law of England, and has been followed in many states, several of which he names, and he cites the following cases decided by this court as sustaining it: *Ellis v. Railroad*, supra; *Manufacturing Co. v. Railroad*, 122 N. C. 881, 29 S. E. 575; *Hosliery Co. v. Railroad*, 131 N. C. 238, 42 S. E. 602; *Lumber Company v. Railroad*, 143 N. C. 324, 55 S. E. 781.

The evidence in our case, though somewhat circumstantial, tends to show conclusively that the fire was ignited by live sparks or coals that fell from the defendant's engine. This being so, the proof is also clear that the track and right of way were foul with dry stubble, which readily caught from the spark or cinder, and that there and in that way the fire originated. If it caught off the right of way, there is equally strong evidence of negligence against defendant; and it was for the jury to find the fact. The question was fairly submitted to them. It was sufficient for them to find that the fire occurred in either one of the suggested ways; for it does not, in law, require two acts of negligence to make a wrong. *Knott v. Railroad*, supra.

[3,4] But defendant contends that if the

fire was negligently caused by the engine dropping a live spark from the smokestack, or a live cinder from the ash pan, it was apparently extinguished after burning over intervening land for some distance from its track; and, while it smoldered in the stumps, and, perhaps, in other places, it was several days before it broke out again and destroyed the plaintiffs' timber. The evidence is that on June 12, 1911, and at first, it burned timber on land next to the railroad track, before it reached the plaintiffs' timber on that day, a small portion of which was consumed, and that on June 23, 1911, it "sprang up" again, and spread to plaintiffs' other timber. The evidence also discloses the fact that plaintiffs assisted in the attempt to put out the fire; but it turns out that the combined efforts of all the neighbors failed to extinguish it. But it is argued from these facts that the fire that destroyed the plaintiffs' woods on June 23, 1911, was not proximately caused by that which started on the defendant's right of way June 12, 1911. Neither the distance traversed by the fire, though lands of other parties intervened, nor the time elapsing between the initial fire and the final conflagration, which destroyed the plaintiffs' property, is conclusive against the existence of proximate cause; that is, that the second fire was proximately caused by the first. The connection of cause and effect must be established; the breach of duty must not only be the cause, but the *proximate cause*, of the damage to the complaining party. We may thus illustrate and state the rule: The proximate cause of an event is understood to be that which, in a natural and continuous sequence, unbroken by any new, independent cause, produces the event, and without which it would not have occurred. This is a general statement of the rule. 1 Sh. & Redf. on Neg. (5th Ed.) § 28. The learned authors add something which is peculiarly applicable to the facts of our case: "Proximity in point of time or space, however, is no part of the definition. That is of no importance, except as it may afford evidence for or against proximity of causation; that is, the proximate cause which is nearest in the order of responsible causation." 1 Sh. & Redf. (5th Ed.) p. 28.

While we do not say that the question of proximate cause may not sometimes, owing to the special facts of the case in hand, resolve itself into one of law, it has been said to be the general and true rule that what is the proximate cause of an injury is ordinarily a question for the jury; the court instructing them as to what the law requires to constitute it, and the jury applying the law to the facts. It is not a question of science or of legal knowledge. It is to be determined as a fact, in view of the circumstances of fact attending it. The primary cause may be the proximate cause of a disaster, though it may operate through successive instruments, as an article at the end

of a chain may be moved by a force applied to the other end, that force being the proximate cause of the movement, or as in the oft-cited case of the squib thrown in the market place. *Scott v. Shepherd* (Squib Case) 2 W. Bl. 892. "The question always is: Was there an unbroken connection between the wrongful act and the injury—a continuous operation? Did the facts constitute a continuous succession of events, so linked together as to make a natural whole; or was there some new and independent cause intervening between the wrong and the injury? It is admitted that the rule is difficult of application. But it is generally held that, in order to warrant a finding that negligence, or an act not amounting to wanton wrong, is the proximate cause of an injury, it must appear that the injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been foreseen in the light of the attending circumstances." *Railway v. Kellogg*, 94 U. S. 469, 24 L. Ed. 256. What was said by Justice Strong in the *Kellogg* Case has generally been approved and adopted by the courts as an apt statement and explanation of the rule. *Ramsbottom v. Railroad*, 138 N. C. 39, 50 S. E. 448.

Judge Cooley has given us three propositions which further illustrate the application of the general rule, and in which he states it a little differently, but with his usual accuracy: "(1) In the case of any distinct legal wrong, which in itself constitutes an invasion of the right of another, the law will presume that some damage follows as a natural, necessary, and proximate result. Here the wrong itself fixes the right of action. We need not go further to show a right of recovery, though the extent of recovery may depend upon the evidence. (2) When the act or omission complained of is not in itself a distinct wrong, and can only become a wrong to any particular individual through injurious consequences resulting therefrom, this consequence must not only be shown, but it must be so connected by averment and evidence with the act or omission as to appear to have resulted therefrom according to the ordinary course of events and as a proximate result of a sufficient cause. (3) If the original act was wrongful, and would naturally, according to the ordinary course of events, prove injurious to some other person or persons, and does actually result in injury through the intervention of other causes which are not wrongful, the injury shall be referred to the wrongful cause, passing by those which were innocent. But if the original wrong only becomes injurious in consequence of the intervention of some distinct wrongful act or omission by another, the injury shall be imputed to the last wrong as the proximate cause, and not to that which was more remote." Cooley on Torts (Ed. of 1879), p. 69.

In substantial agreement with this view of

Judge Cooley is the further observation of the court in the Kellogg Case, 94 U. S. at page 475 (24 L. Ed. 256): "We do not say that even the natural and probable consequences of a wrongful act or omission are in all cases to be chargeable to the misfeasance or nonfeasance. They are not when there is a sufficient and independent cause operating between the wrong and the injury. In such a case the resort of the sufferer must be to the originator of the intermediate cause. But when there is no intermediate efficient cause, the original wrong must be considered as reaching to the effect, and proximate to it. The inquiry must therefore always be whether there was any intermediate cause, disconnected from the primary fault and self-operating, which produced the injury. Here lies the difficulty." Justice Strong adds that this difficulty must be met and the inquiry answered in accordance with common understanding as applied to the peculiar facts. What would be the proximate cause of an event under some circumstances might not be under other and different facts and surroundings; and our common sense, which is the essence of the law, must be brought into service.

[5, 6] We may now the more readily answer the objection of the defendant to the plaintiffs' recovery, based upon the absence of any proximate cause for the last fire which can be referred to its original negligence. "The intervention of time or distance between the two fires, as when seen, is not fatal to plaintiffs, but was proper to be considered by the jury on the question of proximate cause. *Phillips v. Railroad*, 138 N. C. 12, 50 S. E. 462; *Black v. Railroad*, 115 N. C. 687, 20 S. E. 713, 909; *Poeppers v. Railroad*, 87 Mo. 715, 29 Am. Rep. 518; *Railroad v. McBride*, 54 Kan. 172, 37 Pac. 978. If the continuity in sequence of the several events was not broken, and the causes operated together and in connection with each other, either successively or concurrently, each being a contributing cause to the final result, as the jury, by their verdict, evidently found to be the fact, the defendant's act in starting the fire would, in law, be said to have proximately caused the damage to the plaintiffs' lands, and a case of actionable negligence would then be presented. The court charged the jury, in substance, that the burden was on the plaintiffs to satisfy them that the same fire which was started on June 12, 1911, burned the land of the plaintiffs on the 23d, and if they had failed to do so they were not entitled to recover; otherwise they would be. The fire might be so continuous as to form an unbroken chain of causation leading up to the last outbreak, which destroyed plaintiffs' trees, although there may have been a considerable interval of time elapsing between the first and the last fire. Its identity was not lost, because it died down and smoldered in the stumps and in other burnable matter, and finally was revived and

broke out afresh by reason of the contact with the dry pine leaves, which carried it at once to plaintiffs' land.

But the defendant's counsel rely on the case of *Doggett v. Railroad*, 78 N. C. 305, and it must be admitted that, at first blush, there is a seemingly close resemblance between the two cases; but upon further comparison it is found to be a similarity more apparent than real, and, besides, a critical examination of that case will discover that the two cases are essentially different. In this case the court instructed that they must not answer the issue in favor of plaintiffs, unless they were satisfied that the fire of the 12th was the same that burned the plaintiffs' woods on the 23d; it being one continuous fire from the start. There was evidence to support this charge; for the jury might well have inferred from the testimony of the witnesses Lindsay Brown and others that the fire had never been extinguished, but continued to burn slowly, or to smolder, until Friday the 23d, when it reached plaintiffs' trees and destroyed them. In the *Doggett* Case, the very learned justice laid stress upon the negligence of the plaintiff, placing the burden upon him to show its absence, and also undertook to decide the question of plaintiff's negligence as matter of law. We know that, in both respects the law of negligence has since undergone great change by statute and decisions of this court. Again, in that case, it was said: "The second burning did not necessarily follow the first, because of the intervening arrest of the progress of the fire. But even supposing that the progress of the flames had been continuous, if there was any intervening negligence in the effort to extinguish the fire, either by the intermediate owners of fences, or by the neighbors who assembled for that purpose, when their endeavors, properly exerted, might have been successful, the entire weight of authority is that the plaintiff cannot recover." In our case there is no allegation of negligence on the part of the plaintiffs in the answer, and no issue as to it was submitted; nor, we believe, is there any suggestion that they did not do their best to stay the progress of the fire—all that the law required of them. In the *Doggett* Case, as we have seen, in the words taken from the opinion, the "progress of the fire was arrested," while there is evidence in this record that the fire started on the 12th was not extinguished. If the defendant wished to rely upon plaintiffs' negligence, or desired any more definite instruction in regard to it, a specific request should have been made, based upon proper averment in the answer and upon the evidence. *Simmons v. Davenport*, 140 N. C. 407, 53 S. E. 225, and cases cited in note.

Conceding, only for the sake of argument, that the judge's charge was somewhat general in its terms, it was in itself correct; and if the defendant thought that some other

view of the matter should be presented, or that it should be more pointed, or addressed more closely to the particular facts, he should have made his want known to the court in the usual way. So we said, by Justice Hoke, in the apposite case of *Gay v. Mitchell*, 146 N. C. 509, 60 S. E. 426, when the question of proximate cause was likewise involved. The court might well have asked the jury in our case to inquire and find whether, in the exercise of care, the defendant could reasonably have foreseen that the injury to plaintiffs' property would be the natural and probable consequence of its negligence in dropping sparks in the right of way, and explained more fully the rule of proximate cause, in any view of the evidence presenting the question; but we cannot say that its omission to give the charge is positive or reversible error, in the absence of any special request to do so. The jury have evidently found that the fire was not extinguished, but continued in its progress, though very slowly at times, until the final catastrophe. It may be true that plaintiffs were under the duty to protect their property against a seen or known and threatened danger, and to prevent or minimize the danger by the use of proper care (2 Sh. & Redf. on Neg. [5th Ed.] § 679; *Hocutt v. Telegraph Co.*, 147 N. C. 186, 60 S. E. 980), and that their failure to do so would exculpate defendant or diminish the measure of its liability. But this question is not now before us, and we forbear to discuss it.

Nor need we determine whether there was any intervening or independent cause, or evidence of it, which, in law, or in the judgment of the jury acting under proper instructions from the court, would insulate the defendant's original negligence or affect its liability. Nor need we inquire as to the nature or intent of such an intervening cause, with respect to its sufficiency for the purpose of breaking or dissevering the sequence of events; that is, whether it should be itself a superseding, responsible, or culpable cause. Suffice it to say that proximity of cause has no necessary connection with contiguity of space or nearness in time. The negligent fire, in its foreseeable, natural, and probable course and progress, to be ascertained by attending circumstances, is regarded as a unity. *Cooley on Torts* (1879) pp. 76, 77, and notes. The intervention of considerable time and space may be considered by the jury on the question of proximate cause; but it is not controlling. 2 Sh. & Redf. on Neg. (5th Ed.) § 686, and notes, especially 7 and 8. The pauses in the progress of the fire, and the lapse of time, while matters for the consideration of the jury in determining the continuity of effect, do not enable the court to say, as matter of law, that the causal connection between the defendant's negligence in firing the right of way and the injury to the plaintiffs was

broken. It was so said, substantially, in *Haverly v. Railroad*, 135 Pa. 50, 19 Atl. 1013, 20 Am. St. Rep. 848.

The damage, it is true, must be the legitimate sequence of the thing amiss, and if the negligent act and the resulting loss are not known by common experience to be naturally and usually in such sequence, and the damage does not, according to the ordinary course of events, follow from the wrong, then the latter and the damage are not sufficiently conjoined or concatenated, as cause and effect, to constitute actionable negligence; the element of proximate cause being absent. *Cooley on Torts*, 69. In this case the jury must have found that it was one and the same fire throughout its various stages; there being no complete cessation of it. With this fact before us, there does not appear to have been any intermediate efficient and adequate cause operating by itself to break the connection; and the primary wrong must be considered as reaching to the effect, and therefore as proximate to it. *Railroad v. Kellogg*, supra; *Insurance Co. v. Boon*, 95 U. S. 117, 24 L. Ed. 395. We have declined to enter upon the wide field of investigation which would have opened up to us if we had attempted a critical review of the doctrine of proximate and remote cause, as it is discussed in cases without number, being admonished against the futility of such a course by the words of a wise judge, when discussing a similar question: "It would be an unprofitable labor to enter into an examination of the cases. If we could deduce from them the best possible expression of the rule, it would remain after all to decide each case largely upon the special facts belonging to it, and often upon the very nicest discriminations. One of the most valuable of the criteria furnished us by these authorities is to ascertain whether any new cause has intervened between the fact accomplished and the alleged cause. If a new force or power has intervened, of itself sufficient to stand as the cause of the misfortune, the other must be considered as too remote." *Insurance Co. v. Tweed*, 7 Wall. 44, 19 L. Ed. 65. For the reason given, we do not regard the case of *Doggett v. Railroad* as controlling the decision in this case.

[7] The question raised, as to whether there was any evidence that defendant owned a right of way, and, if so, as to its extent, is answered by the language of the witnesses, who testified, in so many words, that the fire was seen on the right of way and track, which implies, necessarily, that there was a right of way, and, nothing else appearing, this is some evidence of the fact for the jury. A similar question was decided at this term. *Lumber Co. v. Brown*, 75 S. E. 714.

We find no error in the record.
No error.

(160 N. C. 83)

PIGFORD v. NORFOLK-SOUTHERN R. CO.

(Supreme Court of North Carolina. Sept. 25, 1912.)

1. MASTER AND SERVANT (§ 226*)—INJURIES TO SERVANT—ASSUMPTION OF RISK—NEGLECT OF MASTER.

A servant assumes only the risks incident to his service, and not those which are the result of the master's negligence, unless such negligence has produced a condition so obviously dangerous that the servant is guilty of contributory negligence in working in his surroundings.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 659-667; Dec. Dig. § 226.*]

2. MASTER AND SERVANT (§ 265*)—INJURIES TO SERVANT—CONTRIBUTORY NEGLIGENCE—BURDEN OF PROOF.

In an action for injuries to an employé from the negligence of his master, the burden is on the employer to show contributory negligence.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 877-908; Dec. Dig. § 265.*]

3. MASTER AND SERVANT (§ 289*)—INJURIES TO SERVANT—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.

Whether an employé was guilty of contributory negligence which would bar a recovery in proceeding with his work of loading a car with iron rails, after a refusal of the master to grant his request for more help, was a question for the jury, to be decided on the standard of an ordinarily prudent man.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1089-1132; Dec. Dig. § 289.*]

4. MASTER AND SERVANT (§ 163*)—INJURIES TO SERVANT—DUTY OF MASTER.

A master must use the same care in providing his servant with reasonably safe and sufficient number of assistants as he is obliged to use in furnishing a safe place to work.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 828-830; Dec. Dig. § 163.*]

5. MASTER AND SERVANT (§ 190*)—INJURIES TO EMPLOYÉ—ACTS OF VICE PRINCIPAL.

Where an employer intrusts the control of his employés to another, he is liable for any abuse of the delegated authority to the same extent as though he had been personally present and acting himself.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 449-474; Dec. Dig. § 190.*]

6. TRIAL (§ 191*)—INSTRUCTIONS—ASSUMPTION OF CONTOVERTED FACTS.

Instructions which assume controverted facts as established were properly refused.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 420-431, 435; Dec. Dig. § 191.*]

7. EVIDENCE (§ 553*)—EXAMINATION OF WITNESSES—SUFFICIENCY OF HYPOTHETICAL QUESTION.

In an action for injuries to an employé, a hypothetical question put to a medical witness as to the cause of the injury was sufficient where it combined substantially all the facts which the evidence would have justified the jury in finding, and was sufficiently explicit for him to give an intelligent and safe opinion.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2369-2374; Dec. Dig. § 553.*]

8. MASTER AND SERVANT (§ 276*)—INJURIES TO SERVANT—LIABILITY OF MASTER—EFFECT OF DELAY IN BRINGING SUIT.

An employé's delay in bringing suit for injuries does not determine the liability of the master, but is only a circumstance for the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 950-952, 954, 959, 970, 976; Dec. Dig. § 276.*]

9. TRIAL (§ 114*)—ARGUMENT OF COUNSEL—IMPROPER ARGUMENT.

Latitude in permitting statements in argument must be indulged, when not prejudicial on account of the heat of argument and the excited zeal of counsel.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 275-278; Dec. Dig. § 114.*]

Appeal from Superior Court, Craven County; Justice, Judge.

Action by T. H. Pigford against the Norfolk-Southern Railroad Company. From a judgment for plaintiff, defendant appeals. No error.

Action for injuries alleged to have been caused by negligence. Plaintiff was employed by defendant, and, at the time he was hurt, was instructed by J. D. Spradlin, the supervisor and his superior officer, to load a gondola car with iron rails, which had been twisted and bent in a wreck and were very crooked. Defendant told Spradlin that he would want more help. The situation may be better described in his own words: "I told him I would want more help. I told him I had three men and my boy working with me, and I didn't think I had help enough to load it. He said: 'Go and try; do the best you can. It is the engineer's orders.' I went down and tried to load it; but I could not, and got hurt. We were loading up the rail on a slide; that car was about seven feet high. We had laid some pieces of rail for a slide, and was putting it up that way. The rail was top heavy. I was in the center of it, and we got it up about four feet high, and it turned over on me, and I felt something tear loose. I had hold of the rail. Q. Why did something tear loose? A. Because I was holding the rail with all my strength; that is about all. I got hurt, and we laid the rail down on the ground. Q. State why you got hurt. A. Because I was trying to hold the rail. It was crooked, and the rail was about to turn over in the center—about to fall. Both ends were about to fall, and if it fell it would turn over on the man; and I got hurt because I was trying to hold it up in that position (indicating what he meant)."

Plaintiff suffered a rupture, which was progressive in its nature, and resulted in serious and permanent injury. After he was first hurt, Spradlin furnished the help asked for, and he then performed the work assigned to him. Three issues were submitted to the jury as to negligence, contributory negligence, and damages. There was nothing said in the answer, nor was there any issue,

as to assumption of risk. The court charged the jury as to the duty of defendant to provide for its employé reasonably safe means and sufficient help to perform his work, and that if it had failed in this duty—the special act of negligence being the failure to furnish necessary or adequate help—and this was the proximate cause of plaintiff's injury, they would answer the first issue "Yes," and that if defendant undertook to do the work, after Spradlin had failed, upon proper application, to give him more help, and that a man of ordinary prudence would not have undertaken the performance of the task under the circumstances, or if defendant did not exercise ordinary care in the manner of doing the work, and either act of carelessness proximately caused the injury, they would answer the second issue "Yes"; the burden as to the first issue being upon the plaintiff, and as to the second upon the defendant. There was a verdict for plaintiff, and defendant appealed from the judgment thereon.

Moore & Dunn, of New Bern, for appellant. Guion & Guion and D. L. Ward, all of New Bern, for appellee.

WALKER, J. (after stating the facts as above). [1] The duty of the defendant to supply help sufficient for the safe performance of the work allotted to the plaintiff is not questioned by the appellant, but it is contended that if it failed to do so the plaintiff was guilty of such negligence in going on with the work, after the refusal to comply with his request, as bars his recovery; it being an act of contributory negligence on his part which was the proximate cause of the injury to him. We cannot assent to this proposition, except in a qualified sense. The doctrine of assumption of risk is dependent upon the servant's knowledge of the dangers incident to his employment and the ordinary risks he is presumed to know. But extraordinary risks, created by the master's negligence, if he knows of them, will not defeat a recovery, should he remain in the service, unless the danger to which he is exposed thereby is so obvious and imminent that the servant cannot help seeing and understanding it fully if he uses due care and precaution, and he falls, under the circumstances, to exercise that degree of care for his own safety which is characteristic of the ordinarily prudent man. 26 Cyc. 1196-1203. We consider the rule to have been settled by this court in *Pressly v. Yarn Mills*, 138 N. C. 410, 51 S. E. 69, and subsequent decisions approving it. Justice Hoke, for the court, in that case approving what had formerly been decided in *Hicks v. Manufacturing Co.*, 138 N. C. 819, 50 S. E. 703, gave this clear statement of the rule, as deduced from the authorities: "While the employé assumes all the ordinary risks incident to his employment, he does not assume the risk of defective machinery and appliances due to the employer's negligence.

These are usually considered as extraordinary risks which the employés do not assume, unless the defect attributable to the employer's negligence is obvious and so immediately dangerous that no prudent man would continue to work on and incur the attendant risks. This is, in effect, referring the question of assumption of risk, where the injury is caused by the negligent failure of the employer to furnish a safe and suitable appliance, to the principles of contributory negligence; but it is usually and in most cases desirable to submit this question to the jury on a separate issue as to assumption of risk, as was done in this case. When the matter is for the jury to determine on the evidence, it may be well to submit this question to their consideration on the standard of the prudent man, in terms as indicated above. The charge on the third issue substantially does this, and the language used is sanctioned by the authorities"—citing *Sims v. Lindsay*, 122 N. C. 678, 30 S. E. 19; *Lloyd v. Hanes*, 128 N. C. 359, 35 S. E. 611; *Coley v. Railroad*, 129 N. C. 407, 40 S. E. 195, 57 L. R. A. 817; *Marks v. Cotton Mills*, 135 N. C. 287, 47 S. E. 432.

There is a clearly marked line of divide between assumption of risk and contributory negligence, the former being confined to the ordinary perils of the service, and the servant could not be held by his contract, or upon any other ground, at least in a technical sense, to have assumed the risk of his master's negligence, as the contractual relation is the other way; the master impliedly undertaking, by the contract of service, to exercise proper care for the servant's safety by selecting reasonably fit and safe tools and appliances, and providing a reasonably safe place and a sufficient and competent force for the performance of the work, and, perhaps, other duties not necessary to be here enumerated. "He complies with the requirements of the law in this respect if, in the selection of machinery and appliances and the employment of sufficient help, he uses that degree of care which a man of ordinary prudence would use, having regard to his own safety, if he were supplying them for his own personal use. It is culpable negligence which makes the employer liable, not a mere error of judgment. We believe this is substantially the rule which has been recognized as the correct one and recommended for our guide in all such cases. It measures accurately the duty of the employer and fixes the limit of his responsibility to his employé"—citing *Harley v. B. C. M. Co.*, 142 N. Y. 81, 36 N. E. 813. So that the liability of the employer to the employé in damages for any injury the latter may receive while engaged in his work depends upon whether the employer has been negligent. *Avery v. Lumber Co.*, 146 N. C. 592 [60 S. E. 646]; *Barkley v. Waste Co.*, 147 N. C. 585 [61 S. E. 565]." *Cotton v. Railroad*, 149 N. C. 227, 62 S. E. 1093.

[2] If, therefore, the master is culpably negligent, and the servant receives an injury which the law will impute to that negligence as its proximate cause, the master will be held liable in damages, because the master's breach of duty was not by any means an ordinary peril of the service within the scope of the contract, but an extraordinary one, for which the master is liable, unless the servant's own negligence contributed to the injury, and is considered to be its proximate cause. If the master, by his own negligence, has brought about a dangerous condition with which the servant is confronted, the obviousness of the danger and the impression the situation would make upon a man of ordinary prudence and discretion, with respect to his own safety, would determine the servant's measure of duty to himself, which the law will require of him under the circumstances, always bearing in mind that, as the question of negligence is composed of law and fact, it is difficult, if not impossible, to extract from the authorities a rule so nicely and comprehensively expressed as to fit all cases. There is no such touchstone in the law by which we can try and test the legal quality of any act of negligence; but with the general principle in hand each case must be decided upon the facts peculiarly its own. Subject to the private act of 1897, c. 56 (Revisal, § 2646), the servant assumes only the ordinary and incidental risks of the service, those which necessarily and naturally, in the course of things, accompany it, and which exclude the idea of any negligence of the master; and if the master negligently injures him, he must show negligence of the servant, in order to defeat a recovery. In several recent cases this question has been considered favorably to the views herein expressed. Justice Allen said, in *Norris v. Mills*, 154 N. C. 474, 70 S. E. 912: "The charge to the jury was, we think, in some respects more favorable to the defendant than it was entitled to, and particularly as to the doctrine of assumption of risk, as the employé never assumes the risk of any injury caused by the failure of the employer to perform a duty which he cannot delegate; and the duty to provide a reasonably safe place to work is one of them." *Hamilton v. Lumber Co.*, 156 N. C. 519, 72 S. E. 588; *Pritchett v. Railroad*, 157 N. C. 88, 72 S. E. 828. It is better for the servant that his case should be decided upon a principle of contributory negligence, as it casts the burden of proof upon the defendant under our law. *Pell's Revisal*, § 483.

[3] The defendant contended that when the plaintiff's request for more help was refused, and he was directed to go on with the work and do the best he could without it, he should have quit the service, and not have exposed himself to the danger which resulted in his injury. This would be a harsh rule to apply in such a case. There are many reasons, some humane, why it should

not prevail. The master should be fair and just to his servant. It is best for both that he should be so. The latter is entitled to fair treatment, just compensation, proper facilities for doing his work, and reasonable care and protection while engaged in it. The servant is not required to retire from the service, or to refuse to go on with his work, unless, as we have said, the danger is obvious, or he knows and appreciates it. He may know of the risk without fully appreciating the danger. Whether such a situation was presented to him at the time of the injury is a question for the jury, to be decided generally upon the rule of the prudent man. We cannot do better than to reproduce here the carefully expressed views by Justice Hoke in *Hamilton v. Lumber Co.*, 156 N. C. at page 523, 72 S. E. at page 589, as they seem to be specially applicable to the facts of this case: "On the conduct of the intestate, while we have held that our statute, known as the fellow servant law (Revisal, § 2646), applies to these logging roads, we do not think that the terms of the law, giving a right of action to an employé injured by reason of defective 'machinery, ways or appliances,' refer to conditions as now disclosed in the testimony; the term 'ways,' we think, having reference rather to roadways and objective conditions relevant to the inquiry, and which it is the duty of the employer to provide. The negligence, if any, imputable to defendant on the testimony is by reason of negligent directions given and methods established by the employer, subjective in their nature, and to which the statute, on the facts presented, was not intended to apply. It is well understood, however, that an employer of labor may be held responsible for directions given or methods established, of the kind indicated, by reason of which an employé is injured, as in *Noble v. Lumber Co.*, 151 N. C. 76 [65 S. E. 622, 134 Am. St. Rep. 974], *Shaw v. Manufacturing Co.*, 146 N. C. 235 [59 S. E. 676], *Jones v. Warehouse Co.*, 138 N. C. 546 [51 S. E. 106]; and where such negligence is established it is further held in this jurisdiction that the doctrine of assumption of risk, in its technical acceptance, is no longer applicable (*Norris v. Cotton Mills*, 154 N. C. 475 [70 S. E. 912]; *Tanner v. Lumber Co.*, 140 N. C. 475 [53 S. E. 287]), but the effect of working on in the presence of conditions which are known and observed must be considered and determined on the question whether the attendant dangers were so obvious that a man of ordinary prudence, and acting with such prudence, should quit the employment rather than incur them (*Bissell v. Lumber Co.*, 152 N. C. 123 [67 S. E. 259]), and, on the issues as to plaintiff's conduct, the fact that the particular service was rendered with the knowledge and approval of the employer or his vice principal, or under his express directions, if given; also the employé's reasonable apprehensions of discharge

in case of disobedience, etc., may be circumstances relevant to the inquiry."

[4, 5] It is as much the duty of the master to exercise care in providing the servant with reasonably safe means and methods of work, such as proper assistance for performing his task, as it is to furnish him a safe place and proper tools and appliances. The one is just as much a primary, absolute, and nondelegable duty as the other. When he intrusts the control of his hands to another, he thereby appoints him in his own place, and is responsible for the proper exercise of the delegated authority, and liable for any abuse of it to the same extent as if he had been personally present and acting in that behalf himself. This principle is well settled. *Shaw v. Manufacturing Co.*, 146 N. C. 239, 59 S. E. 676; *Tanner v. Lumber Co.*, 140 N. C. 475, 53 S. E. 287; *Mason v. Machine Works (C. C.)* 28 Fed. 228; *Railroad v. Herbert*, 116 U. S. 642, 6 Sup. Ct. 590, 29 L. Ed. 755; *Shives v. Cotton Mills*, 151 N. C. 290, 66 S. E. 141; *Pritchett v. Railroad*, supra; *Holton v. Lumber Co.*, 152 N. C. 68, 67 S. E. 54.

It may be assumed that the law does not impose on the master any duty to take more care of his servant than the latter should take of himself; their respective obligations in this respect being equal and the same—that is, to be careful, and to adjust their conduct to the standard of the ordinarily prudent man. In measuring the extent of this duty, the jury will always consider their situation and opportunities, their comparative ability to know the peril of the service and to realize the attendant danger, and any other circumstance shedding light upon the main or principal question of negligence and its proximity to the injury inflicted.

We cannot say, as matter of law, upon the evidence in this case, that the danger of continuing to load the car with the rails upon the slanting skid, without additional help, was such as to bar a recovery. Whether it was so great and obvious that no man of ordinary prudence would have gone on with the work in its presence was properly submitted by the court to the jury, under what we hold to be correct instructions. The charge, in every respect, seems to have been as favorable to the defendant as the law permitted, or it had any right to expect. The judge would not have been warranted in practically taking the case from the jury by such a peremptory charge upon both of the issues upon negligence, as he was requested to give. It was the province of the jury to find the facts, under instructions of the court as to the law. Nor does it make any difference that the work required of the plaintiff was not complicated but simple in its nature. He was entitled, in any view of it, to a reasonably sufficient squad of hands to help him perform it. In this connection, we may well consider the case of *Shaw v. Manufacturing Co.*, 146 N. C. 235, 59 S. E.

676, the facts of which are very similar to those in this case. The plaintiff, Shaw, was told to remove a bed plate and plunger from one part of the defendant's mill to another, and reported to the superintendent that he needed a large chain block for the purpose. His request was refused, and he was directed to do the work with his two small chain blocks. He protested that they were too small, and again asked for a larger chain block, but was told to go ahead and use the small ones anyway. Shaw also applied for more help; but none was supplied. With reference to these facts, this court, by Justice Brown, said: "The evidence shows, further, that insufficient help was furnished (one man and three inexperienced colored boys), and, upon plaintiff's protesting that such help was insufficient, Constable said he knew the three boys were not 'worth a damn,' but that they were all he had, and he directed plaintiff to go ahead, and promised to furnish more help, which he failed to do. Upon this uncontradicted evidence, his honor would have been justified in charging the jury that, if believed to be true, it proved that the defendant's superintendent had been undeniably negligent in his duty to plaintiff." The only difference between the two cases is that in the Shaw Case the evidence was held to be uncontradicted; while in this case it was disputed, and the court left it to the jury to find the facts, and they found that plaintiff's version was the true one. This assimilates the cases, and they cannot be distinguished upon the ground that in Shaw's Case one of the appliances was defective and unusable. The court lays no particular stress upon that fact. Sufficient help was just as necessary to safeguard the servant as flawless implements. The two cases, in their essential and controlling facts, are substantially alike, and the same rule must govern both.

[6] Defendant submitted many prayers for instructions. Some of them assumed facts as established, which were disputed, and others called upon the court to treat the question of negligence as one of law. Those that were proper in form, and applicable to the case, were substantially given.

[7] The hypothetical question put to the expert, Dr. Caton, as to the cause of the hernia, while, perhaps, not as full as it might have been, combined substantially all the facts, and was sufficiently explicit for him to give an intelligent and safe opinion. The evidence would justify a finding of those facts by the jury. This is sufficient. *Summerlin v. Carolina & N. W. R. Co.*, 133 N. C. 551, 45 S. E. 898; *State v. Bowman*, 78 N. C. 509; *State v. Cole*, 94 N. C. 938; *State v. Wilcox*, 132 N. C. 1120, 44 S. E. 625.

There are other exceptions which, upon a careful review of them, we do not think require separate discussion. The central and controlling question relates to the conduct of the plaintiff in the presence of a dangerous

situation thrust upon him by defendant's negligence in ignoring his reasonable request for more help to do the work of lifting the heavy rails, which was made more difficult by their twisted condition. Plaintiff nevertheless attempted to do the work by the command of the defendant's superintendent and alter ego, Spradlin, who was in authority over him, with power to discharge him for disobedience of the order. The jury did not think the danger was so obvious or menacing that a man of ordinary prudence would not have faced it in the effort to comply with the instruction to go ahead and do the best he could with the help he then had. He was injured seriously in his endeavor to follow Spradlin's direction; and, the jury having further found that it was a negligent order, and that plaintiff was without fault, the defendant must answer to him in damages for the consequent injury.

[8] The delay in bringing the suit is, by itself, of no legal significance. It was a circumstance for the jury to consider upon the general question, and was explained by the fact that the disease produced by the injury was almost imperceptibly slow in its progress and development.

[9] If the remarks of plaintiff's attorney, in his address to the jury, were improper, though we are not ready to admit it, but rather think they were legitimate, it could not, in our view of the facts, have so seriously affected the rights of appellant as to call for a reversal. There must be prejudice by the offending counsel of one party to his adversary's rights to induce us to reverse. What counsel said was entirely too mild to hurt, even if it had been not altogether fair in forensic debate, when some latitude must be indulged for the undue heat of argument and the excited zeal of counsel, and sometimes they must give and take, if there is no gross abuse of privilege. *State v. Underwood*, 77 N. C. 502; *State v. Bryan*, 89 N. C. 531; *State v. Suggs*, 89 N. C. 527; *Devries v. Haywood*, 63 N. C. 53; *State v. Tyson*, 133 N. C. 692, 45 S. E. 838; *Railway v. Witte*, 68 Tex. 295, 4 S. W. 490.

We have given good heed to the able and learned brief and oral argument of the defendant's counsel, Mr. Moore, but after all has been said and duly considered we are unable to say that any error in the case has been discovered.

No error.

(92 S. C. 496)

STATE v. BOOZER.

(Supreme Court of South Carolina. Sept. 26, 1912.)

1. CRIMINAL LAW (§ 1137*) — APPEAL — WAIVER OF ERROR.

Where, on an appeal from a prosecution for murder, the statement of facts submitted contains the admission that the defendant did

the killing, no error can be predicated on the court's assumption of such fact in its charge. [Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 3007-3010; Dec. Dig. § 1137.*]

2. HOMICIDE (§ 300*)—INSTRUCTIONS—SELF-DEFENSE—ANALYSIS OF OTHER CASES.

The analyzing of another case in the charge in a prosecution for murder to illustrate the doctrine that the plea of self-defense is not available to one who brings on the difficulty could not have injured the defendant, and will not require a reversal.

[Ed. Note.—For other cases, see *Homicide*, Cent. Dig. §§ 614, 616-620, 622-630; Dec. Dig. § 300.*]

3. CRIMINAL LAW (§ 1038*)—FAILURE TO CHARGE—NECESSITY OF REQUEST.

In a prosecution for murder, the court's omission to charge that defendant's failure to testify should not be taken against him will not constitute ground for reversal, in the absence of a request therefor.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 2646; Dec. Dig. § 1038.*]

Fraser, J., dissenting.

Appeal from General Sessions Circuit Court of Newberry County; Ernest Gary, Judge.

"To be officially reported."

Sam Boozer was convicted of murder, and appeals. Affirmed and remanded.

See, also, 74 S. E. 646.

G. G. Sale, of Newberry, for appellant. Solicitor R. A. Cooper, of Laurens, for the State.

WOODS, J. The defendant was convicted of the murder of James S. Gilliam and sentenced to death at the summer term, 1911, of the court of general sessions for Newberry county. While the main reliance is on alleged errors in the charge, the appeal as first presented contained only isolated excerpts from the charge, the proposed case was not assented to by the solicitor, and there was nothing to show that it was ever served on him. In place of exceptions, the record contained the grounds on which a motion was made for a new trial. In this condition of the case, the court ordered the record to be amended by including the charge of the circuit judge. That order has now been complied with.

In favor of life, we waive all irregularities in the record. It is not necessary to delay the decision, even to have the case as made up served on the solicitor; for, accepting the record as made up ex parte on behalf of the defendant, we think there was no error on the trial. The following is a statement of the facts of the case as made up by defendant's counsel:

"It appears from the testimony that on the day of the killing Sam Boozer and others living on the plantation of John Hipp had gone to the town of Newberry, some 12 miles distant; that during the morning James S. Gilliam, the deceased, who was superintendent or foreman of the farm own-

ed by Mr. Hipp, and upon which Sam Boozer worked and resided, while drinking, had chased Clayton Boozer, wife of Sam Boozer, out of his (Gilliam's) yard with a gun, had forcibly entered the house of Sam Boozer, and in the struggle which took place cut May Belle Rook, the stepdaughter of Sam Boozer, on the throat, and Clayton Boozer, Sam Boozer's wife, slightly on the hand. The testimony further shows that John Hipp received a message, while in the town of Newberry, requesting him to come to his plantation to quiet a difficulty, but it appears that neither Hipp nor Sam Boozer knew the parties involved in the difficulty until they reached the plantation about 4 o'clock on the afternoon of the killing; that Hipp, together with Sam Boozer and Amos Boozer, went from Newberry to Old Town, which is a railroad station near Hipp's plantation, where the killing occurred, on the train leaving Newberry about 3 o'clock. When they reached the plantation, everything was quiet, and Gilliam was lying down. Clayton Boozer and May Belle Rook, after the difficulty with Gilliam in the morning, had left the place and gone to the house of a colored man living on an adjoining plantation, where Sam Boozer found them shortly after his arrival from Newberry. It appears that Hipp's wagon, loaded with provisions for different laborers, Sam Boozer among them, reached the plantation late in the afternoon and before sundown, and was to be unloaded at what the witness called the "big house," being the house in which Gilliam, the overseer, lived. Sam Boozer came to Gilliam's back yard with his shot gun about the time the wagon came. Gilliam left his house, going out of the back door towards the lot, for the purpose, as he stated, of feeding the stock, and this seems to be the first time that he and Sam Boozer had met since the difficulty of the morning. The witnesses do not agree as to the conversation which took place between them, but, at any rate, all the witnesses testify that Gilliam turned and started back into his house; whereupon Sam Boozer shot him in the back of the head, killing him instantly."

The requests to charge were as follows:

"(1) Where all the facts are proved, the jury must say whether there was malice, and not imply it from the mere fact of killing.

"(2) Whether the killing was under sudden heat and passion, or from a settled, deliberate purpose, must be determined by the jury upon the facts of the case.

"(3) Although there may have been time for deliberation, if the purpose to kill was formed and immediately executed in a passion, especially if the passion was aroused by a recent provocation, the murder is not deliberate and premeditated.

"(4) While an intentional homicide, if neither justifiable nor excusable, is nominally murder, yet, where it is committed upon a

sudden heat of passion, aroused by adequate provocation, technical malice being lacking, the crime is reduced to manslaughter.

"(5) Although anger is the passion usually existing in cases of killing in sudden heat and passion, yet any other passion, as sudden resentment or terror, rendering the mind incapable of cool reflection, may reduce the grade of the crime from murder to manslaughter.

"(6) A violent attack upon or injury to a relative or friend in the presence of defendant, or, under peculiar circumstances, even in his absence, but shortly before the homicide, may be adequate provocation to reduce a homicide to manslaughter, if it was not committed with malice."

Reference to the charge shows that the substance of every sound proposition of law contained in the requests was given to the jury. It is true the jury were told that the defendant relied on the plea of self-defense; but the charge covered the subject of manslaughter and the requests to charge in this language: "The boast of the law is to protect human life. The Constitution guarantees the protection of human life; but the law realizes that when a man is in hot blood, and has been provoked by that reasonably, not entirely dethroned his reason, but while the blood is coursing hot through his veins, and he is in a temper, his feelings are wrought up, and if he has had such provocation as would be likely to put him in that condition, and he acts then, on the spur of the moment, the law will put that veil of charity over his acts and says: 'Now, you acted beyond the pale of the law; but, inasmuch as you did it in hot blood, while your passions were aroused, while you were smarting from an indignity that was reasonably a legal provocation, we will put that veil of charity over your act, and reduce the killing, under those circumstances, if not done in malice—will reduce the killing, under those circumstances, to manslaughter, which is the killing of another without malice aforethought, either expressed or implied, and upon sufficient legal provocation.' To give you an illustration: Two citizens meet on the street, who have no ill will one against the other; but they get into a conversation. That waxes into a debate, into a dispute. Hot words pass, and they get to blows; and, while one is smarting under the insults he has had—the blow, possibly, that he has had—he strikes, and with no intention of taking human life, but while he is in hot blood, and the result of that blow produces death, the law would throw that veil of charity I have been speaking of over his acts—'You did it in hot blood, and I will not hold you to that strict accountability as if you had gone off, prepared yourself, made preparation, and then come back to avenge your grievances, whether real or imaginary.' It

does not permit one to take out his vengeance, and then undertake to excuse himself on the ground that he was in hot blood."

[1] The court cannot hold that the circuit judge erred in assuming that the killing by the defendant was admitted, when the statement of facts submitted on appeal contains that admission.

[2] Careful consideration fails to show how reference in the charge to the case of *State v. Emerson* was injurious to the defendant. It was used merely as an illustration of the doctrine that the plea of self-defense is not available to one who brings on the difficulty. *State v. Jones*, 86 S. C. 49, 67 S. E. 160.

[3] The omission from the charge of an instruction that defendant's failure to testify was not to be taken against him is not reversible error. If the defendant's counsel desired such an instruction, it was his duty to call it to the attention of the circuit judge. *State v. Adams*, 68 S. C. 421, 47 S. E. 676.

We are unable to find any case in this state deciding the question whether it is necessary to the validity of a verdict in a felony case that defendant's counsel should be present when it is received. The rule generally followed is that the presence of the defendant is necessary, but not the presence of his counsel. *Hommer v. State*, 85 Md. 562, 37 Atl. 26; *Martin v. State*, 79 Wis. 175, 48 N. W. 119; *Barnard v. State*, 88 Wis. 659, 60 N. W. 1058; *O'Bannon v. State*, 76 Ga. 32; *Baker v. State*, 58 Ark. 513, 25 S. W. 603; *Huffman v. State*, 28 Tex. App. 174, 12 S. W. 588.

The judgment of this court is that the judgment of the circuit court be affirmed, and that the cause be remanded, so that another day may be assigned for the execution of the sentence.

GARY, C. J., and HYDRICK and WATTS, JJ., concur.

FRASER, J. (dissenting). I cannot concur in the opinion of the majority of the court. The defendant's plea was "not guilty," and his defense anything that negated or reduced the grave offense charged. To charge that the defense was "self-defense" tended to eliminate from the minds of the jury all other defenses.

It seems to me that the defendant would have been very unwise to confine his defense to self-defense, when the deceased was shot in the back of the head, especially when two women of his household had been wounded in his house by the deceased. I do not mean to say that the defense was sufficient and ought to have prevailed. I simply do not think that where the plea is "not guilty" that the court has the right to restrict the defense. In *State v. Wyse*, 32 S. C. 54, 10 S. E. 615, the court says: "He pleaded not guilty, and the issue was made upon that

plea. The issue involved the questions: First, Had a homicide been committed by the appellant; and, if so, secondly, what was the degree of the offense committed, whether murder, manslaughter, or excusable homicide?" The plea of "not guilty" put in issue every fact in the case. He did not go on the stand, so he could not have admitted anything.

His honor charged: "Now, the question that comes up, in the first instance, as to Sam Boozer is not whether he killed the deceased or not; that is not the issue; that is inferred or implied from the defense that he set up. By his defense and the evidence, his defense is that he did it, but that he did it under such circumstances as that the law would excuse him for it; in other words, that he did it in self-defense."

It is true that his honor charges as to manslaughter; but I do not think his illustration, which deals solely with a blow to the defendant, covers a case in which the evidence shows a blow to the wife of the defendant. The defendant requested a charge on that subject, and I do not think it was covered by the charge.

For these reasons, I cannot concur in the opinion of the majority.

(92 S. C. 393)

STATE ex rel. LYON, Atty. Gen., v.

BOWDEN et al.

(Supreme Court of South Carolina. Sept. 21, 1912.)

1. OFFICERS (§ 6*)—GOVERNOR — POWER OF APPOINTMENT.

The Governor has no inherent power of appointment to office, and the power must be conferred by the Constitution or the statutes, and appointments must be made in accordance with such power.

[Ed. Note.—For other cases, see *Officers*, Cent. Dig. § 7; Dec. Dig. § 6.*]

2. OFFICERS (§ 15*)—GOVERNOR—POWER OF APPOINTMENT.

Under Const. art. 5, § 20, empowering the Governor to appoint, by and with the advice and consent of the Senate, magistrates who shall hold their offices for two years and until their successors are appointed and qualified, an appointment for a full term without the advice and consent of the Senate is without effect.

[Ed. Note.—For other cases, see *Officers*, Cent. Dig. § 17; Dec. Dig. § 15.*]

3. JUSTICES OF THE PEACE (§ 8*)—APPOINTMENT—VACANCIES — CONSTITUTIONAL PROVISIONS.

Const. art. 5, § 11, providing that vacancies in the Supreme Court or inferior tribunals shall be filled by elections, relates to elective judicial officers only, and does not apply to the office of magistrate filled by the Governor's appointment and the Senate's confirmation.

[Ed. Note.—For other cases, see *Justices of the Peace*, Cent. Dig. §§ 11-14; Dec. Dig. § 8.*]

4. JUSTICES OF THE PEACE (§ 8*)—VACANCIES APPOINTMENT—STATUTORY AUTHORITY.

Since the Constitution does not provide for the filling of vacancies in the office of

magistrate, the Legislature, under its general legislative power, may provide for filling vacancies occurring while the Senate is not in session.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 11-14; Dec. Dig. § 8.*]

5. OFFICERS (§ 15*)—VACANCIES — APPOINTMENT—STATUTORY PROVISIONS.

Under Civ. Code 1902, § 254, authorizing the Governor to fill by appointment vacancies in county offices, and section 624, providing for the appointment of magistrates by the Governor with the advice and consent of the Senate, and that any vacancy which may happen during the recess of the Senate may be filled by the Governor, who shall report the appointment to the Senate at its next session, and, if the Senate do not consent thereto at such session, the office shall be vacant, the Governor's power of appointment without the advice and consent of the Senate is limited to vacancies occurring during a recess of the Senate, and the appointment ceases to be of force on the Senate at its next session failing to confirm it.

[Ed. Note.—For other cases, see Officers, Cent. Dig. § 17; Dec. Dig. § 15.*]

6. JUSTICES OF THE PEACE (§ 8*)—TERM OF OFFICE.

Under Const. art. 5, § 20, providing that magistrates shall hold their offices for two years and until their successors are appointed and qualified, one who was appointed to the office of magistrate by and with the advice and consent of the Senate holds the office until the expiration of two years, and until his successor has been appointed by the Governor by and with the advice and consent of the Senate, and has qualified.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 11-14; Dec. Dig. § 8.*]

7. OFFICERS (§ 54*)—TERM OF OFFICE.

Where a term of office is fixed by law at a term of years, and until the appointment or election and qualification of a successor, the term of the incumbent does not end until the expiration of the term, and the appointment, or election, and qualification of his successor, and there is no vacancy.

[Ed. Note.—For other cases, see Officers, Cent. Dig. §§ 74, 75; Dec. Dig. § 54.*]

8. JUSTICES OF THE PEACE (§ 8*)—TERM OF OFFICE—CONSTITUTIONAL PROVISIONS.

Const. art. 5, § 20, providing that magistrates shall hold their offices for two years, and until their successors are appointed and qualified, is not inconsistent with article 1, § 11, providing that no person shall be elected or appointed to office for life or during good behavior, but the terms of all officers shall be for some specified period; the purpose of which being only to change the rule that offices could be held during good behavior.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 11-14; Dec. Dig. § 8.*]

9. STATUTES (§ 207*)—CONSTRUCTION—INCONSISTENT PROVISIONS.

Where, in a legislative enactment, a special provision is made as to a subject which would otherwise be embraced in a general provision on the same subject, the special provision is an exception, and is not intended to be embraced in the general provision.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 284; Dec. Dig. § 207.*]

Gary, C. J., Watts, J., and Sease, Circuit Judge, dissenting.

Quo warranto by the State, on the relation of J. Fraser Lyon, as Attorney General, against J. M. Bowden and another, and against S. S. Tiner and another, and against W. R. Tanner and another, and against T. O. Fowler and another. Judgment that enumerated defendants are lawful magistrates, and that other defendants are intruders.

Attorney General Lyon, for plaintiff. Wm. McGowan, of Spartanburg, for defendant. Bowden. C. P. Sanders, of Spartanburg, for defendant Kirby.

WATTS, J. These cases were heard together in the original jurisdiction of the court, upon a rule to show cause issued by the Chief Justice upon verified complaints, and the pleadings in the cases, complaints, answers, and returns and demurrers to answers and returns are substantially the same and raise the same questions, so it is only necessary to set out the pleadings in the first case. The complaint is as follows:

"The plaintiff above named respectfully shows to the court:

"(1) That he is informed and believes that one J. M. Bowden has since the 22d day of February, 1911, been exercising, and still is exercising, the power and duties of the office of magistrate for the county of Spartanburg, in the city of Spartanburg, without legal appointment or authority therefor.

"(2) That A. H. Kirby was on the 5th day of February, 1909, duly appointed by the Governor magistrate for the county of Spartanburg, in the city of Spartanburg, and on the 8th day of February, 1909, his appointment to said office was regularly confirmed by the Senate of said state, and he was duly commissioned as said magistrate.

"(3) That the said A. H. Kirby at once entered upon the discharge of the duties of said office, and has since continuously discharged the duties thereof, and is now exercising the powers and discharging the duties of said office under and by virtue of the appointment and commission aforesaid.

"(4) That on the 20th day of February, 1911, the Governor of this state, without recommendation of the Senator or members of the House of Representatives from Spartanburg county, unlawfully appointed J. M. Bowden to be magistrate for the county of Spartanburg, in the city of Spartanburg (this being the office held by A. H. Kirby), and on the 22d day of February, 1911, issued to him a commission as magistrate aforesaid. That said appointment has never been submitted to the Senate for approval, and has not been confirmed by the Senate.

"(5) That the said J. M. Bowden under the said commission so unlawfully issued to him as magistrate aforesaid, and without the consent and approval of the Senate as required by section 20, art. 5, of the Constitution, and without any other or legal warrant, right, or

grant whatsoever, has undertaken to exercise the powers and duties of said office, and has since that time continuously exercised the powers and duties notwithstanding the fact that the said A. H. Kirby was legally appointed and commissioned as magistrate for the county of Spartanburg, in the city of Spartanburg, as provided by section 20, art. 5, of the Constitution, and was at the time of the attempted appointment of J. M. Bowden, and is now, holding said office and lawfully exercising the powers and performing the duties thereof.

"(6) That no appointment of a successor to the said A. H. Kirby has ever been confirmed by the Senate, nor has any legal appointment of a successor to the said A. H. Kirby been made.

"Wherefore, the plaintiff prays that this court in the exercise of its original jurisdiction issue its order against the said J. M. Bowden and A. H. Kirby, the defendants, requiring them to answer and show by what authority they claim to hold and exercise the duties of said office of magistrate for the county of Spartanburg, in the city of Spartanburg; that it be adjudged that the said J. M. Bowden is guilty of unlawfully exercising said office of magistrate, and that he be excluded therefrom; that the said J. M. Bowden be required to pay the cost of the proceeding, together with such fine, not to exceed two thousand (\$2,000) dollars, as the court may adjudge; that the said A. H. Kirby be adjudged to be entitled to the said office, and that he be allowed to continue to hold the same and exercise the powers and duties thereof."

The answer and return of A. H. Kirby, one of the defendants above named, is as follows:

"(1) This defendant respectfully says that no copy of the complaint has been served upon him, and he is therefore unable to say whether he formally admits or denies the allegations thereof, but, in so far as he is informed, he believes the allegations are true.

"(2) This defendant further says that he was regularly appointed and commissioned and sworn in as a magistrate in and for the county of Spartanburg on or about the — day of February, 1909, his office being in the city of Spartanburg; that he is informed and believes no one has been legally appointed to succeed him, and that he has been performing the duties of said office of magistrate ever since his appointment and qualification, and claims the right to hold and exercise the duties of said office, and to collect the salary and fees belonging to the same until some one has been duly appointed, commissioned, and sworn in as his successor. Wherefore, this defendant prays that the complaint be dismissed as to him."

The answer and return of J. M. Bowden,

the other defendant above named, is as follows:

"(1) That he admits paragraph 1, as to exercising the duties of magistrate for Spartanburg county, and no other part thereof.

"(2) That the defendant has no knowledge of paragraph 2, of the complaint.

"(3) That the defendant is informed that A. H. Kirby has been exercising the authority of magistrate, but has no knowledge of the legality of the same.

"(4) That the defendant, replying to paragraph 4, says that he was duly commissioned by the Governor of South Carolina on the 22d day of February, 1911, as magistrate for Spartanburg county, and directed to exercise the duties thereof, and has no knowledge whether the appointment was brought before the Senate or not.

"(5) The defendant, replying to paragraph 5 of the complaint, denies that he is unlawfully exercising the duties of magistrate.

"(6) That defendant, replying to paragraph 6 of the complaint, alleges that he was duly appointed magistrate for Spartanburg county as stated in paragraph 1, and knows nothing about the appointment of A. H. Kirby. Wherefore, the defendant demands that the complaint herein be dismissed with costs."

The demurrer to the answer and return of J. M. Bowden by the Attorney General is as follows:

"Now comes the plaintiff herein, and demurs to the answer and return of the defendant J. M. Bowden upon the ground that it fails to state facts sufficient to constitute a defense, in that (1) it admits all the material allegations of the complaint; (2) it fails to deny that the appointment of J. M. Bowden as magistrate was not confirmed by the Senate; (3) it fails to set up any facts by way of affirmative defense."

It will be seen that A. H. Kirby was appointed magistrate on February 5, 1909, and on February 8, 1909, his appointment was confirmed by the Senate. J. M. Bowden was appointed and commissioned by the Governor to this same office on February 22, 1911. D. T. Gossett was appointed magistrate on February 5, 1909, and his appointment confirmed by the Senate on February 8, 1909, and on February 22, 1911, S. S. Tiner was appointed by the Governor and commissioned to the same office. E. Potter was appointed magistrate on February 8, 1909, and his appointment was confirmed by the Senate. On February 28, 1911, W. R. Tanner was appointed and commissioned by the Governor to the same office. On February 19, 1910, W. C. Harrison was appointed a magistrate (to fill out the unexpired term of R. L. Pearson, resigned), and commissioned as such on March 4, 1910, and on February 27, 1911, T. O. Fowler was appointed and commissioned as magistrate for the same office. It was conceded at the hearing of the cases

that Bowden, Tiner, Tanner, and Fowler's appointments had never been confirmed by the Senate, and that the Legislature had adjourned and was not in session after their appointments until 1912. There is no evidence that Harrison's appointment was confirmed by the Senate. Section 20, art. 5, of the Constitution, contains this provision: "A sufficient number of magistrates shall be appointed and commissioned by the Governor by and with the advice and consent of the Senate for each county who shall hold their office for the term of two years and until their successors are appointed and qualified." After the adoption of the Constitution, a statute was enacted providing that: "The Governor shall have authority by and with the advice and consent of the Senate to appoint magistrates in each county of the state, who shall hold their office for the term of two years and until their successors are appointed and qualified. Such magistrates may be suspended by the Governor for incapacity, misconduct or neglect of duty; and the Governor shall report any suspension with the cause thereof to the Senate at its next session for its approval or disapproval." Code of Laws, § 982. Also that "the Governor shall have authority by and with the advice and consent of the Senate to fill any vacancy caused by death, removal or otherwise of any magistrate for the unexpired term." Code of Laws, § 983. Also: "In the event of a vacancy at any time in any of the offices of any county of the state, whether from death, resignation, disqualification, refusal or neglect to qualify of the person elected or appointed thereto, expiration of the term of office, removal from the county or from any other cause, the Governor shall have full power to appoint some suitable person, who shall be an elector of the county, and, upon duly qualifying according to law, shall be entitled to enter upon and hold the office to which he has been appointed, if it be an elective office, until the next general election, when an election shall be held to fill the unexpired term, and the officer so appointed or elected shall hold said office for the term of said election or appointment, and until his successor shall qualify; and if it be an office which was filled originally by appointment, until the adjournment of the General Assembly at the regular session after such appointment; and shall be subject to all the duties and liabilities incident to said office during the term of his service therein." Code of Laws, § 254. Also: "That the Governor by and with the advice and consent of the Senate shall appoint the following officers: * * * Magistrates. * * * Any vacancy which may happen in any of the said offices during the recess of the Senate may be filled by the Governor, who shall report the appointment to the Senate at its next regular session, and if the Senate do

not advise and consent thereto at such session, the office shall be vacant." Code of Laws, § 624. Also: "That the following officers shall be appointed by the Governor: * * * Any vacancy in a county office, by reason of death, resignation, refusal or neglect to qualify of the person elected or appointed thereto, expiration of the term of office, or any other cause. The person so appointed to hold his office, in all cases in which the office is elective, until the next general election and until his successor shall qualify, and in cases of offices which are originally filled by appointment and not by election, until the adjournment of the session of the General Assembly next after such vacancy has occurred." Code of Laws, § 625.

By the quotations above as to the law and an application of facts thereto, it will be seen that Kirby, Gossett, and Potter, being appointed by the Governor and confirmed by the Senate in 1909, held office until the adjournment of the General Assembly in 1911. Harrison, having been appointed in 1910 for an unexpired term, and his appointment being a recess appointment, held until the adjournment of the General Assembly in 1911. There being a vacancy in the offices, the Governor appointed Bowden, Tiner, Tanner, and Fowler to these offices, and they were commissioned and were entitled to hold and enjoy the offices until the General Assembly met and their names sent to the Senate for approval and confirmation. The Senate having failed to confirm them, they were no longer magistrates, after the adjournment of the General Assembly in 1912. Since February 22, 1911, Kirby has wrongfully held the office of magistrate. Since February 22, 1911, Gossett has wrongfully held the office of magistrate. Since February 28, 1911, Potter has wrongfully held the office of magistrate. Since February 27, 1911, Harrison has wrongfully held the office of magistrate. Since the time in 1912 that the Senate refused to confirm the appointments made by the Governor of Bowden, Tiner, Tanner, and Fowler they have wrongfully held the office of magistrate.

Wherefore, it is adjudged that each of the defendants herein are guilty of usurping and intruding into, and are unlawfully holding and exercising, the offices of magistrates in Spartanburg county, and it is the judgment of this court that the defendants be excluded from the office of magistrate, and that the plaintiff recover costs against each defendant.

GARY, C. J., concurs.

SEASE, Circuit Judge. In the cases of State ex rel. Lyon v. Bowden et al., Same v. Tanner et al., Same v. Tiner et al., Same v. Fowler et al., I concur in the opinion of Associate Justice R. C. WATTS, and direct

that this concurrence be attached to the original opinion and filed therewith.

WOODS, J. In these actions instituted by the Attorney General under chapter 2, tit. 13, of the Code of Procedure, is to be determined the tenure by which a magistrate holds office under the Constitution and statutes of the state. The complaints, which are substantially the same in all the cases, allege that under commissions issued by the Governor, without authority of law, certain of the defendants have undertaken to exercise the duties of the office of magistrate in Spartanburg county in the place of magistrates whose terms of office have not expired; namely, J. M. Bowden in the place of A. H. Kirby, S. S. Tiner in the place of D. T. Gossett, W. R. Tanner in the place of E. Potter, and T. O. Fowler in the place of W. C. Harrison. The court is asked to adjudge that A. H. Kirby, D. T. Gossett, E. Potter, and W. C. Harrison are lawful magistrates, and that the defendants J. M. Bowden, S. S. Tiner, W. R. Tanner, and T. O. Fowler be excluded from the offices they claim, and that each of them pay the costs of the proceedings against him, and a fine not exceeding \$2,000. An order was made requiring the defendants to show cause why the relief asked in the complaint should not be granted. There were returns and demurrers thereto, but there is no controversy as to the facts. Kirby, Gossett, and Potter were appointed magistrates in Spartanburg county, and their appointments confirmed by the Senate in February, 1909. No appointments were sent to the Senate at the session in 1911, but in February, 1911, after the adjournment of the Senate, his excellency, the Governor, undertook to appoint as successors to Kirby, Gossett, and Potter the defendants Bowden, Tiner, and Tanner. These appointments were submitted to the Senate at its session in 1912, and the Senate refused to confirm them. W. C. Harrison was appointed by the Governor magistrate in Spartanburg county in 1910, and his appointment was confirmed by the Senate at the session of 1910. On February 28, 1911, after the adjournment of the Senate, the Governor undertook to appoint the defendant T. O. Fowler as successor to Harrison. This appointment was submitted to the Senate at the session of 1912, and the Senate refused to confirm it.

[1] The authority of the Governor to appoint magistrates is conferred and limited by the Constitution, and, if the appointments of Bowden, Tiner, Tanner, and Fowler were not made in accordance with that authority, they were of no effect. The principle is universally recognized that the Governor of a state has no inherent power of appointment to office, and that his power must be found in the Constitution or statutes of the state. *Elledge v. Wharton*, 89 S. C. 113, 71 S. E. 657; *Bruce v. Matlock*, 86 Ark. 555, 111 S.

W. 990; *Throop on Public Officers*, § 362; 8 Cyc. 857. After a review of the cases, the principle deduced is thus stated in the note to *People v. Freeman* (Cal.) 13 Am. St. Rep. 130. "The truth is that the power of appointing or electing to office does not necessarily and ordinarily belong to either the legislative, the executive, or the judicial department. It is commonly exercised by the people, but the Legislature may, as the law-making power, when not restrained by the Constitution, provide for its exercise by either department of the government, or by any person or association of persons whom it may choose to designate for that purpose. It is an executive function when the law has committed it to the executive, a legislative function when the law has committed it to the Legislature, and a judicial function, or at least a function of a judge, when the law has committed it to any member or members of the judiciary."

[2] What, then, is the limitation placed by the supreme law of the state on the power of the Governor to appoint magistrates? The Constitution thus provides for magistrates as officers of the judicial department of the state government: "A sufficient number of magistrates shall be appointed and commissioned by the Governor, by and with the advice and consent of the Senate, for each county, who shall hold their offices for the term of two years and until their successors are appointed and qualified." Article 5, § 20. Since this supreme law which confers on the Governor the power of appointment expressly limits and conditions that power on the advice and consent of the Senate, it is clear beyond controversy that an appointment for the full term provided by the Constitution without the advice and consent of the Senate is beyond the power of the Governor and without effect. *State v. Howe*, 25 Ohio St. 588, 18 Am. Rep. 321; *People v. Bissell*, 49 Cal. 407; *Attorney General v. Rareshide*, 32 La. Ann. 934; *Watkins v. Watkins*, 2 Md. 354; *Brady v. Howe*, 50 Miss. 607; *Tappan v. Gray*, 9 Paige (N. Y.) 507; *State ex rel. Standish*, *Attorney General v. Boucher*, 3 N. D. 389, 56 N. W. 142, 21 L. R. A. 539.

[3] It will be observed that the section of the Constitution above quoted, providing for the appointment of magistrates by the concurrent action of the Governor and the Senate and fixing the term, does not provide for temporary vacancies in the office by resignation, death, removal, or other cause. The only section of the Constitution relating to the filling of vacancies in judicial offices is section 11 of article 5, which provides: "All vacancies in the Supreme Court or inferior tribunals shall be filled by elections as herein prescribed: Provided, that if the unexpired term does not exceed one year such vacancy may be filled by executive appointment. All judges, by virtue of their office, shall be conservators of the peace through-

out the state; and when a vacancy is filled by either appointment or election, the incumbent shall hold only for the unexpired term of his predecessor." This section, by its terms, relates exclusively to elective judicial officers, for it provides that all vacancies shall be filled by election. The "unexpired term" referred to then manifestly means the term which will expire at the next election. The impossibility of making this section, relating to elective judicial officers, fit the office of magistrate, which is not elective, but filled by the Governor's appointment and the Senate's confirmation, is too manifest to require elaboration.

[4] As it thus appears that the Constitution does not provide for the filling of vacancies in the office of magistrate, there can be no doubt of the authority of the General Assembly, under its general legislative power, to provide for filling such vacancies occurring while the Senate is not in session. The principle is stated in *McAllister v. U. S.*, 141 U. S. 174, 11 Sup. Ct. 949, 35 L. Ed. 693, and many other cases, and the exact point was decided in *Tappan v. Gray*, 9 Paige (N. Y.) 507.

[5] The General Assembly in the exercise of this power has by section 254 of the Civil Code authorized the Governor to fill by appointment vacancies "in any of the offices of any county of the state, whether from death, resignation, disqualification, refusal or neglect to qualify of the person elected or appointed thereto, expiration of the term of office, removal from the county or any other cause; * * * and if it be an office which was filled originally by appointment, until the adjournment, of the General Assembly at the regular session next after such appointment." The office of magistrate falls under this statute. Section 624 provides for the appointment of magistrates and other officers by the Governor by and with the advice and consent of the Senate, and enacts further with respect to vacancies that "any vacancy which may happen in any of said offices during the recess of the Senate may be filled by the Governor, who shall report the appointment to the Senate at its next session, and if the Senate do not advise and consent thereto at such session, the office shall be vacant." No one will doubt that, under these statutes, the Governor's power of appointment without the advice and consent of the Senate is limited to vacancies occurring during a recess of the Senate, and that the appointment ceases to be of force if the Senate at its next session fails to confirm it. The appointments in the cases now under consideration were made by the Governor without the advice and consent of the Senate; and they were without effect because when they were made there were no vacancies in the office.

[6] The length of the term of office of magistrate is specifically ordained by the Consti-

tution to be "two years and until their successors are appointed and qualified." Therefore one who is appointed to the office of magistrate by and with the advice and consent of the Senate holds the office until the expiration of two years, and until his successor has been appointed by the Governor by and with the advice and consent of the Senate and has qualified. Unless the words "until their successors have been appointed and qualified" are to be erased from the Constitution, the time which may elapse between the expiration of the two years and the actual appointment by and with the advice and consent of the Senate and the qualification of the successor is as much a part of the specific term of office fixed by the Constitution as the two years. The failure of the Governor to appoint, or of the Senate to act upon the appointment or the rejection by the Senate of the appointment of the Governor, does not create a vacancy. On the contrary, it was the clear intention of the framers of the Constitution to provide against the inconvenience to the people of a vacancy arising from the failure of due appointment by the Governor and confirmation by the Senate of a successor in the office at the expiration of the two years. To take any other view would be not only to erase words from the Constitution, but to attribute to the constitutional convention and the General Assembly the purpose to empower the Governor to exercise sole control of the appointment of magistrates of the state in total disregard of the constitutional safeguard that his appointment shall be subject to the advice and consent of the Senate. The manner in which such sole control could be exercised is obvious. Upon the expiration of the term of two years, the Governor could refuse to appoint and submit to the Senate for confirmation. If it were true that the office then became vacant on the adjournment of the Senate, the Governor could, under the statutes, appoint to the vacancy, and the appointee would hold until the Senate should act upon the appointment at its next session. If the appointment should be rejected by the Senate or not submitted to the Senate, the Governor could again refuse to submit an appointment to the Senate, and again, after its adjournment, appoint to the vacancy. This process could be continued indefinitely to the complete subversion of the Constitution and the destruction of the checks on the executive power which the Constitution has so clearly ordained.

[7] No citation of authority can make the matter plainer than the words of the Constitution, but we think it safe to say that the courts have held with complete unanimity that, when a term of office is fixed by law at a term of years and until the appointment or election and qualification of a successor, the term of the incumbent does not end until the expiration of the time

named and the appointment or election and qualification of his successor, and there is no vacancy. *State v. Hadley*, 64 N. H. 473, 13 Atl. 643; *State v. Metcalf*, 80 Ohio St. 244, 88 N. E. 738; *State v. Boucher*, 3 N. D. 389, 56 N. W. 142, 21 L. R. A. 539; *People ex rel. Parsons v. Edwards*, 93 Cal. 153, 28 Pac. 831; *Carr v. Wilson*, 32 W. Va. 419, 9 S. E. 31, 3 L. R. A. 64; *State v. Harrison*, 113 Ind. 434, 16 N. E. 384, 3 Am. St. Rep. 663.

[8] It has been suggested, however, that the provision of section 20, article 5, of the Constitution, that magistrates shall hold beyond the two years until their successors are appointed and qualified, is inconsistent with and must yield to section 11, art. 1, which provides that "no person shall be elected or appointed to office in this state for life or during good behavior, but the terms of all officers shall be for some specified period, except notaries public and officers in the militia." There is no inconsistency in the two provisions. Prior to the adoption of the Constitution of 1895, offices in this state might be held during good behavior. The purpose of section 11, art. 1, was to change this rule, and make the term a limited one so as to make office holders more amenable to the elective or appointive power. It would be most unreasonable to impute to the constitutional convention a purpose to give to the expression, "some specified period," a meaning so narrow as to prohibit any legislative provision against the inconvenience arising from vacancies in public office, which would occur if the incumbent could not be allowed to hold until the appointment or election and qualification of his successor. Such a construction of the Constitution is impossible. The convention could not have meant to prohibit itself and the General Assembly from doing that which it later in the same Constitution actually did in providing that the Governor and the justices of the Supreme Court should hold their office for the number of years mentioned, and until their successors should be elected and qualified, and that magistrates should hold their offices for two years and until their successors should be appointed and confirmed, and should qualify.

[9] But, even if the two provisions were inconsistent, no principle of construction is better settled, both by authority and reason, than this. Where, in a legislative enactment, a special provision is made as to a subject which would otherwise be embraced in a general provision on the same subject, the special provision is held to be an exception, and not intended to be embraced in the general provision. *Enlich on Statutes*, § 399; 36 Cyc. 1151. From these considera-

tions the conclusion is inevitable that there were no vacancies when the Governor attempted to appoint without the advice and consent of the Senate, that the appointments were without authority of law, and were of no effect. The term of office of Kirby, Gossett, and Potter extended from their appointment, with the advice and consent of the Senate, in February, 1909, for two years and until their successors should be appointed by the Governor, by and with the consent of the Senate, and should qualify. The Constitution and statute law of the state provide that the Governor should appoint their successors and submit the appointments to the Senate for its consent and advice at the expiration of two years from February, 1909; that is, at the session of the Senate in 1911 and the session of 1912. It is thus evident that there has been no appointment of successors to these magistrates by and with the advice and consent of the Senate; that their terms of office had not expired and the offices were not vacant when the Governor undertook to appoint, without the advice and consent of the Senate and during a recess, Bowden, Tiner, and Tanner as magistrates; that these last appointments were of no effect; and that Kirby, Gossett, and Potter are still lawful magistrates of Spartanburg county. By the same reasoning it results that the appointment of Fowler as successor to Harrison was without authority of law, and that Harrison is still the lawful magistrate.

The judgment of this court, therefore, is that A. H. Kirby, D. T. Gossett, E. Potter, and W. C. Harrison are lawful magistrates of Spartanburg county, and that the defendants J. M. Bowden, S. S. Tiner, W. R. Tanner, and T. O. Fowler be excluded from the office of magistrate, and that they pay the costs of these proceedings.

HYDRICK and FRASER, JJ., and GAGE, PRINCE, WILSON, DE VORE, RICE, SPAIN, and FRANK B. GARY, Circuit Judges, concur. GARY, C. J., dissents for the reasons stated in the opinion of Mr. Justice WATTS, filed on the 5th of June, 1912, in these cases.

GARY, C. J. Whereas by inadvertence it was stated in the opinion rendered in these cases that the appointments of J. M. Bowden, S. S. Tiner, W. R. Tanner, and T. O. Fowler as magistrates were not submitted by the Governor to the Senate at its session in 1912, the fact being that they were submitted and rejected by the Senate, it is ordered that correction of the error be made in the opinion of the court.

(92 S. C. 400)

McDOWELL v. BURNETT, County Sup'r,
et al.(Supreme Court of South Carolina. Sept. 21,
1912.)**1. JUSTICES OF THE PEACE (§ 8*)—TERM OF
OFFICE—APPOINTMENT.**

Under Const. art. 5, § 20, providing for the appointment by the Governor, by and with the advice and consent of the Senate, of magistrates who shall hold their offices for two years and until their successors are appointed and qualified, one appointed a magistrate during a session of the Senate and confirmed by the Senate holds the office for the full term from the date of his confirmation, and Civ. Code 1902, § 983, limiting the tenure to the unexpired portion of the predecessor's term, is without effect.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 11-14; Dec. Dig. § 8.*]

2. OFFICERS (§ 61*)—REMOVAL—CONSTITUTIONAL AND STATUTORY PROVISIONS.

Const. art. 8, § 27, providing for the removal of officers for incapacity, misconduct, or neglect of duty in such manner as may be provided by law when no mode of trial or removal is provided in the Constitution, requires that officers shall be removed in the manner provided by law for incapacity, misconduct, or neglect of duty, legally shown to the removing power, and leaves to the Legislature the discretion to provide the manner of removal, the designation of the person or tribunal which shall have the power of removal, and the procedure to ascertain the fact of incapacity, misconduct, or neglect of duty, unless a mode of trial or removal is provided in the Constitution.

[Ed. Note.—For other cases, see Officers, Cent. Dig. § 90; Dec. Dig. § 61.*]

3. OFFICERS (§ 7*)—REMOVAL—GROUNDS.

Const. art. 4, § 22, authorizing the Governor to suspend an officer indicted for embezzlement of public funds, and declaring the office vacant in case of conviction, applies to the removal of all officers, including magistrates, except the Governor, but is limited to the misconduct of embezzlement, and does not apply to other forms of misconduct, or incapacity or neglect of duty.

[Ed. Note.—For other cases, see Officers, Cent. Dig. §§ 8, 9; Dec. Dig. § 7.*]

4. OFFICERS (§ 61*)—REMOVAL—IMPEACHMENT.

Under Const. art. 3, § 27, authorizing the removal of officers for incapacity, misconduct, or neglect of duty in the manner provided by law when no mode of trial or removal is provided in the Constitution, and article 4, § 22, authorizing the Governor to suspend an officer indicted for embezzlement and declaring the office vacant on conviction, and article 15, §§ 3, 4, providing that the Governor and all other executive and judicial officers shall be liable to impeachment, and that for any willful neglect of duty not a sufficient ground of impeachment, the Governor shall remove an executive or judicial officer on the address of two-thirds of each house of the Legislature, every executive and judicial officer whose authority and jurisdiction extend over the entire state, and whose office is created by the Constitution or by statute, and filled by election by the people at large, is removable by impeachment, or by the Governor on the address of the Legislature, or by conviction of embezzlement of trust funds, and all other officers are subject to removal under the statute or under common law where that is applicable, and magistrates

are not such judicial officers as are removable by impeachment or by the Governor on the address of the Legislature.

[Ed. Note.—For other cases, see Officers, Cent. Dig. § 90; Dec. Dig. § 61.*]

5. CONSTITUTIONAL LAW (§ 14*)—CONSTRUCTION OF CONSTITUTION.

A court in construing the Constitution must not limit the meaning of plain language in the Constitution used without express limitation further than it can be made plain with reasonable certainty that such limitation was intended.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 11; Dec. Dig. § 14.*]

6. CONSTITUTIONAL LAW (§ 20*)—CONSTRUCTION—LEGISLATIVE CONSTRUCTION—EFFECT.

A legislative construction of a constitutional provision, though not binding on the court, is entitled to great consideration.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 15; Dec. Dig. § 20.*]

7. OFFICERS (§ 7*)—REMOVAL—POWER OF GOVERNOR.

The Governor has no implied power to remove an officer holding under the Constitution creating the office and fixing the tenure, unless the power is conferred by the Constitution or statute.

[Ed. Note.—For other cases, see Officers, Cent. Dig. §§ 8, 9; Dec. Dig. § 7.*]

8. JUSTICES OF THE PEACE (§ 10*)—"REMOVAL"—"SUSPENSION"—POWER OF GOVERNOR.

Under Const. art. 12, § 8, conferring on the Governor power to remove officers of charitable and penal institutions, and article 4, § 22, authorizing the Governor to suspend an officer indicted for embezzlement, and Cr. Code 1902, §§ 381, 388, 389, 410, providing for the removal by the Governor of local officers convicted of specific misconduct, and providing for the dismissal from office of any magistrate convicted of neglecting to pay over fines, and Civ. Code 1902, §§ 625, 982, authorizing the Governor to remove for cause any officer appointed by him to fill a vacancy, and authorizing the Governor to suspend magistrates for incapacity, misconduct, or neglect of duty, etc., the Governor has no power to remove magistrates serving for a full term except after trial and conviction, as provided by the Constitution and the statutes, but he may suspend any magistrate when a showing has been made to him by affidavit that the magistrate is probably guilty of embezzlement and a true bill has been found, and he may suspend for incapacity, misconduct, or neglect of duty, but submit the suspension to the Senate for approval or disapproval, and an attempt of the Governor to remove a magistrate without indictment and conviction is without effect as a removal. A "suspension" is the mere temporary withdrawal of the power to exercise the duties of an office, while a "removal" is a complete deprivation of official tenure.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. § 16; Dec. Dig. § 10.*]

For other definitions, see Words and Phrases, vol. 7, pp. 6079-6081; vol. 8, pp. 7784, 6833-6835.]

9. EVIDENCE (§ 83*)—PRESUMPTIONS—PERFORMANCE OF OFFICIAL DUTIES.

The presumption is that the Governor in the exercise of the power of his office acts with a view to the public interest, and the courts will give effect to his acts to the utmost extent that they are authorized by law.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 106; Dec. Dig. § 83.*]

10. JUSTICES OF THE PEACE (§ 10*)—REMOVAL—POWER OF GOVERNOR.

Under Civ. Code 1902, § 982, authorizing the Governor to suspend magistrates for incapacity, misconduct, or neglect of duty, requiring the Governor to report any suspension with the cause thereof to the Senate for its approval or disapproval, the power of suspension can only be exercised after notice and hearing, though a public office is not property, and though the incumbent may not complain when suspended or removed without reason under a power to suspend or remove at will conferred by law.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. § 16; Dec. Dig. § 10.*]

Gary, C. J., Watts, J., and Gary and Sease, Circuit Judges, dissenting.

"To be officially reported."

Mandamus by B. L. McDowell against T. C. Burnett, County Supervisor, and another, County Treasurer of Greenwood County, in which W. H. Kerr was made a party defendant by order of court. Petition dismissed.

See, also, 90 S. C. 400, 73 S. E. 782.

D. H. Magill, of Greenwood, for petitioner. Giles & Ouzts and Grier, Park & Nicholson, all of Greenwood, for respondent.

WOODS, J. The important question presented in this case is whether the Governor of the state has the power, at his discretion, to remove from office a magistrate whose appointment has been confirmed by the Senate. The duty of the court to pass on the limitations of the power of the General Assembly or the chief executive of the state is one of great delicacy, to be entered upon with the greatest deliberation and with care to find in the law support for the legislative action or the action of the chief executive if it be possible. While several provisions of the Constitution and a number of the statutes are to be examined and reconciled in the light of the legal history of the state, we venture to think that the correct solution may be made evident. The question arises under a petition filed by B. L. McDowell, asking the court to issue a writ of mandamus requiring the supervisor of Greenwood county to issue, and the county treasurer to pay, a check for his salary as magistrate. An order was made requiring the defendants to show cause why the writ should not be issued. Afterwards W. H. Kerr, who claimed to hold the office of magistrate against McDowell, was made a party by order of the court. 90 S. C. 400, 73 S. E. 782. Returns were made which were not traversed. The facts appear from the petition, returns, and from an agreed statement submitted by counsel. W. G. Austin, whose term of office as magistrate began in 1909, died during the session of the General Assembly of 1910. W. H. Kerr was appointed, and his appointment was confirmed by the Senate at the same session.

[1] We have held in the case of State ex rel. Attorney General v. Bowden et al., 75

S. E. 866, that section 11 of article 5 of the Constitution relating to vacancies and unexpired terms of elective judicial officers has no application to magistrates, who are appointive officers. As the Constitution provides that magistrates "shall hold their offices for the term of two years and until their successors are appointed and qualified" (article 5, § 20), when Kerr was appointed during a session of the Senate and confirmed by the Senate and qualified, his tenure was not for an unexpired term, but for a full term from the date of his confirmation. The effort of the General Assembly to limit the tenure in such a case to the unexpired portion of the predecessor's term by section 983 of the Civil Code, being inconsistent with the Constitution, is without effect. The court has so held in several cases. Wright v. Charles, 4 S. C. 178; Whipper v. Reed, 9 S. C. 5; Macoy v. Curtis, 14 S. C. 367; Simpson v. Willard, 14 S. C. 191; Smith v. McConnell, 44 S. C. 493, 22 S. E. 721. The two years from the date of Kerr's confirmation did not expire until the session of the Senate in 1912. On February 25, 1911, the Governor issued a commission to J. W. Canfield, and wrote Kerr: "Your successor having been appointed your commission is hereby revoked and made null and void." Kerr refused to surrender the office, and retained his books and records, and continued to exercise the duties of magistrate. Thereafter, on March 21, 1911, the Governor wrote Kerr a formal notice of removal as follows: "I am informed that you continue to act as magistrate. I have already advised you that your commission has been revoked, and while I had hoped you would retire gracefully, I now repeat to you that you are hereby removed from the office of magistrate for neglect of duty, having refused and failed to make your monthly statement in writing to the auditor and treasurer of the county of Greenwood." Canfield sent his resignation to the Governor in May, 1911, whereupon the Governor issued a commission to McDowell, the petitioner. As Kerr's term had not expired when these appointments of Canfield and McDowell were made, neither of them could be sustained on the ground that it was made to fill a vacancy arising from the expiration of Kerr's term of office. But the Governor gave Kerr formal notice of removal by the revocation of his commission; and, if the law has invested the Governor with the power to remove magistrates serving for the full term at his discretion, a vacancy was created by removal, the appointments of Canfield in February, 1911, and of McDowell in May, 1911, when Canfield resigned, were valid, and McDowell would be entitled to the salary of the office until the end of the session of 1912, when the Senate refused to confirm his appointment. The inquiry into the power of the Governor to remove re-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

quires a detailed examination of the constitutional and statute law of the state.

[2] The first provision in the Constitution in respect to the removal of officers is found under the head of "Legislative Department," and is in these very general terms: "Officers shall be removed for incapacity, misconduct or neglect of duty, in such manner as may be provided by law, when no mode of trial or removal is provided in this Constitution." Article 3, § 27. It will be observed that the provision is mandatory, in that it requires that officers shall be removed in such manner as may be provided by law, when incapacity, misconduct, or neglect of duty has been legally shown to the removing power. It was held, however, in *Sanders v. Belue*, 78 S. C. 171, 58 S. E. 762: "The requirement that officers shall be removed for incapacity, official misconduct or neglect of duty in such manner as may be provided by law, by no means implies abrogation of the general rule of law above stated, that an appointive officer may be removed at the pleasure of the officer who appointed him." This section, it is to be remarked, further leaves to the legislative department the discretion to provide the manner of the removal, and this includes the designation of the person or tribunal who shall have the power of removal, and the procedure by which such person or tribunal shall have a hearing and ascertain the fact of incapacity, misconduct, or neglect of duty, except when a mode of trial or removal is provided—that is, a person or tribunal designated and a procedure indicated—in subsequent provisions of the Constitution.

[3] The first question, then, is whether a mode of trial or removal of magistrates has been laid down in the Constitution. There are three sections providing modes of trial and removal of officers. Article 4, § 22, reads as follows: "Whenever it shall be brought to the notice of the Governor by affidavit that any officer who has the custody of public or trust funds is probably guilty of embezzlement or the appropriation of public or trust funds to private use, then the Governor shall direct his immediate prosecution by the proper officer, and upon true bill found the Governor shall suspend such officer and appoint one in his stead, until he shall have been acquitted by the verdict of a jury. In case of conviction the office shall be declared vacant and the vacancy filled as may be provided by law." This applies to the removal of all officers, including magistrates, except the Governor; but, being limited to the misconduct of embezzlement, it has no application to other forms of misconduct or to incapacity or neglect of duty.

[4] The other sections are those relating to impeachment and removal from office upon address of the General Assembly, and they are very broad in their terms. They are found in article 15 under the head "Impeachment":

"Sec. 3. The Governor and all other executive and judicial officers shall be liable to impeachment; but judgment in such cases shall not extend further than removal from office. The person convicted shall, nevertheless, be liable to indictment, trial and punishment according to law.

"Sec. 4. For any willful neglect of duty, or other reasonable cause, which shall not be sufficient ground of impeachment, the Governor shall remove any executive or judicial officer on the address of two-thirds of each house of the General Assembly. * * *

If the convention meant to include magistrates in the term "all other executive and judicial officers," then magistrates could be removed for incapacity, misconduct, or neglect of duty only by impeachment, or by the Governor on address of two-thirds of each house of the General Assembly. In the widest and usual meaning of the words, "all other executive and judicial officers," would include every officer of the state not of the legislative department from the highest to the most insignificant. Yet, even if sections 3 and 4 of article 15 stood alone, it would hardly be reasonable to suppose that the framers of the Constitution meant to use the words in such a broad sense that every petty officer of the state and county, except in case of conviction of embezzlement, should be subject to impeachment, and could be removed only by impeachment or address of two-thirds of the General Assembly. But they do not stand alone, and it must be that "all other executive and judicial officers" was meant in some limited sense, for section 27 of article 3 clearly contemplates the removal of officers of some kind in a manner other than by impeachment, address of the General Assembly, or conviction of embezzlement. That section must have some meaning, and its meaning, if possible, must be reconciled with the article relating to impeachment. In other words, if both provisions are to be given effect, there must be a line of distinction somewhere between impeachable executive and judicial officers and those smaller local officers subject to removal under the statutes of the state or the common law. The use of such general terms as "all executive and judicial officers," "all civil officers," and the like in the impeachment articles of Constitutions, where they must have been meant to have some limited meaning, is one of the most curious anomalies of legislation. However difficult the task, the court must try to find the line of distinction which the convention probably had in mind and mark that as the true line.

[5] In essaying the task, the primary principle must be kept in view that, in construing the Constitution of the state, the court should not take the liberty of limiting the meaning of plain language, used without express limitation, further than it can be made plain with reasonable certainty that such limitation was intended. On first impres-

sion, it may seem logical to hold the incumbents of all offices created by the Constitution removable by impeachment, and the incumbents of offices created by the General Assembly subject to removal in such manner as the General Assembly may provide. But this distinction would lead to results which could not have been intended, for under it not only magistrates, but solicitors, could be removed only by impeachment, legislative address, or on conviction of embezzlement, and even sheriffs and coroners would fall under the rule except for the single offense of allowing a prisoner to be taken by a mob and injured through the negligence, permission, or connivance of the officer. Search for the line of distinction which the framers of the Constitutions of 1868 and 1895 intended to draw in the light of the history of the subject in this state and of judicial authority in this country leads to this conclusion: Every executive and judicial officer whose authority and jurisdiction extends over the entire state, in whose official conduct the entire state is concerned, and whose office was created by the Constitution, or created by statute and filled by election by the people at large, is removable by impeachment or by the Governor on the address of the General Assembly or by conviction of embezzlement or of appropriation of trust funds and in these modes only. All other officers are subject to removal under the provisions of the statute law of the state or under the common law where that is applicable. The Constitution of 1790 provided that "the Governor, Lieutenant-Governor and all the civil officers shall be liable to impeachment." Article 5, § 8. Under this provision, it was held in *State v. O'Driscoll*, 2 Tread. Const. 713, Id., 3 Brev. 526, decided in 1815, that a clerk of the court was subject to impeachment; the court saying as to the procedure by impeachment: "It is not pretended that there is any other which is authorized to disqualify state delinquents from holding offices of trust or profit. * * * All the civil officers (which is the phrase of the Constitution) must be understood to mean all public officers, holding civil offices of any grade of honor, trust, or profit under this state. If the purpose of the prosecution is to punish them officially, or for any misdemeanor in office, or remove them from office, or disqualify them from holding offices of honor, trust, and profit, and not merely to punish them as criminal offenders in the ordinary course of justice, the party must be proceeded against by impeachment, and in no other mode; at all events, he may be so proceeded against, although he may be liable to other mode of prosecution." To remedy the inconvenience of the removal of local officers by impeachment and to dissipate all doubt as to whether they could be removed otherwise, in 1828 the impeachment article of the Constitution of 1790 was amended as follows: "Sec. 4.

All civil officers, whose authority is limited to a single election district, single judicial district, or part of either, shall be appointed, hold their office, be removed from office, and in addition to liability to impeachment, may be punished for official misconduct, in such manner as the Legislature, previous to their appointment, may provide." Under this amendment of the Constitution of 1790, the General Assembly, by the statute of 1829, provided for the removal by the Governor, after indictment and conviction of official misconduct, of "any public officer hereafter to be elected or appointed whose authority is limited to a single election or judicial district." 6 St. at Large, p. 390.

[6] Although the Constitution of 1790 was supplanted by that of 1868, this statute has remained a part of the law of the state, and with insignificant verbal change, is now embodied in section 388 and the first sentence of section 389 of the Criminal Code. Thus we find a legislative declaration running from 1829 to a very late day that "officers whose authority is limited to a single election or judicial district" may be removed without impeachment. The validity of section 388 and section 389 of the Criminal Code and of trials thereunder of a magistrate and a probate judge was recognized in *State v. Tarrant*, 24 S. C. 593, and *State v. Green*, 52 S. C. 520, 30 S. E. 683. Not only so, but this line of cleavage on the subject of removal from office between local officers and all officers having jurisdiction over the entire state has been followed in many other statutes enacted at various times through the course of many years. Among these are section 381 of the Criminal Code for the removal of any county officer, section 383 for the removal of clerks of court, sheriffs, and magistrates, section 395 and section 403 for the removal of sheriffs, section 410 for the removal of magistrates, section 416 for the removal of constables, and section 393 for the removal of solicitors. This apparent legislative construction, though not binding on the court, is entitled to great consideration. It was departed from, but to a very limited extent, in *State v. Ansel*, 76 S. C. 395, 57 S. E. 185, 11 Ann. Cas. 613. The statute provided that the board of directors of the state dispensary should be elected by the General Assembly, and that the term of office should be "for two years unless sooner removed by the Governor." It was held that the Governor could remove and that the members of the board were not such officers as were subject to impeachment under the Constitution, although they had general charge of the state's entire interest in the sale of liquor. The important consideration was that these dispensary directors held offices, not only created by the General Assembly, but filled by the election of the General Assembly; and it was reasonable to hold that officers so entirely the creatures of the General As-

sembly were not of such dignity as to be ranked with officers subject to impeachment, and that they could be removed as the General Assembly should direct. The same reasoning and rule would apply with even greater force to offices created by the General Assembly and filled by appointment of the Governor under legislative authority.

But there is no reason to depart from the rule recognized and followed in the entire history and scheme of legislation on the subject to the extent of holding that offices created by the General Assembly and filled by election of the people at large do not fall within the class whose incumbents are removable by impeachment. On the contrary, when the people at large have chosen by election an officer charged with duties affecting the interests of the entire state, such an officer is responsible to all the people, and there are the strongest reasons why the commission received from the people should not be annulled by removal, except in the solemn method of an impeachment trial before a body representative of all the people. It would be an unwarranted, not to say arbitrary, stretch of judicial authority to hold that such an officer is not embraced in the constitutional description "all other executive and judicial officers."

The few precedents on the subject indicate perplexity of the courts, but they also indicate approval of the line between impeachable and nonimpeachable officers which we have stated. The Supreme Court of Massachusetts, construing a clause of the Constitution providing for impeachment proceedings "against any officer or officers of the commonwealth," held that it was not intended to apply to local offices created either by the Constitution or the statutes, but to "officers elected by the people at large, or provided for in the Constitution, for the administration of matters of general or state concern." Opinion of the Justices, 187 Mass. 599, 46 N. E. 118. This case, it will be observed, expressly lays down the line of distinction we have adopted as required by our legislation and decisions. The Constitution of Wyoming provided for impeachment of the "Governor and other state and judicial officers." In *State v. Grant*, 14 Wyo. 41, 81 Pac. 795, 82 Pac. 2, 1 L. R. A. (N. S.) 588, 116 Am. St. Rep. 982, the courts in holding that the provision was not applicable to the office of superintendent of one of the water divisions of the state did not lay down any line of distinction, but made these general observations: "We are strongly inclined to the opinion, without deciding the point, that the officers liable to impeachment are the Governor and other state officers mentioned in section 11, art. 4, of the Constitution, which does not include the office in question. Certainly and it has generally been so considered that only the superior executive and judicial officers of a state are subject to im-

peachment and we have found no case where an officer holding by appointment, or an inferior officer of any kind, has been held subject to impeachment." In *State v. Hewitt*, 3 S. D. 187, 52 N. W. 875, 16 L. R. A. 413, 44 Am. St. Rep. 788, the question was whether the trustee of a state college was an impeachable officer under the Constitution, providing for impeachment of "the Governor and all other state and judicial officers except county judges, justices of the peace and police magistrates." The court in deciding that he was not said: "We are of the opinion that the term 'state officers,' as used in said section, includes only such general officers as immediately belong to one of the three constituent branches of the state government. * * * The Constitutions of many of the states contain the same language as our own, defining what officers are subject to impeachment, but, so far as we have observed, such language has not been taken to include officers who hold by appointment either by the Governor or some supervising board, authorized to make such selection and appointment. * * * Similar conditions exist in other states, demonstrating the fact that trustees or superintending officers of state institutions, receiving their office not directly from the people, but by appointment from some other officers or boards for subordinate administrative purposes, are not understood to be included in the term 'state officers,' as used in the constitutional article on impeachment." The question was discussed in *State v. Smith*, 6 Wash. 496, 33 Pac. 974, and *State v. Burke*, 8 Wash. 412, 36 Pac. 281, but the line of distinction was not definitely drawn. We conclude that magistrates are not such judicial officers as are removable under the impeachment article of the Constitution, but are removable in such manner as the General Assembly may provide.

[7] We have held in *State ex rel. Lyon, Atty. Gen., v. Rhame*, 75 S. E. 881, herewith filed, that the Governor has no implied power to remove an officer holding under a statute which creates the office and fixes the tenure. For a still greater reason, such power must be denied when the Constitution creates the office and fixes the tenure, and no power of removal is conferred either by the Constitution or by statute.

[8] But even if it could be assumed that, in the absence of a statute covering the subject, the Governor, as the appointing officer, would have, under the common law, the power to remove at will magistrates serving for a full term, although the term of office is fixed by the Constitution, still it cannot be doubted that such common-law power is at an end when the Legislature, under express constitutional authority, has provided the condition on which the Governor may remove such officers. The General Assembly has provided for the removal by the Governor of all local officers, and magistrates

fall in this class, for neglect of duty of any kind, but the power of removal is expressly conditioned on indictment and conviction. Criminal Code, §§ 388, 389. The General Assembly has provided further, by section 381, for removal by sentence of the court of any county officer convicted of incapacity, misconduct, or neglect of duty, and specifically by section 410 for the dismissal from office of any magistrate who shall be convicted of neglecting or refusing to pay over fines. Can it be doubted that these statutes supersede any common-law power of removal at the will of the executive, even if without them such power would have existed? Further, the Constitution itself negatives the claim that the Governor has unlimited power of removal of officers whose terms are fixed by law. The minds of the framers of the Constitution adverted to the subject of removal by the Governor, and conferred that power only as to the officers of charitable and penal institutions. Article 12, § 8. In addition to this, both the Constitution and the statute law of the state, by necessary implication, have denied the Governor the unconditional power of removal by conferring the power of suspension and the power of removal of those whom he has appointed to fill vacancies. Section 22 of article 4 confers on the Governor the power to suspend an officer having the custody of public funds when it appears to the Governor that such officer is probably guilty of embezzlement and a true bill has been found, but in such case the suspension is at an end if the officer is acquitted, and removal follows the suspension only in the event of trial and conviction. This clearly shows that even for the highest official crime the Governor has only the power of suspension, and certainly implies that he shall not have the power of removal at will. Kerr, having been appointed by the Governor and confirmed by the Senate, was not filling a vacancy by appointment of the Governor, but was serving a full term. Section 625 of Civil Code authorizes the Governor to remove for cause an officer appointed by him to fill a vacancy, and thus negatives the intention to confer on the Governor the power to remove an officer holding for a full term. But, aside from all other considerations, section 982 of Civil Code is conclusive against the power of the Governor to remove a magistrate serving a full term, at his discretion, without the approval of the Senate. That section provides: "Such magistrates may be suspended by the Governor for incapacity, misconduct or neglect of duty; and the Governor shall report any suspension, with the cause thereof, to the Senate at its next session, for its approval or disapproval." The difference between suspension and removal is evident to all men. One is the mere temporary withdrawal of the power to exercise the duties of an office, the other is a complete and final deprivation of official tenure.

29 Cyc. 1405; *Sumpter v. State*, 81 Ark. 61, 98 S. W. 719; *Poe v. State*, 72 Tex. 625, 10 S. W. 737; *Gregory v. Mayor*, 113 N. Y. 416, 21 N. E. 119, 3 L. R. A. 854; *Maben v. Rosser*, 24 Okl. 588, 103 Pac. 674. The General Assembly, in conferring on the Governor the power to suspend, denied him the power to remove magistrates, except as such power was conferred conditionally by other statutes to which we have referred.

Consideration of the Constitution and the statute law of the state forces the court to these conclusions: First. The Governor has no power to remove magistrates serving for a full term, except after trial and conviction as provided by the Constitution and the statutes referred to. Second. The Governor has power to suspend such magistrates, when a showing has been made to him by affidavit that the magistrate is probably guilty of embezzlement and a true bill has been found. Third. The Governor has the power of suspension also for incapacity, misconduct, or neglect of duty, subject to the requirement that he should submit the suspension to the Senate at its next session for its approval or disapproval. Fourth. The attempt of the Governor to remove Kerr without indictment and conviction, as provided by law, was without effect as a removal.

[9, 10] But the question remains, Can any effect be given to the Governor's order, designed as a removal, by giving to it the lesser effect of a suspension for the misconduct, imputed by the Governor, of failing to make monthly statements to the auditor and treasurer of the county? The presumption is that the chief executive, in the exercise of the powers of his great office, acts with a view to the public interest, and therefore the courts should give effect to his acts to the utmost extent that they are authorized by law. The attempt to remove under this principle might be given effect as a suspension of Kerr from office from March 21, 1911, when the Governor undertook to remove for cause, until the adjournment of the Senate at its next session in 1912; but section 982 of Civil Code expressly provides that the Governor shall report the suspension of an officer to the Senate at its next session for its approval or disapproval, and the suspension of Kerr was not so reported to the Senate. In addition to this, the Senate expressed its refusal to approve Kerr's suspension by passing a joint resolution that Kerr was entitled to the salary of the office after the attempted removal. Aside from all this, however, we have reached the conclusion, after much consideration, that the attempted removal cannot be given the effect of a suspension because Kerr was not first notified and given an opportunity to be heard on the charge of misconduct. The power of suspension is conferred in this clause of section 982: "Such magistrates may be suspended by the Governor for incapacity, misconduct, or neglect of duty;

and the Governor shall report any suspension, with the cause thereof, to the Senate at its next session, for its approval or disapproval." The power is not intended for arbitrary exercise, but is conditioned on a finding by the Governor of incapacity, misconduct, or neglect of duty. It is true that a public office is not property, and an incumbent has no legal cause of complaint when suspended or removed, even without reason, under a power to suspend or remove at will conferred by law. Such a suspension or removal implies no condemnation; for, under such provisions of law, changes in public office are common for reasons which in no wise reflect on the person suspended or removed. But, under a statute like this, conferring on the Governor the power to suspend a magistrate for incapacity, misconduct, or neglect of duty, suspension implies that the Governor has by careful investigation ascertained the fact that the officer is incapable, or has been guilty of misconduct or neglect of duty. When it is remembered that the Governor, to whom the law has intrusted the power to suspend an officer, is presumed to act with fairness and sedate judgment, it becomes evident that the suspension by him for misconduct is a most serious condemnation. The court cannot impute to the General Assembly the intention to subject an officer to such a condemnation without notice and an opportunity to be heard, for the intention to preserve the right to be heard before condemnation is implied in all legislation unless it is expressly denied. Under statutes like this conferring the power of removal, the right to be heard under the principle we have stated has been upheld by the courts with little dissent. The authorities on the subject, both English and American, are too numerous for citation. Elaboration of the principle referred to and the authorities will be found in Trainor v. Wayne County Auditors, 89 Mich. 162, 50 N. W. 809, 15 L. R. A. 95, and note; State v. Hewitt, 3 S. D. 187, 52 N. W. 875, 16 L. R. A. 413, 44 Am. St. Rep. 788; 23 Am. & Eng. Enc. 436; 29 Cyc. 1409. It is true, as we have already pointed out, that removal is a permanent deprivation of office, while suspension is only a temporary deprivation; but, on the other hand, suspension is in some respects more serious than removal since the officer suspended must remain in uncertainty as to his future. It is also true that the public interests sometimes require that an officer should be quickly suspended, but even in such emergencies the present facilities of communication make possible notice and hearing before suspension, without detriment to the public. Stronger than all other considerations, however, is the fact that the General Assembly might have conferred on the Governor the power to suspend at will for any cause he thought sufficient, and that power could have been exercised without notice and hearing,

but it chose to withhold that power, and the limitation imposed on the power of suspension connotes the condition that it shall be exercised only after notice and hearing. There is little authority on the right to notice and hearing before suspension from office, but in *State v. Johnson*, 30 Fla. 433, 11 South. 845, 18 L. R. A. 410, the court seems to regard suspension in this respect as standing on the same footing as removal.

Our conclusion is that the attempted removal of Kerr from the office of magistrate was without effect, and that he is now, and has been since his confirmation by the Senate, a lawful magistrate of Greenwood county, and that he, and not McDowell, is entitled to the salary.

The judgment of the court is that the petition be dismissed.

HYDRICK and FRASER, JJ., and PRINCE, GAGE, WILSON, DE VORE, RICE, and SPAIN, Circuit Judges, concur.

WATTS, J. (dissenting). The pleadings and facts are fully set out in the opinions filed in the case heretofore on February 26, 1912. Mr. Kerr made answer as required by the court, and denies the right of the Governor to remove him, and claims that he was duly appointed and commissioned on January 27, 1910, by the Governor of this state magistrate at Greenwood for the unexpired term of W. G. Austin, deceased, and until his successor was appointed and qualified, and denies that any one has been legally appointed as his successor. I adhere to the views expressed in my dissenting opinion herein, and am of the opinion that Kerr's term of office expired when the General Assembly adjourned in 1911, and there was a vacancy in the office then, and the Governor had the right to and did fill it, and that the petitioner was both de jure and de facto magistrate from the date he was commissioned until the Senate failed to confirm him in 1912, and entitled to pay for his services, and even if he was not de jure the magistrate, but only de facto being commissioned and rendering services as such he would be entitled to be paid for his services, under *Elledge v. Wharton*, 89 S. C. 113, 71 S. E. 657. I think the petition should be granted and mandamus issued in accordance with views indicated.

GARY, C. J. I dissent on the following grounds: First, for the reasons stated in the opinion herein of Mr. Justice Watts, reported in 90 S. C. 400, 73 S. E. 782; and, second, because the petitioner is entitled to his salary from the date of his appointment until the adjournment of the Senate in 1912, for the reasons stated in the case of *Elledge v. Wharton*, 89 S. C. 119, 71 S. E. 657, especially as a joint resolution was adopted by the General Assembly at its session com-

mencing the 9th of January, 1912, requiring the county supervisor of Greenwood county to draw his warrant for each month from January 1, 1911, for \$29.16% monthly salary in favor of W. H. Kerr, till the expiration of his term of office as magistrate, and directing the treasurer of said county to pay said warrants. There is no difference in principle between that case and the one under consideration.

GARY, Circuit Judge. In the case of *McDowell v. Burnett* I cannot concur in the opinion of the majority of the court en banc. The question that the court is called upon to decide is whether or not Mr. McDowell is entitled to demand payment of his salary as magistrate.

I am of the opinion that Mr. Kerr is a suspended officer. Whether he was justly or unjustly suspended is beside the question. Mr. McDowell having discharged the duties of the office by commission from the Governor pending the suspension of Mr. Kerr, he is at least a *de facto* officer, and I think he should be paid the salary for his services while so acting. The fact that the General Assembly made provision for paying a salary to Mr. Kerr also pending his suspension does not change the status of the parties.

I therefore dissent.

SEASE, Circuit Judge. In the case of *McDowell v. Burnett* I concur in the opinion of Associate Justice WATTS, and direct that this concurrence be attached to the original opinion, and be filed therewith.

(92 S. C. 408)

STATE ex rel. LYON, Atty. Gen., v. WHITTEN.

(Supreme Court of South Carolina. Sept. 21, 1912.)

1. JUSTICES OF THE PEACE (§ 8*)—APPOINTMENT—POWER OF GOVERNOR.

Under Civ. Code 1902, § 254, authorizing the Governor to fill vacancies in county offices, and section 624, authorizing the Governor to appoint, by and with the advice and consent of the Senate, magistrates, and that any vacancy which may happen during the recess of the Senate may be filled by the Governor, who shall report the appointment to the Senate at its next session, and, if the Senate do not confirm the appointment, the office shall be vacant, a recess appointment of the Governor to the office of magistrate made to fill a vacancy terminates on the adjournment of the next session of the Senate without confirmation.

[Ed. Note.—For other cases, see *Justices of the Peace*, Cent. Dig. §§ 11-14; Dec. Dig. § 8.*]

2. QUO WARRANTO (§ 57*)—ISSUES.

The court in quo warranto to oust defendants from the office of magistrates notwithstanding their appointment by the Governor will not consider whether the persons who were exercising the duties of the offices before the appointments have since made the offices vacant by abandonment or otherwise, since the questions are outside of the scope of the action, and since the persons holding the offices

at the time of the appointments are not before the court.

[Ed. Note.—For other cases, see *Quo Warranto*, Cent. Dig. § 68; Dec. Dig. § 57.*]

"To be officially reported."

Quo warranto by the State, on the relation of J. Fraser Lyon, Attorney General, against S. E. Whitten, and against W. E. Green, and against W. T. Chamblee, and against J. A. Young. Judgment excluding defendants from the office of magistrate.

Attorney General Lyon, for plaintiff. K. P. Smith and J. E. Breazeale, both of Anderson, for defendants.

WOODS, J. The complaints in these actions brought by the Attorney General in April, 1912, under chapter 2, tit. 13, of the Code of Procedure, allege that the defendants have unlawfully obtruded themselves into the office of magistrate, and ask as relief that the court will so find and adjudge that the defendants be excluded from office.

The material allegation in all the complaints is that each of the defendants is undertaking to perform the duties of magistrate under an appointment made by the Governor in the year 1911 after the adjournment of the Senate, and not confirmed by the Senate at its session of 1912. The complaints do not allege that there are any lawful incumbents of the offices whose terms have not expired, nor are any persons who may have held the office at the time the defendants were appointed before the court. The answer of the defendant, S. E. Whitten, is as follows: "(1) That he denies each and every allegation of the complaint not herein admitted. (2) That he was on February 23, 1911, by the Governor of the state of South Carolina duly appointed to the office of magistrate for Anderson county at Pendleton in said state and county, and that his commission as magistrate was issued to him by the Governor and attested by R. M. McCown as Secretary of State, and, upon being so appointed and commissioned, his predecessor in office voluntarily surrendered to defendant the office of magistrate at Pendleton, together with the books and records of said office. (3) That his appointment, as aforesaid, was made during a recess of the Senate, that body having adjourned sine die on February 18, 1911. (4) That until this action was begun defendant did not know whether or not his appointment as magistrate had been confirmed by the Senate, and did not know whether or not his appointment as magistrate was made without the recommendation of the senator or members of the House of Representatives from Anderson county. (5) That since his appointment, as aforesaid, he has been performing the duties of said office without adverse claim of any one, or in opposition to any claimant to said office, and until this action was commenced no one had ever questioned his right to hold

and enjoy said office, and that he has been and is performing the duties of said office in good faith, believing himself to be a legally appointed magistrate. Wherefore defendant prays (1) that the rule to show cause and the complaint herein be dismissed without cost to the defendant; (2) that his holding said office be declared legal." On the answer is indorsed an admission that the defendant's appointment has not been confirmed by the Senate.

The answer and admission of the defendant W. E. Green is the same, except that it contains the allegation that his predecessor, S. M. Johnson, was appointed during a recess of the Senate, and that his appointment has never been confirmed. The answer of the defendant J. A. Young does not deny any of the allegations of the complaint, but admits that he has been acting as magistrate since the 27th day of February, 1911, under a recess appointment made by the Governor. It does not deny that the appointment has never been confirmed by the Senate, but alleges that such lack of confirmation was not known to the defendant until the complaint herein was served upon him. It alleges that he has performed the duties of the office, believing himself to be the lawful magistrate. The answer of W. T. Chamblee is to the same effect, but it further alleges that, when the defendant received his commission, his predecessor in office turned over to him the books and papers belonging to the office, and soon thereafter removed from Anderson county, and has not made his home in the county since, and that, if he had not accepted the office, his community would have been deprived of the services of a magistrate for several months. The Attorney General demurred to all the answers on the ground that they admitted the material allegations of the complaints, and failed to set up any affirmative defense.

[1] The question thus presented by the pleadings is whether these appointments to the office of magistrate made by the Governor after the adjournment of the Senate in 1911, and not confirmed by the Senate at its next session in 1912, entitle the appointees to hold the office after the adjournment of the Senate in 1912. After full discussion of the question, it was decided in *State ex rel. Lyon, Attorney General, v. Bowden and Others* (75 S. E. 866), that, under sections 254 and 624 of the Civil Code, a recess appointment of the Governor to the office of magistrate, even if made to fill a vacancy, was at an end upon the adjournment of the next session of the Senate without confirmation. It follows that all the defendants must be excluded from the office of magistrate.

[2] There are two reasons why the court cannot legally decide nor with propriety express an opinion as to whether there were any vacancies in the offices when the defendants were appointed, or whether the persons

who were exercising the duties of the office before the appointment of the defendants have since made the offices vacant by abandonment or otherwise. The first reason is that those questions are entirely outside the scope of the actions; the other is that the persons holding the office or exercising its duties at the time the defendants were appointed are not before the court.

The judgment of the court is that the defendants be excluded from the office of magistrate, and they pay the costs of these actions.

GARY, C. J. I concur in the result.

HYDRICK and FRAZER, JJ., and PRINCE, GAGE, WILSON, DE VORE, RICE, SPAIN, and FRANK B. GARY, Circuit Judges, concur.

WATTS, J. I concur in the result of the opinion of WOODS, J.

SEASE, Circuit Judge, concurs.

(92 S. C. 455)

STATE ex rel. LYON, Atty. Gen., v. RHAME et al.

(Supreme Court of South Carolina. Sept. 21, 1912.)

1. OFFICERS (§ 7*)—REMOVAL—POWER OF GOVERNOR.

The power of removal from office by the Governor is not an incident to his office, but exists only when conferred by the Constitution or statutes, or is implied from the conferring of the power of appointment.

[Ed. Note.—For other cases, see *Officers*, Cent. Dig. §§ 8, 9; Dec. Dig. § 7.*]

2. OFFICERS (§ 7*)—APPOINTMENT—REMOVAL.

The power of removal from office is not incident to the power of appointment, where the term of office is fixed by statute.

[Ed. Note.—For other cases, see *Officers*, Cent. Dig. §§ 8, 9; Dec. Dig. § 7.*]

3. BANKS AND BANKING (§ 17*)—BANK EXAMINER—REMOVAL FROM OFFICE—POWER OF GOVERNOR.

Under the common law and under Const. art. 12, § 8, authorizing the removal by the Governor of officers of charitable and penal institutions, and article 4, § 22, empowering the Governor to suspend officers when indicted for embezzlement, and to remove them after a conviction, and under Civ. Code 1902, §§ 340, 393, authorizing removal of officers by the Governor with the consent of the Senate, the Governor has no authority to remove from office the State Bank Examiner, whose term of office is fixed at four years by Act Feb. 23, 1906 (25 St. at Large, p. 103), as amended by Act Feb. 20, 1911 (27 St. at Large, p. 4), without conferring on the Governor the power of removal or referring to the subject of removal.

[Ed. Note.—For other cases, see *Banks and Banking*, Cent. Dig. §§ 21, 22; Dec. Dig. § 17.*]

4. CONSTITUTIONAL LAW (§ 102*)—PUBLIC OFFICERS—TERM OF OFFICE.

Public officers have no contract or property rights in their offices, and, except as provided by the Constitution, they are subject to legislative control, and the Legislature may, sub-

ject to the Constitution, fix the term of office, provide for removal, abolish the office, or reduce the term.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 225; Dec. Dig. § 102.*]

5. CONSTITUTIONAL LAW (§ 70*)—STATUTES—JUDICIAL POWER.

The court in construing a statute will not consider the wisdom of the Legislature in enacting the statute.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 129-132, 137; Dec. Dig. § 70.*]

Watts, J., and Gage, Circuit Judge, dissenting.

Original action by the State, on the relation of J. Fraser Lyon, Attorney General, against B. J. Rhame and another, to adjudge B. J. Rhame an intruder in the office of State Bank Examiner. Dismissed.

Attorney General Lyon, for petitioner. W. F. Stevenson, of Cheraw, for respondents.

WOODS, J. His excellency, the Governor, on April 1, 1912, issued his proclamation, reciting acts and omissions which he characterized as neglect of duty by B. J. Rhame, State Bank Examiner, and declaring that he did thereby, for the imputed neglect of duty, remove Rhame from his office. Thereafter the Governor appointed H. W. Fraser State Bank Examiner. Rhame having refused to surrender the office, this action was brought by the Attorney General under title 13, c. 2, asking the court to adjudge Rhame an intruder in the office, and that he be excluded therefrom. Fraser was made a party, and by answer has alleged that he is the lawful State Bank Examiner under the appointment of the Governor. Rhame by his answer alleges, first, that the term of office of the State Bank Examiner is fixed by statute, and that the Governor has no power to remove him; second, that, if such power exists, it can be exercised only for cause and after a hearing on the charge made, and that no hearing was given him on the charge set out in the proclamation as the cause of removal; and, third, that the charge of misconduct was without foundation. The defendant Fraser replied to the answer of Rhame, alleging that the Governor had full power to remove Rhame, that Rhame had been heard on the charges preferred against him, that his defense was insufficient, and that the Governor had found him guilty of neglect of duty and misconduct, and for that reason had removed him. The Attorney General demurred to Rhame's return.

The first and main question thus raised is whether the Governor has power to remove from office the State Bank Examiner. The office of State Bank Examiner was first created by the Act of 1896. Civil Code 1902, §§ 1768, 1769. That statute provided that he should be appointed by an advisory board consisting of the Governor, Comptroller Gen-

eral, Secretary of State, Treasurer, and Attorney General, "and hold the said office for two years unless sooner removed by the advisory board, which board shall fill any vacancy by an appointment for the unexpired term." In 1906 the act of 1896 was repealed, and a new statute enacted providing that the Governor should appoint a competent person as Bank Examiner, and that in the selection the Governor "may advise with the executive committee of the South Carolina Bankers' Association." 25 Stat. 103. This act was amended in 1911 (27 Stat. 4), but the amendment does not bear on the tenure of office. The statute of 1906, as amended in 1911, provides: "The term of the office of said Bank Examiner shall be four years and he shall receive as compensation therefor three thousand dollars per annum," etc. But no power of removal is conferred on the Governor, nor is any reference made to the subject of removal.

The question then comes to this: When a statute creates an office to be filled by appointment of the Governor and fixes the term for which the appointee shall hold, but confers on the Governor no power of removal, does the Governor, nevertheless, have the power of removal under the Constitution or the statute law of the state or under the common law? Laying aside for the moment the Constitution and the statute law of the state, we consider the common-law rule as established by judicial expression. Surely, men of common sense, learned and unlearned, would be surprised to find the law to be that, when the legislative department has created an office to be filled by appointment of the Governor and extended and limited its term to four years, yet the Governor could at will shorten the term by removal, although no power of removal has been conferred. Such executive power is denied by both reason and authority.

[1] The Governor, as chief executive, has no prerogative control over officers such as is held by the king of Great Britain. The power of removal from office, therefore, is not an incident of the executive office, and it exists only where it is conferred by the Constitution or by the statute law, or is implied from the conferring of the power of appointment. In *Sanders v. Belue*, 78 S. C. 177, 58 S. E. 762, this court held that the absolute power of removal at pleasure is incident to the power of appointment, unless the law provides duration of the official term or mode of removal. In *Hardy v. Reamer*, 84 S. C. 487, 66 S. E. 678, the statute authorized the city council to establish a board of police commissioners and set their terms of office. After establishing the board and selecting its members, the city council undertook to abolish the board. In an opinion delivered on the circuit and adopted by this court, Judge Ernest Gary thus clearly states the principle: "The pow-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

er given the mayor and aldermen is that of electing or appointing members of the board provided for by the act. In exercising this power they act as executives, as the appointing to office is an executive, and not a legislative, function. Having exercised this power by electing or appointing plaintiffs to the offices provided for by the act, and being neither authorized to remove such officers or to abolish such offices, created by a superior sovereignty, their power is exhausted, and they cannot remove plaintiffs, either directly or by abolishing their offices, so long as their terms are unexpired."

[2, 3] These cases laying down the rule in this state that the power of removal is not incident to the power of appointment, where the extent of the term of office is fixed by the statute, and not subject to be shortened, are buttressed by unbroken authority in other jurisdictions. *Avery v. Tyringham*, 3 Mass. 177, 3 Am. Dec. 105; *People v. Robb*, 128 N. Y. 180, 27 N. E. 267; *State ex rel. Relley v. Chatfield*, 71 Conn. 112, 40 Atl. 922; *State v. Dahl*, 140 Wis. 301, 122 N. W. 748; *Bruce v. Matlock*, 86 Ark. 555, 111 S. W. 990. In *People v. Robb*, supra, the New York Court of Appeals says that the following provision of the Constitution of New York was an embodiment of the generally recognized rule: "When the duration of any office is not provided by the Constitution, it may be declared by law, and, if not so declared, such office shall be held during the pleasure of the authority making the appointment." Const. art. 10, § 3. In *Marbury v. Madison*, 1 Cranch, 138, 2 L. Ed. 60, Chief Justice Marshall thus stated the general rule: "Mr. Marbury, then, since his commission was signed by the President, and sealed by the Secretary of State, was appointed; and as the law creating his office gave the officer a right to hold for five years, independent of the executive, the appointment was not revocable, but vested in the officer legal rights, which are protected by the laws of his country. * * * It has been created by special act of Congress, and has been secured, to the person appointed to fill it, for five years." This rule was restated and recognized in *McAllister v. U. S.*, 141 U. S. 174, 11 Sup. Ct. 949, 35 L. Ed. 693; *Ex parte Hennen*, 13 Pet. 230, 10 L. Ed. 138; *Reagan v. U. S.*, 182 U. S. 419, 21 Sup. Ct. 842, 45 L. Ed. 1162. At the argument the case of *Parsons v. U. S.*, 167 U. S. 324, 17 Sup. Ct. 880, 42 L. Ed. 185, was mainly relied on as completely overturning the rule stated, and laying down the rule that the power of appointment implies the power of removal, even where the term of office is fixed by the statute which confers the power of appointment, and no power of removal is expressed. The case does not bear that construction. On the contrary, the entire opinion of Justice Peckham rests on the argument that, under the Constitution and statutes of the

United States, the office of district attorney and like federal offices fall without the general rule, and are not controlled by it. The federal statute provided: "District attorneys shall be appointed for four years and their commissions shall cease and expire at the expiration of four years from their respective dates." After consideration of the powers bestowed by the Constitution on the President to remove officers, and an elaborate review of the acts of Congress on the subject, the court holds that the debates in Congress, the history of congressional action on the subject, and the statutes themselves show that four years was fixed as a limitation on a term which was at one time indefinite, and that in so limiting the term it was not the intention of the Congress to interfere with the President's power of removal which he had when the term was indefinite, and so under the Constitution subject to his power of removal. It is on this ground that the court distinguishes the case, and takes it out of the general rule laid down in *Marbury v. Madison*. Thus it appears, we think, beyond controversy that the *Parsons Case* is in no wise opposed to the rule that the power of removal is not an incident of the power of appointment if the length of the term is fixed by statute, and no authority to remove is conferred by the statute. Not only does the common law deny the power of removal as an incident of the power of appointment when the term of office is fixed by the statute and the power of removal not expressed, but the Constitution and statutes of the state strongly negative such a power. The Constitution by expressly conferring on the Governor the power (section 8, art. 12) to remove the officers of charitable and penal institutions "until the next session of the General Assembly and until a successor or successors shall be appointed" impliedly negatives the intention to bestow the power to remove other officers; and the conferring, by section 22, art. 4, of the lesser power to suspend officers for the grave offense of embezzlement, and that only on a true bill found, and providing that there shall be removal only after conviction, negatives the intention to bestow the larger power of removal without a true bill and without conviction on a charge less grave than embezzlement.

[4] The statute law of the state by the strongest implication denies the authority to remove here asserted. Public officers are created for the benefit of the commonwealth, incumbents have no contract or property rights in them, and, unless otherwise it be provided by the Constitution, they are subject entirely to legislative control. Hence, subject to the Constitution, the General Assembly may fix the term, provide for removal, abolish the office, reduce the term, and in every respect control the existence, powers, emolu-

ments, and tenure of public officers. In the exercise of this power the General Assembly has, with assiduous care, provided that the removal of even minor and local officers should take place only after indictment and conviction of misconduct, as instance the provisions for the removal of all local officers by section 388 and section 389 of the Criminal Code only on trial and conviction, or has provided that they should be merely suspended by the Governor, and be removed only on consent of the Senate, as instance the provision made for the suspension and removal of county auditors and treasurers (Civil Code 1902, §§ 340, 393), or has enacted that they should be removed by judicial decree in a civil action as provided in the article of the Code of Procedure under which this action was brought. When a different policy was intended, the tenure has been expressly stated to be subject to removal, as in the case of the dispensary directors and the election commissioners whose tenure was made subject to removal by the Governor. Criminal Code 1902, § 556; Civil Code, § 206. There is no escape from the conclusion that the Governor has no power to remove the State Bank Examiner. The duties of the State Bank Examiner extend over the entire state, but he is not elected by the people at large, hence he is not an officer removable only by impeachment; for the rule was thus laid down in *McDowell v. Burnett*, 75 S. E. 873, herewith filed: "Every executive and judicial officer whose authority and jurisdiction extends over the entire state, in whose official conduct the entire state is concerned, and whose office was created by the Constitution, or created by statute and filled by election by the people at large, is removable by impeachment or by the Governor on address of the General Assembly, or by conviction of embezzlement or appropriation of trust funds and in these modes only. All other officers are subject to removal under the provisions of the statute law of the state or under the common law where that is applicable." Under this rule the General Assembly in creating the office of State Bank Examiner might have provided that the term should be four years subject to be shortened by removal by the Governor or on the happening of any other contingency. But it did not see fit to do so.

[5] The wisdom of legislative action is without the sphere of judicial inquiry. It may be that fixing the term of the office of State Bank Examiner rigidly at four years in the last statute, when, by the earlier statute, it had been fixed at two years subject to be shortened by removal, was an oversight, or it may be the change was due to an intention to make an officer, clothed with so much discretion and power and charged with such great responsibility in safeguarding, by his supervision, enormous public and private interests, entirely independent of

any outside influence, and removable only by a civil action under the Code of Procedure. These questions are not for us. The court can only declare that under the law as it exists the State Bank Examiner is not subject to removal at the discretion of the Governor, and that the defendant, B. J. Rhame, is still State Bank Examiner.

This conclusion makes unnecessary the consideration of the other questions argued, and it is therefore ordered and adjudged that the petition be dismissed.

GARY, C. J. I concur in the opinion of WOODS, J., for the reason that the law does not provide for the removal of the State Bank Examiner by the Governor, as it does in the case of magistrates.

HYDRICK, J., and SEASE, PRINCE, WILSON, RICE, FRANK B. GARY, and SPAIN, Circuit Judges, concur.

GAGE, Circuit Judge (dissenting). I think the Governor had the power to remove the Bank Examiner. If he had not then in a supposed case, admitted to be flagrant, and touching the most sensitive interests of the people, the Governor, sworn to "take care that the laws shall be faithfully executed," is powerless to execute them. In such a case the Examiner might accept from the banks bribe money; he might refuse to make any examination; he might be convicted of crime; and the Governor would be powerless to act. Such a result ought not to be abided, except upon the plainest mandates of the law, and from which there is no escape. The banks carry the arterial blood of the business world. It ought to reach the people quickly, free from taint of suspicion. A broken bank is like a poisoned spring of water. It affects the whole community, stockholders and strangers. Its evil effects last for a generation. The risk of such a disaster ought not to be taken by that construction of the law which will promote bank failures. If there is an officer in the state who needs to be kept closely at his work, and always on the alert, he is the Bank Examiner. If the Governor is robbed of the power to exact such a performance by the Examiner, and if such exaction be necessary, who will do it? The Constitution only prescribes in the article on Corporations that the General Assembly shall provide by law for the thorough examination of banks. The General Assembly only provided that the Governor shall appoint a competent person to examine the banks. The term of service was fixed at four years. No provision was made in the act, or elsewhere in the statutes, for the removal of such an officer.

The Constitution, it is claimed, limits the power of the Governor. The section relied upon is found in the article (article 15) on impeachments, and is section 4 of that arti-

cle. It is confessedly irrelevant to this case, unless the Bank Examiner is an executive officer liable to impeachment. It is inconceivable that an officer of that character, created under a general provision of the Constitution, should be subject to trial by impeachment. Such a construction is calculated to bring the administration of law into ridicule. The General Assembly evidently thought that the Examiner might be removed otherwise than by impeachment; for in the first act on the subject another mode of his removal was explicitly prescribed. Code Laws, § 1768 (Civil Code). There is no reason to dogmatically classify every officer of the state as either executive or judicial; and, if there was, the framers of the Constitution never intended that an executive officer like a Bank Examiner was subject to trial by impeachment. They only provided for the impeachment of such executive or judicial officer as was liable to that procedure. Nor did they intend that he could only be removed upon an address of two-thirds of the General Assembly in the event there was not sufficient ground for impeachment. When it has been once admitted that the General Assembly had the power which it undertook to exercise at section 1768 of the Code of Laws, then the article on impeachments has no relevancy to this case. The circumstance that the Constitution has limited the Governor's power to suspend officers guilty of embezzlement (article 4, § 22), and officers of penal and charitable institutions (article 12, § 8), does not warrant the conclusion that it was intended to limit his power in the case at bar. But rather the contrary conclusion is inferable. The circumstance that his power was limited in particular cases implies that in other cases it was not limited.

This case is rather governed by article 3, § 27, of the Constitution. Reference there is made simply to "officers," not executive and judicial officers, and for any neglect of duty by them, wilful or not, they may be removed as the law provides; for the Constitution, they thought, in the article on impeachments provided no remedy—else why this? It must be conceded that there is no statute "law" provided, and the law referred to includes the common law, and must be governed by that law.

The issue, therefore, is this: If such an officer be confessedly guilty of a neglect of duty midway his term of office, is he exempt from removal by any power? For, if not subject to this power, then to none. The question ought to furnish the answer. Admittedly the power to be exercised by the Governor is not arbitrary, nor at will; it must be for cause, and cause will move any man from any office any time.

The next issue is a mixed one of law and fact; and it is, Has the Governor given the Examiner a right to be heard before his re-

moval? Perhaps it was not such a hearing as courts give litigants; but it was a hearing, and it would not be wise for the courts to hamper the executive by set rules to govern him in his execution of the laws. Nor is it wise to weigh too nicely the evidence upon which he acted. If injustice has thereby been done, it will be incomparable to the statement of the law which will paralyze all Governors in their efforts to preserve the fiscal institutions of the state. Finally, in my opinion, this cause is controlled by the case of the State ex rel. Rawlinson v. Ansel, Governor, 76 S. C. 395, 57 S. E. 185, 11 Ann. Cas. 613. The dispensary commissioners were as much executive officers as is the Bank Examiner. The Constitution and the statutes also made provision for them. It is true the statute provided that the Governor might remove them; but, if the case was controlled by the Constitution, in the article on Impeachments, that provision of the statute was of no force. In that case Governor Ansel removed the Commissioners, and his act was sustained.

I am of the opinion that H. W. Fraser is the lawful Bank Examiner of the state.

WATTS, J. I cannot concur in the opinion of Mr. Justice WOODS in this case that the Governor did not have the power to remove Rhame as Bank Examiner, and appoint Fraser in his stead. There is not the slightest doubt in my mind but that he had the power, both by reason and authority; and, while the cases of Sanders v. Belue, 78 S. C. 177, 58 S. E. 762, and State v. Ansel, 76 S. C. 395, 57 S. E. 185, 11 Ann. Cas. 613, are not exactly decisive of the precise point at issue, yet the inference to be drawn from these cases are that the Governor had ample and plenary power to remove any one appointed by him to office where there was no express provision to the contrary in the act creating the office. I cannot see how the created can be greater than the creator. I think, under the Constitution and statute law of the state, the Governor has the right to remove from office any one appointed by him to office, where there was no express provision in the act creating the office to the contrary, for incapacity, neglect of duty, misconduct, etc. The Governor is charged with executing the laws, and has the innate and inherent power to remove any appointee of his for failure to perform the duties of the office to which he has been appointed, where the act creating the office is worded like the act creating the office of Bank Examiner in this case. The office of Bank Examiner is not, in my opinion, a constitutional office. It is one of immense importance, and he has great powers for good and evil in looking into the banking institutions created under the laws of the state. The Constitutional Convention of 1895 was so careful to

guard the interests of depositors in the banks that by a constitutional provision it discriminated against and increased the liabilities of the stockholders in banks more than the stockholders of any other institutions. Money is not deposited in banks alone by persons who are competent to manage their affairs, but a great deal is deposited there under the orders of court, such as estate money, widows' and orphans' money, money in litigation, etc. One of the objects in creating the office of Bank Examiner was that he inspect the condition of the bank's affairs rigidly, and see that the officials of the bank conduct them as the law required. Now, say that a Bank Examiner who is appointed for four years, after he gets his appointment, can neglect his duties, be guilty of misconduct, be incapable, be guilty of the sins of both commission and omission, cannot be removed by the Governor, who appointed him, for any of the reasons enumerated or for willful misconduct, because the act creating the office fixes the tenure and gives no right of removal, is a doctrine that I will never subscribe to until a majority of the court decides to the contrary. We have no binding authority to the contrary; and, even if we did have, I would be in favor of overruling it. In the case at bar it is being decided by the highest court in the state, the court en banc, where the circuit judges have been called to the assistance of the Supreme Court, and, in the absence of any binding authority to the contrary, I do not intend to be bound by any moss-covered, antiquated rules, but be governed by what, in my opinion, is in consonance with reason, common sense, and the exigencies demanded by an enlightened and progressive age. It is far preferable that an office holder, appointed under such a statute as the Bank Examiner, should be removed by an erroneous, arbitrary exercise of power or even by tyrannical abuse of the power on the part of the Governor than to say that he cannot be removed for incapacity, misconduct, or neglect of duty. Even to exercise the powers of removal in this way would be less injurious to good government, and would command more respect for the laws of the state. To hold that he cannot be removed for these causes in my opinion will stagger and surprise citizens of the state and weaken the enforcement of the laws by the executive department, made by the legislative department, and construed by the judicial branch of the government.

As to whether Mr. Rhame could be removed without a hearing, I do not think that question is properly here, as, when the Governor called on him to explain, he contented himself with challenging the right of the Governor to remove him, and he thereby waived his right to be heard.

I think the judgment of the court should be that the defendant, Rhame, be ousted from office.

(94 S. C. 129)

ELLIOTT v. ATLANTIC COAST LINE R. CO.

(Supreme Court of South Carolina. Oct. 2, 1912.)

1. COMMERCE (§ 10*)—INTERSTATE COMMERCE—STATE REGULATION—NEGLIGENCE—LIMITATION OF LIABILITY.

Congress not having acted on the subject, either by the interstate commerce (Act Feb. 4, 1887, c. 104, 24 Stat. 379 [U. S. Comp. St. 1901, p. 8154]), Elkins (Act Feb. 19, 1903, c. 708, 32 Stat. 847 [U. S. Comp. St. Supp. 1911, p. 1309]), or Carmack (Act June 29, 1906, c. 3591, § 20, pars. 11, 12, 34 Stat. 595 [U. S. Comp. St. Supp. 1911, p. 1307]), acts, Acts Ex. Sess. Va. 1902-04, c. 608, pars. 24, 25 (Code 1904, § 12941), providing that no agreement made by a transportation company for exemption from liability for injury or loss occasioned by its own neglect or misconduct shall be valid, was valid and applicable to an interstate shipment beginning at Norfolk and destined to a point in South Carolina, and invalidated a provision in the bill of lading that, in consideration of a reduced freight rate, it was agreed that in case of injury to or death of any of the horses or mules in the consignment the carrier's liability for each should not exceed \$75.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 8; Dec. Dig. § 10.*]

2. CORPORATIONS (§ 391*)—POWERS—REGULATION.

Each state may determine what powers may be possessed by corporations organized under its authority, and what effect shall be attached to such corporations beyond their powers.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1573, 1578; Dec. Dig. § 391.*]

3. CARRIERS (§ 203*)—TRANSPORTATION OF ANIMALS—INTERSTATE COMMERCE—WHAT LAW GOVERNS.

Where a shipment of horses and mules was made from Virginia to a point in South Carolina, the law of Virginia, where the contract of shipment was made, governs the carrier's liability for negligence.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 203.*]

4. CARRIERS (§ 203*)—INTERSTATE COMMERCE—CONGRESSIONAL LEGISLATION—APPLICATION.

Where, in an action for injuries to horses and mules shipped in interstate commerce, defendant claimed that the acts of Congress were intended to supersede the state law on the question of the carrier's right to limit its liability, the federal law could not be applied, in the absence of proof by the carrier that it had complied with the requirements thereof.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 203.*]

Appeal from Common Pleas Circuit Court of Marion County; Geo. E. Prince, Judge.

Action by E. T. Elliott against the Atlantic Coast Line Railroad Company. Judgment for defendant, and plaintiff appeals. Reversed.

J. B. Gibson, of Dillon, and Jas. W. Johnson, of Marion, for appellant. Henry Buck, of Marion, and Henry E. Davis, of Florence, for respondent.

WATTS, J. This was an action for damages by plaintiff against defendant. The

complaint alleges that on May 2, 1907, at Norfolk, Va., the plaintiff delivered and defendant received for shipment a car load of mules and horses in consideration of the usual freight charges paid thereon, and the defendant agreed to safely carry and deliver same to plaintiff at Dillon, S. C.; that the defendant did not fulfill and perform its agreement, but, on the contrary, so carelessly and negligently acted and conducted itself in the business of common carrier that one of the horses died, and three others were injured and became diseased to such an extent that he was injured and damaged in the sum of \$577.33, and he filed claim for that amount on July 10, 1907. Defendant denied the material allegations of the complaint, and as a further defense set up "that, in consideration of a reduced freight rate granted to plaintiff by this defendant at the time of the shipment alleged in the complaint, plaintiff agreed and contracted with the defendant that, should damages occur to any of the horses or mules contained in the shipment described in the complaint, for which this defendant might be liable, the value at shipping point on the day of shipment should govern the settlement, in which the amount claimed for each horse or mule damaged should not exceed the sum of \$75; and this defendant alleges that by reason of said contract, fairly entered into between plaintiff and defendant, for valuable consideration, the plaintiff is estopped from claiming a greater sum than \$75 for loss of or damage to either or any of the horses or mules alleged in the complaint to have been damaged, or to have died, and is estopped from setting up the value of any of the said horses or mules at point of destination."

Other defenses were set up, but not relied on at the hearing. The case was first tried before Judge Shipp and a jury, and resulted in a verdict for the plaintiff for the full amount claimed. Upon motion of defendant, Judge Shipp granted a new trial, on the ground he had committed error in ruling out volume 13, Interstate Commerce Reports, offered to be introduced in evidence by defendant's counsel. The case was then tried before Judge Prince and a jury in 1911, and a verdict rendered for the plaintiff for \$275.88, which represented the value of the horses, as limited in the bill of lading, and damage to others and freight and expenses. At the trial plaintiff offered to introduce in evidence volume 13, Interstate Commerce Reports, which Judge Prince ruled out. After verdict, plaintiff appeals and alleges error on part of the presiding judge in 12 exceptions. Exceptions 4, 5, 6, 7, 8, 9, and 10 question the correctness of his honor's ruling in holding virtually that Congress has legislated upon this subject, and the Virginia statute will not control. These exceptions are as follows:

Exception 4: "In holding 'that this contract, being for an interstate shipment, is

regulated by the Interstate Commerce Law, and not by the laws of Virginia'; whereas it is submitted that, Congress not having legislated on the subject, the Interstate Commerce Law did not apply, and the contract should have been construed according to the laws of the state of Virginia, where the contract was made."

Exception 5: "In not charging the jury that the contract for shipment of the horses in question, having been made in the state of Virginia, was to be construed according to the laws of Virginia, and under the statute law of Virginia and the decisions of its courts a common carrier could not limit the common-law liability for negligence; and therefore the stipulation in the bill of lading in question undertaking to do so was null and void, and the shipper was not bound thereby."

Exception 6: "In charging the jury, 'Now, it is competent for a common carrier to limit its common-law liability to a certain extent,' in the face of the statute law of Virginia, and the decisions of the Virginia courts construing it, which had been introduced in evidence; the contract in question having been entered in the state of Virginia."

Exception 7: "In charging the jury that the stipulation contained in the bill of lading limiting the amount to be recovered in case of loss for each horse to \$75, if there was a reduction of the rate of freight caused by that limitation, was valid."

Exception 8: "In not charging the jury that the attempt of the defendant to limit its common-law liability for negligence, as shown by the bill of lading introduced in evidence, was null and void under the laws of the state of Virginia, where the contract in question was entered into, and that plaintiff was entitled to recover the full amount of the damages sustained, not exceeding the amount claimed, provided he had sustained loss and damage through the negligence of defendant."

Exception 9: "In not charging the jury that they should disregard that part of the bill of lading which undertook to limit the defendant's liability for damages caused by its negligence."

Exception 10: "In not charging the jury that, even if the Interstate Commerce Law was applicable, the stipulation in the bill of lading undertaking to limit the defendant's common-law liability for damages caused by its negligence was void, for the reason that the amount fixed in the bill of lading does not purport to be an agreed valuation, but was fixed arbitrarily by the defendant, without reference to the real value of the horses in question."

[1] There is no question, if Congress has legislated upon the question we are now considering, that the state statute of Virginia must give way, and, if the act in question of the Virginia Legislature burdens interstate commerce, that it must also give way;

but if Congress has not legislated upon this precise question, and the Virginia act does not burden interstate commerce, then this appeal must be determined by the Virginia statute. The Virginia statute is as follows: "Whenever any property is received by a common carrier to be transferred from one place to another, within or without this state, or when a railroad or other transportation company issues its receipt or bills of lading, in this state, the common carrier, railroad or transportation company issuing such bill of lading shall be liable for any loss or damage or injury to such property caused by its negligence or the negligence of any common carrier, railroad or transportation company operating within any territory or state of the United States to which such property may be delivered, or over whose lines such property may pass; and the fact of loss or damage in such case shall itself be prima facie evidence of negligence, and the common carrier, railroad or transportation company issuing any such receipt or bill of lading shall be entitled to recover in a proper action the amount of any loss, damage or injury it may be required to pay the owner of such property from the common carrier, railroad or transportation company aforesaid through whose negligence the loss, damage or injury may be sustained. No contract, receipt, rule, or regulation shall exempt any such common carrier, railroad or transportation company from the liability of a common carrier which would exist had no contract been made or entered into. The receipt of goods destined to a point beyond the line or route of the initial carrier or the acceptance of through freight on same shall be deemed to be a contract for carriage to ultimate destination and delivery of such property at that point. And unless the common carrier, railroad or transportation company first receiving such property shall, within a reasonable time after loss or damage thereto, pay to the consignor, his agent or assignee the amount or damage sustained thereby, then such consignor, his agent or assignee may by proper action recover of such common carrier, railroad or transportation company first receiving such property the amount of such loss or damage. No agreement made by a transportation company for exemption from liability for injury or loss occasioned by its own neglect or misconduct as a common carrier shall be valid." Acts of Assembly of Virginia, Extra Session 1902-04, p. 960, pars. 24 and 25 (Code 1904, § 1294).

The provision of the Virginia Code has been construed by the Court of Appeals of that state in the case of *Chesapeake & Ohio Railway Co. v. Beasley*, 104 Va. 788, 52 S. E. 566, 3 L. R. A. (N. S.) 183, wherein this language is used: "The conclusion of the whole matter may, in our view, be summed up as follows: At common law the carrier could not by contract limit or restrict his

liability for injury or loss caused by negligence of himself or servants. The object of the Legislature was to give to this recognized, common-law principle the force of a statute; and it would, indeed, be a singular outcome of an effort on the part of the Legislature to give an added sanction to the common law if by the ingenious construction the power to limit should be deduced from the prohibition to exempt."

That court had the right to and did interpret the Code of Virginia; and unless the Congress of the United States has sought to prohibit a carrier engaged in interstate transportation from limiting, or has permitted a carrier to limit, its liability to a stipulated valuation, or has legislated on the precise question at issue, the state of Virginia may require common carriers, although engaged in interstate commerce, to answer for the whole loss resulting from their negligence, whether there is a contract or not.

The sections of the act of Congress to regulate commerce (Act Feb. 4, 1887, c. 104, 24 Stat. 379 [U. S. Comp. St. 1901, p. 8154]), and the act known as the Elkins Act (Act Feb. 19, 1903, c. 708, 32 Stat. 847 [U. S. Comp. St. Supp. 1911, p. 1309]), that can have any bearing in this case deal exclusively with the matter of rates and rebates; and what is known as the Carmack Amendment to that act (Act June 29, 1906, c. 3591, § 20, pars. 11, 12, 34 Stat. 595 [U. S. Comp. St. Supp. 1911, p. 1307]), deals with the right of a common carrier to relieve itself of liability for the acts of its connecting carriers, who in effect are made its agents, instead of the shipper.

The purpose of the Interstate Commerce Act is stated in *Armour Packing Co. v. United States*, 209 U. S. 56, 28 Sup. Ct. 428, 52 L. Ed. 681, *Texas & Pacific Railway Co. v. Abilene Cotton Oil Co.*, 204 U. S. 428, 27 Sup. Ct. 350, 51 L. Ed. 553, *Louisville & Nashville Railroad Co. v. Mottley*, 219 U. S. 467, 31 Sup. Ct. 265, 55 L. Ed. 297, 84 L. R. A. (N. S.) 671, all of which cases point to the fact that Congress' great purpose was to prevent unjust and unreasonable rates, prevent favoritism, secure equality, require publication of rates and tariff, and to give all the same opportunity to know what the rates were, and to have the equal benefit of them. These cases point to the fact that the Interstate Commerce Act deals primarily with rates and discriminations; and the right of a common carrier to limit its liability by special contract is not included, either expressly or by implication.

In our opinion, the acts of Congress have not legislated, or attempted to legislate, upon the subject dealt with by the Virginia statute; and the Virginia statute has been construed by the Virginia court, and should govern in this case.

This is not in conflict with the principle as laid down in the case of *Gulf, Colorado & Santa Fé Railway Co. v. Hefley*, 158 U. S.

98, 15 Sup. Ct. 802, 89 L. Ed. 910, as there the state and federal statutes operated upon the same subject-matter, both dealing with rates and prescribing different rules; the federal statute being within the competency of Congress to enact, the state statute had to give way.

The respondents rely upon the case of *Southern Railway Co. v. Reid*, 222 U. S. 424, 82 Sup. Ct. 140, 56 L. Ed. 257, decided in January last by Supreme Court of the United States. We do not think this case controls the case at bar. A careful examination of the entire opinion will show that it was on the subject of rate making and the regulation of interstate commerce. It holds that Congress had taken control of rate making; and when the Legislature of North Carolina undertook to penalize a carrier for not receiving freight intended for interstate shipment, when no rate had been established, it was invading the field already covered by an act of Congress, and its action was void.

[2] Each state may determine what powers may be possessed by corporations organized under its authority, and what effect shall attach to acts done by such corporations beyond their powers. That is a question of state policy, and therefore a matter of local and not general law. *Anglo-American Land, Mortgage & Agency Co. v. Lombard*, 132 Fed. 721, 68 O. C. A. 89. The Virginia statute does not attempt to undertake to deal with rates. It deals with contracts. It does not attempt to regulate interstate commerce, but prohibits, under the police powers of the state, the carrier from making a contract which it regards as contrary to public policy. It forbids a certain kind of contract, and stops. This question has been settled in *Chicago, Milwaukee & St. Paul Railway Co. v. Solan*, 169 U. S. 133, 18 Sup. Ct. 289, 42 L. Ed. 688; and *Pennsylvania R. R. Co. v. Hughes*, 191 U. S. 477, 24 Sup. Ct. 132, 48 L. Ed. 268.

[3] The case should have been determined by the law of Virginia, where the contract of shipment was made. *Frasier v. Railway Co.*, 73 S. C. 140, 52 S. E. 964; *Scudder v. Union Nat. Bank*, 91 U. S. 406, 412, 23 L. Ed. 245; *Walker v. Telegraph Co.*, 75 S. C. 526, 56 S. E. 38; *Gilliland & Gaffney v. So. Ry.*, 85 S. C. 30, 67 S. E. 20, 27 L. R. A. (N. S.) 1106, 137 Am. St. Rep. 861.

[4] Even if the act of Congress was intended to supersede all state legislation on the question under consideration in the case at bar, it would have no application, for the reason that the defendant failed to allege or prove that it had complied with the requirements of the act of Congress. See *Blitch v. Railroad*, 87 S. C. 107, 69 S. E. 16; *Hardaway v. Railroad*, 90 S. C. 475, 73 S. E. 1020. The case is therefore governed by the statute of Virginia and the construction of its state courts.

His honor was in error in holding that Congress had legislated upon the subject, and that the Virginia statute did not control. The exceptions raising this question must be sustained. It is unnecessary to consider the other exceptions.

Judgment reversed, and new trial granted.

WOODS, HYDRICK, and FRASER, JJ., concur.

GARY, C. J. I concur for the reason stated in the opinion of Mr. Justice WATTS, that, even if the act of Congress was intended to supersede all state legislation on the question under consideration, it would have no application, for the reason that the defendant failed to allege or prove that it had complied with the requirements of the act of Congress.

(92 S. C. 501)

LELAND v. MORRISON.

(Supreme Court of South Carolina. Oct. 1, 1912.)

1. REFERENCE (§ 63*)—DUTY OF MASTER—TAKING EVIDENCE.

A master is bound to take and report all testimony offered.

[Ed. Note.—For other cases, see *Reference*, Cent. Dig. §§ 94, 95; Dec. Dig. § 63.*]

2. APPEAL AND ERROR (§ 931*)—REVIEW—PRESUMPTIONS.

On appeal from a decree after a reference to a master, the trial judge will be presumed to have based his conclusions on competent evidence only, though the master reported incompetent evidence.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3728, 3762-3771; Dec. Dig. § 981.*]

3. MORTGAGES (§ 37*)—DEED AS MORTGAGE—PAROL EVIDENCE—ADMISSIBILITY.

Parol evidence is admissible to show that a deed absolute on its face is in reality a mortgage.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. §§ 97-107; Dec. Dig. § 37.*]

4. APPEAL AND ERROR (§ 901*)—REVIEW—BURDEN TO SHOW ERROR.

On appeal from a decree, the burden is on appellant to show that the trial judge erred in his findings of fact.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 3670; Dec. Dig. § 901.*]

5. MORTGAGES (§ 139*)—DEED AS MORTGAGE.

Where a deed, though absolute in form, is shown to have been intended as a mortgage, it will remain as security until foreclosed, unless the grantor deprives himself of the interest he has in the property by some subsequent conveyance or relinquishment of interest.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. § 278; Dec. Dig. § 139.*]

6. MORTGAGES (§ 608½*)—DEED AS MORTGAGE—LACHES.

Suit brought January 21, 1911, to declare a deed absolute in form to be a mortgage was not barred by laches, though the deed was dated October 24, 1894.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. § 1815; Dec. Dig. § 608½.*]

Appeal from Common Pleas Circuit Court of Charleston County; Geo. W. Gage, Judge.

Action by H. G. Leland against J. B. Morrison. Judgment for plaintiff, and defendant appeals. Affirmed.

The following is the decree entered by the trial court:

"The object of the action is to declare an instrument of writing to be a mortgage, which on its face appears to be a deed absolute. The action was begun in January, 1911.

"The defendant married the plaintiff's sister, and thus there is added to the issue an element of delicacy and difficulty.

"A history of the transaction is this: In December, 1890, the plaintiff bought from one Sanders about 2,000 acres of land near McClellanville, and known as the 'Doe Hall' plantation. The price agreed to be paid was \$6,000, but the plaintiff paid down only \$1,200, and made a mortgage for the balance of \$4,800. Of the cash payment, one-half thereof was borrowed from one Walker. On February 2, 1892, the plaintiff agreed with the defendant to sell him a one-half interest in the land. The agreement was reduced to writing, and it recites that the balance of \$4,800 was due and payable in four equal annual installments of \$1,200 each, payable January 1, 1892, January 1, 1893, January 1, 1894, and January 1, 1895.

"The agreement further recites that of the \$1,200 which fell due January 1, 1892, the defendant had paid \$600, and he agreed to pay \$600 each year thereafter.

"The agreement further provided that, in the event either party to it should fail to meet his own annual payments of \$600, then the other party might meet it and hold the interest of that party as security for its return.

"January 6, 1893, the plaintiff executed to the defendant a mortgage on the said plantation to secure a debt expressed to be \$2,200. October 24, 1894, the plaintiff executed to the defendant an absolute deed to the said plantation. The consideration expressed in the deed was \$3,000. The deed recites that there was then due on the purchase-money mortgage to Sanders the sum of \$1,800 and interest.

"The same day the deed was made the defendant addressed to the plaintiff a letter, which is the basis of this action. That letter declares that upon the payment by Leland to Morrison, on or before December 1, 1896, of one-half of all such amounts as Morrison may have paid, or may thereafter pay, on the purchase price of the said plantation, with interest on such payments at the rate of 7 per cent., then Morrison would convey to Leland a one-half interest in the plantation. This letter and the deed are in the handwriting of the Honorable Henry A. M. Smith.

"January 3, 1894, Leland and Morrison leased the plantation to one C. Henry Leland

for turpentine uses, and they were to receive therefor \$140. March 11, 1895, Morrison leased to H. G. Leland the same premises for the same uses and for the same price. January 29, 1896, Morrison leased to H. G. Leland the same premises for turpentine uses, and for cultivation in agriculture, for the price of \$140 for the turpentine and for 800 pounds lint cotton for farm cultivation.

"December 16, 1896, Morrison addressed to Leland a letter, and therein made a statement of the account betwixt them. The plaintiff largely rests his case on the terms of this letter. Therein Morrison charges Leland with one-half the principal of the purchase price and interest thereon, and credits him with those sums received by him from Leland in 1893, 1894, 1895, and 1896 under the aforesaid lease. The general statement of the account is thus:

To sums paid by Morrison on price & taxes	\$2,816 00
To balance due Sanders on price....	1,008 00
	<hr/>
	\$3,824 00
By cash paid by Leland.....	741 00
	<hr/>
To balance due by Leland to Morrison	\$3,083 00

"In the letter Morrison wrote that Leland would owe him that much, 'should we go back to the agreement of 1892,' which agreement was expressed in the Smith letter. In the letter Morrison also wrote: 'Will it be possible for you to sell your half for over \$3,000 and save anything for yourself? Let me hear from you at once.' The record does not disclose a written answer to this letter of December 16, 1896.

"Mr. Morrison took exclusive possession of the plantation in 1897, and has made valuable improvements upon it. He has erected thereon a mansion house worth \$3,000 or \$4,000. He has felled trees, drained the land, and brought it into cultivation. At the outstart there was only about 100 acres of arable land. Now there are some 225 acres open to cultivation. Mr. Morrison has underdrained the land at a cost of \$1,000, and he has fenced it and built tenant houses and barns. He has cut 3,000,000 feet of timber worth \$3,000.

"It is conceded that in 1890 the premises were barely worth \$6,000, if as much as that. As a part of the history of the country, it is known that lands throughout the whole state began to rise in value about 1900, and since then have steadily appreciated. Now the plaintiff fixes the value of Doe Hall at \$20,000. The defendant fixes the value at not less than \$10,000. I have no doubt but that fact, in a measure, accounts for this controversy, both the demand and the refusal of the demand.

"The parties submitted their differences to a friendly board of arbitrators; but its conclusion is not set up as a bar, and throws no light on the issues now made.

"The plaintiff concedes that one-half the

land belongs to the defendant; that his one-half is liable to contribute a moiety of the purchase price of \$6,000; and that the defendant is entitled to have the improvements he has made on the premises, but that the defendant is chargeable with the timber he gathered from the premises and for the rents which he received in excess of his share.

"The issue of fact which lies at the threshold of the controversy is the meaning of the Smith letter. The defendant's contention is that this letter amounted only to an option, extended by Morrison to Leland, to buy a one-half interest in the premises at any time before December 1, 1896. The plaintiff's contention is that it was more than that, and was a declaration, in effect, which modified the title, made at the same sitting and absolute on its face.

"If the Smith letter is considered in connection with the fact that Leland was the owner at outstart, that he first made a contract to let Morrison have a one-half interest, that he thereafter mortgaged the land to Morrison to save him from loss, that the last payment to Sanders was due January 1, 1895, that after December 1, 1896, and on December 16, 1896, Morrison acknowledged in writing that Leland was the owner of one-half, then the conclusion is irresistible that the two men were tenants in common, each of a half. The fact is fixed, not altogether, it is true, but in large measure, by the writings of the defendant, and there is no escape from that conclusion.

"Beyond question, on December 16, 1896, by the defendant's own confession in the letter of that date, Leland had then the full right to pay \$3,083 and accept a deed for a one-half interest in the land. That was 16 days after the expiration of the alleged option. It is true that defendant now denies that Leland had this right of redemption; but the letter fixes the fact against the present denial, and the present denial gives pregnant meaning to the letter.

"If the defendant had that right on that day, when and how did he lose it?

"Rights are reciprocal. The defendant then had the right to sell Leland's one-half and have the proceeds applied to the payment of his half of the Sanders debt, and have the plaintiff's equity barred. The defendant had the right for 20 years thereafter. The lapse of that time alone would have defeated the right. The plaintiff had the corresponding right to wait 14 years thereafter to enforce his right. The long lapse of time, to wit, 14 years, operates only to throw a doubt over the fact of plaintiff's contention; but the proper evidence dissolves the doubt.

"The defendant objected to the parol testimony of the plaintiff, which tends to prove that the deed was not intended to be absolute. I think the testimony was competent. It does not vary the terms of the written instrument; but it tends to well explain and

confirm the evidence of all the writings together that the parties intended that Leland should be half owner of the plantation. *Shute v. Shute*, 82 S. C. 264, 64 S. E. 145.

"The defendant relies upon a verbal and strict construction of the letter of December 16, 1896, to show that Morrison was not fully minded to go back to the contract of 1892, and that at best he proposed a case for Leland's action on the hypothesis that they did go back to the contract of 1892. But the letter in its entirety—all of it—proves that Morrison was there mindful of Leland's right to pay up and take legal title. And this view is strengthened when the history of the transaction from first to last is recalled.

"There is no room to apply the defense of estoppel to the plaintiff. And I do not understand that such a defense is seriously, if at all, made. But if it is, the testimony does not sustain it. Leland had no knowledge that Morrison did not have. Morrison had done no act, at Leland's suggestion or acquiescence, which will work injury to him. Morrison has not been misled. If anybody has been injured by the transaction, it is Leland. The improvements made by Morrison were made on his own land, and of right.

"Now, am I able to sustain the plea of laches? That doctrine is applied to prevent the commission of a wrong.

"The plaintiff's long delay in prosecuting his right may, in a measure, be explained. Some men are slow at any time to take action. They procrastinate, and months lengthen into years, and years into decades. And the parties are akin, and either of them might well abhor a resort to the courts of the county to settle their differences.

"At the outstart the land was of small value; timber growing upon it was not then exploited; the rise in value was gradual and constant, so that at last it grew to be an estate.

"But above all things no harm can come to Morrison by granting the relief sought. He cannot lose a cent. He testified that the improvements, which cost him some \$5,000, are on such part of the whole as may be set aside to him when partition be had. He is entitled to have that remedy to protect him from loss.

"He is furthermore entitled to have Leland's half interest first subjected to the payment of all sums which Morrison has paid, and which Leland ought to have paid. When that has been done, if there yet be a surplus, then Leland is entitled to it. It seems to me that this is complete equity.

"Finally, the defendant contends that in the making of the mortgage and the deed by Leland to Morrison there was present in Leland's mind a fraudulent intent to circumvent his creditors and sequester his property from their reach. If that be so, then Leland is not entitled, as matter of course, to the remedy he now seeks.

"But the testimony does not merely estab-

lish so grave an issue. There is no proof that Leland is now insolvent, or that his creditors have not been paid, or that they were hindered, or that he has the intent which moves men to deceive. He was embarrassed. He did prefer Morrison, and the preference was accepted; and, so far as the evidence shows, the preference was lawful.

"I think all the issues have been thus passed upon; and I conclude that the prayer of the complaint must be allowed.

"I shall not undertake to formulate a technical order for relief, but shall remand the case to the master to take an account of what may be due by Leland on the purchase price of the plantation; to ascertain what Leland is chargeable with while he was in possession; to ascertain what Morrison is chargeable with while he was in possession; to ascertain the value of the timber cut by Morrison, and if he is liable therefor, or for any part of it; to ascertain what rents Morrison got, and if he is liable to Leland for any part thereof. It is so ordered."

Wm. Henry Parker, of Charleston, for appellant. W. A. Holman, of Charleston, and R. C. Holman, of Barnwell, for respondent.

WATTS, J. This action was commenced by the plaintiff against the defendant on January 21, 1911, and was in a general nature an action to declare as a mortgage a deed, absolute in form, conveying realty and transferring personality, dated October 24, 1894; for an accounting of the rents and profits of the realty and a partition and division of the realty as between tenants in common. The answer denies that there was any understanding between the parties that the deed was a mortgage, and alleges that the deed was a deed absolute, and the consideration an existing indebtedness between the parties, and alleges facts setting up the defenses of laches and estoppel; also invokes the equity of the court not to aid the plaintiff in enforcing an alleged agreement by way of secret trust, where the plaintiff's purpose was to sequester property from his creditors. The cause was heard by his honor, Judge Gage, on the pleadings and testimony taken before the master, who filed his decree in September, 1911, granting the relief asked for in the complaint. Thereupon defendant appealed, and asks reversal of the same.

For a proper understanding, the decree of Judge Gage should be set out in the report of the case. The exceptions are 25 in number. Exceptions 1, 2, 3, and 4 question the correctness of his ruling in holding the deed of October 24, 1896, to be a mortgage, and not a deed absolute. Exceptions 5, 6, and 7 in holding certain parol testimony competent and admitting the same. Exceptions 8, 9, 10, and 11 question his honor's construction and findings as to the effect of certain letters and leases introduced in evidence. Exceptions 12, 13, and 14 question his holding and finding

as to plaintiff's right to redeem, and that the doctrine of estoppel does not apply under the facts of the case, and the testimony does not sustain the doctrine of estoppel. The other exceptions complain of the finding of facts by the judge, and except to pretty much all of his findings of fact and his conclusions of law. We will not undertake to discuss the exceptions in the case seriatim, but will try to dispose of them under general heads.

The pivotal point in the case hinges upon the question of law whether the conveyance of Leland to Morrison, in October, 1884, was what it purported to be, a deed absolute, or a mortgage; and, if it was intended as a mortgage, has Leland by his conduct and acts so conducted himself during this time as to mislead Morrison to his prejudice, and to be guilty of such laches as to defeat his contention?

[1, 2] We will first consider and dispose of the exceptions which complain of error on the part of his honor in admitting parol testimony. It will be borne in mind that the evidence in this case was taken before the master, and, under the law, it is his duty to take all of the testimony offered and report it to the court. Even if incompetent testimony was in evidence, as this was not a jury trial, but a trial before the judge, it is reasonable to suppose his honor, in reaching his conclusions as to the facts of the case, did not base his decision upon anything but competent, relevant testimony.

[3] There is no doubt that testimony is competent to show that a deed, absolute on its face, is in reality a mortgage, and that this may be shown by parol evidence. *Brownlee v. Martin*, 21 S. C. 399; *Tant v. Guess*, 37 S. C. 489, 16 S. E. 472; *Cresswell v. Smith*, 61 S. C. 579, 39 S. E. 757.

[4] His honor committed no error in admitting this testimony; he having been satisfied by all of the competent testimony in the case that the purported deed was intended by the parties to be a mortgage, and not a deed, and this being conclusively proven by the letter of Morrison to Leland, dated October 24, 1894, as to the exceptions of his honor's finding of fact in reference thereto. For the reasons stated by the circuit judge, this court is satisfied with his findings. "It was incumbent on the appellant to satisfy this court by the preponderance of the evidence that his honor, the presiding judge, erred in his findings of fact, which he has failed to do." *Hickson Lumber Co. v. Stallings*, 91 S. C. 473, 74 S. E. 1072. These exceptions are overruled.

[5] Having concurred with his honor in his finding that the deed was intended as a mortgage, we will next consider: Has Leland so conducted himself as to have his claim that it was intended as a mortgage to be defeated by laches, estoppel, or any other cause by the action and conduct of Leland during this time?

There is no doubt that where a deed, though absolute in form, is shown to be intended as a security for the payment for a debt, it will always remain a security until foreclosed by some judicial proceeding, or unless the party deprives himself of the interest he has in the property by some subsequent conveyance or relinquishment of interest.

In *Walling v. Aiken*, McMul. Eq. 18, the court says: "We concur very fully with the presiding chancellor that the conveyances of the lands by Neely and Kennedy, connected with the written agreement between the complainant and the defendant, constitute a mortgage or security. And it is the well-known rule of the court that that which was originally intended as a security shall never be turned into an absolute conveyance. Even if it be expressly stipulated that if the money be not paid at a given day the title shall be absolute, and the estate irredeemable, this stipulation operates nothing. And it is equally incompetent to stipulate from what source the funds to redeem shall be derived. The mortgagee is considered in this court only as a creditor; and all that he is entitled to is his money, coming at what time (within the known limits), or from what source, it may."

In *Brownlee v. Martin*, 21 S. C. 400, this language is used by Chief Justice McIver: "The law looks with jealousy and suspicion upon all dealings between the mortgagee and the mortgagor from the supposed influence which the former has over the latter. If, therefore, a deed, absolute on its face, is shown (as it may be shown by parol evidence) to have been executed merely as a security for a debt, it will operate only as a mortgage, and it cannot be converted by any subsequent written agreement into an absolute conveyance, unless such subsequent agreement is based upon a sufficient consideration, and is shown to have been fairly made, without undue influence by the creditor; and the burden of showing this is upon the mortgagee. In other words, it must amount to a sale of the equity of redemption, fairly made, upon sufficient consideration. These views are fully supported by authority. *Russell v. Southard*, 12 How. 139 [13 L. Ed. 927], recognized in *Lee v. Lee*, 11 Rich. Eq. 582, and followed by *Babcock v. Wyman*, 19 How. 289, [15 L. Ed. 644]; *Villa v. Rodriguez*, 12 Wall. 323 [20 L. Ed. 406]; *Morgan v. Shinn*, 15 Wall. 105 [21 L. Ed. 87]; *Peugh v. Davis*, 96 U. S. 332 [24 L. Ed. 775]; *Brick v. Brick*, 98 U. S. 514 [25 L. Ed. 256]." This doctrine is adhered to and reaffirmed in the case of *Tant v. Guess*, 37 S. C. 497, 16 S. E. 472.

Applying the facts of the case to these decisions, the irresistible conclusion is that Morrison only held one-half of the land as security for a debt; and that he and Leland are tenants in common of the land in dispute, unless Leland is estopped by lapse of time

or some other good cause from asserting his right to have the deed in question declared a mortgage or security to one-half interest.

Jones on Mortgages (volume 1, § 330) says: "Delay in asserting an absolute deed to be a mortgage has not the same effect upon the rights of the parties that attends delay in seeking to enforce, in equity, the performance of an executory contract. Once a mortgage, always a mortgage, is the maxim of the law; and payment does not stand on the footing of performance in equity. The character of the deed being fixed by the evidence as conditional, the mortgagor has the same time to make payment that any other debtor has. The right to foreclose and the right to redeem are reciprocal; and if one is barred the other is also barred. The only effect that delay can have in such a case is in its bearing on the primary question of mortgage or no mortgage. The poverty of the mortgagor, and many other circumstances, may sufficiently explain this. No lapse of time short of that which is sufficient to bar the action will prevent the introduction of parol evidence to show a deed was 'intended as a mortgage.'"

In *Anding v. Davis*, 38 Miss. 574, 77 Am. Dec. 653, we find: "Parol evidence is admissible to show that a deed, absolute on its face, was intended by the parties to have operation only as a mortgage; and it is immaterial in this respect, as between the parties, whether the debt intended to be secured was then contracted by the mortgagor, or was contracted for the purpose of securing a pre-existing debt. Complainant's right, if competent in its inception to be established by parol evidence, will not be lost by any lapse of time not sufficient to bar it by the statute."

[8] Under the law of this state, the life of a mortgage is 20 years. Any time during that period, the owner of it has the right to foreclose it; and if the statute of limitations does not bar the right to foreclose it would not bar the right to redeem. The right to foreclose and the right to redeem are reciprocal. When the right of one exists, the other exists. When one is barred, the other is barred. The questions presented by these exceptions are dependent upon the findings of fact. For the reasons stated by his honor, the circuit judge, this court is satisfied with his finding of facts, mentioned in the assignment of error, and these exceptions are overruled. These conclusions practically dispose of the whole case; and, while the testimony shows that Morrison behaved in the most lenient and forbearing manner with Leland and treated him with the greatest consideration, and used his credit by borrowing money, when it was hard to do, and befriended him in every way, and patiently tried to get the matter adjusted on the most generous terms and honestly thought later that he had an absolute deed to the land, we are constrained

to hold that the deed was a mortgage, and that Leland has the right to redeem; that Morrison should have foreclosed, and his leniency, forbearance, and generosity has been his undoing.

This court is satisfied with the finding of facts, set out in the assignment of error on the part of his honor, the circuit judge, that the court will not aid the plaintiff in enforcing an alleged agreement, by way of secret trust, where the purpose of the plaintiff was to sequester property from his creditors, for the reasons stated by the circuit judge. We may say that the appellant has failed to convince this court that there was error in the particulars mentioned in the other exceptions. All exceptions are therefore overruled.

It is the judgment of this court that the judgment of the circuit court be affirmed.

GARY, C. J., and WOODS and HYDRICK, JJ., concur. FRASER, J., did not sit in this case.

(71 W. Va. 55)

MARTIN et al. v. BERKELEY COUNTY COURT.

(Supreme Court of Appeals of West Virginia. Sept. 7, 1912.)

(Syllabus by the Court.)

INTOXICATING LIQUORS (§ 61*) — LICENSE — MANDAMUS.

Section 46, c. 6, Acts of 1909, gives the council of the city of Martinsburg sole power to grant or refuse license to sell intoxicating liquors, in the city or within two miles of its limits, and when it has granted such license the act is mandatory upon the county court to grant a state license.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. §§ 60-62; Dec. Dig. § 61.*]

Application of T. W. Martin and others for writ of mandamus to the County Court of Berkeley County. Writ granted.

Faulkner, Walker & Woods and H. H. Emmert, all of Martinsburg, for petitioners. A. B. Noll and A. C. Nadenbousch, both of Martinsburg, and Marshall McCormick, of Roanoke, Va., for respondent.

BRANNON, P. On the 10th day of June, 1912, the council of the city of Martinsburg granted to T. W. Martin a license to sell at retail spirituous liquors at the Berkeley Hotel in that city. On the 11th day of July, 1912, said Martin presented to the county court of Berkeley county a certified copy of the order of the city council granting such license and asked the court to grant him a state license to sell such liquors at said hotel. The county court entered an order stating such application to it for such state license, and the council grant, and stating that Martin had paid the tax and complied with all the requirements of law in relation to the matter, and refusing to grant such

state license. Said Martin now asks this court to grant him a writ of mandamus against the county court requiring it to grant such state license.

The case involves the construction of section 46 of chapter 6 of the Acts of the Legislature of 1909, the present charter of Martinsburg. That section says that whenever anything for which a state license is required to be done within that city its authorities may require a license. A power of revocation of license is also given the city. This gives the licensing power to the city, indicating intent to give this populous, important municipality an autonomy or self-governing power as to this matter. This clause is followed by the language: "And no license to sell strong or spirituous liquors, or wine, or beer, ale, porter or drinks of like nature, within said city, or within two miles of the corporate limits thereof, shall be granted by the county court of Berkeley county, unless the person applying therefor shall produce to said county court the certificate of the council of the city that said council has granted a city license authorizing said person to sell as aforesaid; and upon the production of said certificate before said county court, said court shall grant a state license to sell as aforesaid to said person, upon his compliance with all the requirements of law in relation thereto."

Here is plainly further manifested a purpose to vest in the city the sole power to grant or refuse such license. We do not deem it necessary to further discuss the case, or go over the numerous points made in argument, as we are of the unanimous opinion that this case is ruled by the case of Ward & Co. v. County Court, 51 W. Va. 102, 41 S. E. 154.

Therefore we award the mandamus.

(11 Ga. App. 539)

ROME INS. CO. v. THOMAS. (No. 3,833.)
(Court of Appeals of Georgia. Sept. 27, 1912.)

(Syllabus by the Court.)

1. APPEAL AND ERROR (§ 1051*)—REVIEW—HARMLESS ERROR—ADMISSION OF EVIDENCE.

While declarations of an alleged agent are not admissible to prove agency, still the error of permitting a witness to testify that a named person said he was the agent of another is immaterial, when the statement is made in connection with the recital of such facts and circumstances as would fully authorize the conclusion that he did in fact sustain that relation to the alleged principal. Where the extraneous circumstances, independently of and without regard to the declarations of the agent himself, conclusively tend to establish the fact of his agency, his declarations, though inadmissible if standing alone, may, as part of the *res gestæ* of the transaction, be considered.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4161-4170; Dec. Dig. § 1051.*]

2. TRIAL (§ 261*)—INSTRUCTIONS—REQUESTS.

A trial judge is not required to perfect a request which is incorrect, and, if the charge as

requested is defective, he may refuse instructions upon that subject altogether, unless the instruction relates to a matter so material to the issue as that, even in the absence of a request, it would be error to omit to charge the jury upon the subject.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 660, 671, 675; Dec. Dig. § 261.*]

3. INSURANCE (§ 378*)—AVOIDANCE—ESTOPPEL—KNOWLEDGE OF AGENT.

As to all matters affecting conditions precedent to a contract of insurance, the knowledge of the agent of the insurance company is imputed to the company, and the company is thereby charged with notice of any facts, affecting the risk about to be assumed, which may have come to or rest in the knowledge of its agent, and which good faith in the discharge of his duty as agent would require him to disclose to his principal.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 968-974; Dec. Dig. § 378.*]

4. INSURANCE (§ 378*)—AVOIDANCE—ESTOPPEL—KNOWLEDGE OF AGENT.

If, before or at the time of execution of the contract of insurance, the insurance company's agent who procured the contract had notice that the assured was not in good health, but, on the contrary, was suffering from an incurable disease, and nevertheless the policy was issued and delivered, and the premium accepted thereon, the insurer will be presumed to have waived a condition avoiding the policy in the event of ill health of the assured at the time of its delivery, and will be estopped from setting up that provision of the policy in defense to an action upon the contract of insurance.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 968-974; Dec. Dig. § 378.*]

Error from City Court of Columbus; **G. Y. Tigner, Judge.**

Action by Hazel Thomas, by next friend, against the Rome Insurance Company. Judgment for plaintiff, and defendant brings error. **Affirmed.**

H. R. Goetchius and Chapman & Howard, all of Columbus, for plaintiff in error. **D. L. Parmer and E. H. Rawls**, both of Columbus, for defendant in error.

RUSSELL, J. Hazel Thomas, by her next friend, brought suit against the Rome Insurance Company for \$180, beside interest, claimed to be due her as beneficiary of an insurance policy upon the life of her mother. It was admitted that the policy was issued by the company and the premiums paid up to and including September 26, 1910, that the insured died on October 31, 1910, and that demand for payment had been made by the beneficiary, and had been refused. There was no contradiction of the evidence to the effect that the application was taken by one J. E. Sharpe, who was an agent of the company; that the policy was issued August 1, 1910; that the premiums were regularly paid when due, up to and including September 26, 1910; that the next premium was due October 3, 1910; that the insured died of pellagra, and had pellagra two years before her death, and had been attended by physicians for it, but that she was not afflicted with any other disease or complaint. There

was sharp conflict in the testimony as to whether the agent, Sharpe, had notice at the time he took the policy that the insured had pellagra. The evidence was also in conflict as to whether the assured signed the application and the physician's certificate. There was positive testimony in behalf of the plaintiff that the assured did not sign either the application or the medical examiner's report—that the signatures there appearing were not her genuine signatures. The defendant produced evidence to the effect that its agent had no notice of the ill health of the assured, and that no other agent of the company had any reason to suspect that the assured was not in good health. The defendant contended that the policy lapsed for non-payment of premiums, and the evidence as to this point was in conflict. The evidence on the part of the plaintiff was that the insured died on October 28, 1910, while there was testimony in behalf of the defendant that she did not die until October 31, 1910. The clause of the policy pertinent to this issue was that, "should the death of the insured occur while any premium is in arrears not exceeding four weeks, the company will nevertheless pay the policy, subject to its conditions." Under the defendant's evidence if the insured died October 31st, the policy had lapsed, because the premiums were then more than four weeks in arrears. But under the plaintiff's testimony that the insured died October 28th the policy had not lapsed. In addition to this, the plaintiff introduced testimony to the effect that payment of the accrued premiums was tendered on October 18th, and was refused by an agent of the company, who was authorized to receive them. Summarizing the material issues of fact, only three were presented: (1) Did the company, at the time the application was taken, have notice that the insured had pellagra? (2) Did the insured die on October 28, or on October 31, 1910? (3) Did the insured make any material misrepresentations with intent to defraud the insurance company by inducing it to issue the policy? The evidence on behalf of the plaintiff as to each of these issues was sufficient to sustain as matter of fact the finding of the jury; and therefore the question as to whether the trial court erred in refusing a new trial depends upon the general assignment of error; that the verdict is contrary to law, and those specific assignments of error in which complaint is made that the court erred in the admission of certain testimony, in instructions to the jury, and in refusing to instruct as requested.

[1] 1. It is insisted that the court erred in permitting the witness Ellene Thomas, over the objection of the defendant that agency could not legally be shown by proof of declarations of the alleged agent, and that the proposed evidence was hearsay, to testify: "I offered to pay certain premiums to a man

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

who said his name was Wright and was an agent of the company, but he declined to receive the unpaid premiums. He said the policy had lapsed." Proof of agency cannot be made by mere declarations of the alleged agent, and, if the evidence in question stood alone, the objection would be meritorious. The court, however, stated that the testimony was admitted to be considered in connection with other testimony in the case, to enable the jury, upon consideration of the testimony as a whole, to determine whether Wright was the agent, and that the agency could not be proved by declarations of the alleged agent alone. By reference to the brief of testimony it appears that the man who said his name was Wright, and who another witness said was Wright, came to the home of this witness in response to a request by telephone to the insurance company to send an agent to collect premiums. In response to this telephone message two men (one of them the man who said his name was Wright) appeared. They stated they had come in response to the telephone message. They asked for the beneficiary's receipt book. They had the company's books and receipt book. They examined the beneficiary's receipt book, and they then declined to accept any premium on the policy, stating as the reason that the policy had lapsed. We agree with the trial judge that these circumstances were sufficient to authorize the jury to conclude that Wright was an agent of the company. His statement that he was an agent, in connection with the fact that he came in response to a telephonic request for an agent, was at least a part of the *res gestæ* of the transaction, and so illustrative of the other circumstances to which the witness testified as to be practically inseparable from them. Even if the objection to that portion of the testimony in which the witness alleged that Wright said he was an agent should have been sustained, the fact that a man who had the company's books and receipt book, after examining the receipts for premiums which had been paid upon the policy, said that the policy had lapsed, should certainly not have been excluded; and nothing is better settled than that when an objection is offered to certain testimony as a whole, and any portion of it is competent, the objection should not be sustained. It is the duty of the counsel in making his objection, and not the duty of the court in passing upon it, to separate the wheat from the chaff.

While declarations of an alleged agent are not admissible to prove agency, still the error of permitting a witness to testify that a named person said he was the agent of another is immaterial when the statement is made in connection with the recital of such facts and circumstances as would fully authorize the conclusion that he did in fact sustain that relation to the alleged principal. Where the extraneous circumstances, independently of and without regard to the

declarations of the agent himself, conclusively tend to establish the fact of his agency, his declarations, though inadmissible if standing alone, may be considered as part of the *res gestæ* of the transaction.

[2] 2. It is insisted that the court erred in failing to charge the jury, as requested in writing, that "whatever you may find as to the representations of the assured to the agent of the defendant, if any were made, as to pellagra, you may also go further, and inquire if the assured did or did not make any representations to the agent as to not having been attended by a physician for a serious disease preceding the date of the policy. If the facts show that she had been so attended, and she suppressed that fact when asked with reference thereto, then, under the terms of the policy, she could not recover." It is insisted that the court's failure to give this charge was error and harmful to the defendant, because the company's answer specifically set up the defense that in the written application of the assured she had been asked if she had been attended by a physician during the period, and she answered "No," and that the failure of the court to give this specific charge as requested deprived the defendant of one of its main grounds of defense, and was particularly harmful for the additional reason that there was no testimony that any agent of the insurance company had ever been informed that the assured had been attended by a physician for pellagra during the year previous to the application, or at any time; and, under the express terms of the contract of insurance, the policy should be avoided. Of course, a trial judge is never required to comply with a request to the judge which does not correctly present the law, nor is he required to perfect the charge, so as to render it appropriate to the issues involved. For this reason, we think the court did not err in refusing the request to charge as presented. But there is an additional reason why the request was properly refused. To have given the instruction in the form requested, the court would necessarily have taken away from the jury the right to pass upon the materiality of the representations, and would have permitted the jury to consider them without any reference to whether they were made with intent to deceive and defraud the company. There was evidence to the effect that the agent of the company was informed at the time he filled in the application that the insured had pellagra. If this evidence was believed by the jury, it would seem that it would be immaterial whether the applicant stated that the assured had been treated by a physician or not, because all the testimony was to the effect that pellagra is an incurable disease, and the purpose of the inquiry as to the attendance of a physician is to enable the company by inquiry of the physician, to ascertain whether the person whom it is proposed to

have insured is in fact in good health. This must necessarily be true, because the statement that one is in good health is so largely a matter of opinion and so general as as very readily to give rise to controversy. If the insurance company had knowledge brought home to its agent that the assured was afflicted with pellagra, it could not reasonably be assumed that the applicant would be in good health at the time of the delivery of the policy, which perhaps would occur only a few days later.

Even if the first clause of the request to charge is correct, the judge could not instruct the jury that if the evidence showed that she had been attended by a physician, and she suppressed that fact when asked with reference thereto, that she could not recover, because it was in the province of the jury to say whether, as a matter of fact, the agent of the company had been notified that the proposed assured was suffering with pellagra. It was for the jury to say whether or not pellagra is an incurable disease, and it was for the jury to say, if they found the truth to be that the assured had pellagra and the agent of the company knew it at the time he took the application, whether any misrepresentation the assured may have made as to the condition of her health was material or fraudulent. The request for an instruction upon the principle which the plaintiff in error sought to have presented to the jury might have been so framed as to have been a complete statement of the principle as applicable to the evidence, but "unless the charge is itself a complete statement of the principle involved, without requiring addition or alteration to make it perfect, a failure to give it will not require new trial." *Head v. Bridges*, 67 Ga. 227 (4).

[3,4] 8. In two grounds of the motion for a new trial complaint is made of instructions of the court under which notice to an agent of an insurance company of material facts affecting the risk was imputed to the company; and, as these two grounds concern the same matter, we shall treat them together. Exception is taken to an instruction to the effect that the knowledge of the agent was the knowledge of the company, and if the agent knew, at the time that the application was made, that the assured had a fatal disease, and notwithstanding this the policy was issued, a recovery would not necessarily be defeated. Also to the following charge: "If the agent of the company had notice before and at the time of taking the application that the assured was afflicted with a serious or fatal disease, it would be notice to the company, and be a waiver of the clause in the policy saying it was void unless assured was in good health when the policy was issued." Neither of these instructions was erroneous. In *Fair v. Metropolitan Life Insurance Co.*, 5 Ga. App. 708, 63 S. E. 812, this court held that the knowledge of the examining physician

of the company, after physical examination of an applicant for insurance, of any of the applicant's ailments, was notice to the company; and in *Johnson v. Aetna Insurance Co.*, 123 Ga. 404 (2), 51 S. E. 339, 107 Am. St. Rep. 92, it was ruled that limitations in insurance policies upon the authority of the agent of the company to waive the conditions of the contract for insurance are to be treated as referring to waivers made subsequently to the issuance of the policy. See, also, *Mechanics' Ins. Co. v. Mutual Bldg. Co.*, 98 Ga. 266, 25 S. E. 457. In *Aetna Insurance Co. v. Johnson*, supra, the ruling in *Thornton v. Travelers' Ins. Co.*, 116 Ga. 122, 42 S. E. 287, 94 Am. St. Rep. 99, to the effect that an insurance company which, with notice that the insurer has not complied with some of the conditions of the policy, issues the policy, can defend on the ground that these conditions were not complied with, was disapproved, and since then the Supreme Court has uniformly adhered to the ruling announced in the *Johnson Case*. See, also, *Springfield Fire Insurance Company v. Price*, 132 Ga. 687, 694-695, 64 S. E. 1074; *Athens Mutual Insurance Co. v. Evans*, 132 Ga. 710 (5), 64 S. E. 993; *Athens Mutual Insurance Company v. O'Keefe*, 133 Ga. 792, 66 S. E. 1093; *Athens Mutual Insurance Company v. Ledford*, 134 Ga. 503, 504, 68 S. E. 91.

In the policy which is the subject-matter of this suit it is stipulated that "no obligation is assumed by the company prior to the date hereof, nor unless on said date the insured is alive and in sound health," and the point is urged that as the evidence is undisputed that the insured was not in good health on the date specified, but, on the contrary, was practically in a dying condition, as an effect of an incurable disease, there could be no recovery on the policy.

In other portions of the charge of the court all of the contentions of the defendant, so far as they are supported by the law, are fairly presented, but the trial judge took the view (and, we think, correctly) that if the jury, instead of believing that the agent of the company had no knowledge of the true condition of the health of the assured, and instead of believing that the application and the physician's report were signed by the assured, preferred to believe that the agent of the company was informed prior to the filing of the application for insurance that the assured had pellagra, and further preferred to believe that she did not sign the application or the physician's report, and for that reason had not made any representation as to whether she had been attended by a physician or not, the jury should be plainly told that notice to an agent who procured the contract of any defects in the health of the assured was notice to the company, and that, if the policy was issued after this notice, the company thereby waived the stipulation which provided that no obligation was assumed by

the company unless the assured was in good health on the date of the policy. It was perhaps questionable whether the judge was technically correct in using the term "waiver," but this expression was not harmful to the plaintiff in error. He could perhaps more correctly have said that if the company, with knowledge that the applicant for insurance was suffering from an incurable disease, nevertheless issued the policy and accepted premiums thereon, it would be estopped from setting up as a defense, the provision in reference to good health at the time and date of the policy which was relied upon by the defendant. Upon this subject, see *Aetna Insurance Company v. Johnson*, supra, and citations. Though there is apparently an irreconcilable conflict between the rule laid down in that case and that declared in *Thornton v. Travelers' Insurance Company*, 116 Ga. 121, 42 S. E. 287, 94 Am. St. Rep. 99, the doctrine announced in the *Thornton* Case was properly overruled in the *Johnson* Case, and it is now well settled that knowledge of material facts on the part of an agent of an insurance company is notice to the company, and, if with this notice the company issues a policy, it is estopped in equity from deriving benefit from any stipulation in the policy which might have availed it if it had been ignorant of the facts. This rule is especially to be upheld in that form of insurance known as "Industrial insurance," for the reason that it operates largely among and principally affects that portion of our population who pay for the protection which life insurance affords out of the weekly earnings derived from their labor, and who are in many instances easily imposed upon by the statements of agents.

Judgment affirmed.

(11 Ga. App. 569)

SATTES & WIMER LUMBER CO. v. HALES.
(No. 3,768.)

(Court of Appeals of Georgia. Sept. 30, 1912.)

(Syllabus by the Court.)

1. EXECUTION (§ 188*) — CLAIMS BY THIRD PERSONS—JURISDICTION OF EQUITY.

A claim is a proceeding of an equitable nature, and in a proper case the aid of equity may be invoked by the plaintiff in *fi. fa.*, as well as by the claimant.

[Ed. Note.—For other cases, see *Execution*, Cent. Dig. §§ 560, 562, 563; Dec. Dig. § 188.*]

2. LOGS AND LOGGING (§ 26*)—LIENS—PERSONS ENTITLED.

One who hauls logs to a sawmill with the knowledge and consent of the owner, who, in accepting the laborer's services, assumes to direct him as to the manner in which the logs should be cut, and what logs are to be hauled, may foreclose his statutory lien for hauling the logs upon the lumber cut therefrom, although the lienor was not employed in the first instance by the owner to haul the logs. The lien of a laborer upon the products of his labor cannot be defeated by one who has knowledge of the performance of the labor, and who

accepts the benefit thereof, otherwise than by proof that the lien was waived or has been discharged by payment.

[Ed. Note.—For other cases, see *Logs and Logging*, Cent. Dig. §§ 60-66; Dec. Dig. § 26.*]

Error from Superior Court, Gordon County; A. W. Fite, Judge.

Claim by the Sattes & Wimer Lumber Company to property levied on by one Hales. Judgment for claimant, and the plaintiff in *fi. fa.* brings error. Affirmed.

J. G. B. Erwin, Jr., of Calhoun, for plaintiff in error. J. M. Lang, of Calhoun, for defendant in error.

RUSSELL, J. Hales sought to foreclose his statutory lien, for hauling logs, upon 29,000 feet of lumber, the property of the Sattes & Wimer Lumber Company, and the company interposed a claim, setting up that the lumber was its property, and not the property of one G. W. Spears, under whose employment the hauling was done, and who was the defendant in the foreclosure of the lien. When the case came on for trial, the judge, over the objection of the Sattes & Wimer Lumber Company, allowed an amendment to the lien foreclosure proceedings, or, as it may more properly be called, an amendment to the plaintiff's joinder of issue in a claim case equitable in its nature. This amendment set up that the Sattes & Wimer Lumber Company, being the owner of a large quantity of timber in Gordon county, contracted with one Oart to haul it to mill, and saw it and stack it, for \$8 per 1,000 feet; that Oart in turn sublet the contract to Spears (the defendant in this lien proceeding) for \$7 per 1,000 feet, and Spears contracted with Hales, the plaintiff, to cut and haul the logs to the millyard for \$3.40 per 1,000 feet. It was under this contract that Hales performed the work for which he claims the lien. The equitable amendment in aid of the levy further set up that, soon after Hales began hauling the logs under the contract with Spears, Mr. Sattes, a member of the firm of Sattes & Wimer Lumber Company, came into the woods where he was at work, and on several different occasions gave him instructions as to the kind and size of timber to cut, and told him that all timber cut and hauled by him, which was not within the proper specifications, would not be accepted, and that the company would not pay him therefor. It is alleged that the claimant company, through its agents and members of the firm, knew that Hales was doing the work, and that they not only gave him no notice that they would not pay him, but, on the contrary, directed him how to do the work, and that he carried out their directions, with the result that the value of the company's property was enhanced to the amount claimed by him in his lien foreclosure; that the original contractors are residents of West Virginia, and reside near the

claimant, and Spears is not worth more than the homestead exemption allowed by law, and, by reason of the nonresidence of Cart, the plaintiff is without remedy to collect this debt. The amendment further alleged that the lumber levied on was cut from the very timber which he (Hales) cut and hauled, and that, as the lumber company could have deducted the amount due him from the amount it contracted to pay, if either party must sustain a loss, it should be the lumber company, rather than the plaintiff, because it had knowingly accepted his services.

The claimant demurred orally to the lien foreclosure, on the ground that it purported to be a foreclosure against the defendant, Spears, and upon the property of the Sattes & Wimer Lumber Company, and that it was not alleged that any demand was ever made or other reason given authorizing proceedings against the Sattes & Wimer Lumber Company; also upon the grounds that the plaintiff's lien foreclosure proceeding failed to set out any cause of action, and moved the court to dismiss it upon these grounds. After the allowance of the amendment the claimant renewed its oral motion to dismiss the proceedings. Upon the trial there was no testimony except that of the plaintiff himself, who testified that he cut and hauled timber to Spears' sawmill, under his contract with Spears, at \$3.40 per 1,000 feet, from November, 1910, until May, 1911; that Spears paid him monthly until April, 1911, when he failed to make payment; that he completed his contract with Spears, and made demand on him for payment, before bringing this suit; that the lumber levied on was sawed from the timber which he cut and hauled to the mill; that Mr. Sattes, of the claimant company, was there when he began cutting and hauling, and came to the woods and gave him the direction that no timber which was not 15 inches in diameter was to be cut, and told him that the company would not pay for any that was unsound or smaller than the prescribed diameter. The lumber company paid Cart monthly the price agreed upon for timber that was sawed and stacked. The plaintiff's testimony established all of the allegations of his amendment.

[1] We do not think the court erred in allowing the amendment. A claim case is a proceeding equitable in its nature, and nothing is more common than to permit the claimant to make amendments amplifying his original claim and invoking the aid of equitable principles to establish it. There is no reason why the plaintiff in a claim case should be entitled to less rights than the claimant, nor does any good reason appear why the plaintiff cannot file an amendment in behalf of his joinder of issue as well as the claimant. That is all the amendment amounts to in this case. See *Wilkins v. Gibson*, 113 Ga. 56 (7), 38 S. E. 374, 84 Am. St. Rep. 204.

[2] 2. Then, did the court err in not dismissing the proceedings upon the ground

that it appeared that the labor was done for one Spears, and the lien was foreclosed against him as the nominal employer, and yet the foreclosure was sought to be enforced against the property of the Sattes & Wimer Lumber Company? We bear in mind that the enforcement of the plaintiff's right involved the use of a harsh statutory remedy, which must therefore be strictly construed and applied; but as we view the case, under the allegations of the lienor's amendment, the services were practically performed, not for the original contractor (Spears), but for the claimant. By coming in under the amendment the formal foreclosure by the justice of the peace was, in effect, set aside, and it became an open question as to whether Hales was entitled to foreclose any lien at all, and who (if anybody) owed him for the hauling, and what property, if any, was subject to the foreclosure of his lien, if he had a lien. The execution issued upon the foreclosure by the justice of the peace is only apparently final process. Its issuance does not preclude the defendant or other parties at interest from showing that it should not have been issued. The claimant having arrested the levy of the lien *fi. fa.*, and transferred it into mere mesne process, the court had before it an affidavit which was subject to amendment, and which, as we think, was properly amended so as to show that the real debtor under equitable principles was the Sattes & Wimer Lumber Company, and not Spears. The superior court had jurisdiction to apply equitable principles, and, as it appeared undisputed in the testimony that the Sattes & Wimer Lumber Company knew that Hales was performing the services under and in accordance with their contract, and as they received the benefits of Hales' labor, it would seem that, if either party should lose, that party should lose who, with knowledge of all the facts, could most easily have prevented loss from accruing to either party.

The judgment in this case is sustainable for a still better reason. The affidavit of foreclosure as amended, and the evidence, set up that the plaintiff's lien was that of a laborer, and that the property levied upon was the product of his labor. The claimant must be presumed to know the law with regard to the lienor's services in cutting and hauling the logs, and to have known that its property could not be discharged from this lien by paying the original contractor, who undertook the contract as a whole, and then employed the plaintiff as a laborer to do a portion of the work. There is no evidence that the laborer had waived his lien, and there is undisputed evidence that he had not been paid for his labor. If the claimant had purchased the property in ignorance of the existence of the lien, the case would be different; but the lien of a laborer upon the product of his labor cannot be defeated by one who has knowledge of the performance

of the labor, and who accepts the benefit thereof, otherwise than by proof that the lien was waived, or has been discharged by payment.

Judgment affirmed.

(11 Ga. App. 586)

FLEMING et al. v. SMITH, Governor.
(No. 3,777.)

(Court of Appeals of Georgia. Sept. 30, 1912.)

STATES (§ 111*)—FEES OF SOLICITORS—LIABILITY OF STATE.

The fees and commissions allowed to solicitors in cases of litigated recognizances, under Pen. Code 1910, § 1128, are payable only out of proceeds of such suits, and not out of the state treasury; the fees in Supreme Court, for which the state is liable under section 1128, being limited to fees for services rendered in criminal cases proper.

[Ed. Note.—For other cases, see States, Cent. Dig. § 110; Dec. Dig. § 111.*]

Motion by P. L. Fleming and others against Hoke Smith, Governor, to tax costs in Court of Appeals against the State. Motion disallowed.

J. Rod Skelton, of Hartwell, for the motion.

PER CURIAM. The solicitor of the city court of Hartwell filed in this court a motion claiming a fee of \$15 for services rendered in the Supreme Court, the case being one of litigated recognizance, arising upon the forfeiture of a bond in a criminal case, and asked that this fee be taxed as costs and be paid by the state.

We are of the opinion that solicitors general and solicitors of city courts are not entitled to be paid such fees from the state treasury, but that the double fees and commissions allowed in cases of litigated recognizances (Penal Code, § 1128) are only to be paid in the event of collection, and out of the amount collected from criminal bonds. Section 1128 of the Penal Code applies only to fees for services rendered in criminal cases proper, either where the defendant has been acquitted, or where there has been a conviction, and the defendant is unable to pay the costs. It does not apply to cases of a civil character, or even of a quasi criminal character.

The motion, therefore, to tax the costs against the state, is disallowed.

(11 Ga. App. 581)

ARNOLD et al. v. ATLANTA OIL & FERTILIZER CO. (No. 4,176.)

(Court of Appeals of Georgia. Sept. 30, 1912.)

(Syllabus by the Court.)

1. VENUE (§ 22*)—DOMICILE OF PARTIES—DEFENSES.

As a general rule, where the maker and indorser of a promissory note reside in different counties, suit may be brought on the note in either county; but the maker of a note can-

not be deprived of his constitutional right to be sued in the county of his own residence by an indorsement procured by the payee without the knowledge and consent of the maker, and for the sole purpose of conferring jurisdiction upon the courts of the county of the indorser's residence.

[Ed. Note.—For other cases, see Venue, Cent. Dig. §§ 35-37; Dec. Dig. § 22.*]

2. PLEADING (§ 144*)—PLEA—SET-OFF.

The demurrer to the plea of set-off was properly sustained; the allegations thereof being insufficient to show liability of the plaintiff to the defendant.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 293; Dec. Dig. § 144.*]

Error from City Court of Atlanta; H. M. Reid, Judge.

Action by the Atlanta Oil & Fertilizer Company against J. W. Arnold, Jr., and others. Judgment for plaintiff, and defendants bring error. Affirmed in part, and reversed in part.

The Atlanta Oil & Fertilizer Company sued J. W. Arnold, Jr., and E. C. Arnold, as principal makers, and W. C. Thompson, as surety, on a promissory note payable to the plaintiff. The suit was brought in the city court of Atlanta. Before pleading to the merits, J. W. Arnold, Jr., and E. C. Arnold, at the appearance term, filed a plea to the jurisdiction of the court, alleging that they were at the time of the filing of the suit, and still are, residents of Walton county, Ga.; that the city court of Monroe, in Walton county, and the superior court of Walton county, had jurisdiction of their persons and of the subject-matter of the suit; and that the city court of Atlanta did not have jurisdiction of their persons. They further alleged that the indorsement of W. C. Thompson, who resided in Fulton county, was obtained for the sole purpose of giving to the courts of Fulton county jurisdiction of the persons of these defendants, and this was done without the consent of the defendants, either express or implied; that the indorsement was obtained as a device, at the instigation of the plaintiff and its attorney, whereby these defendants "should and would be inveigled into the jurisdiction of this honorable court, for the sole purpose of giving this court jurisdiction of the persons of the defendants, and that the same was an effort conceived in fraud, whereby the defendants were to be deprived of their legal rights in the premises." The plaintiff moved to strike this plea to the jurisdiction upon the ground that it was insufficient; that it failed to show want of jurisdiction in the city court of Atlanta as to defendants in the cause of action upon which was brought; that the note appeared on its face to be joint and several, and that the defendant Thompson resided in the county of Fulton, which gave the city court of Atlanta jurisdiction of the persons of all of the joint obligors on the note; that the allegation in the plea

that fraudulent practices were used by the plaintiff in order to give the city court of Atlanta jurisdiction of the persons of the defendants was a mere conclusion of the pleader, without any facts stated in support of such conclusion. The court sustained the motion to strike, and exceptions pendente lite were duly preserved.

The defendant J. W. Arnold, Jr., filed a plea of set-off, averring that at the time of the commencement of the suit the plaintiff was indebted to him "10 per cent. of \$11,516.65, to wit, in the sum of \$1,151.66, which said last-named sum is a reasonable, fair, and equitable commission for the collection of plaintiff's notes placed with defendant by plaintiff for collection, together with interest thereon at the rate of 7 per cent. per annum." A copy of the account, attached to this plea, shows that before the execution of the note sued on the defendant J. W. Arnold, Jr., had paid over to the plaintiff, on collections made by him for the plaintiff, the sum of \$11,516.65, less 10 per cent. commission. Subsequently J. W. Arnold, Jr., amended his plea of set-off, by alleging that his account against the plaintiff arose as follows: On the 1st of September, 1910, the plaintiff placed with this defendant certain promissory notes against parties residing in the counties of Walton and Morgan, and this defendant, with considerable loss of time and much expense, succeeded in collecting for the plaintiff the aggregate sum above stated, "and, in the absence of any definite agreement as to what defendant was to receive for making such collections, defendant asks that he be allowed a commission as aforesaid. It was understood and agreed that he would be paid a reasonable amount therefor."

The plaintiff demurred to the plea of set-off, on the grounds that it was insufficient; that it did not show any contract between them to pay any commission on the collections made; that it does not show any facts or circumstances that would authorize the inference that the plaintiff was to pay the defendant any commission on the alleged collections, and that the plea as amended was insufficient to show any right on the part of defendant to recover commissions from the plaintiff; that the plea does not show that the defendant did not retain his commissions on the collections; that it fails to show that the defendant turned over any money to the plaintiff that he was entitled to retain as commissions, nor does it show any reason why he turned over to the plaintiff his commissions, or why he did not retain them, if in fact he paid them over; that, the note sued upon having been executed by the defendant subsequent to the time when he claimed that the commissions became due to him, his plea of set-off is insufficient to show that his commissions were not satisfied at the time of the execution of the note, nor does

the plea show any reason on the part of the defendant for executing the note, if he had any valid claim against the plaintiff for the commissions. The court struck this plea, and exceptions pendente lite were preserved.

The defendant E. C. Arnold filed a plea of suretyship, but no evidence was submitted in support of the plea. The plaintiff introduced the note sued upon, which note showed that the defendants J. W. Arnold, Jr., and E. C. Arnold had each signed it as makers, and that W. C. Thompson, the other defendant, had signed it as surety; that it was payable at the Fourth National Bank of Atlanta, to the order of the plaintiff, and was for \$2,003.17 principal. Thereupon a verdict was rendered in favor of plaintiff, and judgment was entered accordingly. Error is assigned on allowing the verdict and judgment, because of the erroneous rulings heretofore excepted to, which entered into, affected, and controlled the final judgment.

Hal G. Nowell and E. W. Roberts, both of Monroe, for plaintiffs in error. Sam D. Hewlett, of Atlanta, and D. W. Blair, of Marietta, for defendant in error.

RUSSELL, J. (after stating the facts as above). [1] 1. This court is of the opinion that the plea to the jurisdiction was sufficient, as against the general motion to strike, filed at the trial term. We all agree that it was defective in form and would have been subject to a timely special demurrer. We do not think that the payee of a note has the right, without the knowledge or consent of the maker and over his objection, to procure the accommodation indorsement of a person residing in a county other than that in which the maker lives, for the sole purpose of obtaining jurisdiction of the person of the maker in the county where the accommodation indorser resides. Every citizen has, subject to certain exceptions expressly declared, the right to be sued at his own domicile, and, unless the case be within one of the exceptions mentioned in the Constitution, this right cannot be taken away, except with the consent of the citizen. It frequently happens that where one in good faith executes a promissory note, expecting at the time to pay it at its maturity, facts may thereafter arise constituting a good defense to the note. In our opinion, the payee of such a note cannot, either because he apprehends a defense will be made, or after discovering that a defense will be made to it, procure the signature of an indorser or surety residing in any county which he may select, for the sole purpose of obtaining jurisdiction of the maker in that county, unless the maker consents for such indorsement to be obtained. The force of every word in the contract, as well as the legal effect of the contract as a whole, with the resultant consequences to each party, under the law, has its origin in the consent of the parties to the contract in the form in

which it was at the time when it was mutually agreed to and executed. If a contract has been so changed that the legal consequences, even though these are only consequences attending its enforcement, are different from the consequences which would have ensued from the enforcement of the contract as made, then the contract has been materially changed; and this change cannot be made effectual, except by the consent of both parties.

Every one is presumed to know the legal effect of his act, and to anticipate the legal consequences which will legitimately result; but without his consent one cannot be bound to a change of his relation to the opposite party to the contract, so that the consequences to himself will be different from what he had the right to expect them to be at the time he entered into the contract. The right of being sued at one's domicile (if one is to be sued at all) is a substantial right, provided for the convenience of the citizen, who in every case is brought into court at the demand of another, who seeks to have a liability imposed upon him, and who must establish that liability by proof. The defendant presumptively has wronged no one, nor violated any obligation, and it devolves upon the plaintiff to prove his case by the preponderance of evidence, and if the plaintiff fails in this, the presence of the defendant has been required merely for the purpose of allowing the plaintiff to make the effort of establishing his case.

It is alleged in the plea to the jurisdiction that the indorsement was obtained without the consent of the makers, either express or implied, and for the sole purpose of giving the courts of the county in which the indorser resided jurisdiction of the person of the defendants, and was a fraud on the rights of the makers. This averment was sufficient, as a matter of law, against the general motion to strike. Of course, the mere fact that the indorsement was obtained for the single purpose of giving the court of the county of the indorser jurisdiction of the maker would make no difference, if the maker knew of the indorsement and even tacitly assented thereto. Indorsements are frequently required for this purpose, and this is entirely legitimate. What we hold is that such an indorsement, obtained without the knowledge or consent of the maker, does not deprive the maker of the right to be sued in his own county.

[2] 2. There was no error in striking the plea of set-off, filed by J. W. Arnold, Jr. It is true, of course, that where there are two makers of a promissory note, either as principals or indorsers, one can set off an individual claim against the plaintiff, growing out of the transaction which gave rise to the execution of the note. *Wilson v. Exchange Bank*, 122 Ga. 495, 50 S. E. 357, 69 L. R. A.

97, 2 Ann. Cas. 597. Here, however, it is manifest, from an examination of the averments of the plea of set-off, that it was wholly insufficient to show a prima facie indebtedness by the plaintiff to the defendant. It was insufficient for this purpose, for all of the reasons stated in the demurrer to the plea; and this is so manifest that we deem it unnecessary to discuss the question, or to cite authorities in support of the judgment of the learned trial judge in striking this plea.

Judgment affirmed in part, and in part reversed.

(11 Ga. App. 579)

SEABOARD AIR LINE RY. v. BLACK-SHEAR. (No. 3,837.)

(Court of Appeals of Georgia. Sept. 30, 1912.)

(Syllabus by the Court.)

1. RAILROADS (§§ 344, 350*)—OPERATION—INJURIES AT CROSSINGS—PLEADING—QUESTION FOR JURY.

The court did not err in overruling the general demurrer, and the amendments to the petition sufficiently complied with the defendant's demand for particular information. The petition amplified every illustrative circumstance pertaining to the occasion upon which the injury was said to have been committed, and charged that the defendant was negligent in so storing cars upon one of its side tracks as to obstruct his view and prevent him from seeing an approaching train; that the defendant was negligent, in that the train which caused the injury approached the public crossing too rapidly; and that there was no flagman or other employé stationed upon the train to keep a lookout and give warning of its approach, and that no signal of its approach was given. It was alleged that the plaintiff was riding in a wagon owned and driven by another person, and, there being nothing to indicate that a train was approaching, they attempted to cross the railroad tracks, and had crossed the side track, and were just getting upon the main track, when the occupants of the wagon saw the backing train approaching with great speed and within from six to ten feet of them, and that in this alleged emergency the plaintiff jumped from the wagon to save himself, and in the fall received the injuries described in the petition.

(a) While a railway company has generally the right to place and store cars upon its side tracks, it is a jury question whether the storing of cars upon the particular side track, under stated circumstances, is negligence as related to one whose injury may have been caused or contributed to by the improper or untimely placing of such cars. An instruction to the jury that, "where a car is left on a side track, whether that is negligence is a question for the jury under all the circumstances of the case," was not error, for the reason, assigned by the plaintiff in error, that the defendant had the right to store on its side track whatever cars it saw proper.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1107-1112, 1152-1192; Dec. Dig. §§ 344, 350.*]

2. INSTRUCTIONS OF COURT—CONTRIBUTORY NEGLIGENCE.

The evidence authorized the instructions of the court upon the subject of contributory negligence.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

3. TRIAL (§ 267*)—INSTRUCTIONS—REQUESTS PARTLY ERRONEOUS.

The instructions requested were properly refused. A portion of the request was not adjusted to the evidence, and another portion was clearly objectionable, because it would have been a statement of the court's opinion that certain facts therein referred to had been proved. A trial judge is not required to separate that which is good in a request from that which is bad; but, if the request is in any respect defective, he may refuse it as a whole.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 668-672, 674; Dec. Dig. § 267.*]

4. TRIAL (§ 194*)—INSTRUCTIONS—INVADING PROVINCE OF JURY.

The judge's statement, in his charge to the jury, that "backing cars across a crossing is especially dangerous," and that "it is negligence to back a train without proper lookout, lights, or other signals of warning," was such error as, under the mandatory provisions of section 4863 of the Civil Code of 1910, requires the grant of a new trial, and upon this ground only the judgment refusing a new trial is reversed. The circumstances which may constitute negligence in a particular case are so peculiarly and exclusively for the determination of the jury that a trial judge cannot declare that the omission or commission of any act is, as a matter of law, negligence, unless it has been so expressly declared by law.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 413, 439-441, 446-454, 456-466; Dec. Dig. § 194.*]

Error from City Court of Abbeville; D. B. Nicholson, Judge.

Action by Richmond Blackshear against the Seaboard Air Line Railway. Judgment for plaintiff, and defendant brings error. Reversed.

Tom Eason, of McRae, and N. M. Patten, of Abbeville, for plaintiff in error. Hal Lawson, of Abbeville, for defendant in error.

RUSSELL, J. Judgment reversed.

(11 Ga. App. 533)

DIAMOND POWER SPECIALTY CO. v. CITY OF WEST POINT.

(No. 3,634.)

(Court of Appeals of Georgia. Sept. 27, 1912.)

(*Syllabus by the Court.*)

1. FORMER DECISION CONTROLLING.

This case is controlled by the ruling of the Supreme Court in the case of *Conyers v. Kirk & Co.*, 78 Ga. 480, 3 S. E. 442.

(*Additional Syllabus by Editorial Staff.*)

2. MUNICIPAL CORPORATIONS (§ 254*)—CONTRACTS—REMEDIES—QUESTION FOR JURY.

Where the ordinances of a city provide that in case of necessity purchases for street lighting may be made by the committeemen, the question whether a proposed purchase is absolutely necessary under given circumstances must be determined by the jury.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 696-700; Dec. Dig. § 254.*]

3. MUNICIPAL CORPORATIONS (§ 247*)—CONTRACTS—RATIFICATION.

Even if the chairman of the electric committee of a city council had no authority to purchase blowers for the city electric plant,

yet where the blowers were accepted and installed, and operated for nine months, the city would be estopped from setting up want of authority to execute the contract.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 651-656, 682; Dec. Dig. § 247.*]

4. MUNICIPAL CORPORATIONS (§ 864*) — INDEBTEDNESS—CREATION.

A contract of a city to purchase blowers for its electric plant, to be paid for, if satisfactory, after 30 days' trial, does not involve the creation of an indebtedness, but was a cash contract, though the city became indebted for the blowers by failure to pay at the agreed time.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1828-1835; Dec. Dig. § 864.*]

Error from City Court of La Grange; Frank Harwell, Judge.

Action by the Diamond Power Specialty Company against the City of West Point. Judgment for defendant, and plaintiff brings error. Reversed.

E. R. Bradfield, Jr., of La Grange, for plaintiff in error. Benj. H. Hill, of West Point, for defendant in error.

RUSSELL, J. [1] The court erred in directing a verdict for the defendant. There is a remarkable similarity between the defense in this case, as well as the evidence in support of it, and the defense and the facts appearing in the case of *City of Conyers v. Kirk & Company*, 78 Ga. 482, 3 S. E. 442. When the facts and the law of that case were analyzed by Chief Justice Bleckley, he summarized the defense (as it must be construed in this case) to be twofold: (1) That no purchase was made; and (2) that, if it was made, there was a breach by the plaintiff and a failure of consideration. And he held that, even if a city cannot make a contract through a committee, or the chairman of that committee (and it appears that in that case, as in the case sub judice, the chairman of the committee "was the chief actor in the matter"), but the proposed action must be reported to the council in assembled meeting, and there determined in a formal way and entered upon the minutes, nevertheless "a municipal corporation can make a cash contract for current supplies * * * for lighting the streets, through its appropriate officers or committees, as effectually as by formal resolution entered on its minutes."

[2] And we may say, further, upon the point that, though the chairman of the light committee had no authority to purchase the blowers which are the subject-matter of this suit, the court, in our opinion erred in directing a verdict, because the ordinances of the city of West Point provide that in case of necessity purchases may be made by committeemen; and, necessarily, the question as to whether any proposed purchase is absolutely necessary, as related to the cir-

cumstances under which the purchase is to be made, must be determined by the jury.

[3] It may be conceded that the chairman of the electric committee, who made this contract, was not expressly authorized to do so; but the evidence conclusively shows that he made the purchase of the blowers, and that the blowers were received by the city, and installed in an electric plant owned and operated by the city, and that they were thus operated for a period of nine months. Certainly this evidence was of such character as would make it obligatory upon the city, whether its agent was authorized or not, to ratify the contract. In other words, under these facts the city would be estopped from setting up any want of authority to execute contract, when impliedly at least it had ratified the purchase.

The fact that the contract itself was executed by a member of the city council, who was chairman of the electric light committee, and that he was afterward elected mayor, and his correspondence with the plaintiff, disclose the fact that these blowers were installed in January, 1909, in the electric plant belonging to the city and operated by the city, and thus continued to be operated for nearly a year. Certainly such facts were pertinent to the question of ratification, regardless of the question as to whether the original purchase was authorized or not. It was the duty of the city to repudiate the contract at once, upon knowledge that it had been made, and it would be bad faith to allow the city to use the property for a longer period of time, taking the benefit of the contract, and refuse to pay for the fruits. Municipalities, as well as individuals, should be held to good faith.

[4] The question raised in the case of *City of Conyers v. Kirk*, supra, as to the nonliability of the city, upon the ground that the creation of a debt was involved, is not here presented, and cannot be, because the record shows that the parties intended that if, after 30 days' trial, the blowers were satisfactory, they should be paid for; if unsatisfactory, they were to be returned. The 30 days was solely for testing purposes. This made a cash transaction. If the blowers were not satisfactory, they were to be returned. The failure to return them made a debt; but the debt originated, not by virtue of the contract, but by breaking it. As was said by Chief Justice Bleckley in that case: "Surely there never can be and never will be any law against paying a debt which arises from default in making a cash payment at the time the debtor ought to have made it; the cash sufficient for the purpose being then in the debtor's treasury." It is not contended here that the city did not have the cash on hand to pay for the blowers, but the contention is rather that the party who purchased the blowers was not authorized to make a cash contract.

We do not mean to hold that the city of West Point is precluded from showing that there was a failure of consideration as to the blowers, but we do mean to hold that the evidence in the present record does not show that it was wholly valueless, and certainly, if a jury should find that the contract was ratified, the city could not claim anything more than an abatement of the purchase price proportionate to the degree of the blowers' failure to perform the functions guaranteed.

Judgment reversed.

POTTLE, J., not presiding.

(11 Ga. App. 552)

HARRELL et al. v. WILLIAMS.

(No. 3,890.)

(Court of Appeals of Georgia. Sept. 27, 1912.)

(Syllabus by the Court.)

1. JUDGMENT (§ 143*)—DEFAULT JUDGMENT—VACATION—APPLICATION.

It is not an abuse of discretion to overrule a motion to open a judgment rendered by default, when the movant does not attempt to assign a reason why a defense was not filed at the proper time.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 269-291; Dec. Dig. § 143.*]

2. COURTS (§ 189*)—MUNICIPAL COURTS—PROCEDURE.

Under the provisions of section 1 of the act amending the act creating the city court of Douglas, approved August 14, 1908 (Acts 1908, p. 135), the presiding judge of that court did not err in entering judgment in favor of the plaintiff, against the defendant and his sureties, upon a demand which, as pleaded, was a liquidated demand.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 409, 412; Dec. Dig. § 189.*]

3. VENUE (§ 22*)—DOMICILE OF PARTIES—CO-DEFENDANTS.

The court had jurisdiction of the subject-matter of the suit, and by proper legal service obtained jurisdiction over the persons of the defendants; and the judgment was not void for the reason stated in the case of *Jordan v. Callaway*, 138 Ga. 209, 75 S. E. 101. Under the amendatory act as to the city court of Douglas, above referred to, the judge of that court is authorized to enter judgment at the appearance term, even upon an account, if no defense is interposed.

[Ed. Note.—For other cases, see Venue, Cent. Dig. §§ 35-37; Dec. Dig. § 22.*]

Error from City Court of Douglas; W. C. Lankford, Judge.

Action by A. D. Williams against W. L. Harrell and others. Judgment for defendants, and plaintiff brings error. Affirmed.

Williams brought suit in the city court of Douglas, returnable in the May term, 1911, of that court; and at the appearance term, there being no defense filed, the court, on motion, granted a judgment by default, for the principal, interest, and attorney's fees sued for. After the judgment had been granted, and during the same term of the court, the defendants paid the costs and filed

a written motion to vacate the judgment, treating the case as being in default, and asking that the default be opened, and that they be permitted to file the defense attached to the motion. The motion complied with the requirement that it should allege a meritorious defense and announce ready for trial. The motion was not heard until October 30, 1911, when the motion was overruled and denied.

The motion to open the default rested upon the grounds: (1) That three of the defendants had not been served personally, but, as appeared from the officer's return, were served by leaving copies of the petition at their most notorious place of abode; (2) that it appears from the petition and the exhibits that the plaintiff's cause of action is not such a liquidated demand as would authorize the plaintiff to take a judgment against the defendants by default at the first term of the court, because the plaintiff undertook arbitrarily to fix the amount of the account, without any agreement with the defendants; and (3) that, under the act of the General Assembly creating the city court of Douglas, judgments by default can only be rendered at the first term of that court upon liquidated demands, unconditional contracts in writing, and accounts properly pleaded, and it affirmatively appears from the plaintiff's petition that his demand is neither an unconditional contract in writing, nor a liquidated demand, nor such an account as is contemplated by the act above recited, for the reason that it affirmatively appears from the petition and the exhibits that the sum sued for was fixed without the knowledge or consent of the defendants, and without first having been agreed upon or liquidated.

The petition sets out a breach of a bond of W. L. Harrell, as principal, and other defendants, as sureties. The bond was executed in accordance with the terms of a contract (set out in the petition) which was formally entered into by the defendant Harrell and the plaintiff. In the bond the principal and the sureties, jointly and severally, agreed to pay Williams all moneys that had been advanced by him to Harrell under the terms of the contract and bond, and also to pay Williams for nursery stock sold by him to Harrell according to the terms of the bond and contract. The petition alleges that the sums of money advanced are evidenced by promissory notes, copies of which are attached. Items of the amounts due for nursery stock are shown by exhibits. It is alleged that Harrell refused to pay the moneys advanced to him, and refused to pay in full for the nursery stock, and that by such refusal the obligation of the bond was breached.

Rogers & Heath, of Douglas, for plaintiffs in error. Ohastain & Henson, of Douglas, for defendants in error.

RUSSELL, J. (after stating the facts as above). [1] 1. As appears from the record the plaintiffs in error treated the motion to vacate the judgment as a motion to open a default, for they offered to plead instanter, and presented a plea, which they alleged presented a meritorious defense. They perhaps pursued the wrong remedy, but we will deal only with the case made. It would perhaps suffice to say that the judge did not err in denying the motion to open the default, if for no other reason than that the motion presented no sufficient reason why a defense was not filed at the proper time. Granting that the plaintiffs in error had properly conceived the judgment to be such a one as that it might be set aside upon a motion to open the default and an offer to plead, still in such a case as that it would not have been abuse of discretion on the part of the court to have declined to consider such a motion. When a party, without any reason except his own laches, fails to pursue his remedy or invoke a defense, as the case may be, neither law nor equity will relieve him.

[3] 2. In view of the fact, however, that it is insisted that some of the defendants were not properly served, it may be contended that the failure to serve these defendants was itself cause for not filing an answer in time, and that the statement that they were not served is itself a declaration of a sufficient reason to have invoked the discretion of the court to open the default. We will therefore consider the ground of the motion which asserts that some of the defendants were not legally served. This contention rests upon the fact (as appears from the entries of service as to these defendants) that in each case service was perfected by leaving copies at the defendant's most notorious place of abode, and that at that time each of these defendants resided without the limits of the county in which the suit was filed. If such service were, as contended, ineffectual and nugatory, it might afford a good reason why the judgment of default should have been set aside as to them, not only because the court should have used discretion to give all parties their day in court, but also because, if the defendants had not been served, the judgment as to them would be void, and should have been so treated by the court, under the ruling of the Supreme Court in *Jordan v. Callaway*, 138 Ga. 209, 75 S. E. 101. But we hold the service good. The decision of the question rests upon the fact that, in our judgment, the defendants were not guarantors for the debt of the principal, W. L. Harrell, but were sureties with him upon a joint and several bond. If they were sureties, it is manifest that they could be sued with Harrell in the county of his domicile (Civil Code, §§ 5529, 6541), and the pe-

tion and service show him to have been a resident of Coffee county.

[2] 3. The plaintiffs in error further insist that the judgment was erroneous, because the city court of Douglas, being required to operate under the rules of the superior court, could not, from the very nature of the action, have rendered a lawful judgment at the appearance term. Construing the action to be (as we hold it to be) a suit upon a bond jointly executed by Harrell and his codefendants, the plaintiffs in error contend that the damages sought to be recovered are not liquidated, that this fact is apparent from the petition and the exhibits, and that therefore the judgment was void, and should have been set aside. Waiving the point (which to us seems to be one of insuperable difficulty to the plaintiffs in error) that the judge was not required to set aside a judgment upon a mere motion to reopen a default, and treating the motion as proper, we are still unable to agree to the proposition that the petition and exhibits evidenced the total invalidity of the judgment, as contended. Under the first section of the act to amend an act creating the city court of Douglas, approved August 14, 1908 (Acts of 1908, p. 135), the judge of the city court of Douglas was authorized in all suits on unconditional contracts, on liquidated demands or on account, to render judgment where no defense was filed, at the appearance term. In the present case the decision of the question must be controlled by the special act regulating practice in the city court of Douglas. The plaintiff had the right to recover, in the absence of any plea having been filed by the defendants, whatever amounts were properly pleaded as the constituent elements measuring the defendants' default in performing their obligation. Certainly, with the stipulation in the contract which provides that the defendants shall be sureties for whatever sums of money are advanced to Harrell, together with the undenied statement that these moneys are evidenced by notes, and the exhibition of the copies of these notes, the demand for the money advanced would appear to have been liquidated.

As to the fruit trees sold Harrell, numerous itemized statements of fruit trees furnished him at stated prices were attached to the petition. The petition alleged that these were sold and delivered to him as shown upon the several statements. In the absence of any denial of these accounts, which were properly pleaded, the plaintiff was entitled to a judgment in his favor under the peculiar verbiage of the act to which we have referred.

We have not overlooked the contention of the plaintiffs in error as to the "June buds," to the effect that this item of the account cannot be said to be liquidated, because the

contract shows the price was to be agreed upon later, and therefore the price had not been fixed at the time the contract was made; nor their insistence that several items of the account are for buds or budded stock. We think it can safely be assumed (under the general rule that every presumption is to be taken in favor of the validity of a judgment) that there was an agreement as to the price of the budded stock, and that this item, too, is shown to have been liquidated, because the contract was made in January, and the budded stock was not supplied until 10 months thereafter. But, if we are wrong in this, the act of 1908 is so extremely broad as to include "an account," and it would seem, where a party is legally served with a petition in an action, even upon an unliquidated account, in the city court of Douglas, judgment may be rendered by default if the defendant does not defend the action, or if, having filed his defense, it is adjudged by the court to be insufficient in law. In section 1 the following language is used: "In all cases when suit is brought for a liquidated demand or an account, and there has been legal service of such declaration and no defense is filed thereto, or if such defense as is filed is stricken, or adjudged to be insufficient in law, either in form or substance, it shall be the duty of the court at such term to give judgment thereon without the intervention of the jury."

Where an action is brought upon a bond, the proof upon the measure of liability is not required to be different or stronger than it would be required to be if the action were brought upon the collateral matter originally. In other words, the plaintiff in the present case is not required to establish the existence of the several items of liability against the defendant, and the consequent liability of the sureties therefor, with any better proof than if he were proceeding against the principal alone, and it is apparent that, under the act creating the city court of Douglas, he could recover against the principal obligor upon a properly pleaded account, in the absence of any plea setting up a good defense; and he is not required to do any more in the case of the sureties than the law requires him to do in order to fix liability upon the principal obligor.

Judgment affirmed.

(11 Ga. App. 579)

HOBBS v. TAYLOR et al. (No. 3,829.)
(Court of Appeals of Georgia. Sept. 30, 1912.)

(Syllabus by the Court.)

1. PRINCIPAL AND SURETY (§ 126*)—RELEASE OF SURETIES.

The provision of section 3546 of the Civil Code of 1910, concerning sureties, guarantors, and indorsers, that they shall be discharged if,

after notice to sue, the creditor or holder of the obligation refuses to commence an action against the principal, has no reference to statutory bonds, such as a forthcoming bond, taken in the progress of a judicial proceeding.

[Ed. Note.—For other cases, see *Principal and Surety*, Cent. Dig. §§ 329-351; Dec. Dig. § 126.*]

2. DIRECTION OF VERDICT—ERROR.

The court erred in directing the verdict.

Error from City Court of Dublin; K. J. Hawkins, Judge.

Action by A. L. Hobbs, administrator, against W. B. Taylor and others. Judgment for defendants, and plaintiff brings error. Reversed.

James A. Thomas, of Dublin, for plaintiff in error. S. P. New, of Dublin, for defendants in error.

RUSSELL, J. Judgment reversed.

(11 Ga. App. 514)

SHEPPARD v. DANIEL MILLER CO. (No. 3,545.)

(Court of Appeals of Georgia. Sept. 27, 1912.)

(Syllabus by the Court.)

1. FORMER DECISION CONTROLLING.

So far as the pleas of the defendant relate to the original liability of the guarantor, the decision of the trial judge, in striking the defendant's answer, was authorized by the ruling of this court in *Sheppard v. Daniel Miller Company*, 7 Ga. App. 760, 68 S. E. 451.

2. GUARANTY (§ 59*)—ACTION AGAINST GUARANTOR—ABATEMENT OF LIABILITY.

Nor did the trial judge err in striking that portion of the defendant's answer in which it was insisted that the guarantor was entitled to an abatement or diminution of his liability in the amount which the creditor received as his distributive share from the assets of the bankrupt. There was no allegation that the guarantor had complied with his contract of guaranty; and his remedy was to pay the debt, and, by thus becoming a creditor of the bankrupt, become entitled to prove a claim as a creditor, and, as such, share in the distribution of the bankrupt's estate.

[Ed. Note.—For other cases, see *Guaranty*, Cent. Dig. § 69; Dec. Dig. § 59.*]

3. PLEADING (§ 36*)—ANSWER—ADMISSIONS—EFFECT.

Construed as a whole, the answer of the defendant (except in so far as it denied liability for attorney's fees) was a practical admission of indebtedness, because the denials contained in it were entirely inconsistent with the admissions made in the same connection, and, under a well-settled rule in such cases, the admissions, and not the denials, must prevail. It being undisputed that the proper notice in regard to the attorney's fees was served, the court did not err in directing the verdict.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. §§ 81-86; Dec. Dig. § 36.*]

(Additional Syllabus by Editorial Staff.)

4. GUARANTY (§ 86*)—ACTION AGAINST GUARANTOR—PLEADING.

Where a contract of guaranty, stating on its face that it was a continuing contract, was attached to the petition, and defendant did not deny the execution of the contract, its denial

that the contract was a continuing one failed to set up a defense.

[Ed. Note.—For other cases, see *Guaranty*, Cent. Dig. § 100; Dec. Dig. § 86.*]

Error from Superior Court, Calhoun County; Frank Park, Judge.

Action by the Daniel Miller Company against E. S. Sheppard. Judgment for plaintiff, and defendant brings error. Affirmed.

J. R. Pottle and C. L. Glessner, both of Blakely, for plaintiff in error. Smith & Miller, of Edison, for defendant in error.

RUSSELL, J. [1] 1. This case has heretofore been before this court. 7 Ga. App. 760, 68 S. E. 451. In ruling upon the demurrers at that time, we held that the measure of the guarantor's liability was fixed by his contract, and that it was no concern of his if the creditor extended credit for a larger amount than that which he guaranteed would be paid. His liability would not be increased beyond the precise limits of his contract, and certainly it would not be diminished if the creditor himself saw fit to take the risk of an unsecured debt greater in amount than that which the guarantor undertook to secure. So far as the answer of the defendant is concerned, it may well be said that the admissions outweigh the denials, and for that reason the court did not err in striking all of the answer, except the paragraph which denied that notice of the claim for attorney's fees had been duly given, as required by law.

[4] To the plaintiff's petition was attached a copy of the contract, in which the defendant undertook to guarantee payment to the amount of \$1,500 on any goods sold or to be sold by the plaintiff to Fain & Weaver. On its face it stated that it was a continuing contract, and certainly, under its terms, it would be a continuing contract, at least until the plaintiff was notified by the guarantor that no further credit was to be extended to Fain & Weaver. Therefore the defendant's denial of the second paragraph of the petition was entirely nugatory, unless the answer specifically denied the execution of the contract and amounted to a plea of non est factum. As the defendant did not deny the execution of the contract, or that the articles of merchandise set forth in the bill of particulars were furnished to Fain & Weaver, he in legal effect admitted his execution of the contract and the plaintiff's compliance therewith. Likewise, for the reason that there is no denial of the execution of the contract, those paragraphs in which it is insisted that the contract was not a continuous one fail to set up any issuable defense; and as there was an admission in the answer that an even larger amount of goods than that guaranteed by the defendant had been supplied by the plaintiff to Fain & Weaver, the court properly disregarded the qualified

denial to the effect that the goods had not been delivered in accordance with the contract. The ruling of the trial judge upon that portion of the answer which attempted to set up that the liability of the guarantor was affected by reason of the fact that the creditor has sold Fain & Weaver upwards of \$3,000 worth of merchandise, when he had only contracted to guarantee the payment of \$1,500, was in accord with the ruling of this court in our prior adjudication upon the demurrers.

[2] 2. The trial judge did not err in striking that portion of the defendant's answer in which it was insisted that the guarantor was entitled to an abatement or diminution of his liability, in the amount which the creditor received as his distributive share from the assets of the bankrupt. There was no allegation that the guarantor had complied with his contract of guaranty; and the remedy of the guarantor was to pay the debt, and, by thus becoming a creditor of the bankrupt, thereby become entitled to prove a claim as a creditor, and, as such, share in the distribution of the bankrupt's estate. In fact, the ruling in the present case is controlled by the prior decision of this court, except in so far as the defendant's answer sought to set up the fact that the creditor had received \$300.28 from the bankrupt's estate in partial payment of his debt, and claimed this amount as a set-off. As the guarantor had not complied with his contract, he was not a creditor of the bankrupt so far as the subject-matter of the present litigation is concerned. He had not paid out any amount for which the bankrupt was liable to him. Therefore he was not entitled, primarily, to participate in a division of the fund arising from the bankrupt's estate. And the plea was without merit in so far as the answer sought to set up as a defense that his liability to the plaintiff should be diminished at least in proportion to the amount received by the plaintiff from the bankrupt's estate, because his obligation bound him to secure the plaintiff against loss in the sale of goods to Fain & Weaver to the extent of \$1,500, and, if Fain & Weaver owed a larger sum than the amount guaranteed, it was immaterial whether their creditors collected all or any portion of it in addition to the amount which the guarantor obligated himself to see paid. There was only one way in which the guarantor could have qualified himself to ask that a portion of the assets of the bankrupt should be applied to reduce his liability, and this was by paying the amount which he undertook to guarantee, and thereby subrogating himself to the rights of the original creditor, by himself becoming a creditor of the bankrupt. The fact that the plaintiff received a dividend from the bankrupt could not affect the guarantor, until the plaintiff had received a sufficient dividend to reduce

the debt to less than \$1,500. The guarantor was responsible for that sum. The plaintiff in the present case was not a secured creditor, because it does not appear that it had any security upon the property of the bankrupt, and if the guarantor had paid the plaintiff the \$1,500 for Fain & Weaver, he would himself have become a creditor of Fain & Weaver and been entitled to prove his claim. *Remington on Bankruptcy*, p. 386, § 635. But if the creditor fails to prove his claim, and refuses to permit the surety to have the instrument to file with proof of claim, as required by law, the surety nevertheless is not released. His remedy is to pay the debt. *Remington on Bankruptcy*, p. 904, § 1517. As well said by *Remington* (Id. p. 384, § 544), "a surety, when he assumes the relation, becomes contingently the creditor of the debtor and the debtor of the creditor."

[3] 3. The court did not err in striking the paragraphs of the defendant's answer concerning which complaint is made. Taken as a whole, the formal denial of liability was rendered wholly ineffectual by the admission of such material facts as necessarily established a legal liability. *Beddingfield v. Bates Advertising Co.*, 2 Ga. App. 107, 58 S. E. 320. Upon the issue raised by the answer of the defendant as to attorney's fees, the evidence was not contradicted that the requisite legal notice was properly and timely given; and for this reason there was no error in directing the verdict.

Judgment affirmed.

POTTLE, J., not presiding.

(11 Ga. App. 564)

SOUTHERN RY. CO. v. INMAN, AKERS & INMAN (two cases). (Nos. 3,749, 3,750.)
(Court of Appeals of Georgia. Sept. 30, 1912.)

(Syllabus by the Court.)

1. LIMITATION OF ACTIONS (§ 35*)—LIMITATIONS APPLICABLE—PENAL ACTIONS.

An action brought under section 2 of the act approved August 23, 1905 (Acts 1905, p. 120), to recover against a railroad company the sum fixed by rule of the Railroad Commission for failing to furnish cars on demand, is so far penal in its nature as to be barred, under the provisions of section 4370 of the Civil Code of 1910, after one year from the date upon which the cause of action arose.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 158-167; Dec. Dig. § 35.*]

(Additional Syllabus by Editorial Staff.)

2. PENALTIES (§ 1*)—DEFINITION.

The words "penalty" and "forfeiture" are generally used synonymously, and a statute is penal when it inflicts a forfeiture by way of penalty for breach of its provisions (citing *Words and Phrases*, vol. 6, pp. 5272, 5273).

[Ed. Note.—For other cases, see Penalties, Cent. Dig. § 1; Dec. Dig. § 1.*]

Error from City Court of Atlanta; H. M. Reid, Judge.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Actions by Inman, Akers & Inman against the Southern Railway Company. Judgments for plaintiffs, and defendant brings error. Reversed.

McDaniel & Black and E. A. Neely, all of Atlanta, for plaintiff in error. Hill & Wright, of Atlanta, for defendants in error.

POTTLE, J. These were actions brought in 1910 under the provisions of the act approved August 23, 1905 (Acts 1905, p. 120), to recover from the railway company for its failure to promptly furnish cars ordered at various times during the years 1906 and 1907. The point is made that the actions were barred by the statute of limitations, and, as we have reached the conclusion that this point is well taken, no other question need be dealt with.

[1] A consideration of the question upon which the case turns renders it necessary to classify the nature of the recovery authorized by section 2 of the act of 1905 and storage rule 9 of the Railroad Commission. The announced purpose of the act, as set forth in its title, was to further extend the powers of the Railroad Commission of this state, and to confer upon the Commission, among other things, the power "to provide a penalty for noncompliance with any and all reasonable rules, regulations and orders prescribed by the said Commission in the execution of these powers." Section 2 of the act required that the Commission "shall, by reasonable rules and regulations, provide the time within which said car or cars shall be furnished after being ordered as aforesaid, and the penalty per day per car to be paid by said railroad company in the event such car or cars are not furnished as ordered, and provided, further, that in order for any shipper or consignor to avail himself of the penalties provided by the rules and regulations of said Railroad Commission, such shipper or consignor shall likewise be subject, under proper rules to be fixed by said Commission, to the orders, rules and regulations of said Railroad Commission." Section 3 provides that, before any railroad company "is subjected to the penalties" provided by the act, the company shall be required to show cause before the Commission and be by it adjudged liable. The Commission, by rule, fixed one dollar per car, for each day of delay after four days, as the sum which a defaulting company should pay. The cause of action arises immediately upon the company's default, and the question is: Within what time must the action be brought?

Section 4370 of the Civil Code of 1910 provides: "All actions by informers, to recover any fine, forfeiture, or penalty, shall be commenced within one year from the time the defendant's liability thereto was discovered, or by reasonable diligence could have been discovered." This statute was held to be applicable to a suit against a telegraph com-

pany, brought under the act of 1887 (Acts 1887, p. 111), to recover the sum fixed by that act to be paid by the defaulting company. *Western Union Telegraph Co. v. Nannally*, 86 Ga. 503, 12 S. E. 578. That decision settles for us two propositions, viz.: First, that the sum recoverable under the act of 1887 was a penalty for breach of a public duty; and, secondly, that the suing plaintiff was an informer within the meaning of the statute, now codified in section 4370 of the Code of 1910, notwithstanding he obtained the entire recovery. After considering the history and origin of this statute, Mr. Chief Justice Bleckley, delivering the opinion, said: "We have no doubt that the Code intended to sum up all cases provided for in these two previous statutes, and treat them as cases brought by informers. If this construction is not sustainable, then the Code prescribed no limitation whatever for such an action as the one now under consideration, unless it falls within section 2916, which is in these words: 'All suits for the enforcement of rights accruing to individuals under statutes, acts of incorporation, or by operation of law, shall be brought within twenty years after the right of action accrues.' We think it incredible that actions for penalties should have been limited to one year when brought by an informer, and to twenty years when brought by others, not falling within the strict, literal description of informers. There is every reason why the omission of a telegraphic company to deliver a message with due promptness should not be left open to suit for twenty years. If any penalty whatever ought to be prosecuted for speedily, it would be one of this nature. To leave the company exposed to suit for the almost innumerable transactions of this kind for twenty years would be simply absurd." In *Central of Georgia Ry. Co. v. Huson*, 5 Ga. App. 529, 63 S. E. 597, this court held that section 4370 of the Code was applicable to a suit brought against a common carrier, under section 2770 of the Code, to recover double the amount of an overcharge or in overpayment of freight.

[2] Were it not for previous decisions, both of this court and of the Supreme Court, we would have no difficulty in holding that so much of the act of 1905 as relates to the recovery of what has been denominated "reciprocal demurrage" is purely penal in its nature, and was intended by the General Assembly as a punishment for the breach of a public duty. A penalty is often imposed by the exaction of a sum of money for the infraction of a civil right. For example, it has been said that a penalty is: "A punishment inflicted by a law for its violation." "A sum of money imposed by statute, to be paid as a punishment for the commission of a certain act." "A penalty is a punishment imposed by law or contract for doing or failing to do something that it was the duty of a party to do." "A penalty is in the nature

of punishment for the nonperformance of an act, or for the performance of an unlawful act. It involves the idea of punishment, whether enforced by civil or criminal procedure." "The word 'penalty' and the word 'forfeiture,' as used in statutes, are generally used synonymously. A statute properly designated as penal is one which inflicts a forfeiture of money or goods by way of penalty for breach of its provisions." Words and Phrases, vol. 6, pp. 5272, 5273. The very purpose of the act was stated in the title "to provide a penalty for noncompliance with the rules and regulations of the Commission." By section 2 certain things are required of a shipper before he can avail himself of the "forfeitures or penalties" prescribed by the Commission, and it is expressly provided that the Commission shall fix the penalty per day per car to be paid by the carrier. By section 3 it was provided that, before a carrier could be "subjected to the penalties" of the act, it should have an opportunity to be heard before the Commission. All of the things required of the carrier by the act were owing by it to the public generally. They were public duties, and for their breach the penalties named in the act were imposed. The sum recovered by the shipper may or may not be compensatory. He may have sustained no damage. He need not show that he has. He makes out his case by proving the default and a compliance by him with the conditions precedent prescribed by the act. Again, his damage may be far in excess of the amount of the penalty. It is plain to us that the General Assembly intended to provide a punishment for the carrier's breach of its public duty as a means of compelling the performance of that duty. The conclusion that the act was intended to be at least mainly penal seems to be irresistible, when we consider that while this court held that the remedy afforded by the act was exclusive (Pennington v. Douglas Ry. Co., 3 Ga. App. 665 [3], 60 S. E. 485), the Supreme Court later took a different view, and held that, notwithstanding the act of 1905, suit might be brought for the actual damages which a shipper had sustained from the carrier's failure to promptly furnish cars. Southern Ry. Co. v. Moore, 133 Ga. 806, 67 S. E. 85, 26 L. R. A. (N. S.) 851.

This brings us to a consideration of the several decisions construing the act. In none of them was the question now being dealt with presented, nor is there any authoritative language which requires a conclusion contrary to that which we have reached. In the Pennington Case, supra, Judge Russell spoke of the sum recoverable for failure of the carrier to furnish cars as "the liquidated damages provided for by the Steed bill (which are denominated as a penalty)." But that language must be considered in the light of the fact that the court's opinion

that the remedy offered by the Steed bill was exclusive of an action for damages was subsequently held by the Supreme Court to be erroneous. In Smith Lumber Co. v. L. & N. R. Co., 4 Ga. App. 714, 62 S. E. 472, the Chief Judge characterized an action under the act as one "for damages arising from a breach of a public duty imposed upon the defendants by a rule of the Railroad Commission, and to recover the amount of damages fixed by the Commission for the violation of the rule." That case was likewise decided before the decision of the Supreme Court that the remedy under the act was not exclusive. In Southern Ry. Co. v. Melton, 133 Ga. 277, 65 S. E. 665, 26 L. R. A. (N. S.) 851, the main question dealt with was as to the power of the General Assembly to delegate to the Railroad Commission the authority to impose punishment for breach of a public duty. It was held, in substance, that as the General Assembly itself, in the act, declared that a penalty should be imposed, and had simply left to the Commission the power to investigate and declare by rule a reasonable sum to be exacted from the carrier, the act would be upheld. In characterizing the sum to be recovered the court said: "A consideration of the terms of the act of 1905 will show that the word 'penalty,' in the second section, was not employed in its strict sense, but as meaning a reasonable amount, to be fixed by the rule of the Commission, recoverable by the shipper on account of a failure to furnish cars to carry his freight within a reasonable time named in the rule." In Southern Ry. Co. v. Atlanta Sand & Supply Co., 135 Ga. 35, 68 S. E. 807, it was held that storage rule No. 9 of the Railroad Commission, properly construed, was reasonable, and did not violate any of the constitutional rights of the carrier. The nature of the recovery allowed by the rule was not discussed; it being simply referred to in the language of the act as a forfeiture or penalty. The matter was considered by this court in Zuber v. Southern Ry. Co., 9 Ga. App. 539, 71 S. E. 937, where Judge Powell thus states the conclusion of the court: "The exact nature of this liability, which attaches against the carrier and in favor of the shipper on account of a violation of these rules of the Railroad Commission, and which in the second section of the act of 1905 is called a penalty, has never been judicially declared. Some progress towards a definition has been made in the cases of Southern Ry. Co. v. Melton, 133 Ga. 277, 65 S. E. 665, 26 L. R. A. (N. S.) 851, and of Southern Ry. v. Moore, 133 Ga. 806, 67 S. E. 85, 26 L. R. A. (N. S.) 851, in the first of which it was held not to be a penalty in the sense in which that word is used to express the notion of criminal punishment for wrong, and in the other of which it was held not to be such liquidated damages as to preclude the shipper from resorting to his common-law

remedy at his election. See, also, *Southern Ry. Co. v. Atlanta Sand Co.*, 135 Ga. 35, 68 S. E. 807. Giving due effect to all of these cases, it may be said that these rules fix a liquidated sum in the nature of civil punitive damages which an offended shipper may recover from a delinquent carrier by pursuing the course mentioned in the act, but that the remedy thus given is not exclusive, and the shipper may nevertheless at his election bring his common-law action, in which event he must prove his damages and leave to the jury the assessment of the amount."

For the purposes of this decision we think it immaterial whether we speak of the recovery as "civil punitive damages," or as a strict statutory penalty, or what other name may be given it. Certain it is that the amount recoverable was not the exclusive substitute for the shipper's damage; certain it is that it is not strictly compensatory; and equally certain is it that no proof of damage is necessary to recover. What we hold is that the action is so far penal in its nature as that the suit must be brought within one year after the cause of action arises. It is immaterial that the person suing receives the whole of the recovery; for, as Judge Bleckley said in the *Nunnally Case*, supra, he, "if not literally an informer, is designated by statute to take the fruits of an action brought for the violation of a public penal law." Our conclusion is that the defendant's demurrer should have been sustained.

Judgment reversed.

(11 Ga. App. 573)

CITY OF ALBANY v. LINDSEY. (No. 3,800.)
(Court of Appeals of Georgia. Sept. 30, 1912.)

(Syllabus by the Court.)

1. PARENT AND CHILD (§ 15*)—PERSONS IN LOCO PARENTIS.

One who, having accepted the gift of a child from its mother (the father being dead), thereafter duly performs the offices of a parent to the child, stands in loco parentis.

[Ed. Note.—For other cases, see Parent and Child, Cent. Dig. §§ 160-164; Dec. Dig. § 15.*]

2. PARENT AND CHILD (§ 7*)—LOSS OF SERVICES OF CHILD—RIGHT OF ACTION.

The relationship created by acceptance from a mother of the gift of her fatherless infant, and by due performance of parental duties toward the child, raises a corresponding and correlative duty on the part of the child to render, in behalf of the person thus standing in loco parentis, such service of value as the child may be able to perform until it reaches its majority. And one who thus sustains the parental relation has a right of action against one who tortiously deprives him of the service of the child, for any loss of the service of the child, prior to its majority, which is due to the act of the tort-feasor.

[Ed. Note.—For other cases, see Parent and Child, Cent. Dig. §§ 86-99; Dec. Dig. § 7.*]

3. DEATH (§ 18*)—ACTION FOR DEATH OF CHILD—LOSS OF SERVICES.

Though one who, by virtue of the gift of a child, followed by the acceptance of the gift

and the performance of the duties of a parent towards it, is not entitled, under the provisions of section 4424 of the Civil Code of 1910, to recover the value of the life of the child, still, in an action predicated upon the tortious homicide of the child, he may recover for the loss of its services, upon proper proof that the child was able to render services, and of their value, as if the relation were that of master and servant.

[Ed. Note.—For other cases, see Death, Cent. Dig. § 20; Dec. Dig. § 18.*]

Error from City Court of Albany; D. F. Crosland, Judge.

Action by Maude Lindsey against the City of Albany. Judgment for plaintiff, and defendant brings error. Affirmed.

Jas. Tift Mann, of Albany, for plaintiff in error. Pope & Bennet, of Albany, for defendant in error.

RUSSELL, J. The ruling upon the demurrer, to which exception is taken, raises only one question, and, so far as we have been able to find, the precise point has never been decided in this state. It may be said that two questions are developed by the record: (1) Does the acceptance of the gift of a child from the mother, as its sole surviving parent, followed by the performance of parental duties on the part of the donee, create such a relation as that the latter stands to such child in loco parentis? (2) Does the relation created by the facts above stated give the donee the right to maintain an action to recover for loss of services of the child, caused by and based upon its tortious homicide?

[1] The question as to whether one who is not a parent, but merely stands in loco parentis, can recover for the full value of the life of the child is not involved in this case, and, if it were, we are inclined to the opinion that this right, being dependent upon a statute in derogation of the common law and penal in its nature, cannot appertain to one who is not an actual parent. It seems to us, however, that one who sustains to an orphan child the de facto relationship of a parent—cares for, protects, and ministers to its necessities, expending for the child his care and thought and money as if it were his own, thus performing all the duties of a parent, without objection from any source—would have created in his behalf a relationship from which the law would imply correlative filial duties (among them the rendering to the person thus standing in loco parentis of such services of value as the child might be able to perform, or should properly be required to perform, under the circumstances) until the child attains its majority.

The petition alleges that the child involved in the present case was given to the plaintiff by its mother while on her deathbed, and that she was the only surviving parent; that she knew that the child, shortly to be or-

phaned, would be left without any means of support, and gave him to the plaintiff, relinquishing to the plaintiff all right to the custody, control, and services of her infant boy, in consideration of the plaintiff's agreeing to accept the child and to maintain and educate him until he should be 21 years of age. The child was at that time about 6 months old. It is alleged in the petition that from the time of the gift the plaintiff maintained and educated the child, and performed all the duties of a parent toward him, and in doing so incurred an expense averaging about \$100 per year, amounting to more than \$1,000. The child, having been sent on an errand by its foster parent, was killed by coming in contact with an electric light wire belonging to the city of Albany, and the action is brought to recover the value of the child's services until he would have attained his majority.

We need not refer to any phase of the case, except to the question of the plaintiff's right to maintain the action, because the petition is not for any reason demurrable, unless it be upon the ground that this plaintiff is not entitled to recover for the tort, which is well pleaded. If the present plaintiff cannot maintain the action, no one can. In that view of the case, the question presented to us becomes both interesting and important, especially so when every humanitarian consideration impels all of us to encourage the care and protection of helpless orphan infants, who would be dependent upon charity, oftentimes too cold, unless the law recognizes that he who, in the kindness of his heart, performs for these helpless ones the tender offices of a parent is also entitled to parental rights. In fact, in such a case as is now before us, if the injured child had not died, but were living, maimed for life, the parental obligation of protecting the child during minority could not be performed, unless the person exercising the parental duties were given the right to ask for compensation and obtain redress for the injury done to his infant charge. This statement is only illustrative of what we have in mind, for, of course, it can be suggested that an action could be maintained by his next friend for an injury done to an infant; but the point we have in mind is that, for the very protection of the child himself in a case like the present (in which, according to the allegations of the plaintiff, the death of the child is due to the inexcusable negligence of a third person, and yet there can be no recovery unless the existence of a quasi parental relation is recognized), it should follow, as matter of law, that, if the relationship imposes the bearing of burdens, it also confers the rights usually inherent thereto.

We think that under the spirit of the rulings in *Eaves v. Fears*, 131 Ga. 820 (2), 64 S. E. 260, *Howard v. Randolph*, 134 Ga. 691, 68 S. E. 586, 29 L. R. A. (N. S.) 294, 20 Ann. Cas. 892, and *Hicks v. Williams*, 135 Ga.

433, 69 S. E. 547, it is perfectly sound to hold that one who accepts the gift of a child and, in pursuance of the gift, performs all the parental duties towards it, stands in loco parentis to the child. It is true that in the *Hicks* Case and in the *Eaves* Case the gift was made by the father, and therefore these cases fall squarely under the provisions of section 3021 of the Civil Code of 1910, and that the case of *Howard v. Randolph*, supra, was one in which the child sought to maintain an action to recover for service rendered to the person who had occupied the parental relation; but the controlling reason underlying all these rulings is the same, and therefore the ruling in a case where the gift was made by the mother as sole surviving parent should be the same as that which applies where the gift is made by the father, although the relinquishment of parental rights in the case of the father, and the subsequent rights of the donee, are fixed by the Code, and even though it is true that under section 3022 the rights of the mother, upon the death of the father, are limited to the possession of the child "until his arrival at such age as his education requires a guardian to take possession of him," and there is no expression of any means by which she can transfer her right to another, or substitute any one else in her place. It is also true that section 3022, in defining the obligation of a parent (following the common law), refers to the father, and makes no reference to the mother, and it is insisted that a manifest difference between the rights of the mother and the rights of the father is evidenced by the provision that a minor whose father is dead may, upon attaining the age of 14 years, select as his guardian some person other than his mother (section 3035).

All of these considerations depend upon the fact that at common law a legitimate child was largely the child of his father, and but very little the child of his mother, no matter what the circumstances. A reference to two decisions of the Supreme Court at least shows a gradual recognition of greater maternal rights, and the enactment of section 4424 (which is statutory in its original) indicates a similar legislative policy. In *Ansley v. Jordan*, 61 Ga. 488 (6), the Supreme Court declined to decide whether a mother had the right to the service of her son during his minority, and placed its ruling, upholding the refusal of a nonsuit, upon the ground that it was competent for the plaintiff to consent to be hired out by his mother and to represent her as her agent in making the contract upon which the action was based. In *McElmurray v. Turner*, 86 Ga. 219 (3) 12 S. E. 359, Mr. Justice Simmons sustained the right of the mother to foreclose a special lien on certain crops, not only for her own labor, but that of her minor children, upon the theory that as the mother was a widow, and entitled to the possession of her

minor children, she was entitled to their labor and their earnings. In the McElmurray Case it does not appear what was the age of the children, but Mr. Justice Simmons says: "Being entitled, under the law, to the possession of the children, she was entitled to their labor and earnings. If she had hired those minor children to the landlord, she could have recovered in an action against him for their hire. This being true, what rule is there in law, or what reason is there in common sense, which would prevent her from suing out a laborer's lien in her own name for the labor of her minor children, as well as her own labor?"

Even if rulings in this state go no further than to hold that one may stand in loco parentis by virtue of the father's relinquishment of his parental control, we think that, upon reason and principle, the gift of a mother (in a case in which the mother is the sole surviving parent) can create the same relation. The principle is well recognized in other jurisdictions. In Whitaker v. Warren, 60 N. H. 20, 49 Am. Rep. 302, it is held that, where an infant dies by the negligence of another, one standing in loco parentis may recover from him for medical expenses and future loss of service up to the time of death. The New Hampshire court did not express any opinion as to whether the plaintiff could have recovered for loss of service after the death and for the period of its infancy, for no such recovery was sought. In the Whitaker Case the action was brought for nursing and care after the injury, and for medicines and medical attendance; but the court was compelled to rule, and did rule, upon the general nature of the relationship under a state of facts practically identical with those now before us, and as to this it held that "the facts stated are evidence tending to show that the plaintiff stood in loco parentis to the child, and while this relation existed the plaintiff was entitled to all the rights of a parent," citing *Freto v. Brown*, 4 Mass. 675, *Williams v. Hutchinson*, 3 N. Y. 812, 53 Am. Dec. 301, and *Cooley on Torts*, 235. The ruling of the New Hampshire court is recognized as sound in the *Cyclopedia of Law and Procedure* (29 Cyc. 1672), in which the principle is broadly stated that "a person in loco parentis may recover, against a wrongdoer who is responsible for the injury to the child, for the resulting expense and loss of services." In *Williams v. Hutchinson*, 3 N. Y. 812, 53 Am. Dec. 301, it was held that "persons standing in loco parentis are entitled to the rights and subject to the liabilities of an actual parent, though not legally compelled to assume that relation." We conclude, therefore, that one who, having accepted the gift of a child from its mother (its father being dead), thereafter duly performs the offices of a parent to the child, stands in loco parentis.

[2] 2. Having ruled that the plaintiff stood

in loco parentis, her right to recover is clearly established by numerous adjudications of the Supreme Court. As an actual parent the plaintiff could sue for loss of service caused by the death of a minor child, even at common law and without any statute; the right being assumed to rest upon the same rule which entitles a master to recover for injuries to his servant. See *Shields v. Yonge*, 15 Ga. 349, 60 Am. Dec. 698; *Chick v. Southwestern R. R. Co.*, 57 Ga. 357. In *McDowell v. Georgia R. R. Co.*, 60 Ga. 320, the Supreme Court, while holding that a father could not recover for the homicide of his minor daughter, ruled that he might recover for the loss of her service to the time of her majority. The right of a father to recover for the loss of service resultant upon the homicide of his child, from the time of his injury until the child would have been 21 years of age, is also recognized in *Augusta Factory v. Davis*, 87 Ga. 648-650, 13 S. E. 577, *Frazier v. Georgia R. R. Co.*, 101 Ga. 70, 28 S. E. 684, *King v. Southern Ry. Co.*, 126 Ga. 794, 55 S. E. 965, 8 L. R. A. (N. S.) 544, *Southern Ry. Co. v. Flemister*, 120 Ga. 524 (5), 48 S. E. 160, and *Savannah, F. & W. Ry. Co. v. Smith*, 93 Ga. 742 (1), 21 S. E. 157. Though one who, by virtue of the gift of a child, followed by acceptance of the gift and performance of the duties of a parent towards it, is not entitled to recover the value of the life of the child in an action predicated upon the tortious homicide of the child (this because section 4424 of the Civil Code is penal in its nature, and the rights conferred must be limited to those only who are expressly mentioned), still he may recover for the loss of its services, upon proper proof that the child was able to render services, and of their value, as if the relation were that of master and servant.

[3] 3. The learned counsel for the plaintiff in error argues that under the ruling in *Bell v. Central R. Co.*, 73 Ga. 520, the plaintiff's declaration is demurrable, even if the alleged gift and acceptance be construed as a legal adoption, because section 4412 is declaratory of the common law. Granting that the section cited is declaratory of the common law, it cannot be said that the adoption of children (which was unknown to the common law of England) exists only in this state by special statute. The ruling in the *Eaves Case*, supra, is proof to the contrary; and if it be conceded that a surviving mother should have the same rights to the parental control and the services of a minor child as the father would have, if he were in life, then there can be no question about this plaintiff's right to recover, unless her right is precluded by the provisions of section 3025 of the Civil Code, which gives a minor above the age of 14 the privilege of selecting a guardian, and we do not think that the bare possibility of such a contingency, which might never have occurred,

should deprive one who has for years discharged the obligations of a parent of his reasonable expectancy that the object of his benefaction would, under the influence of natural gratitude, make such return in service as would reasonably have been expected if the orphan had been his actual child.

We find no error in the judgment overruling the demurrer.

Judgment affirmed.

(11 Ga. App. 581)

FLEMING v. STATE. (No. 3,952.)

(Court of Appeals of Georgia. Sept. 30, 1912.)

(Syllabus by the Court.)

1. CRIMINAL LAW (§ 101*)—CONFLICTING JURISDICTION—TRANSFER OF CAUSES.

The Legislature may by law provide that cases pending in a city court, which is to be abolished, shall be transferred and stand for trial in the superior court of the county in which the city court is located, and may include in the transfer accusations charging misdemeanors. As to misdemeanors there is no constitutional guaranty that the accused shall be first indicted or presented by a grand jury.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 199-205; Dec. Dig. § 101.*]

2. INSTRUCTIONS OF COURT—SUFFICIENCY OF EVIDENCE.

There was no material error in any of the instructions of the court, the evidence authorized the verdict, and the refusal of a new trial was not error.

Error from Superior Court, Hart County; D. W. Meadow, Judge.

P. L. Fleming was convicted of crime, and brings error. Affirmed.

A. A. McCurry and A. G. & Julian McCurry, all of Hartwell, for plaintiff in error. Thos. J. Brown, Sol. Gen., of Elberton, for the State.

RUSSELL, J. Judgment affirmed.

(11 Ga. App. 618)

AUTO HIGHBALL CO. et al. v. SIBBETT et al. (No. 4,120.)

(Court of Appeals of Georgia. Oct. 2, 1912.)

(Syllabus by the Court.)

CONTEMPT (§ 66*)—PROCEEDINGS TO PUNISH—WRIT OF ERROR—PARTIES.

The state is a necessary party defendant in error to a bill of exceptions complaining of a judgment and sentence against the plaintiff in error for a criminal contempt, instituted for the purpose of vindicating the court's authority, and not for the purpose of enforcing a civil right of an aggrieved party.

[Ed. Note.—For other cases, see Contempt, Cent. Dig. §§ 213-215, 223-237; Dec. Dig. § 66.*]

Error from City Court of Douglas; W. D. Bule, Judge.

Action between the Auto Highball Company and others and W. F. Sibbett and another. From the judgment, the Auto High-

ball Company and others bring error. Dismissed.

Scott & Davis, of Atlanta, for plaintiffs in error. Rogers & Heath, Chastain & Henson, J. W. Quincey, and Lawson Kelley, all of Douglas, for defendants in error.

POTTLE, J. The writ of error was dismissed because the bill of exceptions appeared not to have been filed in the office of the clerk of the trial court within the time required by law. A motion to reinstate the writ of error was made by the plaintiff in error, upon the ground that while, from the date of filing entered on the bill of exceptions, it appeared that that document was not filed in the office of the clerk of the trial court within the time required by law, yet as a matter of fact it was filed within due time, and the date of the filing indorsed on the bill of exceptions by the clerk was erroneous. Upon a consideration of this motion, this court directed the clerk of the trial court to further certify with reference to the date upon which the bill of exceptions was actually filed in his office. The clerk has certified that the bill of exceptions was filed in his office on March 12, 1912, and, in accordance with the direction of this court the date of filing has been changed on the bill of exceptions, so as to read, "Filed in office March 12, 1912." But the motion to reinstate the writ of error will not be granted, because the writ of error must be dismissed for the reason hereinafter indicated.

A motion to dismiss the writ of error was made on the ground that there were no proper parties defendant in error named in the bill of exceptions, and upon whom service was perfected. Contempts are both civil and criminal. Where the object of the contempt proceeding is the obtaining of relief by a complaining party, such as the payment of damages for the violation of an injunction order and the like, the proceeding is civil in its nature. *Gompers v. Buck Stove Range Co.*, 221 U. S. 418, 31 Sup. Ct. 492, 55 L. Ed. 797, 34 L. R. A. (N. S.) 874; *Howard v. Durand*, 36 Ga. 346, 91 Am. Dec. 767; *Ball v. Wright*, 115 Ga. 729, 42 S. E. 32; *Warner v. Martin* 124 Ga. 387, 52 S. E. 446, 4 Ann. Cas. 180. Where, however the proceeding is brought solely for the purpose of vindicating the authority of the court, and not for the relief of an aggrieved party, the proceeding is criminal in its nature. *Bradley v. State*, 111 Ga. 168, 36 S. E. 630, 50 L. R. A. 691, 78 Am. St. Rep. 157; *State v. Steele*, 112 Ga. 39, 42, 37 S. E. 174. In a criminal prosecution for contempt, the state is a proper party; and if exception is taken to a judgment attaching a party for criminal contempt, the state must be made a party defendant in error in the reviewing court. In the present bill of exceptions no defend-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

ant in error is specifically named. Apparently the plaintiff in error sought to make the parties in the original case, out of which the contempt grew, parties to the writ of error, because service of the bill of exceptions was acknowledged by counsel for both parties in the main case. It is true that service of the bill of exceptions was also acknowledged by the solicitor of the city court of Douglas; but since the state was not a party in the court below, and nowhere mentioned in the bill of exceptions as a party, mere service upon the solicitor would not have the effect of making the state a party in the Court of Appeals, even if such solicitor was the party to acknowledge service for the state. We are quite clear that we have no jurisdiction of the writ of error, and the bill of exceptions will therefore be dismissed for want of a proper party defendant in error.

We, however, express our views upon the merits of the case, since the question will likely arise again. The judgment entered for contempt by the judge of the state court was clearly void. It appears that a subpoena duces tecum, regularly issued by the city court of Douglas, was served upon the Auto Highball Company and J. H. Walton, who was described in the caption of the subpoena as "secretary and treasurer." No response was made to this subpoena, and a rule nisi for contempt was regularly issued, calling upon him and the Auto Highball Company to show cause why they should not be dealt with as in contempt of court. At the time fixed for the return of the rule the respondents did not appear, either in person or by counsel, or offer to show cause why they should not be attached for contempt. Thereupon the rule nisi was made absolute, and a judgment was entered against J. H. Walton and the Auto Highball Company that they be imprisoned in the common jail of Coffee county, but that the imprisonment might be relieved by the payment at any time of the sum of \$25. Of course, the sentence against the corporation was void, because a corporation cannot be attached for contempt. *Simmons v. Georgia Iron & Coal Co.*, 117 Ga. 305, 319, 43 S. E. 780, 61 L. R. A. 739. We think it was likewise void as to Walton. This being a criminal prosecution, the judge had no power to impose sentence in the absence of the respondent. The proper course to have pursued would have been to have issued an attachment for the person who had failed to respond to the rule nisi for contempt, have him arrested and brought into court, and have dealt with him in the manner provided by law. The sentence of the court, imposed upon the respondent in his absence, was absolutely void, and cannot be enforced against him. This does not mean that the court is still without power to issue an attachment

and have the contumacious witness brought before it to be dealt with. When the respondent is regularly brought before the court, it will then be time to determine whether or not such facts exist as will justify punishment as for contempt.

Writ of error dismissed.

(11 Ga. App. 557)

ÆTNA LIFE INS. CO. v. CONWAY.

(No. 3,705.)

(Court of Appeals of Georgia. Sept. 30, 1912.)

(Syllabus by the Court.)

INSURANCE (§§ 256, 258, 261, 291*) — AVOIDANCE—MISREPRESENTATIONS OF INSURED.

An applicant for life insurance must act "in the utmost good faith" in disclosing to the insurer all things material to the risk about which information is sought. A misrepresentation in reference to any matter which materially affects the nature, extent, or character of the risk will void the policy; and the willful concealment of a material fact will have the same effect. Where an applicant for life insurance willfully conceals from the insurer the fact of a previous illness, such concealment will avoid the policy, if the disease was of such a character as to enhance the risk. The fact that the insured may have died a short while after the policy was issued, from a disease with which he was not afflicted when the policy was issued, does not conclusively show that the fact of the previous illness was not material, within the meaning of the rule above announced.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 540, 549, 550, 551, 553, 554, 556, 681-690, 694-696; Dec. Dig. §§ 256, 258, 261, 291.*]

Error from City Court of Atlanta; H. M. Reid, Judge.

Action by E. B. Conway against the Ætna Life Insurance Company. Judgment for plaintiff, and defendant brings error. Reversed.

Smith, Hammond & Smith, of Atlanta, for plaintiff in error. Hill & Wright, of Atlanta, for defendant in error.

POTTLE, J. On February 4, 1909, William O. Conway made written application to the plaintiff in error for a policy of life insurance on his own life. The applicant was examined as to the condition of his health by the company's physician, and on February 8, 1909, the policy was issued in favor of the wife of the insured as beneficiary. A few days after the policy was issued the company received information which aroused its suspicions in reference to the physical condition of the insured, and in May, after several efforts had been made by the company's physician to obtain another examination, the insured was finally again examined by the physician in May. From this examination it developed that the insured was suffering with Bright's disease, from which he died in September, 1909. As soon as the company ascertained that the insured had Bright's dis-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

ease, it tendered back the premium and demanded the surrender of the policy for cancellation. The insured refused to comply with this demand, and after his death his widow brought suit upon the policy. The company defended upon the ground that the insured had made material misrepresentations in his application, and had willfully concealed material facts which enhanced the risk, and that for these reasons the policy was void.

The application was copied in and made a part of the contract of insurance. The policy contained the following stipulation: "All statements made by the insured shall, in the absence of fraud, be deemed representations, and not warranties, and no such statement shall avoid the policy, or be used in defense to a claim under it, unless it is contained in the written application for this policy and copied hereon." The following representations were made by the insured in his application: "I do hereby declare that I am in sound health, and have no disease or ailment not fully set forth herein; that the statements and answers herein made (including those on the second page hereof) and signed by me are complete and true, and I agree that they shall form a part of the contract or policy issued by said company upon my life." In the application the insured was asked to give the names and addresses of all the physicians whom he had consulted within the last five years. He answered that he had consulted none, except Dr. J. B. Benson and Dr. G. W. Willett. He was further asked to state the particulars of each illness he had had during the last seven years, with the names of the attending physicians. His reply was as follows: "Jaundice 7 years ago, one month. Colic one day. (No gall stone or kidney stone.) Diabetic." The insured was also asked: "Have you had any of the following diseases? Answer 'yes' or 'no' opposite each." To each of which the insured answered, "No," as follows, to wit: "Habitual headache, No; liver complaint, No; neuralgia, No." It is undisputed that during the summer of 1907 the insured was ill for several weeks. He was examined and treated by one physician, who diagnosed the disease as probably acute Bright's disease. The symptoms were severe pains in the back, followed by fever, severe headache, and the swelling of the eyes, face, and ankles, and other parts of the body, and a loss of 25 pounds in weight. It is further undisputed that the statement of the insured that he had consulted no physician other than Drs. J. B. Benson and G. W. Willett, was untrue, and that he had in fact consulted and been treated by four or five other physicians at various times. It was also shown that the answer of the insured, that he had never had habitual headache, liver complaint, and neuralgia, were untrue; that as a matter of fact, not a great while before the policy was issued, he had

been treated by one physician for habitual headache, and that at other times he had also been treated for liver complaint and neuralgia.

The testimony of the experts indicates that these disorders are symptomatic of Bright's disease. He was treated for habitual headache by Dr. Willett in 1908, and, while this physician was not positive that the insured had Bright's disease at the time, the condition of the insured was such as to indicate auto-intoxication, a symptom of kidney disease and an indication of Bright's disease. Neither did the examination of this physician, nor the examination of Dr. Todd, the company's physician, in 1909, disclose the presence of albumen in the urine; but the evidence is conclusive that a man might have Bright's disease, and the presence of albumen not be discovered upon an examination of the urine. In May, 1909, when Dr. Todd again examined the insured, he was in an advanced stage of Bright's disease. There was testimony of expert physicians that this disease might develop within a few weeks, and there was also evidence of nonexperts to the effect that at the time the policy was issued the insured was a robust man and apparently in sound health. While the evidence as a whole strongly points to the conclusion that the insured had Bright's disease at the time the policy was issued, and probably for some time before, there was perhaps enough evidence for the jury to find that he was in sound health at the time of the issuance of the policy. The case was submitted to the jury, and they found for the plaintiff. The defendant's motion for a new trial was overruled.

The law applicable to the issues raised in the case is found in the following sections of the Code of 1910:

"Sec. 2479. Every application for insurance must be made in the utmost good faith, and the representations contained in such application are considered as covenanted to be true by the applicant. Any variation by which the nature, or extent, or character of the risk is changed will void the policy.

"Sec. 2480. Any verbal or written representations of facts by the assured to induce the acceptance of the risk, if material, must be true, or the policy is void. If, however, the party has no knowledge, but states on the representation of others, bona fide, and so informs the insurer, the falsity of the information does not void the policy.

"Sec. 2481. A failure to state a material fact, if not done fraudulently, does not void; but the willful concealment of such a fact, which would enhance the risk, will void the policy."

"Sec. 2483. Willful misrepresentation by the assured, or his agent, as to the interest of the assured, or as to other insurance, or as to any other material inquiry made, will void the policy."

It is immaterial whether the statements made by the applicant for insurance were representations or warranties, since the effect of such statements must be determined by the provisions of these sections of the Code, without reference to whether the statements may be regarded technically as representations or as warranties. If the representations were untrue, and the nature or extent or the character of the risk was changed by the representations, the policy was void under the express terms of section 2479. Any statement or representation, whether verbal or written, made to induce the acceptance of the risk, if material to the risk, must be true, or the policy is void under the express terms of section 2480, unless the applicant informs the company that the statements are made upon hearsay and are also made in good faith. The willful concealment of a material fact which tends to enhance the risk voids the policy, under the express terms of section 2481; and, under section 2483, a willful misrepresentation in reference to any material inquiry will void the policy. In the case of a representation the important inquiries are: (1) Was the representation false? (2) If false, was it made in reference to a matter material to the risk? In the case of a concealment of a fact, the important inquiries are: (1) Was the concealment willful? (2) Did it relate to a matter material to the risk?

The insured stated unequivocally that he was in sound health. If this was untrue, and if he in fact was suffering from a serious disorder, which made him an undesirable risk, the policy would be void. *Sou. Life Ins. Co. v. Hill*, 8 Ga. App. 857, 70 S. E. 186. We do not mean to say that if an applicant for insurance acts in the utmost good faith, and fairly discloses to the company all of the information in his possession which would throw any light upon the condition of his health and the desirability of the risk, the policy would be void, even though it developed that he suffered from a disorder as to which he had no knowledge, and the existence of which was not ascertained by the examining physicians. But fraud voids all contracts, and there is nothing in the law relating to insurance contracts which alters this universal principle. Indeed, as if to emphasize the doctrine, section 2479 of the Code provides that every application for insurance must be made in the "utmost good faith," and any variation which changes the nature, the extent, or the character of the risk will void the policy. The question of the materiality of a representation or of a fact concealed is primarily one for the jury.

The position assumed by counsel for the defendant in error is that the finding of the jury in favor of the plaintiff should not be disturbed, because they could have found that the insured did not have Bright's disease at the time the policy was issued, and

that if the disease developed afterwards, and from causes which did not exist at the time the policy was issued, none of the representations made by the insured in reference to his previous illness and in reference to the physicians whom he had consulted and by whom he had been treated could have materially affected the risk. We do not believe that this is the exclusive test of the materiality of a representation. When an application for insurance is made, the attitude of the company is that if, in the opinion of its officers, the applicant is a desirable risk, his application will be accepted and the policy issued upon payment of the premium required. It is purely a matter of voluntary contract. The company is not bound to issue the policy, and may refuse to do so without giving any reason for its action. The question, therefore, is, if the applicant had dealt "in the utmost good faith," and disclosed the nature and extent of his previous illness, and disclosed the names of the physicians by whom he had been treated, would he still have been a desirable risk, and would the company have accepted him as such? "In general, it may be said that the test, in determining whether questions contained in an application for insurance are material, is whether the knowledge or ignorance of the facts sought to be elicited thereby would materially influence the action of the insurer." Cooley, *Briefs on the Law of Insurance*, III, p. 1953.

If the applicant in the present case had truthfully answered the questions propounded to him, inquiry from the physicians by whom he had been treated, and a consideration of the symptoms which developed during the progress of the illness from which he had suffered, would have disclosed a condition which one of the physicians diagnosed as the beginning of Bright's disease. As explained by the company's agent in the testimony: "The reason for making inquiry of an applicant for insurance as to the sickness that he has previously had and the physicians who waited upon him is with a view of ascertaining if there has been any sickness that would materially affect the applicant's longevity and to make further inquiry about the sickness referred to in the application. That is with a view of getting the details, detailed information regarding any sickness that may look suspicious to them, from those doctors." The company's physician, Dr. Todd, testified that, if a man suffered with the disorders which the insured had during 1907 and 1908, he would be a very doubtful insurance risk; that "it would impair the risk very much, knowing of those things, especially with the neuralgia, as that is a symptom of Bright's disease, and headaches are also a symptom." And again he says: "Had I known those things, I would certainly have examined him a time or two. I would not have passed him on one exam-

ination, and I would certainly have made inquiry about it." And further: "If at the time I examined him first I had been told that he had neuralgic influenza, enlargement of the liver, congestion about the brain, I would not have reported him to the company until further examination; assuredly, I would not. I would have inquired about those things."

It is suggested that there is nothing to show that the insured acted in bad faith; that, so far as appears, he may have forgotten about the physicians he consulted and whose names he withheld from the company; that he may have honestly overlooked the fact that he was ill in 1907 for about eight weeks, during which time he was treated by two or three physicians for disorders which were symptoms of Bright's disease. It appears, from the evidence, that after this protracted illness in 1907 the accused brought suit against an indemnity company to recover for this very illness. The suit was filed October 22, 1907, the petition was verified by the affidavit of the insured, and in it he alleged that he was taken ill on April 13, 1907, and was continuously sick until May 14, 1907, and, after being up for 3 days, was again taken ill, and remained so until the 8th day of July, 1907; that during this period he was confined in the house, and wholly disabled and prevented from performing any and every duty pertaining to his occupation and business for the period of 12 weeks and 3 days. It is inconceivable that the insured could have been acting in good faith when he concealed the existence of this protracted illness from the company, after having brought suit in reference to it, and when he concealed the names of the physicians who treated him for it; and, while the question of bona fides in a case of this character is primarily one for the jury, the evidence in this record demands the finding that the insured had not acted in good faith, and that the representations made by him and the concealment of the fact that he had suffered from a long and protracted illness, and had been treated for other disorders which were symptomatic of Bright's disease, were material to the risk and avoided the policy. The evidence further disclosed that the company had no knowledge in reference to this misrepresentation until after the policy was issued, and that promptly upon discovery of fraud it offered to restore the premium and cancel the policy.

Under the facts appearing in this record, the evidence demanded a verdict in favor of the company, and the court should have granted a new trial upon this ground, without reference to the special assignments of error therein contained. See, in this connection, *Maddox v. Sou. Ins. Ass'n*, 6 Ga. App. 681, 65 S. E. 789; *Grand Lodge Knights of Pythias v. Barnard*, 9 Ga. App. 71, 70 S. E. 678; *Northwestern Life Ins. Co. v. Mont-*

gomery, 116 Ga. 799, 43 S. E. 79; *Johnson v. American Ins. Co.*, 134 Ga. 800, 68 S. E. 731. Judgment reversed.

(11 Ga. App. 588)

D. R. WILDER MFG. CO. v. CORN PRODUCTS REFINING CO. (No. 3,771.)

(Court of Appeals of Georgia. Oct. 2, 1912.)

(Syllabus by the Court.)

MONOPOLIES (§ 23*)—COMBINATIONS IN RESTRAINT OF TRADE—EFFECT ON VALIDITY OF CONTRACT.

Suit was brought upon a contract to recover the purchase price of goods sold and delivered. The defendant pleaded that the plaintiff was an unlawful combination and conspiracy, formed for the purpose of restraining interstate trade, in violation of the acts of Congress; that through a system of contracts with various purchasers it had secured a monopoly of the business; and that the defendant was forced to purchase the commodity from the plaintiff upon whatever terms could be made. The contract of sale was in writing, and provided that the seller would set aside, out of its profits from the manufacture and sale of the commodity for a certain period, an amount equal to 10 cents per hundred pounds on all purchases of the commodity which should be made by the plaintiff during a certain period. It was agreed that this rebate or discount should be paid to the defendant at the end of the year next succeeding the period above mentioned, on condition that for the remainder of the previous year and during the whole of the next year the defendant should have purchased the commodity exclusively from the plaintiff. It was averred, in the answer, that under the working of this system of contracts each purchaser was placed and kept in a situation whereby, if any competing firm entered into the business, the purchaser, by dealing with such competing firm, would sacrifice a large rebate on the last year's purchases of goods. It was further averred that the entire system of contracts was designed for the purpose of preventing competition, and did in fact prevent competition. It was further averred that the prices charged by the plaintiff were unreasonable; and that each order for goods bought by the defendant contained a clause reciting that the goods were for consumption by the defendant only, and not for resale. It was further averred that the original combination, the series of contracts referred to in the answer, the stipulation against resale and the individual sales, all constituted elements of a general plan or design which, in its entirety, constituted a combination or conspiracy intended and having the effect to restrain and monopolize interstate trade and commerce, in violation of the Sherman anti-trust act of July 2, 1890 (Act July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200]); and that the account upon which the suit was brought was made up, in the knowledge of both the defendant and the plaintiff, with direct reference to the agreement heretofore referred to. *Held*, that the facts set forth in the answer constituted no defense to the action, and that the answer was properly stricken, on motion in the nature of a general demurrer. The case of *Continental Wall Paper Co. v. Voight*, 212 U. S. 227, 29 Sup. Ct. 280, 53 L. Ed. 486, is distinguishable from the present case, which falls within the principle announced in *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540, 22 Sup. Ct. 431, 46 L. Ed. 679.

[Ed. Note.—For other cases, see *Monopolies*, Cent. Dig. § 16; Dec. Dig. § 23.*]

Russell, J., dissenting.

Error from City Court of Atlanta; H. M. Reid, Judge.

Action by the Corn Products Refining Company against the D. R. Wilder Manufacturing Company. Judgment for plaintiff, and defendant brings error. Affirmed.

The Corn Products Refining Company brought its action against the D. R. Wilder Manufacturing Company upon an open account for goods sold and delivered. The defendant filed an answer, admitting the purchase of the goods at the price stated in the account, but set up the following defense:

"The defendant further shows to the court that the plaintiff is an unlawful combination and conspiracy in restraint of interstate trade, being a corporation formed by the consolidation of the Glucose Refining Co., the American Glucose Co., the United States Sugar Refining Co., the Pope Glucose Co., the Illinois Sugar Refining Co., the National Starch Co., the United Starch Co., the Corn Products Co., the Warner Sugar Refining Co., the St. Louis Syrup & Preserving Co., the New York Glucose Co., and many other firms and corporations which, before the formation of the plaintiff company, were independent and competing manufacturing concerns, manufacturing and selling goods of the kind sued for in the plaintiff's complaint. Said combination was for the purpose of monopolizing and restraining interstate trade in the products handled by the plaintiff, and did result in a monopoly of interstate trade, and in greatly advancing the price at which said commodities were sold, and constituted a combination or conspiracy, in violation of the federal statute. Shortly after said combination was effectuated, and while the plaintiff controlled an absolute monopoly of the glucose and grape sugar industry, the plaintiff inaugurated a system of contracts with its purchasers, which it referred to as its 'profit-sharing plan.' Under said system of contracts, it agreed to give to its purchasers a rebate of some certain amount per hundred pounds upon all purchases of glucose or grape sugar during any years, provided and upon the condition that the said purchaser, during the following year, gave to the said Corn Products Refining Co. its exclusive patronage. All of said contracts were substantially similar, except that the amount of the rebate varied from year to year. The defendant attaches hereto, as Exhibit A, a copy of the contract relative to the rebate on its 1906 business, under which it was agreed to give the defendant a rebate of 10 cents per hundred pounds on all shipments of glucose purchased by it from the plaintiff during 1906, provided it gave to the plaintiff its exclusive trade during the year 1907. A substantially similar contract was entered into relative to trades in 1907, and relative to trades in 1908 and 1909, with this difference, relative to the two latter years, viz.,

that the rebate was advanced from 10 cents to 15 cents per hundred pounds. The defendant alleges that substantially similar contracts were given to practically all consumers of glucose and grape sugar in the United States. The defendant alleges that at the time said so-called 'profit-sharing plan' was originated, the plaintiff was the sole firm or corporation in the United States manufacturing and selling glucose and grape sugar, having absorbed all independent and competing concerns; and this defendant and the other manufacturing plants which consumed glucose or grape sugar in the United States were forced to purchase from the plaintiff upon whatever terms could be made, a part of which terms are embraced in this so-called 'profit-sharing plan.'

"Under the working of said system of contracts, each purchaser of glucose or grape sugar was placed and kept in a situation whereby, if any independent or competing firm or corporation entered into the business of manufacturing or selling glucose or grape sugar, such purchaser, by dealing with such independent or competing firm, would sacrifice a large rebate on the previous year's business by giving his trade to such independent or competing concern. The entire system of contracts herein outlined, and the contracts hereinafter referred to, were designed for the purpose of preventing competition from arising in the business which had previously been monopolized by the plaintiff company, and did, in fact, have such effect to a large extent. Defendant alleges that the plaintiff advanced the price of glucose and grape sugar to such exorbitant extent that a few independent concerns have been created, and are now attempting to compete with the plaintiff, and are offering lower prices than those asked by the plaintiff, but are having great difficulty in doing so, because of the fact that the plaintiff has heretofore obtained a hold upon so large a part of the consumers through the working of the system of contracts heretofore described as the so-called 'profit-sharing plan.' The plaintiff is claiming that any consumer who now trades with the said independent concerns forfeits to the plaintiff the rebate on the 1908 business, and is thereby coercing a large number of consumers into buying from the plaintiff at its advanced prices. The defendant alleges that the prices charged by the plaintiff, even after deducting the rebates, are in excess of the prices charged by the independent firms that are now attempting to compete with the plaintiff, and the prices heretofore charged for glucose and grape sugar prior to organization of the plaintiff company, but that the immediate sacrifice claimed by the plaintiff against any consumer who trades with independent concerns, as heretofore described, is so great, and so many consumers are uncertain that said independent concerns will continue to

do business, that the plaintiff is able to control and coerce a large part of the trade, and still controls a partial monopoly of the trade.

"The defendant shows that each purchase made by it, and by other purchasers, from the Corn Products Refining Co. contained the following clause in the contract of purchase: 'The goods herein sold are for your own consumption only, and not for resale.' The defendant shows that the sales for the purchase price of which suit is brought were made under the system of contracts herein outlined. The defendant shows that the original combination, the series of contracts known as the 'profit-sharing plan,' the provision heretofore referred to in the contracts of sale, and the individual sales, all constituted elements of one general plan or design, which, in its entirety, constitutes a combination or conspiracy intended and having the effect directly to restrain and monopolize interstate trade and commerce, in violation of the federal anti-trust act of July 2, 1890. The defendant alleges that the account on which suit is brought was made up, within the knowledge of both it and the plaintiff, with direct reference to and in execution of the agreement heretofore referred to; and that there cannot be a recovery upon said account. Defendant avers that under its contract with the plaintiff for 1908 the plaintiff agreed to allow the defendant a rebate of 15 cents per hundred pounds on all purchases of glucose and grape sugar during the year 1908, upon the conditions heretofore set out. The defendant avers that 15 cents per hundred pounds upon all of its purchases for 1908 amounts to the sum of seventeen hundred and ninety-seven dollars and one cent (\$1,797.01). The defendant alleges that the limitation or condition in said contract that it should trade only with the plaintiff is illegal, being in restraint of interstate trade, in violation of the federal anti-trust act, as heretofore alleged, and is therefore not binding upon this defendant; and that this defendant is entitled to said amount, notwithstanding its failure to comply with said condition. The defendant therefore prays that said amount be allowed as a counterclaim against the plaintiff; and that it may have judgment for said amount."

The contract between the parties, evidencing what is termed in the answer the "profit-sharing plan," was in the form of a letter, as follows (addressed to the defendant company and signed by the plaintiffs): "This company, recognizing the fact that its own prosperity, in a great measure, is interwoven with the good will and co-operation of its patrons, has decided to adopt a liberal plan of profit sharing with you, in case you shall in the future continue to give us your exclusive patronage. This company inaugurates such a policy of profit sharing by announcing that it will set aside, out of its

profits from the manufacture and sale of glucose and grape sugar for the last six months of 1906, an amount equal to ten cents per hundred pounds on all shipments of glucose and grape sugar (Warner's anhydrous and bread sugar excepted) which shall have been made to you by this company from July 1st to December 31, 1906. This amount will be paid to you or your successors on Dec. 31, 1907, on condition that for the remainder of the year 1906 and the entire year 1907 you or your successors shall have purchased exclusively from this company or its successors all the glucose and grape sugar required for use in your establishment. With the assurance of steadfast co-operation of its customers, given in reciprocation for the benefits conferred upon them, this company confidently anticipates a continuance of such profit-sharing distribution annually to the full extent that its earnings may warrant."

The plaintiff moved to strike the answer, and the motion was sustained. The opinion of the trial judge was thus expressed in his order: "This motion is sustained, and the defendant's plea is stricken. The defendant never having made any contract to buy exclusively from the plaintiff, this case does not, in my opinion, come within the decision in the case of *Continental Wall Paper Co. v. Voight*, 212 U. S. 227 [29 Sup. Ct. 280, 53 L. Ed. 486]." The plaintiff excepted.

Smith, Hastings & Ransom, of Atlanta, for plaintiff in error. J. W. Austin, of Atlanta, for defendant in error.

POTTLE, J. We do not find it necessary to discuss at any great length the question whether, conceding the facts alleged in the answer to be true, the plaintiff is an unlawful combination, within the meaning of the federal anti-trust act. The answer was clearly subject to special demurrer. The allegation that the plaintiff is an unlawful combination and conspiracy in restraint of interstate trade, and was formed for the purpose of monopolizing and restraining trade, is clearly a conclusion of the pleader; and no sufficient facts seem to be alleged to support this conclusion and bring the case within the recent decisions of the Supreme Court of the United States in *Standard Oil Co. v. United States*, 221 U. S. 1, 31 Sup. Ct. 502, 55 L. Ed. 619, 34 L. R. A. (N. S.) 834, and *United States v. American Tobacco Co.*, 221 U. S. 106, 31 Sup. Ct. 632, 55 L. Ed. 663. But, in view of the fact that there was no special demurrer to the answer, but only a general motion to strike made at the trial term, it may be that, under the practice prevailing in this state, the general averment that the plaintiff corporation was an unlawful combination and conspiracy in restraint of interstate trade, formed for the purpose of monopolizing such trade, and did, in fact, result in a monopoly of interstate

trade and in greatly advancing the price at which the commodities controlled by the plaintiff were sold, are sufficient to show that the plaintiff is an illegal combination, under the federal anti-trust act. However, as stated above, we make no express ruling on this question.

For the purposes of this case, we may concede that the plaintiff is such an illegal combination and conspiracy in restraint of interstate trade as that it would be subject to the penalties imposed by the Sherman anti-trust act. It by no means follows, however, that the defendant can avoid paying for the goods sold by the plaintiff and consumed by the defendant. In the case of *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540, 22 Sup. Ct. 431, 46 L. Ed. 679, it was expressly ruled by the Supreme Court of the United States that a violation of the Sherman anti-trust act by a combination in restraint of trade, by which a penalty is incurred under the statute, does not prevent the company from recovering under a contract for the purchase price of goods. Mr. Justice Harlan delivered the opinion of the court in that case, saying, among other things: "If the contract between the plaintiff corporation and the other named corporations, persons, and companies, or the combination thereby formed, was illegal under the act of Congress, then all those, whether persons, corporations, or associations, directly connected therewith became subject to the penalties prescribed by Congress. But the act does not declare illegal or void any sale made by such combination, or by its agents, of property it acquired, or which came into its possession for the purpose of being sold; such property not being at the time in the course of transportation from one state to another, or to a foreign country. The buyer could not refuse to comply with his contract of purchase, upon the ground that the seller was an illegal combination which might be restrained or suppressed in the mode prescribed by the act of Congress; for Congress did not declare that a combination illegally formed under the act of 1890 should not, in the conduct of its business, become the owner of property which it might sell to whomsoever wished to buy it. So that there is no necessary legal connection here between the sale of pipe to the defendants by the plaintiff corporation and the alleged arrangement made by it with other corporations, companies, and firms. The contracts under which the pipe in question was sold were, as already said, collateral to the arrangement for the combination referred to, and this is not an action to enforce the terms of such arrangement. That combination may have been illegal, and yet the sale to the defendants was valid."

The plaintiff in error relies upon the decision of the Supreme Court of the United States in *Continental Wall Paper Co. v. Voight*, 212 U. S. 227, 29 Sup. Ct. 280, 53 L. Ed. 486. In that case the Continental Wall

Paper Company brought suit upon an open account to recover the agreed price of goods sold to the defendant. The defense relied upon was that the plaintiff was an unlawful combination and conspiracy in restraint of interstate trade, in violation of the Sherman anti-trust act, and facts are set forth in great detail in support of this allegation. It appeared that the plaintiff was a combination of a number of smaller companies which had been engaged in the manufacture and sale of wall paper, and that these several companies entered into a written agreement with the Continental Wall Paper Company which the Supreme Court construed to constitute a conspiracy to restrain interstate trade and form a monopoly for the purpose of controlling the manufacture and sale of wall paper, in violation of the anti-trust act. It appeared that it was part of the agreement actually entered into between these various companies that all jobbers and other wholesalers of wall paper should be forced to sign an agreement binding themselves to purchase their entire stock of wall paper nominally either from the plaintiff, or from the corporations or firms which had combined to form the large corporation, at the prices fixed by the combination; and that the jobbers and wholesalers should sell only at prices fixed by the seller, under penalty, which the combination of all of the corporations and firms enabled them to enforce, that such jobbers or wholesalers, in case of a refusal to accede to the terms so imposed, or in case of a violation thereof, should be unable to buy wall paper, should be driven out of business, and should sacrifice the good will and capital therein invested. It further appeared that the defendant and every other purchaser of wall paper from the combination, or from any one of its constituent companies, was required to enter into a written agreement, the substantial terms of which were as follows: The company agreed to sell subject to such credit limitation as it might impose, and the jobber agreed to purchase the entire stock required in his business of selling wall paper, to the amount of a certain gross value, without discounts; the jobber reserving to himself the right to purchase such merchandise as he might need in excess of this amount from others. The jobber was allowed certain discounts at rates shown in a schedule accompanying the agreement and made a part thereof.

Attached to the agreement was a schedule of "road" prices at which the company agreed to sell its goods for the term embraced in the contract to dealers other than jobbers, and also a statement of discounts allowed to such customers, other than jobbers, for quantity purchases, together with the terms of credit and freight allowance to which such customers were entitled. The agreement further provided: "It is an essential condition of this agreement that the jobber will not, directly or indirectly, sell or offer for sale

any of the merchandise purchased from the company hereunder at lower prices or upon better or more favorable terms than those shown in schedule B, the intent hereof being to assure the company against the use by the jobbers of this agreement to undersell the company." The prompt performance by the jobber of all the terms of the agreement was made a condition precedent to the exaction of the continuous performance of the agreement by the company. With each order for goods the purchaser was required to sign an agreement "not to sell any of such goods to others on terms better or more favorable than those specified in the above schedule nor lower than said list prices, and our faithful performance of this agreement is a condition precedent to the filling of our order. The intent hereof is to protect you fully against being undersold by us among customers to whom you do allow quantity discounts."

The view of the Supreme Court in that case may best be gathered from the following excerpts from the opinion of the majority, written by Mr. Justice Harlan: "The present case is plainly distinguishable from the Connolly Case. In that case the defendant, who sought to avoid payment for the goods purchased by him under contract, had no connection with the general business or operations of the alleged illegal corporation that sold the goods. He had nothing whatever to do with the formation of that corporation, and could not participate in the profits of its business. His contract was to take certain goods at an agreed price, nothing more, and was not in itself illegal, nor part of, nor in execution of, any general plan or scheme that the law condemned. The contract of purchase was wholly collateral to and independent of the agreement under which the combination had been previously formed by others in Ohio. It was the case simply of a corporation that dealt with an entire stranger to its management and operations and sold goods that it owned to one who wished to buy them. In short, the defense in the Connolly Case was that the plaintiff corporation, although owning the pipe in question and having authority to sell and pass title to the property, was precluded by reason alone of its illegal character from having a judgment against the purchaser. We held that the defense could not be sustained, either upon the principles of the common law, or under the anti-trust act of Congress. The case now before us is an entirely different one. The Continental Wall Paper Company seeks, in legal effect, the aid of the court to enforce a contract for the sale and purchase of goods which, it is admitted by the demurrer, was in fact, and was intended by the parties to be, based upon agreements that were and are essential parts of an illegal scheme. We state the matter in this way, because the plaintiff, by its demurrer, admits, for the purposes of

this case, the truth of all the facts alleged in the third defense. It is admitted by the demurrer to that defense that the account sued on has been made up in execution of the agreements that constituted or out of which came the illegal combination formed for the purpose and with effect of both restraining and monopolizing trade and commerce among the several states. The present suit is not based upon an implied contract of the defendant company to pay a reasonable price for goods that it purchased, but upon agreements to which both the plaintiff and the defendant were parties, and pursuant to which the accounts sued on were made out, and which had for their object, and which it is admitted had directly the effect, to accomplish the illegal ends for which the Continental Wall Paper Company was organized. If judgment be given for the plaintiff, the result, beyond all question, will be to give the aid of the court in making effective the illegal agreements that constituted the forbidden combination. These considerations make it evident that the present case is different from the Connolly Case. In that case the court regarded the record as presenting the question whether a voluntary purchaser of goods at stipulated prices, under a collateral, independent contract, can escape an obligation to pay for them upon the ground merely that the seller, which owned the goods, was an illegal combination or trust. We held that he could not; and nothing more touching that question was decided, or intended to be decided, in the Connolly Case. The question here is whether the plaintiff company can have judgment upon an account which, it is admitted by demurrer, was made up, with the knowledge of both seller and buyer, with direct reference to and in execution of certain agreements under which an illegal combination, represented by the seller, was organized. Stated shortly, the present case is this: The plaintiff comes into court admitting that it is an illegal combination whose operations restrain and monopolize commerce and trade among the states, and asks a judgment that will give effect, as far as it goes, to agreements that constituted that combination, and by means of which the combination proposes to accomplish forbidden ends. We hold that such a judgment cannot be granted without departing from the statutory rule, long established in the jurisprudence of both this country and England, that a court will not lend its aid, in any way, to a party seeking to realize the fruits of an agreement that appears to be tainted with illegality, although the result of applying that rule may sometimes be to shield one who has got something for which, as between man and man, he ought, perhaps, to pay, but for which he is unwilling to pay."

The present Chief Justice and Justices Holmes, Brewer, and Peckham dissented, being of the opinion that the case fell within

the principle of the decision in *Connolly v. Union Sewer Pipe Co.*; Mr. Justice Brewer being also of the opinion that the defense was not well founded for the additional reason that, where a statute created a new offense and denounced the penalty, or gave a new right and declared the remedy, the punishment or the remedy could be only that which the statute prescribed. His view as to this point was thus tersely expressed: "Now, the remedies given in the anti-trust act are three in number: First, a criminal prosecution; second, a forfeiture of property; and, third, an action by any person injured to recover threefold the damages by him sustained. These, being the remedies prescribed, are exclusive. The defendant sought neither of these remedies. It was not so anxious for the public welfare as to make complaint and secure criminal proceedings. There was no property to be forfeited. It did not seek to recover threefold the damage it had sustained, but only to avoid paying for the property it had purchased."

This court yields ready assent to any decision of the Supreme Court of the United States involving the construction and effect of a federal statute. We will give to the decision of that court in the case last mentioned above full scope and effect; but at the same time we cannot bring our minds to agree to the opinion of the majority in that case. On the contrary, we believe that the opinion expressed by the dissenting justices is the sounder and better view of the law. The federal courts have exclusive power to decree illegal a combination formed in violation of the anti-trust act. The illegality of such a combination should be determined by a direct proceeding brought for that purpose in the federal court, in accordance with the procedure and practice in that court, where the corporation assailed has full opportunity to be heard. It ought not to be open to collateral attack in every minor state court where it may bring an action to enforce one of its contracts of sale. In view of the opinion of the Supreme Court of the United States in the *Standard Oil Company*, and *American Tobacco Company Cases*, it is very doubtful whether that court as now constituted will follow this decision. In the *Standard Oil Company Case* the court, in construing the Sherman act, expressed the following view: "The statute under this view evidenced the intent, not to restrain the right to make and enforce contracts, whether resulting from combinations or otherwise, which did not unduly restrain interstate or foreign commerce, but to protect that commerce from being restrained by methods, whether old or new, which would constitute an interference; that is, undue restraint. * * * Thus not specifying, but indubitably contemplating and requiring, a standard, it follows that it was intended that the standard of reason which

had been applied at the common law and in this country in dealing with subjects of the character embraced by the statute was intended to be the measure used for the purpose of determining whether, in a given case, a particular act had or had not brought about the wrong against which the statute provided."

Under this decision the question of the illegality of the combination under the anti-trust act becomes a mixed question of law and fact. It involves a consideration of the details of the business of the alleged unlawful combination, the purposes for which it was formed, the manner in which its business is conducted, and more frequently involves a consideration of complicated facts which ought not to be considered by a jury in a state court, impaneled only to try the question whether a purchaser of goods from a combination should pay for the goods which he has bought and consumed. Suppose, for instance, that the jury impaneled in the case now for decision should determine that the plaintiff is an illegal combination and conspiracy, and that the contract of sale sued on was illegal and void. Another jury, impaneled to pass upon exactly the same issue in a suit of exactly the same kind, might reach an exactly opposite conclusion. Thus the plaintiff would be in a helpless condition, with its very business life in the balance, and compelled to try the issue of its right to exist before every jury impaneled to try the question of its right to recover for goods which it had sold and delivered. We do not believe this to be the law, and we are of the opinion that every consideration of sound public policy and the settled principle of law compel a contrary conclusion. But let us see what the scope and effect of the decision in the case of *Continental Wall Paper Co. v. Voight* is, and then determine whether the decision reached by the majority of the court in that case compels us to hold that the facts set forth in the defendant's answer in the present case show that the contract sued on is illegal and incapable of enforcement.

In the *Continental Wall Paper Company Case* the defendants were virtually compelled to sign a jobber's agreement which, in effect, bound them to buy from the plaintiff all the wall paper needed in their business at certain fixed prices, and not to sell at lower prices, or upon better terms, than those upon which the plaintiff itself sold to dealers other than jobbers. It appeared that the prices thus agreed on were unreasonable; that the plaintiff had practically a monopoly of the manufacture and sale of wall paper; and that the account was made up, "within the knowledge of both buyer and seller, with direct reference to and in execution of the agreements which constituted the illegal combination." The court held, in effect, that the defendants in that case were particeps criminis; that by their contracts they became a

part of the illegal combination and conspiracy; that they entered into these contracts for the purpose of furthering the conspiracy; that they knowingly and intentionally became parties to an agreement executed in violation of the anti-trust law. There is no such situation in the case now in hand, and it is clearly distinguishable from that case. The contract between the plaintiff and the defendant in the present case contains but one feature which differentiates it from the ordinary contract of sale. This feature is called the "profit-sharing plan." It is simply nothing more nor less than an agreement on the part of the seller to divide its profit with the purchaser, provided the purchaser will give to the seller his exclusive trade. We do not see how there can be any legal objection to a contract of this nature. Certainly it is not illegal to allow the purchaser a rebate upon the purchase price on condition that he give the seller his exclusive business. See *In re Corning* (D. C.) 51 Fed. 205; *In re Greene* (C. C.) 52 Fed. 105 (7). We see no objection from a legal standpoint to a manufacturer of goods offering an inducement of this sort, in order to build up his business and secure the exclusive trade of a purchaser. The purchaser is not compelled to buy, and, if he buys, he does so either because he obtains better terms, or because he cannot get the character of goods he desires elsewhere. If he violates his agreement and fails to obtain a rebate or discount, he simply pays for the goods what everybody else does who enters into a similar arrangement. While the great object of the Sherman act was undoubtedly to encourage competition, it never was designed to prevent the execution of legitimate contracts made to increase the business of a manufacturer. Indeed, it is very clear, from the latest expressions of opinion by the Supreme Court of the United States, that, even though a manufacturer should, by the application of legitimate business methods, secure practically the exclusive sale of a commodity, this alone would not make it obnoxious to the anti-trust act. Certain it is therefore, that this contract, made with this defendant, standing alone, is not illegal under any principle of law to which we have been referred.

Nor do we think there is anything in the answer which makes the contract illegal. It is alleged that at the time this system of profit-sharing contracts was inaugurated the plaintiff was the sole corporation in the United States manufacturing glucose and grape sugar, having absorbed all independent and competing concerns. As we have seen, this allegation does not make the contract illegal. It is further averred that the defendants were forced to purchase from the plaintiff glucose or grape sugar upon whatever terms could be made. This allegation does not help the defendant's case. As we have said above, the mere fact that the plaintiff was the exclusive manufacturer of

this commodity, and that the defendants were for this reason forced to purchase from the plaintiff, would not render the contract illegal. The main contention of the defendant seems to be that it was compelled to purchase from the plaintiff for each succeeding year, under penalty of losing the discount allowed under the contract of purchases of the previous year; and that under this system the plaintiff was enabled to maintain a monopoly of the business. We do not understand how this kind of contractual compulsion is obnoxious to the anti-trust act. At the expiration of any contract, the defendants were free not to enter into another; they were free not to make further purchases from the plaintiff; and the fact that their refusal to make further purchases simply entailed a loss of the discount, offered upon condition that they would make further purchases, does not render the contract illegal. It is alleged generally in the answer that these contracts were designed for the purpose of preventing competition, and did in fact have such an effect. Suppose they did. If their terms were legitimate—and there is nothing in the contracts which would make them illegal—the fact that they may have resulted in building up the plaintiff's business to such an extent as to enable it to practically control the sale of a commodity would not render the contracts unenforceable. Indeed, the answer of the defendant in this very case shows that competition has arisen, and that the defendant can purchase the commodity from other concerns; but the defendant alleges it cannot do so, because it would forfeit the discount for the period of one year allowed by the plaintiff. The defendant is at perfect liberty to purchase from these other concerns; and the presumption is that if it does not do so it is because it can secure more favorable terms from the plaintiff. The contracts of the plaintiff in this case may have the effect of lessening or even destroying competition; but, if the methods employed to bring this about are legitimate and not obnoxious to the law, the contracts are not subject to be set aside.

It is further alleged in the answer that each order for goods bought by the defendant contained a clause reciting that the goods are sold "for your own consumption only, and not for resale." A covenant by the buyer of property not to use the same in competition with the business retained by the seller has been held to be valid. *United States v. Addyston Pipe & Steel Co.*, 85 Fed. 271, 29 O. C. A. 141, 46 L. Ed. 122, citing *Hitchcock v. Anthony*, 83 Fed. 799, 28 C. C. A. 80, and *American Strawboard Co. v. Haldeman Paper Co.*, 83 Fed. 619, 27 C. C. A. 634. If not valid, it is incapable of enforcement, and does not restrain the purchaser from reselling the goods at his pleasure. Moreover, there is another very clear distinction between this case and the *Con-*

mental Paper Company Case. In that case written agreements between the combining corporations and firms were executed, and showed as clear a case of conspiracy to restrain interstate trade as it would be possible to conceive. And the Supreme Court of the United States held that the contract of sale in that case was made with direct reference to and in execution of the agreements which constituted the illegal combination. No such agreements are alleged in the present case. It is simply averred that the plaintiff was made up by a combination of a number of manufacturers which were independent competing concerns, and was formed for the purpose of monopolizing and restraining interstate trade. The answer does not set forth any conspiracy agreement; nor does it appear that there was in fact any conspiracy among these constituent companies to restrain interstate trade. But, even if such illegal agreements had been entered into by the companies which combined to form the plaintiff corporation, the defendant was no party to such an arrangement; it took part in no conspiracy to restrain interstate trade; and there is nothing in the contract of sale executed by it which shows that it was made for the purpose, and as a part of, an unlawful conspiracy to restrain interstate trade or commerce. We are quite clear that the trial judge committed no error in striking the defendant's answer in the present case, upon the ground that it set forth no defense to the action. The answer having admitted the purchase of the goods at the price stated in the contract, it was properly stricken and judgment entered in behalf of the plaintiff for the full amount sued for.

Judgment affirmed.

RUSSELL, J. (dissenting). I think the case is fully controlled by the ruling of the Supreme Court of the United States in the case of *Continental Wall Paper Co. v. Voight*, supra, and that the court erred in striking the defendant's answer.

(11 Ga. App. 603)

SOUTHERN RY. CO. v. DAUGHDRILL
(No. 3,772.)

(Court of Appeals of Georgia. Oct. 2, 1912.)

(Syllabus by the Court.)

1. CARRIERS (§ 264*)—TRANSPORTATION OF PASSENGERS—BREACH OF CONTRACT.

A common carrier, who undertakes and agrees to convey a passenger by a definite route and under certain conditions, must comply with its contract or be liable for any damages consequent upon its breach. If, after full explanation of the peculiar circumstances and with full knowledge of the reasons why the proposed purchaser of the ticket desires the information, the ticket agent of a common carrier contracts with a passenger to convey him by a particular route, or under certain specified conditions as to connections, the contract must be performed, notwithstanding the performance of the contract may require the car-

rier to change, for a time, a rule usually followed in the operation of its trains, provided the change is not in violation of law or of any rule of the Railroad Commission, or upon breach of the contract the passenger may recover any damages he may have sustained by reason of the breach.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1037-1039; Dec. Dig. § 264.*]

2. CARRIERS (§ 277*)—TRANSPORTATION OF PASSENGERS—BREACH OF CONTRACT—DAMAGES.

The evidence authorized a recovery for pain and suffering, and the instructions of the court upon that point are not subject to exception or criticism.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1082-1084; Dec. Dig. § 277.*]

3. APPEAL AND ERROR (§ 1004*)—TRANSPORTATION OF PASSENGERS—BREACH OF CONTRACT—QUESTION FOR JURY.

The evidence authorized a finding in favor of the plaintiff, and, after the verdict was voluntarily reduced by her, there was no error in refusing a new trial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3944-3947; Dec. Dig. § 1004.*]

(Additional Syllabus by Editorial Staff.)

4. CARRIERS (§ 254*)—TICKETS—"CONTINUOUS PASSAGE."

Where an agent of a carrier assured the purchaser of a ticket that his wife could take a certain designated train and be conveyed to her home without inconvenience, other than in merely changing cars with a wait of only a few minutes, the words on the ticket, "continuous passage," do not import an agreement that the passenger shall be carried without any stop or change of cars, but indicate that the agent might have had the authority to issue a ticket for such a passage as he assured the purchaser could be had.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1020-1026; Dec. Dig. § 254.*]

For other definitions, see Words and Phrases, vol. 2, p. 1512.]

5. NEGLIGENCE (§ 56*)—"PROXIMATE CAUSE."

When an injury can be traced directly to a tortious act, and but for this tortious act it could not reasonably be supposed that the injury would have resulted, this essentially antecedent act may be said to be the "proximate cause" of the injury.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 69, 70; Dec. Dig. § 56.*]

For other definitions, see Words and Phrases, vol. 6, pp. 5758, 5769; vol. 8, p. 7771.]

Error from City Court of Atlanta; H. M. Reid, Judge.

Action by L. M. Daughdrill against the Southern Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

McDaniel & Black, of Atlanta, for plaintiff in error. Hewlett & Dennis, of Atlanta, and I. F. Mundy, of Rockmart, for defendant in error.

RUSSELL, J. The defendant in error brought a suit against the Southern Railway Company, alleging that on April 28, 1910, she purchased from the carrier a continuous trip ticket from Gainesville to Rockmart, Georgia; that when she reached At-

lanta and prepared to change cars, the agent of the plaintiff in error refused to allow her to take its train, which left Atlanta at 5:10 p. m., and insisted that she could not take that train, because it did not stop at Rockmart. The petition alleged that before the ticket was purchased the plaintiff's husband informed the company's agent at Gainesville that his wife was not at all well, and that if she had to wait in Atlanta he would accompany her. After the agent of the railroad company in Atlanta told her that she could not take the train, she became very much excited and humiliated. She was in a strange city, without friends, acquaintances, or money to pay hotel bills or other expenses. The agent informed her that perhaps she could catch the Seaboard Air Line train, which left the Union Station in five minutes' time. She caught a cab, and went to the Union Station, and caught this train; but when she had gotten upon the Seaboard Air Line train she virtually collapsed from the excitement and shock to her nerves. She went to bed immediately upon her arrival at Rockmart, and was confined to her bed for a week, and continued to suffer for almost a year, from the effect of her excitement and nervousness.

The plaintiff proved her case substantially as laid. The evidence of her husband was that he and his wife were in Gainesville, and she intended to go to Rockmart. She was in very bad health, very nervous, and easily excited. He went to the agent of the Southern Railway Company at Gainesville and inquired what connections could be made going from Gainesville to Rockmart. He explained fully to the agent why he wanted to know, and that, if his wife was subject to a "lay-over" in Atlanta, he would come as far as Atlanta with her, if she were to be delayed for any length of time. The agent told him that his wife could take the evening train (she had first intended to go on the morning train), and go right on through to Rockmart; that she would have only a few minutes to wait in Atlanta, and would be transferred in the same car shed. He thereupon told the agent that his wife would wait until the evening train and that he would not go with her. The witness testified that he told the agent that his wife was not well, and that if she had to lay over in Atlanta, or if she had to make any transfer across town, or anything of that kind, he would come with her; and after the agent's assurance that his wife would only have to wait a few minutes and be transferred in the same car shed, he communicated these facts to his wife. The plaintiff testified that her husband told her she would make a continuous trip; that she would only have to wait a few minutes in Atlanta; that upon her arrival in Atlanta she went to the information window and asked what time she could get a train out to Rockmart. The agent told her there would be a train passing along in a few minutes, but that this train did not

stop at Rockmart, and that she could not get on it. She told him she was sick and wanted to get to Rockmart, and he informed her that she would then have to go to the Seaboard Air Line Railway and go down on its train, and that she only had five minutes to catch the train, but possibly it might be late. He asked to see her ticket, and, after looking at it, said "this is a continuous ticket, but you cannot go there until about 12 o'clock to-night." The plaintiff testified that the agent's statement frightened her and made her very nervous, because she had no money. She was sick, and knew she had no money to pay hotel fare or have a doctor, and thought she was going to be obliged to stay there; that she had no funds at all, and knew no one at all in the city of Atlanta. She further testified that she had traveled but little by herself; that she usually traveled with her husband. Upon the agent's statement that, while she had only five minutes to catch the Seaboard Air Line train, perhaps she could get a hack and catch the train, because it might be late, she got a hack and went over to the other depot. She was not really able to be up, but she had to be up, because she knew she had to go somewhere. She testified that as a result of the excitement she was prostrated when she boarded the Seaboard Air Line train; that she went home and went to bed, and was in bed the rest of the week. She suffered from a cessation of her menstruation, and was weak and nervous for a long time. There was testimony to the effect that the plaintiff's usual weight was from 140 to 148 pounds, and that, as a result of the nervous prostration to which she testified, she lost 20 pounds in weight. Another witness testified that she was in a very nervous condition when she came from the train to her house in Rockmart, and that she was greatly nauseated. The attending physician testified that, when he called to see her, she was very restless and nervous; that she was affected with excessive menstruation, and apparently suffering pain; and he testified as an expert that the excitement caused by the circumstances related by the plaintiff would naturally be injurious to a woman suffering from the sickness by which she was affected.

The verdict was for \$1,000, but the plaintiff voluntarily wrote off a half of the recovery. The defendant excepted to the refusal of a new trial. The motion for new trial contained the general grounds, and the ground that the verdict was excessive, and excepted to the charge of the court to the jury upon the subject of pain and suffering, alleging that there was no evidence warranting the instruction.

[1] 1. Undoubtedly the plaintiff had a right of action, whether she was entitled to recover for pain and suffering as an element of her damages or not, and whether the amount awarded her by the jury is excessive or not. The case at bar is not unlike

that of Atlantic Coast Line R. Co. v. Stephens, 75 S. E. 841, and is practically identical in principle with the case of Southern Ry. Co. v. Flanagan, 10 Ga. App. 745, 74 S. E. 85. The only question presented on this feature of the case is whether or not a carrier is to be held to its contracts as natural persons are held to be bound by theirs—whether, if a railroad company agrees to carry a passenger by a certain route, or within a definite time, or under definite conditions as to connections, it is not bound to comply with this contract, and is not liable for any damages which may result from its breach. It will not do to say that the company is not liable for the acts or statements of its agent in selling a ticket (if the person who sells the ticket is the duly authorized ticket agent), for a corporation can only act through its agents. They are its head and arms and legs.

At the time of the purchase of the ticket involved in this case the plaintiff was a woman in bad health, suffering from extreme nervousness, caused by very irregular menstruation. She wished to go to Rockmart, to be at home and to receive medical treatment. According to some of the testimony, her nervous condition was such that it would not be prudent or proper for her to be subject to a nervous strain, or to attempt any unusual inconvenience without the assistance of an escort. Her case was not an unusual one, when considered in relation to the large class of unfortunately diseased females. Her husband, as was natural and proper, would have gone with her if he had known that she would have to meet the ordinary luck of travelers; but he was informed by the defendant's agent, who sold him the ticket, that his wife could take a certain designated train and be conveyed to her home without inconvenience other than in merely changing cars in the same car shed, and that she would have to lie over only a few moments. Upon this assurance and understanding he bought the ticket, which provided for a continuous passage and expired at midnight of the day of its purchase.

[4] We do not attach any importance to the words "good for a continuous passage" on the ticket, further than in so far as it shows that the parol agreement was not in conflict with the written contract. Of course, the words "continuous passage," when used on a railroad ticket, do not import an agreement that the passenger shall be carried without any stop. It does not imply that there may not be a lay-over or a necessary change of cars; but the use of that language indicates to the purchaser that the agent might have had the authority to issue a ticket in this particular instance for such a passage as he assured the purchaser could be had. In other words, there was nothing in the ticket to put the purchaser on notice that his wife could not

make the trip, just as the agent assured him she could make it. On the assurance of the agent the ticket was bought. It makes no difference that the agent (as it turns out) did not have authority to give the assurance. Presumably he did have the authority, and if he did not have it, and any injury resulted from his misrepresentation, it must be that his principal, and not the purchaser of the ticket, shall be the sufferer as a consequence.

A common carrier, who undertakes and agrees to convey a passenger by a definite route and under certain conditions, must comply with the contract, or be liable for any damage consequent upon its breach. If after full explanation of the peculiar circumstances, and with full knowledge of the reasons why the proposed purchaser of the ticket desires the information, the ticket agent of a common carrier contracts with a passenger to convey him by a particular route, or under specified conditions as to connections, the contract must be performed, notwithstanding the performance of the contract may require the carrier to change, for a time, a rule usually followed in the operation of its trains, provided the change is not in violation of the law or of any rule of the Railroad Commission, and on breach of the contract the passenger may recover for any damage he may have sustained by reason of the breach. There can, therefore, be no doubt that the plaintiff was entitled to recover upon the breach of the contract, if the agent had the authority to make the contract set up by the plaintiff, or upon the breach of public duty in not giving correct information as to the connections of its trains, if the agent did not have authority to make the contract.

[2] 2. But it is insisted that the evidence did not authorize a recovery for pain and suffering, and that the court erred in charging the jury at all upon that point. We think the evidence upon this point required that the jury be instructed with reference to the rights of one who has suffered physical pain as a result of an injury. The testimony of the plaintiff may seem to be somewhat exaggerated, and yet we cannot say that it is. We certainly cannot say that it is unreasonable. She testified that, as a result of the nervousness, she suffered a long illness and a year's weakness. The plaintiff in error insists that, this sickness being caused by the nervousness, and the nervousness being caused by the breach of public duty, and the sickness, if caused by the occurrences in Atlanta, not being directly consequent upon the alleged tort, the injury to the plaintiff is too remote to be the basis of a recovery. We may concede that the plaintiff would not have been sick, except for the nervousness, and that she was made nervous by the discovery that she was obliged to lay over in Atlanta without any acquaintances, friends, or money, and that she al-

lowed herself to become excessively excited, and went rapidly in a hack to catch the train of another railroad company, when she could have remained in the depot of the plaintiff in error and reached her home on the mid-night train. We may concede all that, and still the prime cause of the injury was the act of the company in selling the plaintiff a ticket different from that which she desired and different from what it was represented to be.

[5] Although the act of the plaintiff herself intervened between the defendant's wrong and the injury suffered, and concurred in producing the damage for which she seeks to recover, the company would not be relieved, if the intervening act was the natural result, or was induced by, the previous tortious act of the defendant. See *Rollestone v. Cassirer*, 3 Ga. App. 161, 59 S. E. 442, in which we held that "the rule is the same where, though the plaintiff's act may not in strictness have been caused or induced by the defendant's act or omission, yet the latter caused or created a negligent and dangerous condition, upon which the plaintiff's act, harmless and innocent in itself, and of a nature which might have been anticipated, operated to produce the injuries received." In *Godwin v. Atlantic Coast Line Railroad Company*, 120 Ga. 747, 48 S. E. 139, it is said by Mr. Justice Lamar, delivering the opinion of the court: "In discussing legal causation, the phrase 'proximate cause' does not necessarily mean that which is nearest, but refers rather to the efficient cause, and in this sense is sometimes referred to as the 'immediate and direct cause' as opposed to 'remote.'" In *Southern Rail-*

way Company v. Tankersley, 3 Ga. App. 548, 60 S. E. 297, we held that "by proximate cause is not meant the last act or cause, or the nearest act to the injury, but such act wanting in ordinary care as actively aided in producing the injury as a direct and existing cause."

We think that when an injury can be traced directly to the tortious act (though there be several paths in the track which lead back to this act), and but for this tortious act it could not reasonably be supposed that the injury would have resulted, this essentially antecedent act may be said to be the proximate cause of the injury. This court will not extend the ruling in the case of *Chapman v. Western Union Telegraph Company*, 88 Ga. 763, 15 S. E. 901, 17 L. R. A. 430, 30 Am. St. Rep. 183, and in similar cases, beyond their particular facts, and it is not necessary to discuss the matter of a recovery for mental suffering, because it plainly appears in this case that the plaintiff, perhaps as a result of mental suffering, did actually suffer physical pain for which she was entitled to recover. The judge was right in charging upon this subject, and his instructions are so clear and pertinent as to be free from criticism.

[3] 3. This court has no power to declare excessive a recovery for pain and suffering. The Code leaves the amount of damages recoverable for pain and suffering to the single tribunal of the enlightened conscience of the impartial jury, and as the trial judge was satisfied with the amount of the verdict as reduced by the plaintiff herself, there was no error in refusing a new trial.

Judgment affirmed.

(160 N. C. 104)

CATON v. TOLER.

(Supreme Court of North Carolina. Oct. 3, 1912.)

1. EVIDENCE (§ 471*)—OPINIONS.

The statement, in an action for fire which broke out on plaintiff's land after some low lightwood stumps in defendant's clearing had been burning and smoldering for 24 hours, of witnesses having personal knowledge of the facts and attendant circumstances, and shown to be qualified by observation and experience, that "smoldering lightwood stumps were not dangerous about sparks, and not likely to carry them any distance," is admissible as a statement of fact relevant to the issue.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2149-2185; Dec. Dig. § 471.*]

2. APPEAL AND ERROR (§§ 206, 237*)—REVIEW—OBJECTION—UNRESPONSIVE ANSWER.

Complaint may not be made of the part of the testimony going beyond the import of the question; there having been no objection to the answer and no motion to strike out the testimony.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1283-1289, 1386-1388; Dec. Dig. §§ 206, 237.*]

3. APPEAL AND ERROR (§ 1050*)—HARMLESS ERROR—EVIDENCE.

The effect of the statement of witness, that in his opinion such stumps were not likely to carry fire 44 yards, the distance of the nearest of such stumps on defendant's land from the origin of the fire on plaintiff's land, was nullified by his immediately saying he had seen sparks go that far.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4153-4160, 4166; Dec. Dig. § 1050.*]

4. NEGLIGENCE (§ 21*)—FIRES—ESCAPE TO PROPERTY OF ANOTHER.

Where defendant set fire on land he was clearing, and not to his "woods," to which latter case only Revisal 1905, § 3346, applies, he is not under absolute obligation to prevent escape of the fire, but is held only to the ordinary care of a reasonable and prudent man under conditions as they existed.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 28-30; Dec. Dig. § 21.*]

Appeal from Superior Court, Craven County; Whedbee, Judge.

Action by L. B. Caton against Daniel Toler for damages for alleged burning of plaintiff's land and timber by negligence of defendant. From a judgment on a verdict for defendant, plaintiff appeals. Affirmed.

D. L. Ward and D. E. Henderson, both of New Bern, for appellant. H. O. Whitehurst and R. E. Whitehurst, both of New Bern, for appellee.

HOKE, J. There was evidence tending to show that defendant had been engaged in clearing a new ground, burning it off and preparing the same for cultivation, and the fire complained of broke out on plaintiff's land after some low lightwood stumps in the clearing had been burning and smoldering for 24 hours, and same originated on plaintiff's land as far as 44 yards from the nearest of these stumps.

[1] Objection was made that several wit-

nesses were allowed to express the opinion that lightwood stumps, under conditions indicated, were not dangerous about sparks, and not likely to throw them any distance. The witnesses had personal knowledge of the facts and attendant circumstances involved in the statement, and were shown to be qualified by observation and experience to give an opinion that would aid the jury to a correct conclusion; and we think the ruling of his honor admitting the testimony is sustained by several decisions of the court, as in *Murdock v. C. & O. R. R. Co.*, 159 N. C. —, 74 S. E. 887; *Lumber Co. v. Railroad*, 151 N. C. 217, 65 S. E. 920; *Wilkinson v. Dunbar*, 149 N. C. 20, 28, 62 S. E. 748; *Tire Setter Co. v. Whitehurst*, 148 N. C. 446, 62 S. E. 523; *McKelvey on Evidence*, pp. 230, 231; 1 Elliott, § 675. McKelvey refers to this kind of testimony as follows: "Expert testimony as to facts is nothing more than ordinary testimony as to facts, given by witnesses specially qualified by observation and experience to give it." And again on page 231: "There are two classes of witnesses who are ordinarily spoken of as experts. The one embraces those persons who, by reason of special opportunities for observation, are in a position to judge of the nature and effect of certain matters better than persons who have not had opportunity for like observations. For example, one who has had opportunity to observe the running of railroad trains may testify as to the speed of an ordinary train. Such witnesses are really not experts in the strict sense of the term; they are only specially qualified witnesses." And further (page 232): "Expert testimony as to facts really is no exception to the rule which excludes opinion evidence." And in this instance presented, while expressed in the form of opinion, the statement of these witnesses "that smoldering lightwood stumps were not dangerous about sparks, and not likely to carry them any distance," is the statement of a fact relevant to the inquiry.

[2, 3] The only part of the testimony here which has caused us any perplexity is that of the witness J. E. Whitford, who, going beyond the import of the general question, gave it as his opinion that such stumps were not likely to carry fire the 44 yards, the distance from the nearest stump to the origin of the fire on plaintiff's land. If this were objectionable, however, and this we do not decide, it should not be held for reversible error (1) because, as stated, going beyond the import of the question, there was no objection to the answer and no motion to strike out the testimony; (2) because the witness immediately nullified the effect of his statement by saying that he had seen sparks go that far. In *Lumber Co. v. Railroad*, supra, the evidence was not received; but the case recognized the general principle adverted to,

and the evidence was excluded because the witnesses were not cognizant of all the facts involved in the proposed statement. And in Deppes Case, 154 N. C. 523, 70 S. E. 622, the answer sought was a deduction of the witnesses from facts in evidence and involving clearly an opinion of the witness on the very question the jury were called on to decide.

[4] It was further objected that, in preventing the escape of fire from his new ground, his honor only held defendant to the ordinary care of a reasonable and prudent person under the circumstances as they existed; plaintiff contending that in this respect defendant was under the absolute obligation to see that the fires were extinguished. It may be well to note that on the facts in evidence the action cannot be sustained under section 3346 of the Revisal, giving a right of action when an owner sets out fire in his woods without giving written notice to adjoining proprietors. See *Averitt v. Murrill*, 49 N. C. 322. This being true, we think the position insisted upon by plaintiff is entirely too exigent for the ordinary transactions of everyday life, and that the correct standard of duty is that adopted by the wise and learned judge who presided at the trial—the standard of a “reasonable and prudent man under conditions as they existed.”

There is no error, and the judgment on the verdict is affirmed.

No error.

(159 N. C. 650)

POISSON et al. v. PETTEWAY et al.

(Supreme Court of North Carolina. Oct. 3, 1912.)

DESCENT AND DISTRIBUTION (§ 14*)—NATURE AND COURSE IN GENERAL—SOURCE OF TITLE.

The fourth canon of descents provides that on failure of lineal descendants, where the inheritance has been transmitted by descent from an ancestor, or by devise from an ancestor to whom the devisee would have been one of the heirs, the inheritance shall descend to the next collateral relations of the person last seised of the blood of the ancestor. *Held* that, where a father devised land to his daughter, who devised it to her brother, it would descend on the death of the brother only to his collateral relations of the blood of the father, since it is settled that, when an estate goes through a series of descents to a person who dies without issue, it results back to those of his collateral relations who would be heirs of the ancestor from whom it originally descended, and the statute of this state puts devisees between such parties on the same footing with descents.

[Ed. Note.—For other cases, see *Descent and Distribution*, Cent. Dig. §§ 45-99; Dec. Dig. § 14.*]

Appeal from Superior Court, New Hanover County; Carter, Judge.

Action to try title to land by Fred C. Poisson and others against Elizabeth M. Pette-way and others. From a judgment for plaintiffs, defendants appeal. Affirmed.

H. McClammy and E. K. Bryan, both of Wilmington, for appellants. B. G. Emple and Louis J. Poisson, both of Wilmington, for appellees.

BROWN, J. Jehu Poisson purchased the lot in controversy, and died in 1873, devising it in fee to his daughter Sarah, who died in 1906, devising it in fee to her brother and only heir at law, James Dickson Poisson. He died in 1910 intestate, seised of the property, never having married, leaving no brother or sister, or issue of such. The plaintiffs are the nearest collateral relatives of James D. and Sarah Poisson, of the blood of their father, Jehu Poisson. The defendants are equally related to James Dickson and Sarah through their mother, the wife of Jehu Poisson, but are not of the blood of the latter.

The fourth canon of descents reads as follows: “On failure of lineal descendants, and where the inheritance has been transmitted by descent from an ancestor, or has been derived by gift, devise or settlement from an ancestor, to whom the person thus advanced would in the event of such ancestor's death have been the heir or one of the heirs, the inheritance shall descend to the next collateral relations, capable of inheriting, of the person last seised, who were of the blood of such ancestor, subject to the two preceding rules.” At common law a devisee, who takes the same quality and nature of estate under the will as he would have taken by descent had the testator died intestate, takes by descent, owing to the preference of the common law for the title of descent. Our statute puts a similar devise between such parties on the same footing with the descent.

The only question presented for our consideration is as to whether the heirs at law of James Dickson Poisson must be of the blood of Jehu Poisson, or whether only of the blood of Sarah. The counsel for the defendant contends that the clause in the canon of descents looks only to the proximate and immediate descent; the counsel for the plaintiff, that it looks to the origin of the title in the first purchaser, and requires that the party claiming as heir should be of the blood of the first purchaser, through whatever intermediate devolutions by descent, gift, or devise it may have passed, and however remote may be the first ancestor.

Ever since 1842 we think that it has been settled substantially that when an estate goes to a person through a series of descents or settlements, and that person dies without issue, it results back to those of his collateral relations who would be heirs of the ancestor from whom it originally descended, or by whom it was originally settled. *Wilkinson v. Bracken*, 24 N. C. 315. The question is very fully discussed in that case by Chief Justice Ruffin, who says: “Although our attention has not been particularly directed to

this point in any previous case, yet it has not been entirely unperceived. The general impression made, at least to my mind, from reading the act, without any special reference to this question, cannot fail to be seen in the opinion delivered in *Burgwyn v. Devereux*, 23 N. C. 583. I take it for granted that an inheritance which has descended, no matter when, and I might have added no matter from whom, or from how many, shall descend to the blood of the ancestor from whom it did descend, which, of course, includes the ancestor from whom it first descended."

This seems to have been the impression made on Judge Henderson's mind, as plainly expressed, if not fully decided, in *Bell v. Dozier*, 12 N. C. 333. In a note to the case of *Wilkerson v. Bracken*, supra, is given the report of Judge Gaston from the committee of the House of Commons, December 8, 1808, reporting the fourth canon of descent as above quoted. In it Judge Gaston says: "The fourth rule has for its principal object the securing to the family of the man, by whose industry the property was acquired, the enjoyment of such property in preference to those who have no consanguinity with him."

It is true that this identical question was passed upon by the Supreme Court of the United States in *Gardner v. Collins*, 2 Pet. 58, 7 L. Ed. 347, construing a statute of Rhode Island similar to ours. In that case a very elaborate and interesting opinion was delivered by Mr. Justice Story, and a conclusion reached that the words of the canon meant an immediate descent, gift, or devise, and make the immediate ancestor, donor, or devisor, sole stock of descent. A different rule, as we have shown, has prevailed, and now prevails, in this state.

The judgment of the Superior Court is affirmed.

(160 N. C. 369)

AMAN v. ROWLAND LUMBER CO.
(Supreme Court of North Carolina. Oct. 3, 1912.)

1. TRIAL (§ 165*)—MOTION FOR NONSUIT—EVIDENCE.

The court, on defendant's motion for nonsuit, must consider the evidence in its most favorable light for plaintiff, and take, as established, every fact which it proves or tends to prove.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 373, 374; Dec. Dig. § 165.*]

2. NEGLIGENCE (§ 21*)—FIRES—LIABILITY.

Where the operator of a steam logging skidder for the removal of saw logs from his woods allowed dry and combustible material to accumulate on his land in such close proximity to the engine as to expose adjacent property to unnecessary peril, and a fire was caused by sparks from the engine, a prima facie case of negligence was established, authorizing a recovery for the destruction of adjacent property.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 28-30; Dec. Dig. § 21.*]

3. NEGLIGENCE (§ 21*)—FIRES—LIABILITY.

Where fire escaped from an engine used in operating a logging skidder for the removal of saw logs, but the engine was in proper condition, equipped with a proper spark arrester and was operated in a careful manner, and the fire first started on adjacent property, the owner of the engine was not liable for the destruction of the adjacent property, because there was no negligence.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 28-30; Dec. Dig. § 21.*]

4. NEGLIGENCE (§ 21*)—FIRES—LIABILITY.

Where fire escapes from an engine in proper condition, operated in a careful way, and catches on the right of way maintained by the owner in a negligent condition, and spread to adjacent premises, the owner is liable for the destruction by fire of the adjacent premises.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 28-30; Dec. Dig. § 21.*]

5. NEGLIGENCE (§ 21*)—FIRES—LIABILITY.

Where fire escapes from a defective engine or from a proper engine not operated in a careful manner, the owner of the engine is liable for the destruction by fire of adjacent property, whether the fire first started on the right of way or on the adjacent property.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 28-30; Dec. Dig. § 21.*]

6. TRIAL (§ 295*)—INSTRUCTIONS—REQUISITES—CONSTRUCTION.

The court in determining the correctness of the instructions must view them as a whole, and, when the instructions so viewed correctly state the law, they are sufficient.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 703-717; Dec. Dig. § 295.*]

7. RAILROADS (§ 481*)—FIRES—EVIDENCE—ADMISSIBILITY.

In an action for the destruction of property by fire caused by sparks from an engine operating a logging skidder for the removal of saw logs, it was competent to show that the engine had emitted sparks the day before, and that coals which had come from the engine were lying on the log deck, as bearing on the defective condition of the engine.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1717-1729; Dec. Dig. § 481.*]

8. APPEAL AND ERROR (§ 1058*)—HARMLESS ERROR—ERRONEOUS EXCLUSION OF EVIDENCE.

It is not error to exclude the testimony of a witness to a fact, where the witness had just before testified substantially to the same fact.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4195, 4200-4206; Dec. Dig. § 1058.*]

Appeal from Superior Court, Sampson County; Carter, Judge.

Action by H. S. Aman against the Rowland Lumber Company. From a judgment for plaintiff, defendant appeals. Affirmed.

This action was brought to recover damages for the burning of plaintiff's timber, alleged to have been caused by defendant's negligence in permitting sparks to escape from its engine. Defendant was engaged in operating a steam logging skidder, for the purpose of removing saw logs from its woods, to be carried over its tramroad to the mill. In order to operate the skidder, defendant had cleared a space adjoining it, and known as a "log deck," by removing the trees and some of the undergrowth, and pil-

ing them 30 or 40 feet away from the skidder. The fire started in the tree tops, which had become very dry and combustible during a long period of drought and warm weather. Some of the witnesses had seen sparks on the day before the fire coming from the defendant's engine at the skidder, and there were coals on the ground near the skidder. The log deck or right of way, as it is called in the record, was covered with dry and inflammable grass and leaves, though one of the witnesses stated that the fire did not originate there, but in the tree tops at the edge of the log deck. It also appeared that defendant ran a dummy engine on its tramroad, near the place where the fire started, though no one saw any sparks emitting from it. There was no fire in the vicinity except the fires in the two engines. There was evidence that the fire broke out during the dinner hour, when the logging engine was shut down and its fires banked so that it could not emit any sparks, but one witness testified that the fire may have been set out before the engine was stopped, as it was only from 20 to 40 minutes from the time the draft of the engine was shut off until the fire was first seen in the tree tops. There was other evidence not necessary to be stated. There was a verdict for plaintiff, and, a judgment being entered thereon, defendant appealed.

A. McL. Graham and G. E. Butler, both of Clinton, for appellant. Fowler & Crumpler, of Clinton, for appellee.

WALKER, J. (after stating the facts as above). The defendant asked for a judgment of nonsuit, and its refusal presents the main question in the case.

[1] The familiar rule is that the evidence upon such a motion should be considered in its most favorable light for the plaintiff, and every fact which it proves, or tends to prove, should be taken as established. With this guide before us, we are led unhesitatingly to the conclusion that the ruling of the court was correct. It is true the fire did not originate within the log deck, but on its edge, where the defendant had caused very inflammable material to be piled, and the fire started in this brush heap only 30 feet from the skidder, as the jury might well have found; there being circumstantial evidence that it was communicated from the engine of the skidder.

[2] The jury were fully instructed as to the law of the case, and they were told that if defendant allowed dry and combustible matter to accumulate on its land, in such close proximity to its engine that it exposed adjacent property to unnecessary peril, and the fire was caused by sparks or coals from the engine, a prima facie case of negligence was made out, and in this view the case was properly submitted to the jury, upon all the evidence, to find the fact whether the brush

heap was fired by sparks from a negligently constructed or operated engine.

[3] If the fire was not caused by the engine, or, if so caused, the engine was properly constructed and operated, the defendant is not liable, because, in that event, there has been no breach of a duty owing to the plaintiff. The best constructed engines may sometimes emit live sparks. If there was negligence in the construction or operation of the engine, and the fire proximately resulted therefrom, the liability of the defendant from the consequent danger is apparent. All this was correctly stated and explained to the jury by the learned judge who presided at the trial, and the charge of the court, when properly construed, was in perfect conformity with our decisions. It can make no difference whether the sparks lighted on or off the right of way. If it kindled the fire and destroyed plaintiff's trees, there was a sufficient case of prima facie negligence for submission to the jury upon the whole evidence to find the ultimate fact of negligence.

[4, 5] This court has been most pronounced in its opinion upon this subject, and has adhered steadily and strictly, without the shadow of turning, to the just rules which have heretofore been promulgated. We repeat them here once more: "(1) If fire escapes from an engine in proper condition, having a proper spark arrester, and operated in a careful way by a skillful and competent engineer, and the fire catches off the right of way, the defendant is not liable, for there is no negligence. (2) If fire escapes from an engine in proper condition, with a proper spark arrester, and operated in a careful way by a skillful and competent engineer, but the fire catches on the right of way, which is in a foul and negligent condition, and thence spreads to the plaintiff's premises, the defendant is liable. *Moore v. R. R.*, 124 N. C. 341 [32 S. E. 710]; *Phillips v. Railroad*, 138 N. C. 12 [50 S. E. 462, 3 Ann. Cas. 384]. (3) If fire escapes from a defective engine, or defective spark arrester, or from a good engine not operated in a careful way or not by a skillful engineer, whether the fire catches off or on the right of way and causes damage, the defendant is liable." *Williams v. Railroad*, 140 N. C. 623, 53 S. E. 448. These rules have been approved for a very long period and in numerous cases. *Ellis v. Railroad*, 24 N. C. 138; *Chaffin v. Lawrance*, 50 N. C. 179; *Aycock v. Railroad*, 89 N. C. 321; *Craft v. Timber Co.*, 132 N. C. 151, 43 S. E. 597; *Haynes v. Gas Co.*, 114 N. C. 203, 19 S. E. 344, 26 L. R. A. 810, 41 Am. St. Rep. 786; *Knott v. Railroad*, 142 N. C. 238, 55 S. E. 150; *Cox v. Railroad*, 149 N. C. 117, 62 S. E. 834; *Deppe v. Railroad*, 152 N. C. 79, 67 S. E. 262; *Kornegay v. Railroad*, 154 N. C. 389, 70 S. E. 731; *Currie v. Railroad*, 156 N. C. 419, 72 S. E. 488; *Mizzell v. Manufacturing Co.*, 158 N. C. 265, 73 S. E. 802; *Hardy*

v. Hines Lumber Co., 75 S. E. 855, at this term. Where the fire is caused by sparks falling from the engine on a foul right of way, the railroad is liable for the ensuing damage to others, as it is per se negligence to keep such a right of way which would constantly expose their property to the risk of fire. Where the act of negligence is charged to be a defective engine, it can make no material difference whether the spark lights within or without the right of way, and the following rule must prevail: "The decided weight of authority and of reason is in favor of holding that, the origin of the fire being fixed upon the railroad company, it is presumptively chargeable with negligence, and must assume the burden of proving that it had used all those precautions for confining sparks or cinders (as the case may be) which have already been mentioned as necessary." *Sherman & Redf. on Negligence*, § 876. The liability is fixed, first, if the fire was ignited on a foul right of way; and, second, if not on the right of way, then if the engine was negligently constructed or operated, the fact also being found that the fire originated from the engine and was the proximate cause of the damage, an event reasonably foreseeable as the natural and probable result of the negligent act. *Hardy v. Hines Lumber Co.*, supra. But in this case the tree tops had been piled by the defendant, for its own purpose and convenience, so near the engine, and had become so parched and inflammable by the effect of the dry weather upon it, that it easily ignited from the sparks and was carried by the strong north wind, which had already set in that direction, to the plaintiff's adjoining land and timber, and thereby caused the damage of which he complains. This is what the jury evidently found under the evidence and the charge of the judge, and it made out, at least, a case of actionable negligence against the defendant.

[8] The criticism of the charge by defendant's counsel might be just and the exception to it well taken, if it could be restricted to the detached portion thereof which is the object of attack, as it is not quite explicit, perhaps, as it should have been, but when these isolated sentences or extracts are construed with the other parts of the charge, and viewing the latter in its entirety and thus reading it as a whole, as we are required to do (*State v. Exum*, 128 N. C. 500, 50 S. E. 283; *State v. Lance*, 149 N. C. 551, 63 S. E. 198), the meaning of the judge could not well have been misunderstood by an intelligent jury. We have recently said that "the charge is to be considered as a whole in the same connected way in which it was given, and upon the presumption that the jury did not overlook any portion of it. If, when so construed, it presents the law fairly and correctly to the jury, it will afford no ground for reversing the judgment, though some of

the expressions, when standing alone, might be regarded as erroneous." *Kornegay v. Railroad*, 154 N. C. 389, 70 S. E. 731; *Thompson on Trials*, § 2407. This case is much like *Craft v. Timber Co.*, supra, where we held that piling dry tree tops or other combustible matter so near its track as to expose adjacent property to the danger of being destroyed or injured by sparks from one of its passing engines was an act of negligence, and, if the proximate cause of the injury, was actionable. It does not appear in this case what was the precise extent of defendant's right of way—so called—but, whatever it was, the fact remains that defendant accumulated dangerously inflammable material on its own premises, so near its skidder as to be ignited by a spark from the engine, and thereby communicated fire to plaintiff's trees, and the law, ancient and modern, requires that he should be recompensed for his loss. "If fire break out and catch in thorns, so that the stacks of corn, or the standing corn, or the field, be consumed therewith, he that kindleth the fire shall surely make restitution," was the Mosaic doctrine, and "so use your own as not to injure another" ("sic utere tuo ut non alienum lædas") is that of the common law, which also recognizes and enforces the law of compensation.

[7] The other exceptions require little, if any, comment. The testimony of the witnesses, Hobbs and the Hargroves, was competent to show that the engine had emitted sparks the day before, as bearing upon its defective condition, and the fact that coals which had come from the engine were lying on the log deck was also a relevant fact for the same reason. *Knott v. Railroad*, supra.

[8] The exclusion of Hefty's testimony was not error. The judge might well have admitted it, but we think that the witness had just before testified substantially to the same fact.

We have carefully examined all the assignments of error, but have failed to discover any ground for a reversal.

No error.

(160 N. C. 107)

STEPHENS v. JNO. L. ROPER LUMBER CO.

(Supreme Court of North Carolina. Oct. 8, 1912.)

PRINCIPAL AND AGENT (§ 102*)—IMPLIED POWER OF AGENT.

It is not within the implied power of the superintendent of a lumber company's plant to contract with an employé that he shall be dropped from the company's pay roll for an indefinite time, cease all regular work, and take no other employment, but hold himself in readiness to resume work when notified; he to be paid during the time he is unemployed.

[Ed. Note.—For other cases, see *Principal and Agent*, Cent. Dig. §§ 274-277, 347; Dec. Dig. § 102.*]

Appeal from Superior Court, Pamlico County; Justice, Judge.

Action by A. H. Stephens against the Jno. L. Roper Lumber Company to recover \$1,400 alleged to be due by contract. From a judgment of nonsuit on motion at the close of plaintiff's evidence, plaintiff appeals. Affirmed.

A. D. Ward and D. L. Ward, both of New Bern, for appellant. Moore & Dunn, of New Bern, for appellee.

HOKE, J. Plaintiff, a witness, in support of his demand, testified in effect as follows: That in November or December of 1907, a short while after the panic, he was an employé of defendant company, and in charge of a logging squad in connection with the plant of said company at Oriental, N. C.; that the superintendent of defendant plant at that place was one W. J. Moore, in general charge of same, having power to make contracts, employ and discharge hands, etc.; that the general offices of the company were at Norfolk, Va., the general superintendent of defendant lumbering business being one Harriss, and that the employés of defendant company were paid off monthly according to a pay roll sent to the general offices; that on or about the date specified (November or December, 1907) plaintiff and W. J. Moore, as superintendent of defendant's plant at Oriental, entered into the contract sued on, by the terms of which plaintiff was to be dropped from the company's pay roll for an indefinite period, and cease all regular work for the company, and was to be paid during such time as he was unemployed the sum of \$100 per month, and meantime was not to take other employment, but hold himself in readiness to resume work when notified; that pursuant to this agreement plaintiff remained practically idle for 14 months, when he was again given active employment as a boss of the company's logging force at \$75 per month; that not long after plaintiff resumed work Moore, the local superintendent, was discharged by the company, and soon thereafter plaintiff was discharged; that shortly after Moore was discharged plaintiff mentioned his claim for \$1,400 against the company to ——— Harriss, general superintendent, and same was repudiated and denied by the company, and after his own discharge the suit was instituted.

Plaintiff, repelling the suggestion that it was any part of his motive or inducement for entering into the contract, testified further that W. J. Moore told him, at or about the time the same was made, that the company wanted him as a witness in a lawsuit, and that he would be dropped from the pay roll on that account. Plaintiff admitted that he had been paid for all the work actually done for the company, but said that nothing had been paid on the present claim; that the general superintendent was frequently

around the works at Oriental; and that plaintiff had never mentioned the subject to him until after the discharge of Moore, but had frequently mentioned the matter to Moore while he was superintendent at Oriental, and was told by Moore not to be uneasy that he would get his money.

If it be conceded that the evidence was sufficient to establish the contract, and, further, that the reprehensible purpose to impose plaintiff on the court as an entirely disinterested witness, when he was in fact an employé of the company, was not sufficiently shown as an inducement to the contract on the part of plaintiff to vitiate it (Martin v. McMillan, 63 N. C. 486; Phillips v. Hooker, 62 N. C. 193) we are of opinion that the judgment of nonsuit has been properly rendered. It is not claimed that there was any direct authority from the company to make this particular contract; nor is there any evidence of special instructions limiting the powers of defendant's agent incident to his position. This being true, the real and apparent authority of such agent should be held one and the same, and the right of plaintiff to recover in this case depends upon whether the contract declared on was within the scope of W. J. Moore's powers as general superintendent of defendant's lumbering business at Oriental. Gooding v. Moore, 150 N. C. 195, 63 S. E. 895; Tiffany on Agency, p. 180.

By virtue of his position, then, this superintendent had general power to do what was usual and necessary to carry on the business intrusted to him, and in furtherance of his employer's interest to make all such contracts as were reasonable and appropriate to that end; but this authority is not without limitations. Such an officer is by no means a universal agent, but is restricted, as stated, to "those acts and contracts usually exercised by other agents in the same line of business under similar circumstances, and must conduct the particular business of the principal in the manner usually employed by other agents of the same kind." 1 Clark & Skyles on the Law of Agency, § 203, p. 475.

Again, it is well recognized that a third person dealing with one known to be an agent is not relieved of all obligation in the matter, but is held to the exercise of reasonable prudence; and if an agent, though a general one, departing from legitimate effort in his employer's interests tenders a contract so unusual and remarkable as to arouse the inquiry of a man of average business prudence, the third party is not allowed to act upon assumptions which ordinarily obtain. He is put upon notice, and must ascertain if actual authority has been conferred. 1 Clark & Skyles, p. 509; Mechem on Agency, §§ 289, 290; 31 Cyc. p. 1340-1346.

In 31 Cyc. it is said: "A general agent, unless he act under special and limited authority, impliedly has power to do whatever is

usual and proper to effect such a purpose as is the subject of his employment. Hence, in the absence of known limitations, third persons dealing with such a general agent have a right to presume that the scope and character of the business he is employed to transact is the extent of his authority. This rule, as already stated, does not apply when limitations upon the authority of the agent have been brought home to the knowledge of the third person dealing with him, nor when the third person fails to make such inquiry as conditions demand, especially if the facts and circumstances are such as to suggest inquiry. Furthermore, the implied power of any agent, however general, must be limited to such acts as are proper for an agent to do, and cannot extend to acts clearly adverse to the interests of the principal, or for the benefit of the agent personally. And an agent has no implied authority to do acts not usually done by agents in that sort of transaction, nor to do them in other than the customary manner. The most general authority is limited to the business or purpose for which the agency was created."

And in *Mechem*, supra: "Third persons must act in good faith. It is evident that these rules are established for the protection of third persons who act in good faith. As has been stated, every person dealing with an agent is bound to ascertain the nature and extent of his authority. He must not trust to the mere presumption of authority, nor to any mere assumption of authority, by the agent. He must at all times be able to trace the authority home to its source. Keeping within the scope of that authority, he is safe, and cannot be affected by secret instructions of which he was ignorant. But if he had knowledge of the instructions, or notice sufficient to put him upon an inquiry by which they might have been discovered, he will be held bound by them." And further (section 290): "The person dealing with the agent must also act with ordinary prudence and reasonable diligence. If the character assumed by the agent is of such a suspicious or unreasonable nature, or if the authority which he seeks to exercise is of such an unusual or improbable character, as would suffice to put an ordinarily prudent man upon his guard, the party dealing with him may not shut his eyes to the real state of the case, but should either refuse to deal with the agent at all, or should ascertain from the principal the true condition of affairs."

The wholesome principles embodied in these citations and numerous authoritative decisions here and elsewhere, applying the same, are in condemnation of this alleged contract, and fully sustain the position denying plaintiff recovery thereon. *Bank v. Hay*, 143 N. C. 328, 55 S. E. 811; *Williams*

and *Wife v. Johnston*, 92 N. C. 532, 53 Am. Rep. 428; *Williams v. Whiting*, 92 N. C. 683; *Bank v. Armstrong*, 152 U. S. 346, 14 Sup. Ct. 572, 38 L. Ed. 470; *Bank of Macon v. Nelson*, 38 Ga. 391, 95 Am. Dec. 400; *Craig Silver Co. v. Smith*, 163 Mass. 262, 39 N. E. 1116; *Upton v. Suffolk Co. Mills*, 65 Mass. 586, 59 Am. Dec. 163; *Nephew v. Mich. Central*, 128 Mich. 599, 87 N. W. 753; *Friedman & Sons v. Kelly*, 126 Mo. App. 279, 102 S. W. 1066; *Skene, Jr., v. Casualty Co.*, 91 Mo. App. 121.

In *Williams v. Johnston*, supra, Chief Justice Smith, delivering the opinion, said: "An agency, however comprehensive in its scope, nothing else appearing, contemplates the exercise of the powers conferred for the benefit of the principal. It implies a trust and confidence that the delegated authority will be employed in the honest and faithful discharge of the duties appertaining to the fiduciary relation thus established."

In *Upton v. Suffolk Co. Mills*, it was held "that a general selling agent has no authority to depart from the usual manner of accomplishing what he is employed to effect."

In *Friedman & Sons v. Kelly*, supra, a well-reasoned case and sustained by abundant authority, the court held: "Where an agent, such as a traveling salesman, assumes, in the conduct of the sale of goods, authority which he did not in fact have, and of such extraordinary character as would put a reasonably prudent man upon his inquiry, such party dealing with him cannot in that case hold his principal on the ground of apparent authority. Where a traveling salesman selling ladies' cloaks for his principal agreed with a purchaser that he might retain the cloaks until after the season was over and then return such as were not satisfactory, this was an agreement so unusual and extraordinary that the purchaser should have taken notice that the agent had no authority to make it; and the purchaser could not claim the right to return the cloaks, on the ground that the agreement was within the apparent scope of the agent's authority, especially where the evidence showed that he knew the proposition was extraordinary."

This contract, by which the plaintiff, to use his own language, "was put on the loafing list for 14 months, doing practically nothing for the company's benefit," and where there was nothing, either in the pay rolls or elsewhere, to put the company or its general officer on notice of its existence or its terms, is so very remarkable and unusual, and altogether comes in such questionable shape and circumstance, that his honor was clearly right in holding that no recovery should be allowed thereon in a court of justice.

There is no error, and the judgment of nonsuit is affirmed.

Affirmed.

(130 N. C. 126)

FLANNER v. FLANNER.

(Supreme Court of North Carolina. Oct. 3, 1912.)

1. WILLS (§ 191*)—REVOCATION—SUBSEQUENT BIRTH OF CHILD.

At common law as prevailing in North Carolina, the subsequent birth of child did not of itself amount to revocation of his father's will.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 469-478; Dec. Dig. § 191.*]

2. DESCENT AND DISTRIBUTION (§ 47*)—EFFECT OF WILL.

Revisal 1905, § 3145, providing that children born after the making of the parent's will, and where parents shall die without making any provision for them, shall be entitled to such share of the parent's estate as if he or she had died intestate, applies only when the omission to provide for an after-born child results from inadvertence or mistake; and, unless the will in express terms shows that the omission is intentional, or unless provision is made for the child, either under the will, or by gift or settlement otherwise, the after-born child takes his share, and the statute applies whether there is one or more children.

[Ed. Note.—For other cases, see Descent and Distribution, Cent. Dig. §§ 126-130; Dec. Dig. § 47.*]

3. DESCENT AND DISTRIBUTION (§ 47*)—CONSTITUTIONAL RIGHTS—STATUTORY REGULATIONS.

The right of a married woman to make a will, granted by Const. art. 10, § 6, providing that the property of a married woman shall remain her sole estate and may be devised and bequeathed as if she were unmarried, removes the common-law restriction on the right of a married woman to dispose of her property by will, but the right is subject to legislative regulation; and Revisal 1905, § 3145, providing that children born after the making of the parent's will shall be entitled to the share of the parent's estate as if he or she had died intestate, is not invalid as conflicting with the constitutional right.

[Ed. Note.—For other cases, see Descent and Distribution, Cent. Dig. §§ 126-130; Dec. Dig. § 47.*]

Appeal from Superior Court, Craven County; Whedbee, Judge.

Controversy without action between Wm. B. Flanner, Jr., by his next friend, J. A. Patterson, and Wm. B. Flanner. There was a judgment for plaintiff, and defendant appeals. **Affirmed.**

The facts agreed upon and formally presented are as follows:

"(1) That William B. Flanner, Sr., and Lizzie H. Flanner, were husband and wife, but without children, on the 16th day of May, 1891.

"(2) That on said day Lizzie H. Flanner duly executed her last will and testament in words and figures as follows: 'In the name of God, Amen. I, Lizzie H. Flanner, being of sound mind and memory, do make this my last will and testament. I give, grant and devise to my beloved husband, William B. Flanner, all my property of every kind, real personal and mixed. Witness my hand and seal, May 16th, 1891. Lizzie H. Flanner. [Seal.]'

"(3) That thereafter, to wit, on the 7th day of February, 1892, the plaintiff, William B. Flanner, Jr., was born unto said Wm. B. Flanner, Sr., and his said wife, Lizzie H. Flanner.

"(4) That thereafter said Lizzie H. Flanner died seised and possessed of a valuable tract of land lying situate in Craven county, N. C., containing 440 acres, more or less, and being the same land described in the deed of J. F. Clark and wife to W. B. Flanner, dated November 24, 1886, and registered in the office of the register of deeds of Craven county, in Book 95, p. 114; also an undivided one-sixth part of the whole of certain lands situate in Mecklenburg, N. C.

"(5) That said William B. Flanner, Jr., was and is the only child of said Lizzie H. Flanner.

"(6) That said will was probated on the 13th of November, 1893, and registered in the office of the clerk of the superior court of Craven county in record of wills, Book F, p. 102."

Upon said facts the court entered judgment: "This case coming on to be heard before me, by consent of all parties, upon an agreed statement of facts filed in the record, and upon said statement of facts the court being of the opinion that the plaintiff, William B. Flanner, Jr., is the owner of the real estate fully described and set out in said agreed state of facts, subject to the life estate of his father, William B. Flanner, Sr., it is therefore, ordered, adjudged, and decreed by the court that the said William B. Flanner, Jr., is the owner in fee, subject to the life estate of his father, William B. Flanner, Sr., of the entire real estate described in said agreed state of facts aforesaid." Defendant excepted and appealed.

Gulon & Gulon, of New Bern, for appellant. R. A. Nunn, of New Bern, for appellee.

HOKE, J. [1] Under the principles of the common law as understood and allowed to prevail in this state, the subsequent birth of child did not of itself amount to revocation of a testator's will. *McCay v. McCay*, 5 N. C. 447.

[2] That case, presented at nisi prius in Rowan county at October term, 1808, seems to have attracted the attention of the Legislature, and at the November session following a statute was enacted, regulating the subject, and in terms substantially similar to the provision as it now appears in Revisal 1905, § 3145, to wit: "Section 3145. Void as to after-born children. Children born after the making of the parent's will and where parent shall die without making any provision for them, shall be entitled to such share and proportion of such parent's estate as if he or she had died intestate and the rights of any such after-born child shall be a lien on every part of the parent's estate until

his several share thereof is set apart," etc. Construing this and other statutes of like purport, the courts have generally held that they were not designed to control a parent as to the provision he should make for his child; but the correct interpretation should proceed on the theory that the law was only intended to apply when the omission to provide for an after-born child was from inadvertence or mistake, and this position should be allowed to prevail, unless the will in express terms showed that the omission was intentional, or unless, as contemplated by the statute, provision was made for the child by the parent, either under the will, or by gift or settlement *ultra*, "whether before, contemporaneous with, or after the making of the will." *Thomason v. Julian*, 133 N. C. 309, 45 S. E. 636; *Meares v. Meares*, 26 N. C. 192; *Chace v. Chace*, 6 R. I. 407, 78 Am. Dec. 446; *Gay v. Gay*, 84 Ala. 38, 4 South. 42; concurring opinion, *Somerville, J.*, 84 Ala. 47, 4 South. 45. In our opinion, the spirit and proper meaning of the law both require that its beneficent provisions should apply, whether there be one or more children; and we may not approve the position contended for by defendant that the statute was not intended to control where, as in this case, there was only one child. In the original statute of 1808, the terms were "child or children," and the word "child" was dropped in the enactment of 1868-69, c. 113, § 62, no doubt because the word "children" was considered sufficiently comprehensive to include the one case or the other; and the subsequent terms of the section were only so expressed in order to make the claim of after-born children efficient in cases where there should be more than one.

[3] It was further urged for defendant that the statute cannot be upheld, in that it deprives a married woman of the right to dispose of her property by will, pursuant to article 10, § 6, of our state Constitution; but the position involves a misconception of the meaning of this provision as applied to the facts of the present case. The section referred to, after providing that the property of a married woman acquired before marriage, and all to which she may become entitled to afterwards, shall remain her sole and separate estate, etc., continues as follows: "And may be devised and bequeathed and with the written assent of her husband conveyed by her as if she were unmarried." This right to dispose of property by will is a conventional, rather than an inherent, right, and its regulation rests largely with the Legislature, except where and to the extent that same is restricted by constitutional inhibition. *Thomason v. Julian*, *supra*; *Underhill on Wills*, p. 1; 2 *Blackstone*, Comm. pp. 488-492.

Being properly advertent to this principle, a perusal of the section relied upon will dis-

close that its principal purpose, in this connection, was to remove, to the extent stated, the common-law restrictions on the right of married women to convey their property and dispose of same by will, and was not intended to confer on them the right to make wills freed from any and all legislative regulation. The right conferred is not absolute, but qualified. She may "devise and bequeath her property and with the written assent of her husband convey the same as if she were unmarried," and not otherwise. The laws on this subject presented in the appeal vary somewhat in the different states, and at times require differing interpretations; but in statutes like ours authority here and elsewhere is to the effect that when they apply they do not amount to a revocation of the will in toto, but only render the same inoperative as to the after-born child for which no provision has been made, and that such child takes, not under the will, but rather against it, and holds by descent or under the statute of distribution, according to the nature of the property; and from this it follows that the probate of the will works no estoppel against the claimant, and on the facts presented defendant is entitled to an estate as tenant by curtesy—the interest awarded to him in the judgment. *Thomason v. Julian*, *supra*; *Doane v. Lake*, 32 Me. 268, 52 Am. Dec. 654; *Lorleux v. Keller*, 5 Iowa, 196, 68 Am. Dec. 696; *Pritchard on Wills*, §§ 299, 300; *Underhill on Wills*, § 241.

There is no error in the judgment, and the same is affirmed as rendered.

Affirmed.

(180 N. C. 337)

NORFLEET v. PAMLICO INS. & BANKING CO.

(Supreme Court of North Carolina. Oct. 3, 1912.)

PLEDGES (§ 19*) — COLLATERAL SECURITY — DEBT SECURED — "LIABILITY" — "AGREEMENT" — "CLAIM."

Decedent executed a demand note to defendant, agreeing that the proceeds of certain policies of life insurance, which he had deposited with defendant as collateral to secure the note, should be applied to the payment thereof, and that, if he should come under any other liability or enter into any other agreement with defendant while it was the holder of such obligation, then any excess of collaterals should be applied to such other note or claim, and, in case of any exchange of the collaterals, the provisions of the note should extend to the new collaterals. Decedent thereafter executed a new note to defendant's cashier for a debt owing to defendant, which note was, in fact, for defendant's benefit. When decedent died, he was also a member of a firm which was indebted to defendant for insurance premiums collected and unpaid. At this time all but \$181.50 of the original debt had been paid, for which amount a renewal note had been given which was due and unpaid. *Held*, that the words "liability," "agreement" and "claim," used in the collateral agreement, were sufficient to cover every conceivable obligation, and that the surplus due on the policies was there-

fore liable, not only for the balance of the original debt, but also for the note made payable to defendant's cashier, and for the firm's liability for the unpaid premiums.

[Ed. Note.—For other cases, see Pledges, Cent. Dig. §§ 58-63; Dec. Dig. § 19.*

For other definitions, see Words and Phrases, vol. 5, pp. 4111-4116; vol. 1, pp. 282-284; vol. 2, pp. 1202-1211; vol. 8, p. 7604.]

Appeal from Superior Court, Edgecombe County; Carter, Judge.

Action by James M. Norfleet, as administrator of the estate of Leon A. Williams, deceased, against the Pamlico Insurance & Banking Company. Judgment for defendant, and plaintiff appeals. Affirmed.

This case was submitted upon a case agreed, the material facts of which are as follows: On March 5, 1905, Leon A. Williams executed a note to the defendant for \$3,000, payable on demand, and in the body of the same he agreed that the proceeds of certain policies of insurance on his life, payable to his estate, which he had deposited with defendant, as collateral, to secure his said note, should be applied to the payment of the note, and any surplus should be held by the defendant upon the following terms and conditions, which we copy from the note: "If I shall come under any other liability, or enter into any other agreement with said bank, while it is the holder of this obligation, it is hereby agreed and understood that any excess of collaterals upon this note shall be applicable to such other note or claim held by the said Pamlico Insurance & Banking Company against said Leon A. Williams, and, in case of any exchange of the collaterals above named, the provisions of this note shall extend to such new collaterals." Leon A. Williams on November 16, 1909, executed to one Job Cobb, in his own name, though as cashier of defendant bank and for it, his note for \$44.64; the consideration being a debt which he owed the bank. The original debt of \$3,000 has been paid, except the sum of \$181.50, for which a renewal note was given by Williams, which is now due and unpaid. On October 1, 1909, the firm of Williams, Weddell & Co., of which Leon A. Williams was a member, had been engaged in the insurance business as agents of defendant, and on said date were indebted to defendant, as its agents, in the sum of \$828.30, for premiums collected and not paid to defendant. This debt is now due; no part thereof having been paid. The firm is insolvent. Leon A. Williams died insolvent on October 24, 1911, and plaintiff is his administrator. Defendant, after demand, made a statement to plaintiff of its administration of the said collaterals, showing the total proceeds of the policies in its hands to be \$1,985, and it was thereupon agreed that defendant should retain so much of the said proceeds as is legally applicable to its claims, the same to be determined by the court under the sub-

mission, and pay the balance to the plaintiff. It was admitted, as part of the facts, that defendant, by its cashier, demanded of Leon A. Williams October 1, 1909, the payment of the open account due by Williams, Weddell & Co., to which Williams replied: "You have, to secure it, everything I possess now, and I can do nothing for you." The balance due on the original debt (\$181.50) is not in controversy. The court held upon the admitted facts that defendant had a lien on the proceeds of the policies, under its contract with Leon A. Williams, for the debts of \$44.64 and \$828.30, and adjudged that said amounts and the costs be retained by defendant out of said proceeds, and the balance paid to plaintiff, who appealed from the judgment.

Jas. M. Norfleet, of Tarboro, for appellant.
G. M. T. Fountain & Son and Marshall C. Staton, all of Tarboro, for appellee.

WALKER, J. (after stating the facts as above). The plaintiff contends that, as the liability of Leon A. Williams for the open account is not of the same kind as that upon his note for which the policies were deposited as collateral, the former is not within the terms of the contract; one being an individual and the other a firm. But we are unable to accept this view, as we think the words of the contract are sufficiently broad and comprehensive to embrace an express, and, if not expressed, then an implied, promise to pay the bank the amount of the premiums collected by his firm as insurance agents for it. Partners are liable on their obligations to creditors jointly and severally. It is the undertaking or promise of the partnership, as well as of each of its members. But, apart from this, the debt for premiums collected by the firm, and not paid over, is within the very terms of the agreement as to the collaterals. This case is so much like that of Hallowell v. Bank, 154 Mass. 359, 28 N. E. 281, 13 L. R. A. (O. S.) 315, and the reasoning of the court in that case so strongly commends itself to us, that we might content ourselves with a bare reference to it, were it not for the zeal and confidence with which the contrary view was urged upon us. The clause of the collateral note construed in that case was as follows: "On the non-performance of this promise [a demand note for \$25,000], said bank applying the net proceeds [of the collaterals, being shares of stock] to the payment of this note and accounting to me for the surplus, if any; and it is hereby agreed that such surplus, or any excess of collaterals upon this note, shall be applicable to any other note or claim against me held by said bank." After disposing of a preliminary question, as to whether the surplus proceeds of the collaterals were applicable to the payment of a firm debt until there was a final default in the payment of the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

original note, the court says: "The question remains whether the bank is entitled to hold the security for the bills, which were accepted by Smith's firm and not by him individually. It cannot be denied that the acceptances were claims against him, and that the words used in his note were broad enough to embrace firm acceptances, unless there is some reason in the contract, the circumstances, or mercantile practice to give them a narrower meaning. *Singer Mfg. Co. v. Allen*, 122 Mass. 467; *Chuck v. Freen, Mood & M. 259*. The clause pledging the property for any other claim against the debtor is not inserted with a view to certain specific debts, but as a dragnet to make sure that whatever comes to the creditor's hands shall be held by the latter until its claims are satisfied. *Corey on Accounts* and *Lindley on Partnership* have made it popular to refer to a mercantile distinction between the firm and its members. But we have no doubt that our merchants are perfectly aware that claims against their firms are claims against them, and when a merchant gives security for any claim against him, and there is nothing to cut down the literal meaning of the words, he must be taken to include claims against him as partner."

This principle is affirmed in 22 Am. & Eng. Enc. of Law (2d Ed.) p. 871; 31 Cyc. 821c and 822c, and notes, where the cases are collected. While such an agreement will be construed so as to execute the intention of the parties and to give effect to every part thereof, yet it will be construed strictly, so as not to extend the obligation beyond the meaning contemplated. This is not unlike contracts generally, which must be so interpreted as to ascertain from the context what the parties intended, so as to enforce the undertaking according to their understanding of it. The language of the contract in this case is exceedingly broad, and the contract is sufficient to include, according to its terms and by its very words, "any other liability" or obligation arising out of "any other agreement of Leon A. Williams with the bank," and also "any other note or claim." We can hardly think of any more certain language that could have been employed by the parties to embrace this particular kind of obligation, if they had in mind, and intended at the time, to secure it by the deposit of the collaterals. It was not intended to confine the securities merely to a liability in the form of a note, but to any kind of liability evidenced by note or created by agreement, or in the shape of a claim, and the language was broadened by the use of the words "liability," "agreement," and "claim," in order to extend the operation of the contract to almost every conceivable obligation. Chief Justice Marshall in *Barry v. Foyles*, 1 Pet. 311, 7 L. Ed. 157, said: "This suit is brought on a partnership transaction against one of the partners. The declaration states

a contract with the partner who is sued, and gives no notice that it was made by him with another. Will evidence of a joint assumpsit support such a declaration? Although it has been held from the St. 36 Hen. VI, c. 38, that a suit against one of several joint obligors might be sustained, unless the matter was pleaded in abatement, yet with respect to joint contracts, either in writing or by parol, a different rule was formerly adopted, upon the ground of a supposed variance between the contract laid and that which was proved. This distinction was overruled by Lord Mansfield in the case of *Rice v. Shute*, 5 Burn, 2611. The same point was afterwards adjudged in *Abbott v. Smith*, 2 W. Black, 695, and has been ever since invariably maintained. The principle is that a contract made by copartners is several, as well as joint, and the assumpsit is made by all and by each. It is obligatory on all, and on each of the partners." It was accordingly held that evidence of a joint assumpsit may be given at common law to support a declaration against one of the partners upon his several liability. We are of the opinion that the defendant is entitled to retain a sufficient amount from the proceeds of the collaterals to pay the firm debt, and we entertain the same view in regard to the note of \$44.64, given by Leon A. Williams to Job Cobb for the bank; Cobb being at the time its cashier. Under the old procedure suit upon this note would have been in the name of Job Cobb to the use of the bank, as he is the holder of the legal title, but now it would be brought in the name of the bank, the beneficial owner of the note. It can make no difference that the note is payable to Job Cobb, when it is admitted to be the property of the bank and to have been given for a debt due to it; the amount of the note having been credited to Williams on the books of the bank at the time it was given.

We have not brought to our aid, in construing the contract, the interpretation which Leon A. Williams himself put upon it, when in reply to a demand from the bank for payment of the firm indebtedness he said: "You have, to secure it, everything I possess now, and I can do nothing further for you." It was not necessary that we should lay any stress upon his own construction of his agreement with the bank, as his intention is clearly manifested to us without this additional light. We have carefully examined the authorities cited by the plaintiff's counsel, and do not think they apply to this case, or that they should influence our decision in any degree. They are cases in which it was attempted to divert the proceeds of collaterals deposited to secure a specific debt, to the discharge of some other obligation of the pledgor not mentioned in the agreement of the parties, or to his general indebtedness. The case of *Bank v. Scott*, 123 N. C. 540, 31

S. E. 819, was of this kind, and the court held that the collaterals could not be applied to the payment of debts with which the pledgors were not connected, but should be used only in discharge of the debts, specified in the collateral agreement, upon which they were liable as principals, indorsers, or sureties. The two cases are not exactly alike in their facts, but the principle upon which *Bank v. Scott* was decided is applicable to the case at bar, and sustains our view of the law.

Our opinion, on the whole case, being with the defendant, we affirm the judgment entered by the court upon the case agreed.

Affirmed.

(159 N. C. 579)

HARDISON v. DUNN et al.

(Supreme Court of North Carolina. Oct. 3, 1912.)

1. LOGS AND LOGGING (§ 3*)—CONTRACT FOR SALE OF TIMBER—BREACH—WARRANTY.

Where a contract for the sale of timber, on land described as containing 140 acres, but which in fact contained only 109 acres, did not warrant that the tract contained any specific number of acres, or that there was any certain number of feet of standing timber of the required dimensions on the land, but only required plaintiff to pay \$2,000 on the removal of every 600,000 feet within a specified time, plaintiff could not recover damages because of the shortage in acreage, or because there was not sufficient timber of the contract size on the property to cut 1,800,000 feet.

[Ed. Note.—For other cases, see *Logs and Logging*, Cent. Dig. §§ 6-12; Dec. Dig. § 3.* *Contracts*, Cent. Dig. § 890.]

2. LOGS AND LOGGING (§ 3*)—TIMBER CONTRACTS—RECOVERY OF PAYMENTS.

Where plaintiff voluntarily made two payments of \$2,000 each on a timber contract, he was not entitled to recover any part of such amount because of a shortage of timber or acreage, in the absence of a warranty, or any claim of fraud, misrepresentation, or deceit.

[Ed. Note.—For other cases, see *Logs and Logging*, Cent. Dig. §§ 6-12; Dec. Dig. § 3.*]

3. LOGS AND LOGGING (§ 3*)—SALES—LIABILITY FOR PRICE.

Where a timber contract provided for payments of \$2,000 when 600,000 feet of timber had been cut, not later than specified dates, and two payments had been received for, the landowner was not entitled to a third payment until the third cut of 600,000 feet had been accomplished; and, it appearing that the remaining timber was only sufficient to cut 387,000 feet, plaintiff could only be required to pay the value of that amount, measured by the purchase price of the entire tract.

[Ed. Note.—For other cases, see *Logs and Logging*, Cent. Dig. §§ 6-12; Dec. Dig. § 3.*]

Appeal from Superior Court, Nash County; Cooke, Judge.

Action by W. H. Hardison against J. R. Dunn and another. Judgment for defendants on their counterclaim, and plaintiff appeals. Reversed and remanded.

The land upon which the timber grew is described as containing 140 acres, and the metes and bounds are set out with particu-

larity. After commencement of this action survey was made, and the land found to contain 109 acres only. The defendant set up a counterclaim for \$2,000, unpaid purchase money (being the last payment) on timber. Upon the pleadings, and admission that the tract of land conveyed only 109 acres, his honor adjudged that the plaintiff take nothing by his writ, and that defendants recover \$2,000 and interest on their counterclaim. Plaintiff excepted and appealed.

E. B. Grantham, of Rocky Mount, and Murray Allen, of Raleigh, for appellant. Bunn & Spruill, of Rocky Mount, for appellees.

BROWN, J. [1] We agree with the superior court that the plaintiff has no cause of action against defendants. There is no warranty in the timber contract that the tract of land contains any specific number of acres, or that there is a certain number of feet of standing timber of the required dimension. There is nothing in the paper which indicates that the defendants guaranteed either the acreage of land or quantity of timber. The payments for the timber are provided for in the following clause: "The said W. H. Hardison is to pay \$2,000 before any of the timber is cut, \$2,000 when 600,000 feet have been cut, not later than July 15, 1910, \$2,000 when 600,000 feet more have been cut, not later than January 15, 1911, this payment completing all payments."

[2] The plaintiff voluntarily made the first two payments, and is not entitled to recover any part of them back. When plaintiff made the second payment, he was given this receipt: "Received of W. H. Hardison \$2,000 in full for the second payment on timber contract, and in full for second payment of 600 M. feet. [Signed] J. R. Dunn, Agent." In the absence of a warranty, and any allegation of fraud, misrepresentation, and deceit, we fail to see that plaintiff has any cause of action against defendants, either for damages or to recover any part of the money paid.

[3] We are of opinion, however, that the court erred in rendering judgment upon the pleadings in favor of the defendants upon their counterclaim for the entire third payment of \$2,000. The payments provided for in this contract are conditional, and are not to be made until the condition has been performed. The second payment was made, and is acknowledged to be in full for "600 M. feet" of timber admitted to have been cut. Before the plaintiff can be required to make the third payment of \$2,000, he must cut 600,000 more feet of timber, for the payment is to be made only when that quantity has been cut, and plaintiff must either cut it, or pay for it, by January 15, 1911. It turns out that plaintiff cannot cut the second 600,000 feet, because it is not on the land to cut.

He is entitled to 600,000 feet for the second payment, and to same quantity additional (1,200,000 feet in all) before he can be required to make the third payment. We find nothing in the contract to sustain plaintiff's contention that defendants undertook to sell him 1,800,000 feet.

The plaintiff admits in his complaint that he has cut 600,000 feet and paid for it, and received the receipt above recited. He avers that immediately after paying the second \$2,000, and receiving said receipt, he proceeded to cut under the third installment, and cut only 387,000 feet, when the timber on the tract gave out. This being so, the plaintiff could only be required to pay the value of the 387,000 feet, measured by the purchase price of the entire tract, and not the entire payment of \$2,000, as adjudged by his honor.

On the next trial either party can offer evidence as to the quantity of timber cut.

New trial.

(160 N. C. 39)

TAYLOR v. WHITE.

(Supreme Court of North Carolina. Oct. 3, 1912.)

1. MARRIAGE (§ 60*)—ANNULMENT—PRIOR EXISTING MARRIAGE—NATURE OF ACTION.

An action to annul a marriage on account of defendant's prior existing marriage is not technically an action for divorce, though alimony pendente lite may be allowed; and hence Revisal 1905, § 1563, which limits the time within which a complaint for divorce may be filed, is inapplicable.

[Ed. Note.—For other cases, see Marriage, Cent. Dig. §§ 125-135; Dec. Dig. § 60.*]

2. MARRIAGE (§ 58*)—VALIDITY—EFFECT ON SUBSEQUENT MARRIAGE.

A former marriage, which has been decreed to have been void because induced under duress, was void ab initio, and hence does not afford ground for annulment of a later marriage between one of the parties and a third person, though such decree was rendered after the second marriage.

[Ed. Note.—For other cases, see Marriage, Cent. Dig. §§ 115-123; Dec. Dig. § 58.*]

3. MARRIAGE (§ 67*)—ANNULMENT—DECREE—CONCLUSIVENESS.

A decree annulling a marriage on the ground that it was entered into under duress is conclusive upon the parties, unless impeached in a direct proceeding for fraud or collusion.

[Ed. Note.—For other cases, see Marriage, Cent. Dig. § 140; Dec. Dig. § 67.*]

Appeal from Superior Court, Sampson County; Allen, Judge.

Action by Lucy Taylor against N. D. White. Judgment for plaintiff, and defendant appeals. Reversed.

George E. Butler, of Clinton, and N. D. White, for appellant. Fowler & Crumpler, of Clinton, for appellee.

CLARK, C. J. This is an action brought by the plaintiff in her maiden name for the annulment of her marriage to the defend-

ant, upon the ground that it was void because the defendant at the time of the ceremony had a living wife.

[1] This is not technically an action for divorce, though in a general way it comes under that heading to the extent that alimony pendente lite may be allowed. *Lea v. Lea*, 104 N. C. 603, 10 S. E. 488, 17 Am. St. Rep. 692. We must deny the motion made by the defendant to dismiss for failure to give the affidavit required by section 1563, Revisal 1905, for that applies strictly to divorces; for the requirement that the facts must "have existed to the plaintiff's knowledge at least six months prior to the filing of the complaint," and that on "failure to file a petition for divorce within ninety days after the expiration of that time" the plaintiff shall forfeit the right of action, is intended to prevent hasty action for divorce, and to give the parties opportunity for reconciliation, and to prevent bad faith and collusion. *Holloman v. Holloman*, 127 N. C. 15, 37 S. E. 68; *Nichols v. Nichols*, 128 N. C. 108, 38 S. E. 296. Those reasons do not apply to a void marriage. It is true that such action for annulment and declaring a marriage void ab initio under Revisal, § 1560, comes under the general head of "Divorce" in the Code (chapter 31), and is so styled in *Johnson v. Kincaide*, 37 N. C. 470, yet it has broad features of difference from the general action of divorce, which, technically speaking, is based upon a valid marriage.

[2] In this case the ground for annulment is the allegation that the defendant, at the date of his marriage to the plaintiff in December, 1910, was the husband of one Georgia A. White. The judgment roll of the superior court of Edgecombe county at September term, 1911, was placed in evidence, showing that in a properly constituted action between said N. D. White and his alleged former wife, Georgia A. White, upon issues submitted to the jury, it was found that said N. D. White had been "compelled to marry the defendant, Georgia A. White, against his will, that said marriage was void, and that he had never lived with her as her husband after said alleged marriage," and thereupon judgment was entered that "the marriage ceremony performed by which N. D. White and Georgia A. White were declared man and wife is and was absolutely void, and that said bonds of matrimony are hereby annulled and declared null and void ab initio. G. W. Ward, Judge presiding."

[3] It is true that said decree was entered subsequently to the marriage of N. D. White to this plaintiff; but, as the decree decides and cannot be controverted, there was never any valid marriage between N. D. White and Georgia A. White, and he was a single man at the time of his marriage to this plaintiff. While this plaintiff was not a party to that action, the decree declaring the

status of the parties to that action is conclusive, unless impeached by a direct proceeding for fraud or collusion. "All marriages procured by force or fraud, or involving palpable error, are void; for here the element of mutual consent is wanting so essential to every contract. The law treats a matrimonial union of this kind as absolutely void ab initio, and permits its validity to be questioned in any court, at the option, however, of the injured party." Schouler, Dom. Rel. (3d Ed.) 38. The marriage between the defendant and Georgia A. White being void, he was free to marry the plaintiff; for "a void marriage imposes no legal restraint upon the party imposed upon from contracting another." *Patterson v. Gaines*, 6 How. 591, 12 L. Ed. 553.

Though the decree of annulment of defendant's first marriage was rendered after his marriage to the plaintiff, he had always treated the first marriage as void, and the decree declared it void ab initio. Though it was voidable, and not void, he did not ratify it, and it was therefore void ab initio by the decree. "A marriage is voidable on the ground of fraud, duress, or error, and not absolutely void; but it is voidable by the acts of the party without the necessity for a decree of nullity." *Tiffany*, Dom. Rel. 14, 35. "A decree annulling a marriage is final and conclusive, and not open to collateral impeachment, although it may be vacated or set aside for good cause on proper application. Its effect is to make the supposed or pretended marriage as if it had never existed, and hence it restores both parties to their former status, and to all rights of property as before the marriage. Hence, also, its effect is to make any children of the marriage illegitimate, unless illegitimacy is saved by a statute, as is now the case in several states." 26 Cyc. 920. Such is the case in this state. *Rev. § 1569*; *State v. Setzer*, 97 N. C. 252, 1 S. E. 553, 2 Am. St. Rep. 290; *Sims v. Sims*, 121 N. C. 297, 28 S. E. 407, 40 L. R. A. 737, 61 Am. St. Rep. 665.

The position of the plaintiff is inconsistent. She asks to have her own marriage declared void ab initio, but wishes to deny that effect to a decree of the court declaring her husband's marriage to Georgia A. White also void ab initio. It is true that her ground is the allegation that her husband was incapacitated to marry by reason of an existing marriage; but the ground of the decree obtained by him is that he never entered into the marriage, having been forced into it by duress. In neither case was there a valid marriage, if the allegations were found to be true. The subsequent assent of the husband would have made his voidable marriage valid; but, as that was not given, it was void ab initio, and imposed no obligation on him. The alleged marriage of the defendant with Georgia A. White, not being ratified by him,

was never a de facto marriage, as plaintiff's attorneys claim, while that of the plaintiff and defendant was a de facto marriage, if that term can be applied to a marriage at all. There was no legal impediment on defendant at the time of his marriage to plaintiff, and their marriage is valid.

Error.

(161 N. C. 223)

STATE v. BULLOCK.

(Supreme Court of North Carolina. Oct. 3, 1912.)

1. LICENSES (§ 7*)—TAXATION—UNIFORMITY—CONSTITUTIONAL PROVISIONS.

Pub. Loc. Laws 1911, c. 451, making it unlawful for any person or corporation to carry on the business of hauling logs over the roads of any road district without first having obtained a license therefor, and fixing the license fee, includes any person or corporation engaged in the business, and does not conflict with Const. art. 5, § 3, requiring taxation by uniform rule, etc.

[Ed. Note.—For other cases, see *Licenses*, Cent. Dig. §§ 7-15; Dec. Dig. § 7.*]

2. CONSTITUTIONAL LAW (§§ 205, 287*)—DUE PROCESS OF LAW.

The act is not violative of Const. art. 1, § 7, prohibiting special privileges and the deprivation of life, liberty, or property, except by the law of the land.

[Ed. Note.—For other cases, see *Constitutional Law*, Cent. Dig. §§ 591-624, 831, 905; Dec. Dig. §§ 205, 287.*]

3. CONSTITUTIONAL LAW (§ 230*)—EQUAL PROTECTION OF THE LAW.

The act is not violative of the fourteenth amendment to the federal Constitution.

[Ed. Note.—For other cases, see *Constitutional Law*, Cent. Dig. § 687; Dec. Dig. § 230.*]

Appeal from Superior Court, Nash County; Cooke, Judge.

Orren Bullock was convicted of crime, and he appeals. Affirmed.

The defendant was convicted in the Superior court of Nash county, upon appeal from a justice of the peace, upon a warrant charging that he had carried on the business of hauling logs, etc., without obtaining a license therefor, in violation of the provisions of chapter 451, Laws 1911. The defendant moved in arrest of judgment, for that the indictment and judgment in this action are based upon a statute which violates the Constitution of North Carolina and the Constitution of the United States, and is invalid. Constitution of North Carolina, art. 5, § 3; article 1, § 7; article 1, § 17; Const. U. S. Amend. 14. The motion was overruled, and the defendant excepted and appealed.

Jas. H. Pou and Murray Allen, both of Raleigh, for appellant. Attorney General Bickett and T. H. Calvert, of Raleigh, for the State.

ALLEN, J. [1-3] The statute under which the defendant was convicted (chapter 451, § 39, of Public Local Laws of 1911) reads as follows: "That it shall be unlawful for any

person or corporation to carry on the business of hauling logs, timber or lumber over the roads of any one of the road districts above laid out and created, without first having obtained a license therefor; and any person or corporation carrying on the business of hauling logs, timber or lumber as aforesaid, without having first obtained license, shall be guilty of a misdemeanor, and shall be fined not more than fifty dollars. Said license shall be issued by the road commissioners of the road district or township over the roads of which the wagon or wagons are driven, and will be signed by the chairman and countersigned by the clerk of said road commission. The license tax which said road commission in each township is to collect is as follows, to wit: for each one-horse wagon, five dollars for each year or part of a year; for each two-horse wagon, ten dollars for each year or part of a year; for each three-horse wagon and four-horse wagon, fifteen dollars for each year or part of a year; for each wagon drawn by more than four horses or mules, twenty dollars for each year or part of a year. The money thus collected from license taxes as aforesaid shall be paid over to the treasurer of the county of Nash by the road commissioner collecting the same, to be held to the credit of the township or road district so collecting. Any district or township in which wagons are operated shall be entitled to collect the license tax without respect to its having been collected by any other township."

If this statute is compared with the one under consideration in *State v. Holloman*, 139 N. C. 642, 52 S. E. 408, and the one in *Road Trustees v. Brown*, 159 N. C. 75, 75 S. E. 40, it will be found to be in all material respects like the one sustained by a unanimous court in the first, and that it meets the objections of the justices dissenting in the second. In the *Holloman* Case the statute was as follows: "That any person, firm or corporation desiring to use any of the public roads of a township for carrying on his or its business of hauling mill logs or timber or other heavy material with log wagons, log carts or other heavy vehicles, shall first obtain a license for this purpose from the board of supervisors of the township in which he or they may desire to operate and make use of the roads, by paying an annual license tax of fifteen dollars for each wagon or cart or vehicle of the kind above described to be used, which tax shall be paid to the treasurer of the board fund and placed to the credit of the board of supervisors of the township, to be used by the board as other funds for said township. Any person violating this section shall be guilty of a crime and liable to a penalty of fifty dollars, to be recovered in an action by the board of supervisors of roads of the township where the offense took place, for the benefit of the road fund of that township." And the court held the stat-

ute constitutional; the only difference between the statute in that case and the one in this being that in one the license was to be paid by any person, corporation, etc., carrying on the business of hauling "logs, timber or lumber," while in the other it was to be paid by any person, corporation, etc., carrying on the business of hauling "mill logs or timber or other heavy material."

In the case of *Trustees v. Brown* the following statute was approved: "That any lumber company, corporation, person or persons engaged in the lumber business and desiring to use any of the public roads of any of the townships of Macon county, for the purpose of carrying on its or their business of hauling, either by it or themselves, or by hiring or contracting with other persons, mill logs, lumber, or other heavy material with log wagons, log carts, or other heavy vehicles, shall pay a license or other privilege tax of two (2) cents per mile on each 1,000 feet of mill logs, lumber, or other heavy material so hauled." Two of the justices dissented from the opinion of the court in the last case, upon the ground that the statute did not apply to all who hauled logs, heavy material, etc., but only to those who were engaged in the lumber business, and that this was a discrimination not permitted by law. The statute before us is not subject to this objection, as it includes any person, corporation, etc., engaged in the business of hauling logs, etc.

We therefore hold that the two cases cited are decisive of this, and that there is no error.

No error.

(160 N. C. 45)

ASHFORD v. PITTMAN.

(Supreme Court of North Carolina. Oct. 8, 1912.)

1. BAILMENT (§ 14*)—BAILEE FOR HIRE—LIABILITY FOR NEGLIGENCE.

A bailee for hire is liable for failure to use ordinary care in keeping the bailed property.

[Ed. Note.—For other cases, see *Bailment*, Cent. Dig. §§ 45-56; Dec. Dig. § 14.*]

2. LIVERY STABLE KEEPERS (§ 7*)—NEGLECT—EVIDENCE—SUFFICIENCY.

In an action against a bailee of a horse for its loss in a fire, evidence held sufficient to go to the jury on a question whether the bailee was negligent.

[Ed. Note.—For other cases, see *Livery Stable Keepers*, Cent. Dig. § 6; Dec. Dig. § 7.*]

3. LIVERY STABLE KEEPERS (§ 7*)—EVIDENCE—CIRCUMSTANTIAL EVIDENCE.

Where plaintiff sued to recover for the death of his horse, burned in defendant's stable, by the alleged negligence of defendant as bailee, evidence that on the day of the fire defendant built a fire around a pot to heat water for hog killing, within 30 feet of the stable, is admissible on the issue of negligence.

[Ed. Note.—For other cases, see *Livery Stable Keepers*, Cent. Dig. § 6; Dec. Dig. § 7.*]

Appeal from Superior Court, Ouslow County; Ferguson, Judge.

Action by T. P. Ashford against John A. Pittman. Judgment of nonsuit, and plaintiff appeals. New trial granted.

D. E. Henderson, of New Bern, for appellant. D. L. Ward, of New Bern, and Frank Thompson, of Jacksonville, for appellee.

BROWN, J. The plaintiff's horse was stabled with the defendant for safe-keeping as a bailee for hire. The defendant's stables were on his premises in the town of Swansboro, and in them the defendant had been keeping horses for stabling and feeding, for pay, for the plaintiff and others. On the 13th of December, 1910, the stables were burned, and the plaintiff's horse was destroyed by fire, caused, as alleged, by the negligence of the defendant.

[1] The liability of a bailee for hire for the failure to use ordinary care in the keeping of the property committed to his charge is too well settled to need the citation of authority. Jones on Bailments, 5; 8 A. & E. Ency. 742. The only assignment of error presents the question as to whether there is any evidence of negligence.

[2] The evidence tends to prove that on the morning when the stables were burned the defendant caused to be built a large fire around a pot to heat water for hog killing; that this fire was built within 30 feet of the stables in which the defendant had stored a large quantity of hay and other combustible matters; that a strong wind was blowing at the time very nearly in the direction of the stables, so that sparks from the fire could easily reach them; that there was no other fire around or near the stables, except the one built around the pot; that immediately after building the fire the defendant went away and left it unprotected and unguarded; that after the defendant went into his house in some little while the cry of "Fire" was heard, and the defendant ran out and found the stables on fire. The plaintiff's horse was burned to death in the stables.

No evidence is offered which tends in the least to explain or throw any light upon the cause of the fire, unless it caught from the fire around the pot, built within 30 feet of the stables. It is true that the evidence does not prove conclusively that the stables caught from the fire built so near them; but we think the evidence is of such circumstantial character that it should be submitted to the jury, to be determined whether the building the fire around the pot caused the burning of the stables.

[3] Circumstantial evidence has frequently been allowed to determine matters of much greater consequence, both criminal and civil. There are a number of cases in our reports where the evidence of circumstances has been allowed to go to the jury as bearing upon the origin of a fire. *McMillan v. Railroad*, 126

N. C. 725, 36 S. E. 129; *Aycock v. Railroad*, 89 N. C. 327; *Simpson v. Lumber Co.*, 133 N. C. 101, 45 S. E. 469.

If the jury shall determine that the building of the fire around the pot was the cause of the burning of the stables and the plaintiff's horse, then it will be a question, under the peculiar circumstances and facts of this case, for the jury to say whether a man of ordinary prudence would have built such a fire in such a place and under such circumstances.

New trial.

(160 N. C. 130)

CLARK MILLINERY CO., Inc., v. NATIONAL UNION FIRE INS. CO.

(Supreme Court of North Carolina. Oct. 3, 1912.)

1. INSURANCE (§ 623*)—ACTION ON POLICY—TIME—DENIAL OF LIABILITY.

Where a fire insurance company through its adjuster denied all liability soon after the appraisers' award had been filed, it thereby waived a provision that suit should not be brought until a specified period had elapsed after the filing of satisfactory proofs of loss, or an award of appraisers when appraisal has been required.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1543, 1551-1553; Dec. Dig. § 623.*]

2. INSURANCE (§ 623*)—ACTION ON POLICY—TIME.

A clause in an insurance policy for delay of suit is inserted for the sole benefit of the insurer to permit time for investigation; and hence the insurer may waive the same by an unequivocal denial of liability, and this notwithstanding an agreement that the submission and appraisal should not waive any right of either party.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1543, 1551-1553; Dec. Dig. § 623.*]

3. INSURANCE (§ 622*)—FIRE POLICY—ACTIONS—TIME—COMMENCEMENT BY RECEIVER.

Insured's affairs having been placed in the hands of a receiver, he brought an action in insured's name on the policy in question within the time limited therein, and, after such time had expired, became a party plaintiff to it himself as receiver. Held, that plaintiff receiver was entitled to sue in the name of the corporation for which he was acting, and that the action did not lose its identity by his joining as a party plaintiff in his official capacity, so as to make it a new suit brought without the contract limitation period.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1544-1556; Dec. Dig. § 622.*]

4. ARBITRATION AND AWARD (§ 80*)—CONSTRUCTION.

Everything will be intended in favor of an award as far as possible consistent with the law, but nothing will be intended against it.

[Ed. Note.—For other cases, see Arbitration and Award, Cent. Dig. §§ 420-427; Dec. Dig. § 80.*]

5. ARBITRATION AND AWARD (§ 65*)—CONFORMITY TO SUBMISSION.

Though an award must conform strictly to the submission, it may be good as to a part and void as to the remainder, if the parts are sep-

arable, in case the arbitrators have acted in excess of their authority.

[Ed. Note.—For other cases, see Arbitration and Award, Cent. Dig. §§ 328-332; Dec. Dig. § 65.*]

6. ARBITRATION AND AWARD (§ 80*)—AMBIGUITY.

Any ambiguity in the words of an award should be settled in the way which will best coincide with the apparent intention of the arbitrators, and the court by intendment will restrain general terms to apply to particular words in the submission, so as to connect the particular thing awarded with such general words.

[Ed. Note.—For other cases, see Arbitration and Award, Cent. Dig. §§ 420-427; Dec. Dig. § 80.*]

7. ARBITRATION AND AWARD (§ 60*)—REQUISITES OF AWARD—"CERTAINTY."

The certainty required in an award is certainty to a common intent, not to a certain intent in general, or in every particular, but certainty which is attained by giving to the words their ordinary sense; not excluding, however, any meaning derived from fair argument or inference.

[Ed. Note.—For other cases, see Arbitration and Award, Cent. Dig. §§ 298-309; Dec. Dig. § 60.*]

For other definitions, see Words and Phrases, vol. 2, pp. 1028, 1029.]

8. ARBITRATION AND AWARD (§ 60*)—FORM OF AWARD—CERTAINTY.

While certainty is an essential element of a good award and one of its chief characteristics, it is not necessary that it should be written with such technical and critical nicety that subtle examinations and forced constructions cannot discover a doubt, difficulty, or a double meaning in any part of it; reasonable certainty being sufficient.

[Ed. Note.—For other cases, see Arbitration and Award, Cent. Dig. §§ 298-309; Dec. Dig. § 60.*]

9. ARBITRATION AND AWARD (§ 88*)—PAROL PROOF.

An award of arbitrators cannot be altered by parol, nor is parol evidence admissible to prove the understanding or meaning of the arbitrators, different from that warranted by the terms of the award.

[Ed. Note.—For other cases, see Arbitration and Award, Cent. Dig. §§ 514-518; Dec. Dig. § 88.*]

10. ARBITRATION AND AWARD (§ 52*)—FORM OF AWARD.

An award of arbitrators need not assign reasons, but is sufficient if it consists of a simple announcement of their decision, or the result of their investigation.

[Ed. Note.—For other cases, see Arbitration and Award, Cent. Dig. §§ 261-266; Dec. Dig. § 52.*]

11. ARBITRATION AND AWARD (§ 29*)—BASIS OF ARBITRATION.

Arbitrators are not bound to decide according to law when acting within the scope of their authority, but may make an award according to their notions of justice on principles of equity and good conscience.

[Ed. Note.—For other cases, see Arbitration and Award, Cent. Dig. §§ 147-154; Dec. Dig. § 29.*]

12. INSURANCE (§ 574*)—CONSTRUCTION OF AWARD—UNCERTAINTY.

Where an award of arbitrators, with reference to a loss under a policy, stated that the total amount of the award was \$4,872.62 and the damaged stock, it was not rendered fatally defective for uncertainty because the arbitra-

tors evidently misunderstood the insurance company's blank on which the award was written, and placed certain of the figures in the wrong column.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1430-1432, 1434; Dec. Dig. § 574.*]

13. INSURANCE (§ 574*)—ACTION ON AWARD—CHANGE.

Where an award of arbitrators allowed \$4,872.62 and the damaged stock for loss under a policy, a verdict fixing the value of the damaged goods at \$257 did not authorize the court to deduct that sum from the amount found due by the arbitrators, as such deduction amounted to a change of the award.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1430-1432, 1434; Dec. Dig. § 574.*]

14. APPEAL AND ERROR (§ 1033*)—PREJUDICE—RIGHT TO ALLEGE ERROR.

In an action on an insurance award, the insurance company was not prejudiced by, and could not complain of, an erroneous deduction of the value found by a jury to represent the damaged goods, which the arbitrators had directed should be delivered to plaintiff as of no value.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4052-4062; Dec. Dig. § 1033.*]

15. ARBITRATION AND AWARD (§ 82*)—CHANGE OF AWARD—FRAUD—MISTAKE.

It is not competent to change an award in any way which will change the meaning appearing on its face, in the absence of proof of fraud or mistake.

[Ed. Note.—For other cases, see Arbitration and Award, Cent. Dig. §§ 440-450; Dec. Dig. § 82.*]

Appeal from Superior Court, Wilson County; Justice, Judge.

Action by the Clark Millinery Company, Incorporated, against the National Union Fire Insurance Company. Judgment for plaintiff, and defendant appeals. Affirmed.

This is an action brought in the superior court by the Millinery Company to recover on certain fire insurance policies issued to it by the defendants. The complainant, F. S. Hassell, was appointed receiver of the Millinery Company, a corporation which had become insolvent, and made a party to the action at his own request. The property destroyed by fire was a stock of merchandise, consisting chiefly of millinery and notions and store furniture and fixtures. The parties agreed to submit to arbitration the ascertainment of "the sound value of said property and the loss and damage," and a certain method was prescribed for doing so. The agreement of reference to arbitrators contained what is called a "nonwaiver clause," by which it was stipulated that the submission and appraisal "shall not waive or invalidate any rights of either party to the agreement under the said policy or policies, or any provisions or conditions thereof." The arbitrators met and appointed an umpire, as they were authorized to do by the terms of the submission, and the three returned the following award:

"We, the undersigned, pursuant to the

within appointment, do hereby certify that we have truly and conscientiously performed the duties assigned us in accordance with the foregoing stipulations, and have appraised and determined the actual cash value of said property on the — day of —, 190—, and the actual loss and damages there- by the fire which occurred on that day, to be as follows:

	Sound Value.	Loss and Dam- age.
On	\$6,039.53	
On	\$4,872.62	\$1,168.91
On furniture and fixtures..	\$ 460.80	\$ 178.08

"Total amount of award, \$4,872.62 and the damaged stock.

"Witness our hands this 10th day of March, 1910.

"Agree as to furniture and fixtures only.

"J. I. Thomason,

"Q. E. Rawls,

"Appraisers.

"J. T. Williams,

"Umpire."

The jury returned the following verdict:

"(1) Has there been an appraisal and award, as provided in the policies, as to the amount of damages to which plaintiff is entitled under the policies of insurance attached to the complaint? Answer: Yes (by consent).

"(2) Did the plaintiff bring this action within less than 60 days from the date of the making of the award by the appraisers? Answer: Yes (by consent).

"(3) Did Jordon S. Thomas, adjuster, subsequent to said award and while acting as representative of defendant companies, by words, acts, or conduct, deny all liability under said award? Answer: Yes.

"(4) Did more than one year elapse after the date of the award made by the appraisers and the date that the plaintiff F. S. Hassell, receiver of the Clark Millinery Company, was made a party to this action? Answer: Yes (by consent).

"(5) In what amount are the defendants indebted unto the plaintiffs by reason of the said fire and under the policies of insurance set forth in the complaint, and by virtue of the said award? Answer: Three thousand, four hundred and sixty-one dollars, and seventy-three cents, with interest from May 10, 1910, on stock, and (by consent) \$178.08 damage to the furniture and fixtures, with interest from May 10, 1910.

"(6) What was the value of the insured property saved from the fire? Answer: \$257."

The plaintiffs allege, in the seventh section of their complaint, that the fire occurred on the 1st day of January, 1910, and "practically destroyed the entire stock" of the Millinery Company, and this allegation is admitted in the answer. There was no dispute as to the insurance and award, so far as they related to the furniture and fix-

tures, and that matter is eliminated from the case.

The policies contained the following clauses:

"(1) The loss shall not be payable until sixty days after the notice, ascertainment, estimate and satisfactory proof of loss herein required have been received by this company, including an award by appraisers when appraisal has been required.

"(2) No suit or action on this policy for the recovery of any claim shall be sustainable in any court of law or equity until after full compliance by the insured of all the foregoing requirements, nor unless commenced within twelve (12) months next after the fire."

There was a judgment upon the verdict, and the defendant appealed, after reserving certain exceptions, to be hereafter noted.

Connor & Connor, of Wilson, for appellant. Woodard & Hassell, of Wilson, for appellee.

WALKER, J. The defendants resist recovery upon three grounds.

[1] First. That the action was prematurely brought. It was found by the jury that the company soon after the award was filed denied its liability thereunder, through its adjuster, and the finding is fully supported by the evidence. The adjuster, after examining the award, refused to allow the arbitrators to rearrange the figures and place them in their proper columns, and in reply to a request that he permit this change to be made, so that it might appear clearly what was intended, he said: "It is no good. I demand another appraisal. We are not liable for one cent under that award. You cannot hold us for one cent." This language was a strong and unequivocal denial of all liability, and made inapplicable the stipulation for the six weeks' extension of time for payment. That clause evidently refers to a proof of loss or an award, the validity of which and the correctness of the amount due thereunder are admitted. The agreement is that the company shall be allowed six weeks to pay, and not six weeks if it has refused to pay and denied liability. Why require plaintiff to wait six weeks to sue for a debt which is disputed, or, to put it in other words, to wait six weeks for payment, when the defendant has emphatically said that it will not pay at the end of the time? It was intended to be merely an extension of credit upon an admitted debt. And so are the authorities. It will be observed that the provision for an allowance of six weeks indulgence is the same as to proof of loss and the award, and we have held in Higson v. Insurance Co., 152 N. C. 206, 67 S. E. 509, that a denial of liability will dispense with proofs of loss, and to the same effect are the following cases: Gerring-er v. Insurance Co., 133 N. C. 407, 45 S. E. 773;

Jordan v. Insurance Co., 151 N. C. 341, 66 S. E. 206; Parker v. Insurance Co., 143 N. C. 339, 55 S. E. 717; Insurance Co. v. Edmundson, 104 Va. 486, 52 S. E. 350; 19 Cyc. 857, § 2, and other authorities cited in Higson v. Insurance Co., supra. In State Insurance Co. v. Maackens, 38 N. J. Law, at page 571, the same doctrine is stated, and supported by the citation of many cases: "A denial of all liability on the policy and peremptory refusal to pay under any circumstances is also a waiver of the right of the company to have the stipulated time before any suit is commenced. Upon such denial of liability, and refusal to pay, an action may be commenced at once. Norwich & N. Y. Trans. Co. v. Western Mass. Ins. Co. [Fed. Cas. No. 10,363] 6 Blatchf. C. C. R. 241; s. c., 34 Conn. 561 [Fed. Cas. No. 10,363]; Allgre v. Maryland Ins. Co., 6 Har. & J. [Md.] 408 [12 Am. Dec. 289]; Phillips v. Protection Ins. Co., 14 Mo. 220; Baltimore Fire Ins. Co. v. Loney, 20 Md. 20; Aetna Ins. Co. v. Maguire, 51 Ill. 342; Cobb v. Ins. Co., 11 Kan. 93." The court in Insurance Co. v. Gracey, 15 Colo. 70, 24 Pac. 577, 22 Am. St. Rep. 376, said that the clause was inserted to give the company an opportunity for making arrangements to pay the debt, and when liability is denied, since payment is in no event to be made, preparation therefor becomes a matter of no importance whatever. It therefore held that the condition was waived by the denial. The simple way to put it is that the clause has failed of its purpose. Time was allowed upon the assumption that the company would act in good faith and pay the claim, and not attempt to use the indulgence for the mere purpose of delay. What is said in Insurance Co. v. Cary, 83 Ill. 453, is still more to the point: "What reason can be assigned for extending to the company the benefit of the limitation clause in the policy as to the bringing of an action for a loss which its officers have decided upon full examination not to pay at any time nor under any circumstances? The time given in which to make payment of the loss was of no value to the company, for it did not intend to pay at all, and the assured was at liberty to bring her action at once." The same court said, in Insurance Co. v. Maguire, 51 Ill. 342: "The fair understanding of this condition of the policy seems to us to be that when the company agrees to pay the loss, or are undecided what they will do, no suit can be brought until after the expiration of sixty days from the time proof of loss is furnished, but it cannot apply, nor would it be just that it should, to a case where a company peremptorily refused to pay, as was this case."

[2] The cases uniformly state that the object of this clause, inserted for the sole benefit of the insurer, is to allow time for investigation in the case of the requirement as to proof of loss and of preparation in the case of an adjustment. Proofs would be of

no avail when there is a denial of liability, and it would be unreasonable to insist upon the extension of time to pay a claim, a mere favor, if it did not intend to pay it. "The denial of liability is inconsistent with such a claim and a waiver of it." Insurance Co. v. Gibson, 53 Ark. 494, 14 S. W. 672. The authorities sustaining this view are very numerous. Biddle on Insurance, § 1145; 4 Joyce on Insurance, § 3211; 19 Cyc. 903 (c), and note 57; 13 Am. & Eng. Enc. (2d Ed.) 374; Insurance Co. v. Hancock, 106 Tenn. 513, 62 S. W. 145, 52 L. R. A. 665; Massell v. Insurance Co., 19 R. I. 569, 35 Atl. 209; Assurance Co. v. Hanna, 60 Neb. 29, 82 N. W. 97; Insurance Co. v. Sylvester, 25 Ind. App. 207, 57 N. E. 991; Landis v. Insurance Co., 56 Mo. 591; Insurance Co. v. Wickham, 110 Ga. 129, 35 S. E. 287. The suggestion that an adjusted claim under a policy is analogous to a promissory note, where a mere denial of liability would not affect the operation of the statute of limitations, is fully answered in Insurance Co. v. Wickham, supra, citing Brewer, J., in Cobb v. Insurance Co., 11 Kan. 93. The nonwaiver agreement does not change the result. The denial of liability was something that occurred after the adjustment, and not during its progress. Strause v. Insurance Co., 123 N. C. 64, 38 S. E. 256; Dibble v. Insurance Co., 110 N. C. 193, 14 S. E. 783, 28 Am. St. Rep. 678. Besides, in this case, the defendant ratifies the agent's denial of liability, and still insists upon it. Modlin v. Insurance Co., 151 N. C. 35, 65 S. E. 605. The very terms of the nonwaiver agreement confine its immunity and protection to things said and done while engaged in ascertaining and adjusting the loss, and not to anything said or done ex post facto. This exception, therefore, is overruled.

[3] Second. But defendant says that, if the action was not brought too soon, it was brought too late, as there is a clause requiring suit to be brought within 12 months next after the fire. The fire occurred in January, 1910, and this action was commenced by the Millinery Company on May 4, 1910, but at the time the affairs of that company had been placed in the hands of Mr. F. S. Hassell, as receiver, who originally brought this suit in the name of the corporation, which he had a clear right to do. Pell's Revisal, §§ 1219, 1203, and 847, and notes. It is so held in Smathers v. Bank, 135 N. C. 410, 47 S. E. 893, and Davis v. Manufacturing Co., 114 N. C. 321, 19 S. E. 371, 23 L. R. A. 322, in which Justice Burwell, approving what was decided in Gray v. Lewis, 94 N. C. 392, says: "As well because of the change in the system of our courts, as because of the statutes, the receiver may sue either in his own name or that of the corporation. In whatever name he may elect to bring the action, it is essentially a suit by the corporation, prosecuted by order of the court, for the collec-

tion of the assets." And Justice Connor says in *Smathers v. Bank*, supra, that "whatever may have been the law in respect to the right of the receiver to prosecute actions for the recovery of the assets of the corporation, prior to the change in our judicial system, blending legal and equitable jurisdiction and remedies and power into one tribunal and providing for one form of action, it is well settled that a receiver can now sue either way." A receiver is only the officer of the court, its custodian, and the title to the assets remains in the original owner. He is the arm of the court to collect and administer the assets, and acquires no beneficial interest in them. It is clear that he may use the name of the insolvent corporation, or his own, or both, at his election. High on Receivers, §§ 209, 211. He did not change the nature of the suit by becoming a party to it more than one year after the fire. The action has not lost its identity. It is the same as it was in the beginning. He brought it in the name of the insolvent company, and, if this had not been so and the corporation had itself brought it, he adopted it as his own by having himself made a party afterwards. But the very point as to the limitation has been decided in *Lehigh Coal & Nav. Co. v. Railroad*, 42 N. J. Eq. 591, 8 Atl. 648. In that case, an action at law had been brought in due time, against the corporation, while in the hands of a receiver, for damages arising from negligence of defendant. Summons amended by substituting receiver as defendant, who pleaded the statute of limitations. He was enjoined by the court of equity from setting it up in the court of law, upon the ground that it was the same action and record in law, notwithstanding the amendment. The court said: "If, therefore, the proceedings were in this court for this recovery, and the proceedings had been amended as they have been in the Supreme Court, this court would say that the statute is no bar, for it had not commenced to run at the time of the institution of the suit, although the pleadings have been very materially amended by striking out the name of the only defendant, and inserting the name of another, yet it is the same suit, a suit which was begun before the statute began to run. There is sound reason for this, and I think excellent authority"—citing cases. And this, we think, disposes of the second exception.

Third. The defendant attacks the award upon the ground that its terms are conflicting and, if not, then uncertain, and it cannot, therefore, be enforced, and, if enforceable at all, it is only partially so, and to the extent of holding it good only as an award for \$1,166.91.

[4] The question is not by any means free from difficulty, and may require us to consider carefully the nature in law of an award under a submission by the parties. Anciently the construction of awards often

turned on nice and subtle distinctions, and much refinement will be found in the books of that time on the subject, but a more liberal and sensible method has been introduced, and the judges have invariably laid it down that the courts will intend everything to support awards, if possible, and will always give effect to them, if it can be done consistently with law, and nothing will be intended against them.

[5] An award must be made strictly in pursuance and in uniformity with the submission, which must not, in its terms, be exceeded, and the arbitrators should regularly award as to all things referred to them though an award may be good as to part and void as to the remainder if the parts are separable, where the arbitrators have acted in excess of authority. *Watson on Arbitration and Award*, marg. p. 176 (59 Law Library, 111); *Stevens v. Brown*, 82 N. C. 460. It must be certain and final as to all matters submitted (*Gibbs v. Berry*, 35 N. C. 388), and it will be taken to be so, unless the contrary expressly appears on its face, the law indulging every fair presumption in its favor, and not leaning to a construction which would destroy it, but putting one consistent sense on all the terms. *Wood v. Griffith* (Lord Eldon) 1 Swanst. 43; *Ballard v. Mitchell*, 53 N. C. 153.

[6] Any ambiguity in the words should be settled in the way which will best coincide with the apparent intention of the arbitrators, and the court will, by intendment, restrain the general terms in an award to apply to particular words in the submission; so it will connect the particular thing awarded with the general words of the submission. *Watson*, supra. We have said the award must be certain, for the object of the parties in submitting their disputes to arbitration is to make an end of litigation, and uncertainty in it would only produce a fresh source of dispute between them.

[7] The certainty required in an award is certainty to a common intent (*Watson*, marg. p. 204; *Carter v. Sams*, 20 N. C. 321), not to a certain intent in general or in every particular. It is the certainty which is attained by giving to the words their ordinary sense, but not excluding any other meaning derived from fair argument or inference. *Black's Dict.* p. 186. Lord Mansfield said that awards are now considered with greater latitude and less strictness than they were formerly. And it is right that they should be liberally construed, because they are made by judges of the parties' own choosing. And this is often (as it is here) in cases of small consequence, where the play is not worth the candle. Indeed, they must have these two properties—to be certain and final. But the certainty may be judged of according to a common intent, and consistent with fair and probable presumption. *Hawkins v. Colclonch*, 1 Burr. 274-277.

[8] While certainty is an essential of a good award and one of its chief characteristics, it is not necessary that it should be written with such technical and critical nicety that subtle examinations and forced constructions cannot discover a doubt, or a difficulty, or a double meaning, in any part of it. Reasonable certainty of meaning is sufficient, for it will be construed in a fair and liberal spirit and favorably, with a view to support it as far as a sensible interpretation will allow. *Borretts v. Patterson & Taylor*, 1 N. C. 126, 1 Am. Dec. 576; *Stevens v. Brown*, 82 N. C. 460. If it be expressed in such language that plain men, acquainted with the subject-matter, can understand it, that is enough, no matter how short and elliptical it is. The degree of uncertainty, to avoid an award, should be such as would avoid any other contract such as would leave the meaning of the arbitrators wholly in doubt. *Morse on Arbitration and Award*, pp. 408, 409, and cases cited in notes; *Osborne v. Calvert*, 83 N. C. 366.

[9] The award generally speaks for itself, and cannot be altered any more than the verdict of a jury. It is not open to proof of any understanding or meaning of the arbitrators, different from that it carries with it and warranted by its terms. *Scott v. Green*, 89 N. C. 278.

[10] Arbitrators need not go into particulars or assign reasons, and their duty is best discharged by a simple announcement of their decision, or the result of their investigation. *Patton v. Baird*, 42 N. C. 255.

[11] They are not bound to decide according to law, when acting within the scope of their authority, being the chosen judges of the parties and a law unto themselves, but may award according to their notions of justice and without assigning any reason. *Jones v. Frazier*, 8 N. C. 379; *Leach v. Harris*, 69 N. C. 532; *Robbins v. Killebrew*, 95 N. C. 19; *Ezzell v. Lumber Co.*, 130 N. C. 205, 41 S. E. 99. They may decide upon principles of equity and good conscience, and make their award *ex sequo et bono*. 3 Story, Eq. Jur. § 1454; *Johnson v. Nobor*, 13 N. H. 286, 38 Am. Dec. 487. The policy of the law favors settlements by arbitration, and therefore leans liberally and partially towards them, extending its favor in support of this amicable method of settlement. *Robbins v. Killebrew*, supra. Parol evidence is competent in order to show what matters the arbitrators acted on. *Brown v. Brown*, 49 N. C. 123; *Walker v. Walker*, 60 N. C. 259; *Osborne v. Calvert*, supra.

[12] With these well-settled principles kept in mind, we must determine whether this award is invalid for uncertainty or inconsistency, or whether we can adopt the view of defendant that, if valid, the arbitrators have awarded only \$1,166.91, to be paid to plaintiff. As to the last position, we think that it is utterly inadmissible, as the arbitrators have in so many words awarded the

sum of \$4,872.62 and the damaged stock to the plaintiff, and we cannot, therefore, decide that \$1,166.91 is the amount due. If these two findings are in hopeless conflict, the award is void for uncertainty. Unfortunately the arbitrators have been a little obscure in the form of stating their conclusion. We have no doubt that they performed their duty intelligently and knew exactly what they intended to decide, but were misled by a lack of familiarity with insurance methods and terms, and by not knowing in which column of defendant's form or blank to place the figures. The evidence discloses this fact. They have unwittingly run into a mere inaccuracy of expression, and that is all. Where the intention is clear or free from reasonable doubt, we should not try to test an award by the strict rules of grammar, arithmetic, or bookkeeping, but look at the instrument with favor, and take a common-sense view of it, allowing for the deficiencies of the layman, or those not skilled in legal forms or methods. We may examine the submission, in connection with the award, in order to explain or construe the latter, for they naturally and legally go together. The arbitrators were directed by it to ascertain the sound value of the stock in the first instance, and unless we adopt the amount, \$4,872.62, as this value, there is nothing in the award to stand for it. We have seen that parol evidence may be heard to show what the arbitrators did; that is, what they acted upon, and that they kept within the terms of the submission. This they say was done by following its instructions and deducting the necessary items from the cost price to get the actual "sound value" on the day of the fire and just before it occurred. *Brown v. Brown*, supra. The amount, \$4,872.62, is put in the column headed "Sound Value," and it is very evident that it was arrived at by deducting \$1,166.91 from it, and the latter figures were manifestly placed in the wrong column. This is made more apparent when we consider that the arbitrators actually awarded \$4,872.62 as the loss on the stock, or the amount due under the policies. But the award sheds still more light upon itself, so that we can readily and safely read its meaning. It must be remembered that the statement preceding the actual award was an "appraisal and determination" of values—merely a statement of the process by which they came to their conclusion. The pith of the award, the final adjudication of the arbitrators, is contained in the words, "Total amount of award, \$4,872.62 and the damaged stock." This clearly implies, to the exclusion of any reasonable doubt, that they regarded the loss as total, and included the debris with the pecuniary award, because they decided it was worth nothing. Excluding from our consideration all oral testimony admitted by the court, as to what the arbitrators meant and as to how they awarded,

we can call to our aid a very significant admission of the defendant in the pleadings to confirm our construction of the award. Plaintiff alleged that the fire practically destroyed the entire stock, and this is admitted in the answer. If this be so, how could the amount of the loss be \$1,160.91, only one-fourth of the sound value of the goods? The defendant admitted, and the arbitrators found, a total loss, and for that reason added to their award of money, \$4,872.62, "the damaged stock." The giving of the stock to plaintiff is entirely inconsistent with the claim of defendant that the arbitrators intended to award only \$1,160.91, or any other amount than the one they did give, to wit, \$4,872.62, which was the sound value of the stock, the loss being practically total, as they and the parties thought, and the debris or damaged goods being worth nothing, as the arbitrators evidently decided. The arbitrators could not have made the award without having decided that the loss was total and the debris of no value, because the insured could not fairly and equitably be entitled to the debris upon any other theory. This is not only a "fair and reasonable presumption," but a clear implication from the terms of the award and its context, and such a presumption and implication may be summoned to the aid of an instrument, which, without some such assistance, would have to be condemned as too uncertain (Watson on Arb. pp. 411 and 414), and for that reason incapable of enforcement. [13, 14] It is true that the jury have found that the damaged goods were worth \$257, which was deducted by the court from the amount found due by the arbitrators; but while we think this ruling was erroneous, as changing the award, it was in favor of defendant, who cannot, therefore, complain, and, the plaintiff not having appealed, it must stand. We have considered the case, without reference to the extrinsic evidence, showing what was the intention of the arbitrators.

[15] We have said it is not competent to change the award in any way that will change its meaning, as that appears upon its face, in the absence of proper allegations and proof of fraud or mistake. We must accept it as we find it. *Scott v. Green*, 1 Enc. of Law & Ev. p. 964.

There is no error in the case.
No error.

(92 S. C. 568)

HAYNES v. SULLIVAN et al.

(Supreme Court of South Carolina. Oct. 8, 1912.)

ANIMALS (§ 44*)—KILLING ANIMALS—LIABILITY OF OFFICER.

A police officer, who shot off his pistol merely to frighten a fugitive into submission to arrest, was not liable for the killing of a horse belonging to plaintiff, on which the fugitive was riding, by another person, who shot the horse

without justification, on the officer's call to arrest the fugitive, but not to shoot.

[Ed. Note.—For other cases, see *Animals*. Cent. Dig. §§ 115-122; Dec. Dig. § 44.*]

Appeal from Common Pleas Circuit Court of Anderson County; R. W. Memminger, Judge.

"To be officially reported."

Action by S. A. Haynes against P. W. Sullivan and another. Judgment for plaintiff, and defendant Sullivan appeals. Reversed.

Hood & Sullivan, of Anderson, for appellant. A. H. Dagnall, of Anderson, for respondent.

WOODS, J. The plaintiff recovered judgment in the magistrate's court against the defendants Sullivan and Martin for damages for shooting his horse. On appeal by Sullivan to the circuit court, the judgment was affirmed. Sullivan alone appeals to this court; his main contention being that the proof was conclusive that he did not shoot the horse, nor induce any one else to do so.

Sullivan, acting as a police officer in the town of Honea Path, undertook to arrest a negro named George Jones, who was riding the horse, in the belief that he was transporting contraband liquor. To prevent Jones from getting away, and to frighten him into submission and arrest, Sullivan shot his pistol in the air, making no effort whatever to hit Jones or the horse. The shot did not hit Jones, and Sullivan called out, "Arrest the negro, but don't shoot." The defendant Martin, who was some distance off, shot twice, and the horse was found to be struck. We think it is evident that a police officer, who shoots off his pistol merely for the purpose of frightening a fugitive into submission to arrest, is not responsible for injuries inflicted by others, who shoot without justification, on the officer's call to arrest the fugitive, but not to shoot. There was no evidence that Sullivan and Martin were acting in concert or even that Martin heard Sullivan's shot, and was influenced by that to shoot the horse.

Reversed.

GARY, C. J., and HYDRICK, WATTS, and FRASER, JJ., concur.

(92 S. C. 564)

SPIRES v. ATLANTIC COAST LINE R. CO. (two cases).

(Supreme Court of South Carolina. Oct. 8, 1912.)

1. CARRIERS (§ 284*)—INJURY TO PASSENGER—MISCONDUCT OF OTHER PASSENGERS—CARRIER'S LIABILITY.

Where plaintiff was shot and injured by another passenger while on an excursion train operated by defendant, and there was evidence that the officers in charge of the train had strong reason to apprehend assault on passengers from riotous fellow passengers, and from the person who did the shooting in particular,

but made no effort to quell the riot by calling peace officers, or otherwise, defendant was liable for the injury so sustained.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 1125–1135, 1173, 1222; Dec. Dig. § 284.*]

2. CARRIERS (§ 284*)—EXCURSION TRAIN—OPERATION—PROTECTION OF PASSENGERS.

Where a carrier operates an excursion train for its own profit, it is its duty to provide a police force adequate to protect passengers from any disturbance which due precaution requires that it should anticipate.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 1125–1135, 1173, 1222; Dec. Dig. § 284.*]

3. CARRIERS (§ 284*)—CARE REQUIRED—PROTECTION OF PASSENGERS.

A carrier is bound to use the highest degree of care to protect a passenger from the attacks of a fellow passenger, when the carrier has knowledge of the existence of danger from such cause, or facts from which the danger might be reasonably anticipated.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 1125–1135, 1173, 1222; Dec. Dig. § 284.*]

Appeal from Common Pleas Circuit Court of Barnwell County; W. B. De Loach, Special Judge.

"To be officially reported."

Separate actions by James S. Spires and by J. Addie Spires against the Atlantic Coast Line Railroad Company. Judgments for plaintiffs, and defendant appeals. Affirmed.

Harley & Best, of Barnwell, for appellant. Wolfe & Berry, of Orangeburg, and R. C. Holman, of Barnwell, for respondents.

WOODS, J. On an excursion train run by the defendant from Augusta, Ga., to Sumter, S. C., the plaintiff James S. Spires was stabbed, and the plaintiff J. Addie Spires was shot by Dukes, a fellow passenger. Separate actions were brought for damages against the defendant railroad company; each of the complaints alleging: "That such injuries, damages, and suffering were caused by the willfulness, wantonness, recklessness, carelessness, and negligence of the defendant in the following particulars, to wit: (a) In allowing drunken, riotous, and disorderly persons to enter and come upon its said train at Augusta, Ga., well knowing their condition and the danger therefrom to the plaintiff and its other passengers thereon; (b) In allowing drunken, disorderly, and riotous persons to remain upon its said train from Augusta, Ga., to Denmark, S. C., well knowing their condition and the danger therefrom to the plaintiff and its other passengers thereon; (c) in failing to provide any, or a sufficient, number of officers or trainmen to preserve order and protect the plaintiff and its other passengers on its said train from violence and injury, well knowing that there were a number of drunken, riotous, and disorderly persons thereon whose manner, conduct, and acts were a menace to the plaintiff and its other passengers on such train; and (d) in utterly failing to preserve order upon

its said train, or to protect the plaintiff and its passengers from the insults, abuses, assaults, and batteries made upon the plaintiff and certain of its other passengers thereon by a number of drunken, riotous, and disorderly persons then and there upon its aforesaid train." The plaintiffs recovered separate judgments for actual damages; the claim for punitive damages having been withdrawn.

The appeal depends upon the proposition of defendant's counsel that the circuit judge should have ordered a nonsuit or directed a verdict for the defendant, on the ground that the attacks on the plaintiffs were the sudden attacks of another passenger, which the defendant had no reason to expect, and therefore no reason to guard against.

[1, 2] The evidence from both sides showed these conditions: There was a large and turbulent crowd at the Augusta station, and a number of arrests were made by the police. Just after the train crossed the Savannah river, demonstrations of drunkenness, vulgarity, and violence on the part of at least seven or eight of the passengers began and increased until the condition of riot was reached. The train, made up of nine or ten coaches, was crowded, and the train crew consisted of a conductor and assistant, a special agent of the railroad company, the engineer, fireman, and flagman. There was evidence that some of the passengers appealed to the conductor to put down the disorder, and offered to assist in ejecting the rioters. The conductor and other train officers testified that an attempt to quell the disturbance and to eject the rioters by force, in their opinion, would have increased the disorder and the danger to the passengers, and that they used their utmost efforts, short of the exercise of force, to remove and placate the disorderly persons. There was testimony on behalf of the defendant that Dukes had not participated in the disorder up to the time he stabbed one of the plaintiffs, without provocation, and shot the other; but eyewitnesses on behalf of the plaintiff testified that he was the leader in the violent and vulgar demonstrations. The evidence is convincing that the officers in charge of the train had the strongest possible reason to apprehend assault on passengers from riotous fellow passengers; and it was their duty, after being put on notice, to use every available means to prevent such assaults by having the riot quelled and the rioters ejected. There was, it is true, strong reason for them to conclude that an effort by the small train crew to enforce order would have been ineffectual, and would have increased the danger. But when the riot commenced the train was very near Augusta, and it would have been easy to run the train back and summon the city police. The train passed through Barnwell and other considerable towns in this state,

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

and yet no effort was made to perform the obvious duty of demanding the assistance of sheriffs and other law officers in these places. Besides, it is a matter of common knowledge that disorder is to be anticipated on excursion trains such as this was; and when a railroad company chooses to run such a train for its own profit it is its duty to provide a police force adequate to protect passengers from any disturbance which due precaution requires that it should anticipate.

[3] The law on the subject is too well established to require discussion. It is the duty of a carrier to use the highest degree of care to protect a passenger from the attacks of a fellow passenger, when the carrier has knowledge of the existence of danger from this cause, or of facts from which the danger may be reasonably anticipated. *Franklin v. Atlantic Ry.*, 74 S. C. 340, 54 S. E. 578; *Anderson v. S. C. & G. R. R. Co.*, 77 S. C. 434, 58 S. E. 149, 122 Am. St. Rep. 591; *Norris v. Southern Ry.*, 84 S. C. 15, 65 S. E. 958. The evidence shows, beyond dispute, that the railway company in this case had reason to anticipate injury to its passengers from any of the rioters on the train; and there was evidence from which the jury could reasonably infer that *Dukes*, who inflicted the injury, was conspicuous among the rioters, and that the servants of the defendant in charge of the train were negligent in not using all available means to quell the riot and protect the plaintiffs and other passengers.

It follows that there was no error in refusing to order a nonsuit, or to direct a verdict in favor of the defendant.

Affirmed.

GARY, C. J., and HYDRICK, WATTS, and FRASER, JJ., concur.

(93 S. C. 329)

CARTER v. SOUTHERN RY. CO. et al†
(Supreme Court of South Carolina. Oct. 2, 1912.)

1. RAILROADS (§ 398*)—DEATH OF PERSON ON TRACK—NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.

In an action for the death of a pedestrian on a railroad track, struck by a train, evidence held, by equally divided court, to support a verdict of actionable negligence and freedom from contributory negligence, authorizing a recovery.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1356-1363; Dec. Dig. § 398.*]

2. RAILROADS (§ 358*)—INJURIES—LICENSEES ON TRACK—LIABILITY.

A licensee on a railroad track by express permission to use it, or by implied acquiescence in its use, is entitled to ordinary care on the part of trainmen to prevent injury to him; and he may recover for injuries due to mere negligence on the part of the trainmen, unless guilty of contributory negligence.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1236, 1237; Dec. Dig. § 358.*]

3. JUDGMENT (§ 239*)—PAMTIES.

Where an action for the death of a pedestrian on a railroad track, struck by a train, was brought against the company and the engineer, and the jury rendered a verdict against the company in favor of plaintiff, and in favor of the engineer, a judgment for plaintiff on the verdict held, by equally divided court, authorized under the evidence.

[Ed. Note.—For other cases, see *Judgment*, Cent. Dig. § 417; Dec. Dig. § 239.*]

Woods and Hydrick, JJ., dissenting.

Appeal from Common Pleas Circuit Court of Fairfield County; R. C. Watts, Judge.

"To be officially reported."

Action by Mary J. Carter, as administratrix of J. T. Carter, deceased, against the Southern Railway Company and another: From a judgment for plaintiff against defendant named, it appeals. Affirmed.

The following are the exceptions:

"(1) Because his honor erred in refusing to grant the motion for a nonsuit and to direct a verdict in favor of the defendant upon the first ground, which was 'that there is no evidence in the case tending to show any breach of duty owed by the defendant to the plaintiff's intestate, and no evidence of any negligence whatever upon the part of the defendant company that was the proximate cause of his death.' The error being that the undisputed evidence shows that there was no negligence on the part of the defendant company, its servants or agents, that was the proximate cause of the death of plaintiff's intestate.

"(2) Because his honor erred in refusing the motion for a nonsuit and to direct a verdict upon the second ground urged, which was 'that the undisputed evidence shows that at the time of his death the deceased was a trespasser upon the track of the defendant company, and there is no evidence of any recklessness, wantonness, or willfulness on the part of the defendant, after he was discovered to be on the track, that was the proximate cause of his death.' The error being that, under the undisputed facts and law applicable thereto, the plaintiff's intestate was a trespasser upon the track of the defendant company at the time of his death; and, there being no evidence of recklessness, wantonness, or willfulness shown, after he was discovered to be on the track, his honor, therefore should have granted the motions for a nonsuit, and for the direction of a verdict.

"(3) Because his honor erred in refusing the motion for a nonsuit, and to direct a verdict upon the third ground, which was 'that there is no evidence that this was a traveled place in the legal sense, and no evidence of negligence in striking the plaintiff at a traveled place, which was the proximate cause of his death.' The error being that, the complaint having alleged that the plaintiff's intestate was walking on the track of the defendant company 'at a traveled

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

† Reargument ordered, see 75 S. E. 1135.

place,' and there being no testimony in law to support such allegation, and no evidence of negligence in striking the plaintiff at a 'traveled place,' his honor should have granted said motions.

"(4) Because his honor erred in refusing the motion for a nonsuit and to direct a verdict upon the fourth ground, which was 'that, if the evidence shows that deceased was a licensee upon the track of the defendant company, then there is no evidence of any negligence on the part of the defendant company, or of a breach of any duty that the defendant owed plaintiff's intestate, if he was a licensee; there being no evidence of any lack of care on the part of the defendant company that was the proximate cause of his death.' The error being that there was no evidence of negligence on the part of the defendant company, its servants and agents, even if the plaintiff's intestate was a licensee; but, as the testimony clearly showed, under the law, that the plaintiff's intestate could not be a licensee upon the track of the defendant company at the point where he was struck and killed, there was absolutely no evidence of any breach of duty that the defendant owed the plaintiff's intestate, as there was no evidence of any lack of care on the part of the defendant company after it discovered plaintiff's intestate on the track.

"(5) Because his honor erred in not granting the motion for a nonsuit and for direction of a verdict upon the fifth ground, which was 'that the undisputed evidence shows that the deceased was guilty of contributory negligence, which was the proximate cause of his death.' The error being that the undisputed evidence, from which no other reasonable inference can be drawn, clearly shows that plaintiff's intestate was guilty of contributory negligence as a matter of law.

"(6) Because his honor erred in charging the jury as follows: 'Now, I charge you as a matter of law that, if the public generally are permitted by a railroad company to travel on their railroad track openly, notoriously, adversely, and continuously for 20 years or more, then that makes them licensees. If the railroad company know that they are using their track and traveling over it—that is, the public generally—for 20 years or more, openly, notoriously, continuously, and adversely, against their claim, or against their exclusive right to use it themselves, and they acquiesce in that and permit it, and do not order them off, and do not prevent their doing it, then the law says the public generally acquires a right or license to travel up and down that road, to use it as a thoroughfare for the purposes of walking on it.' The Court: 'Is the law 20 or 10 years?' Mr. McDonald: 'For adverse possession? Ten years, adverse possession; 20 years, presumption of the grant.' The Court: 'If the railroad company permits the public generally to use their railroad track for a

thoroughfare, people to walk on it, and use it as a passway or anything of that sort, openly, notoriously, adversely, and continuously for 10 years or more, and they acquiesced in it, and consent to it, or do not raise any row over it, and permit it, if that goes on for 10 or more years openly, notoriously, continuously, and adversely, then that gives them a permissive right or a license to use the track for that purpose. It does not mean that one man can use it for that length of time. It means the public generally, who go up and down the railroad track. The jury must be satisfied that the public generally have continuously, openly, notoriously, and adversely for 10 years or more traveled the road as a matter of right, and not as a matter of permission, and that the railroad has acquiesced in that, or that they had knowledge of it and permitted it. When that is the case, they are called licensees; that is, the public generally has a license to walk up and down the railroad track.' The error being that neither an individual nor the public, by use of a railroad track for any length of time, can acquire an adverse use thereof, so as to ripen into a right to its use, either as licensee or otherwise; and it was error in his honor to hold and charge otherwise.

"(7) Because his honor erred in charging the jury as follows: 'If in this case the railroad company was negligent and careless—that is, if the agents and servants of the company failed to observe due care and due precaution so as not to injure plaintiff's intestate in this case (that is, Carter) if Carter was a licensee (that is, the public had acquired a right to walk up and down this railroad track under the law, as I have given it to you)—and that carelessness and negligence on their part was the cause of the injury to Carter, and Carter did not, by any act of negligence or carelessness on his part, contribute to the direct and proximate cause of his injury, then, under circumstances of that sort, the plaintiff would be entitled to recover such actual damages sustained proportionate to the injury sustained.' The error being that plaintiff's intestate could not acquire a right to the use of defendant's track at the point where he was killed by adverse use or otherwise, as a matter of law; and the defendant company, its agents and servants, did not owe to him due care as a licensee, and it was error to charge the jury as above set forth.

"(8) Because his honor erred in charging the jury as follows: 'Now, I charge you further, as a matter of law, that a railroad company in running its cars over its track has a right to assume, in the absence of anything to the contrary, or any proof to the contrary, that when a person is walking on its track, and they see or hear the approach of a train, or if they give the necessary signals and everything of that sort, they have a right to assume that the party

walking on the track will get off the track and get out of the way of the approaching train. At the same time the law requires the engineer, the party in charge of the train, the locomotive running it, to observe due care and due precaution not to inflict injury to any person that is on the track. They must observe due care and due precaution, exercise the ordinary care, do what an ordinary prudent person would do, under similar circumstances, not to inflict any injury on any person on the track, and give the necessary signals, and they do not get off, and there is any reasonable way whereby he can stop the train and prevent the injury, and he does not observe due care and due precaution, but is careless and negligent, and does not observe due care and due precaution, and injures any one under circumstances of that sort, and the party injured does not, by any act of carelessness and negligence on his part, in any manner contribute to the direct and proximate cause of his injury, then the party injured, or the party suing for him, would have a right to recover such actual damages as sustained, proportionate to the injury sustained.' The error being that such large was confusing to the jury, inasmuch as his honor failed to distinguish between the duty owed a licensee and a trespasser, and thus charged the jury that, even if, under the facts, the jury should find that plaintiff's intestate was a trespasser, still the defendant company would be liable if it failed to observe due care and due precaution, or failed to exercise ordinary care; whereas the law is that if he was a trespasser the mere failure to observe due care or ordinary care would not render the defendant liable.

"(9) Because his honor erred in charging the jury as follows: 'If you think one defendant was careless and negligent and the other was not, or the agents and servants of the other were not, then your verdict can be against one of the defendants. You can say, "We find for the plaintiff against the Southern Railway Company so many dollars damages," sign your name as foreman; or, "We find against the defendant, Herring," and sign your name as foreman.' The error being that there could be no verdict against the defendant railway company, unless its codefendant, Herring, was guilty of negligence; and his honor should have charged the jury that there could be no separate verdict against the defendant Southern Railway Company if the jury concluded that defendant Herring was not guilty of negligence.

"(10) Because his honor erred in not granting a new trial upon the first ground, which was 'that the evidence in this case shows that plaintiff's intestate was a trespasser upon the railroad track at the time he was killed, as he was not injured at a public crossing, street, or traveled way, nor in a populous community, where he had acquired a license to be upon the track; and there is

no evidence of willfulness, wantonness, or recklessness on the part of the defendant, its agents and servants.' The error being that the undisputed evidence showed that plaintiff's intestate was a trespasser; and there was no evidence of willfulness, wantonness, or recklessness on the part of the defendant, its agents and servants, that was the proximate cause of his death."

"(12) Because his honor erred in refusing motion for new trial upon the second ground, which was 'that, even if, under the facts and the law, plaintiff's intestate was a licensee on the track of the defendant company, there is no evidence of any negligence on the part of the defendant company, or any breach of duty that it owed to plaintiff's intestate, as there was no evidence of any lack of ordinary care on the part of the defendant company or its agents, after discovering him on the track; and the positive testimony shows that the station signal was blown, and the danger signals were given in ample time for plaintiff's intestate to have stepped off the track; and the evidence further shows that defendant's agents and servants used every reasonable measure and precaution, by applying the emergency brakes, to avoid injury to plaintiff's intestate, after discovering him on the track.' The error being that, even if plaintiff's intestate was a licensee, there was no evidence of negligence on the part of the defendant company; but, on the contrary, the undisputed evidence showed that every reasonable measure and precaution to prevent injury to plaintiff's intestate was observed by defendant's agents and servants, after discovering him on the track and that he failed to heed the danger signals.

"(13) Because his honor erred in refusing motion for a new trial on the third ground, which was 'that, whether plaintiff's intestate be considered a trespasser or a licensee upon defendant's track, the undisputed testimony shows that he was guilty of contributory negligence, he having gotten upon the track at a time when he knew that defendant's train was about due, knowing that he was deaf, walking with his back towards the coming train, and failing to look behind him, or to adopt any other means to discover the approaching train; and such contributory negligence on his part was a proximate cause of his death.' The error being that, whether plaintiff's intestate was a trespasser or a licensee upon the track, the undisputed evidence showed that he was guilty of contributory negligence as a matter of law; and such contributory negligence was the proximate cause of his death."

B. L. Abney, of Columbia, and McDonald & McDonald, of Winnsboro, for appellant. A. S. & W. D. Douglas, of Winnsboro, for respondent.

FRASER, J. This was an action for punitive and actual damages, brought by the

plaintiff, as administratrix, for the wrongful killing of her husband by the defendants.

The defendant J. H. Herring was the engineer operating the train that killed the deceased. The verdict was against the railway company alone, and was for \$12,500. This verdict was reduced to \$9,000 by an order of Hon. R. C. Watts and the acceptance by the plaintiff. Judgment was entered for \$9,000 and costs. From this judgment, the defendant railway appealed on the grounds set out in the exceptions, which will be reported.

It seems that the deceased lived near Blackstock, in Fairfield county, and was going to said town to his business on the morning of the 6th of June, 1910, and walked on the railway track, and not on the public highway that adjoined the track. The deceased had been deaf and dumb, but he had learned to talk, but was still deaf. The complaint alleged that the deceased was traveling on the track where the public had been accustomed to walk for more than 20 years, and the deceased had the right to walk there. The defendant claimed that the deceased was a trespasser, and, being deaf, was guilty of contributory negligence in walking on a railroad track, especially when he ought to have known that the train that killed him was due, and walked in the same direction as the approaching train, with his back to it.

The defendant moved for a nonsuit, for the direction of a verdict, and for a new trial, all of which were refused, except the partial relief of a new trial nisi.

The exceptions raise four questions: (1) Was there any evidence to go to the jury on the question of negligence of the defendants? (2) Did the defendants owe to the deceased due care? (3) When the complaint alleged the joint negligence of the two defendants, could judgment be given against one? (4) Was there indisputable evidence of contributory negligence?

[1] 1. Was there any evidence to go to the jury on the question of negligence of the defendants?

There was evidence that the whistle sounded at the whistle post, over 1,000 feet away, but that the deceased did not get off the track; that from that point the deceased was in full view of those on the engine, and it was a question on the nonsuit as to whether they did see him or not. If they did see him, then the question is answered by *Haltiwanger v. Railroad Co.*, 64 S. C. 23, 41 S. E. 810: " * * * An examination of the 'case' shows that there was some testimony tending to show that the engineer did see the deceased on the track, and, as a person walking on a railroad track in front of an approaching train is always 'in a position of apparent danger,' we think there was, at least, some evidence tending to show that

the engineer running the train saw that the deceased was in a position of apparent danger; and therefore we are of opinion that there was no error in refusing the motion for a nonsuit upon either of the grounds upon which such motion was based."

The testimony for the defendants shows that, as a matter of fact, both the engineer and fireman saw him. The testimony further shows that for more than 1,000 feet the fireman said nothing to the engineer about it, until the engineer had reached for the brake and whistle. He said: "Mr. Herring blew the whistle before I said anything. He reached up to the whistle. I said: 'We are going to hit him. Hold it.' The conductor said: 'About the time the brakes went down, we struck him.'" Thus it seems that there was evidence that no effort was made to stop the train or give the danger signal until it was apparent that the deceased would be struck.

Again, the flagman said: "Well, I heard the engineer sound the danger signal, and about the same time felt the brakes go on in emergency, and I looked out of the window right quick on the right-hand side and saw the man fly out to one side."

The answer to this question is: There was evidence of negligence.

[2] 2. Did the defendants owe the deceased due care?

It is true his honor erred in charging that the public could acquire a right to travel the road; but the practical question is: When the agents of the defendant saw the deceased in a position of danger, did they owe him and to humanity due care? This question is answered by *Sanders v. Railway*, 90 S. C. 335, 73 S. E. 357: "Plaintiff's testimony tended to show that he was struck while walking alongside of defendant's track in a well-beaten path at a place where the general public had been accustomed to walk for many years, without any objection from defendant; that the train which struck him was running backwards at a rate of from 12 to 20 miles an hour, through a populous section of the city of Charleston, at a place where men, women, and children were constantly passing and repassing along defendant's right of way and upon and near its tracks; that the train ran upon him from behind, without any signal or warning of its approach being given. We think this testimony made out a prima facie case for plaintiff. From it the jury might reasonably have inferred that the use of its right of way by the public was known to and acquiesced in by defendant; and therefore that plaintiff was a licensee and entitled to ordinary care on the part of defendant to prevent injury to him; and also, from the frequency of the use by the general public, that defendant should have anticipated the presence of persons on or near its tracks at that place, and should have exercised due

care to prevent injury to them. *Jones v. Railway*, 61 S. C. 556, 39 S. E. 758; *Matthews v. Railway*, 67 S. C. 499, 46 S. E. 335 [65 L. R. A. 286]; *McKeown v. Railroad Co.*, 68 S. C. 483, 47 S. E. 713; *Goodwin v. Railroad Co.*, 82 S. C. 321, 64 S. E. 242; *Bamberg v. Railroad Co.*, 72 S. C. 389, 51 S. E. 988; *Lamb v. Railroad Co.*, 86 S. C. 106, 67 S. E. 958 [138 Am. St. Rep. 1030]."

The testimony here showed that the railroad track to Blackstock had been used for more than 20 years by pedestrians, without objection, and a great many people used it. But if the deceased had been a trespasser, then, in *Jones v. Railway*, 61 S. C. 559, 39 S. E. 759, it is said: "It is the trespasser's duty to look out for himself, and to give the railway company a clear track by getting out of the way. If, however, the servants of the railroad company should discover a trespasser upon the track, and should then fail to use ordinary care, under the circumstances, to avoid running him down, this would be evidence from which a jury might infer that the injury was the result, not of mere inadvertence, but of a conscious failure to observe due care, or of wantonness or willfulness."

It may be said that wantonness and willfulness had been eliminated from the case. As a foundation for punitive damages, they were eliminated from the case; but the defendant was still required to make out its affirmative defense of contributory negligence, and if the facts subsequently proven showed willfulness the plea could not prevail.

[3] 3. When the complaint alleged the joint negligence of the two defendants, could judgment be given against one?

This question is answered by several comparatively recent cases, and the answer is that it can. *Ruddell v. Railway*, 75 S. C. 293, 294, 55 S. E. 529: "In the next place, it is insisted the verdict should have been set aside, because the fact that the finding was against the railroad company, and not against its agent, who was directly responsible for the digging and proper guarding of the hole, shows that the verdict was due to prejudice or partiality; the evidence of negligence and wantonness being much stronger against him than against the railroad company. There was no error of law in refusing the motion on this ground, because the liability of the railway company and Brinkley, its agents and codefendant, was joint and several. *Schumpert v. Railway and Hutchinson*, 65 S. C. 332, 43 S. E. 813 [95 Am. St. Rep. 802]; *Gardner v. Railway Co. and Pierson*, 65 S. C. 341, 43 S. E. 816; *Carson v. Railway, Arwood, and Miller*, 68 S. C. 55, 46 S. E. 525."

The testimony was not clear as to what the engineer could see on the left of the center of the track. The jury may have thought that the engineer's view was ob-

structed by the boiler, and that the fireman, the agent of the defendant company, who was on the left side of the engine, was at fault in not notifying him of the danger in time.

4. Was there indisputable evidence of contributory negligence?

The deceased had been warned not to go on the railroad track, and he replied "that an automobile had brushed his clothes, and it looked as if there was no place for him to walk on the railroad or public road."

There was evidence that when his employer desired to attract the attention of the deceased he stamped the floor, and the deceased, feeling the vibrations of the floor, gave attention. The deceased seems to have depended on the telephonic message of a coming train transmitted along the railroad irons and perceived through his feet. The deceased had considered the matter, and seemed to have considered the railroad the safer place. He had considered the matter, and it was for the jury to say whether his conclusion was negligently found, or was simply an error of judgment.

The judgment of this court is that the judgment appealed from be affirmed.

GARY, C. J., concurs. WATTS, J., disqualified.

WOODS, J. (dissenting). In this action against the Southern Railway Company and J. H. Herring, one of its engineers, the plaintiff, as administratrix, recovered judgment against the defendant railway company on a complaint containing the following allegations attributing the death of J. T. Carter, plaintiff's intestate, to the actionable negligence of the defendants: "That on the morning of the 6th day of June, A. D. 1910, the said J. T. Carter, since deceased, was walking along the track of the said Southern Railway from his home, situate a short distance south of the town of Blackstock, in the state aforesaid, a station on defendant Southern Railway Company's railroad, on his way to engage in lawful business in said town, when said track, on and along which plaintiff's intestate was walking, had been used by the public as a traveled place for 20 years or more last past before said 6th day of June, A. D. 1910; and while said intestate was on said traveled place, as aforesaid, he was negligently, recklessly, wantonly, unexpectedly approached from his rear, he being totally deaf, by one of the defendant Southern Railway Company's locomotives, operated by the defendant J. H. Herring, as engineer thereon, drawing a train of cars, at a very high rate of speed, and without due and reasonable precaution, and through the joint and concurrent negligence, recklessness, and wantonness of said defendants, as aforesaid, caused said locomotive drawing said train of cars to strike

said intestate, and so injured him that he then and there died."

The main question to be decided is whether the circuit judge should have granted a nonsuit on the evidence offered by the plaintiff, or should have directed a verdict in favor of defendant at the close of the evidence on both sides, on the grounds, first, that the testimony on behalf of the plaintiff did not tend to prove that Carter's death was due to the negligence of the defendant, but, on the contrary, admitted of no other inference than that the fatality was due solely to his own negligence; and, second, that if the testimony admitted of an inference of negligence against the defendants it showed conclusively that intestate was guilty of contributory negligence.

Though railroad companies are held to the exercise of great care in running trains through the country at high speed, the established right of railroads to the use of their tracks, and the right of the public to require of railroads prompt and efficient service, should not be sacrificed or impaired in favor of pedestrians who, for their own convenience, recklessly take the risk of walking the track in the face of obvious danger.

The general rules of reason applied by this court, and by courts generally, may be thus stated:

(1) Due care requires that those in charge of such a dangerous instrumentality as a railroad train should keep a lookout ahead; and failure to keep such a lookout may be evidence of negligence, or willfulness, or wantonness, according to the circumstances.

(2) Persons who use a railroad track as a walkway without a license, either express or implied, are trespassers, and those in charge of a railroad train owe them no duty, except not to injure them willfully or wantonly. Hence, if the failure to keep a lookout is found to be merely negligent, and not a wanton or willful disregard of duty, such trespassers cannot complain or avail themselves of the failure.

(3) When a railroad servant charged with the duty of keeping a lookout sees a trespasser on the track, he may assume that he is aware of the danger and will get off; but if he has reason to infer from appearances that the trespasser has not heard the train the duty arises to signal him, and failure to signal in such circumstances may be some evidence of willfulness and wantonness.

(4) If, by a wanton or willful disregard of the duty to keep a lookout, the employé in charge of the engine fails to see even a trespasser helpless on the track, or if such employé fails to stop when he observes the trespasser to be helpless, the trespasser is not precluded by his own mere negligence from recovering for the resulting injuries.

(5) When the failure to keep a lookout, or

to signal, or to observe one helpless on the track, or to stop the train to rescue such helpless person, is due to mere negligence, a trespasser who receives injuries cannot recover; but one who is a licensee on the track, either by express permission to use it, or by implied acquiescence in its use, may recover for injuries due to mere negligence in the particulars mentioned, unless he has himself been guilty of contributory negligence.

(6) A railroad servant in charge of a train discharges his duty when he duly signals even a licensee on the track of the approach of the train, unless from appearances or otherwise he, as a reasonable man, ought to have observed that the person on the track was oblivious of the danger, notwithstanding the noise and the signals, or was unable to get off the track.

Taking the testimony for the plaintiff as true, the circumstances of the killing were as follows: The deceased, J. T. Carter, was an intelligent deaf man, who had been educated and taught to speak at the Cedar Springs Institute. He was 39 years old, and was living with his wife, also deaf, and his children near the line of the Southern Railway, between the stations Blackstock and Woodward. He was learning bookkeeping at Blackstock, and had occasion to go there frequently. There was a public road running parallel with the railroad; but the railroad was used to a large extent by pedestrians, as it furnished better walking than the public road. There were several curves in the track. On June 6, 1910, Carter was walking on the track, going from his home to Blackstock, and was seen by Herring, the engineman of defendant's train which passed about 7:20 o'clock in the morning, in time to stop the train and go forward and move Carter off; but the whistle had been blown for the station a few hundred yards away, and there was nothing to prevent the signal and the noise of the train from being heard, so that it was impossible that a man who could hear would not have heard and known that the train was very near. When within 20 or 30 yards of Carter, the engineman gave one or more short, warning blasts of the whistle and stopped the train very quickly; but Carter remained on the track, and the stop was not quick enough to prevent the engine from striking and killing him. There was no evidence that the train was not equipped with approved air brakes, or that the engineman could have stopped it more quickly after he gave the alarm.

I think it by no means clear that there was evidence to go to the jury tending to show that the use of the track where deceased was walking was so general, constant, and unusual, by the people of a populous community, as to put the railroad company on notice of such use, and to require it either to actively forbid it, or to treat those who

used the track as licensees, with the right to have their probable presence on the track taken into special consideration in the running of trains. On the contrary, it seems to me that the proof shows nothing more than the usual unbidden use of a railroad track by the people of an ordinary country neighborhood, at their own risk—such a use as imposed no special duty on the railroad company with respect to them. There were few families living in the vicinity, and what the witnesses said of the use of the track could be said of the use by almost every average community adjacent to a railroad. The doctrine that such an average or ordinary use implies acquiescence or license by the railroad company is without judicial sanction, and has never been announced in this state, as will be seen by the careful distinction made in *Sanders v. Southern Ry. Co.*, 90 S. C. 331, 73 S. E. 356, and the cases therein cited.

But laying aside that question with the assumption that the deceased was entitled to have the defendant exercise ordinary care for his protection from injury while walking on the track, we next inquire, Was there evidence of the lack of such care? The rule is well established that those in charge of a railroad train may presume that a pedestrian will get off the track after they have given a signal sufficient to put him on notice, and that they need not stop the train for his sake, unless there is notice from appearances, or otherwise, that the person on the track has not heard the train or is not able to take care of himself. *Smalley v. Southern Ry.*, 57 S. C. 243, 35 S. E. 459; *Sentell v. Southern Ry.*, 70 S. C. 183, 49 S. E. 215. In the open country, where there is nothing to prevent the pedestrian from stepping off, even if the railroad has acquiesced in the use of its track by others, surely a licensee under no infirmity can demand nothing more than that he shall have warning of the approach of the train. The authorities are clear on this subject. *Drawdy v. Railroad*, 78 S. C. 374, 58 S. E. 980; *Griskell v. Railway*, 81 S. C. 193, 62 S. E. 205; *N. & W. R. R. v. Harmans*, Adm'r, 83 Va. 553, 8 S. E. 251; *McAdoo v. Railroad*, 105 N. C. 140, 11 S. E. 316; *Meredith v. Railroad*, 108 N. C. 616, 13 S. E. 137; *High v. Railroad*, 112 N. C. 385, 17 S. E. 79; *Tyler v. Sites*, Adm'r, 90 Va. 539, 19 S. E. 174; *Beach v. Railroad*, 148 N. C. 153, 61 S. E. 664. In this case the station signal had been blown, there was nothing to prevent the hearing of the noise of the train, and the deceased was walking erect, with every appearance of ability to make himself safe by leaving the track. There was nothing to put the engineman on notice, when he first saw him, that he did not hear the station signal, or would not leave the track in time. But I think there was a question of fact made by the evidence whether the engineer or fireman, having the deceased in sight, should not have

inferred from his conduct that he had not heard the signal and was not aware of the approach of the train, and should have endeavored to stop the train before it was within 20 or 30 feet of him.

Continuing the assumption that Carter was entitled to ordinary care on the part of those in charge of the railroad company's trains, and assuming, further, that the engineer and fireman should have taken notice, before they did, that the deceased would not get off the track, and that the engineman was negligent in failing to stop his train in time to prevent striking deceased, the evidence offered by the plaintiff proved conclusively that the death of her husband would not have occurred but for his own gross, contributory negligence. He was entirely destitute of the sense of hearing. As an intelligent man, he certainly knew that he could not expect the employés of the railroad company to know and take account of his infirmity; and, in fact, it was not known to the engineman or fireman of this train. The train by which he was killed had been running by his house on the same schedule for several years, and was about on time on this occasion. Carter had therefore the strongest reason to expect that it would come up behind him, and that he would be entirely oblivious of its approach. He had been expressly warned of the danger of walking on the railroad by one friend; and another had, on a previous occasion, gone to him and gotten him off the track in time. The case is altogether different in its facts from *McKeown v. Railroad*, 68 S. C. 483, 47 S. E. 713, relied on by the plaintiff's counsel. In that case the court held that there was evidence of willfulness and wantonness in running the train at night without lights, and for this reason, even if there had been conclusive evidence of contributory negligence, it would not have been available on a motion for a nonsuit. In this case all charges of willfulness were withdrawn; and if negligence be imputed to the engineman for failing, by a second or two, to realize Carter's danger in time to stop the train and avert his death, beyond all doubt contributory negligence must be imputed to Carter when he went on the railroad in reckless disregard of danger, which was imminent and obvious. In *Lamb v. Southern Railway*, 86 S. C. 106, 67 S. E. 958, 138 Am. St. Rep. 1030, the court held that a person in full possession of his senses, who undertook to walk across a railroad bridge over a river, undertook a peril so obvious that he was guilty of contributory negligence.

A deaf man, who deliberately chooses to take his course on a railroad track, takes a still more obvious peril. His only hope of escape from a train coming up behind is the chance that those in charge of the train may possibly discover his infirmity in time to stop the train and take him off. It would

be difficult to mark out a course of conduct more grossly negligent. The courts have held that it is contributory negligence for a deaf man to take such an obvious risk. *Schexnadre v. Railroad*, 46 La. Ann. 248, 14 South. 513, 49 Am. St. Rep. 321; *Johnson v. L. & N. R. R.*, 91 Ky. 651, 25 S. W. 754; *International, G. & G. N. R. R. v. Garcia*, 75 Tex. 583, 18 S. W. 223.

In *Central R. R. & B. Co. v. Smith*, 78 Ga. 698, 3 S. E. 398, the plaintiff was injured, while walking on the railroad track at night, by a train running at an excessive rate of speed, but carrying a headlight. Chief Justice Bleckley, in holding that there could be no recovery, said: "As matter of fact, to walk along the middle of a railroad track between crossings when it is dark, and without knowing and remembering whether a train is due or not, and without looking out in both directions for trains that may be due, and without listening attentively and anxiously for the roar and rattle of machinery, as well as for the sound of bell or whistle, is gross negligence."

The deceased in this case was still more negligent; for he chose to walk on the track knowing that it was impossible for those in charge of the train to give him warning of its approach. I cannot escape the conclusion that the judgment of the circuit court should be reversed, and that a nonsuit should have been granted.

It seems to me that there were other errors in the charge, also, in failing to distinguish between the duties owed by the railroad to a trespasser and a licensee, and in giving the instruction that the public might acquire a right to use the railroad as a foot-path by its continuous use for 10 years; but I do not think further discussion necessary. *Matthews v. Railway*, 67 S. C. 499, 46 S. E. 335, 65 L. R. A. 286.

The position that a verdict against the railroad company, and not against the engineman, is contradictory is unsound, and is disposed of by the case of *Ruddell v. Railway*, 75 S. C. 290, 55 S. E. 528, and the cases there cited.

I think there should be a reversal.

HYDRICK, J., concurs. WATTS, J., disqualified.

(92 S. C. 569)

REARDON v. AVERBUCK.

(Supreme Court of South Carolina. Oct. 8, 1912.)

1. PLEADING (§ 236*)—AMENDMENT—DISCRETION OF COURT—AMENDMENT AT TRIAL.

The denial of a motion for leave to amend an answer at the trial was not an abuse of discretion, where defendant had had nearly a year after the commencement of the action in which to acquaint his counsel with his defenses, and the only excuse for the delay was that defendant was a foreigner, speaking English so imperfectly that his counsel did not under-

stand him as to the allegations of the proposed amendment until the morning of the trial.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. § 601; Dec. Dig. § 236.*]

2. LANDLORD AND TENANT (§ 150*)—REPAIRS—DUTY TO MAKE.

A lease which is silent on the subject of repairs implies no obligation on the part of either the lessor or lessee to repair.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 536-557; Dec. Dig. § 150.*]

3. EVIDENCE (§ 441*)—PAROL TO VARY WRITING—MATTERS NOT INCLUDED IN WRITING.

A written lease making no reference to repairs does not prevent the proving of a distinct and separate agreement by the lessor to repair.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 2030-2047; Dec. Dig. § 441.*]

4. LANDLORD AND TENANT (§ 188*)—ACTIONS FOR RENT—DEFENSES—FAILURE TO REPAIR.

In an action on a mortgage to secure the payment of rent, given by the lessee on the day he vacated the premises, because, as he claimed, the building leaked and injured his goods, evidence of an agreement by the landlord, made some time prior thereto, to repair was not admissible, since, by renewing his promise to pay the rent after the landlord's failure to repair, the tenant waived his right to set up a breach as a defense to the mortgage.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 782, 783; Dec. Dig. § 188.*]

5. TRIAL (§ 192*)—INSTRUCTIONS—ASSUMPTIONS AS TO FACTS.

In claim and delivery, it was not error to charge that plaintiff had demanded possession of the property, where defendant's counsel, during the course of the charge, admitted that such demand had been made.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 432-434; Dec. Dig. § 192.*]

6. REPLEVIN (§ 95*)—VERDICT—REQUISITES AND SUFFICIENCY.

In an action to recover possession of a stock of goods covered by a mortgage, where no other goods were referred to in the pleadings or evidence, a verdict for "the recovery of the possession of the goods or the sum of \$200" sufficiently identified the property.

[Ed. Note.—For other cases, see *Replevin*, Cent. Dig. § 118; Dec. Dig. § 95.*]

7. APPEAL AND ERROR (§ 1033*)—REVIEW—HARMLESS ERROR—ERROR FAVORABLE TO PARTY COMPLAINING.

In claim and delivery, where defendant was wrongfully in possession of the property, he could not complain because the jury placed the value thereof at less than its real value.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4052-4062; Dec. Dig. § 1033.*]

Appeal from Common Pleas, Circuit Court of Sumter County.

"To be officially reported."

Action by George W. Reardon against Nathan Averbuck. Judgment for plaintiff, and defendant appeals. Affirmed.

L. D. Jennings, of Sumter, for appellant. Haynsworth & Haynsworth, of Sumter, for respondent.

WOODS, J. In this appeal, in an action of claim and delivery, from a judgment

against the defendant, the exceptions assign errors in these particulars: First, in refusing to allow an amendment to the answer; second, in excluding testimony tending to show that the plaintiff had agreed to repair the store for the rent of which the mortgage was given; third, in charging that the plaintiff had demanded possession of the property; and, fourth, in refusing a new trial, on the ground that the verdict was not in proper form.

The foundation of the action was a mortgage on a stock of goods, executed by the defendant to secure several notes given to the plaintiff for the rent of a storehouse. The defense set up in the original answer was that the store was in a dilapidated condition; that the notes were given for rent in advance; that the plaintiff had promised, when they were given, to repair the store, and had refused to do so; and that defendant's goods were so injured by leaks in the roof that he was forced to move his goods and carry on his business in another store. The rent contract was made on September 7, 1906, for the rent of the store from September 1, 1906, to September 1, 1907, for \$300, and contains no agreement as to repairs. The mortgage was not executed until January 16, 1907.

[1] When the cause was called for trial, the defendant's counsel made a motion to amend by alleging that the defendant signed the mortgage, which was not read to him, under the representation by the plaintiff that it was a paper giving him the right to move, and under the duress of threats of bodily harm at the hands of the plaintiff. As an excuse for not putting this defense in the original answer, counsel for defendant stated that defendant was a foreigner, speaking English so imperfectly that he had not understood him as to the allegations of the proposed amendment until the morning of the trial. The contention that there was abuse of discretion in not allowing the amendment cannot be sustained. The amendment proposed would have introduced on the eve of the trial an entirely new issue. The defendant had had nearly 12 months after the commencement of the action to acquaint counsel with his defenses; and there was good reason for the court to hold that if he had used due diligence and care the defense would have been set up before the call of the case. As there was no error in refusing the amendment, it follows the testimony offered to support it was properly excluded.

[2, 3] As to the second point, it is true, as defendant contends, that a lease silent on the subject of repairs implies no obligation on the part of either lessor or lessee to repair; and, as the written lease in this case made no reference to repairs, it was no obstacle to setting up and proving a distinct and separate agreement by Reardon, the

plaintiff, to put the house in repair. *Williams v. Salmond*, 79 S. C. 459, 61 S. E. 70.

[4] But there is a valid reason for the exclusion of the evidence. The answer alleges that the contract to repair was made on September 7, 1906, the day on which the lease was signed. It is impossible that the payment of the rent could have been conditional on the making of the repairs; for the mortgage to secure the rent for the entire year was given on January 16, 1907, the day that defendant moved out of the store, for the reason, as he alleged, that it leaked and injured his goods. This clearly showed a promise to pay the rent, notwithstanding the failure of the plaintiff to repair. The defendant might have had a separate action, or might have set up a counterclaim for damages for breach of the alleged separate contract to repair; but he could not avail himself of such alleged breach as a defense to this action on the mortgage, for by renewing his promise to pay the rent in the face of plaintiff's failure to repair he waived the right to set up the breach as a defense to the mortgage. *Rouse v. Sarratt*, 74 S. C. 575, 54 S. E. 757.

[5] There is no foundation for the third assignment of error; for the admission of defendant's counsel in the course of the charge could not be construed as less than an admission of a demand for the possession of the property.

[6] The verdict was in this form: "We find for the plaintiff the recovery of the possession of the goods or the sum of \$200." This sufficiently identified the property, as there were no goods referred to in the pleadings or the evidence, except the stock of goods covered by the mortgage. *Bossard v. Vaughn*, 68 S. C. 96, 46 S. E. 523; *Phoenix Co. v. Jaudon*, 75 S. C. 229, 55 S. E. 308.

[7] The defendant cannot complain that the jury placed the value at \$200, instead of \$1,000, the alleged real value. The defendant was wrongfully in possession; and it was to his advantage that the jury should assess the property at less than its value in finding that the plaintiff was entitled to recover from him the property, or its value, if it could not be recovered.

Affirmed.

GARY, C. J., and HYDRICK, WATTS, and FRASER, JJ., concur.

(92 S. C. 515)

WALKER et al. v. DES PORTES.

(Supreme Court of South Carolina. Oct. 2, 1912.)

1. JUDGMENT (§ 681*)—DECREE—CONCLUSIVE—NESS.

A decree providing for the sale of certain land in partition was not binding on certain contingent remaindermen who were not made parties to the proceeding, and their interests would not follow the purchase money.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1202; Dec. Dig. § 681.*]

2. PARTITION (§ 111*)—SALE—PROCEEDS—REPUTATION—SURRENDER OF BENEFITS.

Where contingent remaindermen were not made parties to a partition suit, but the share belonging to the holder of the precedent estate with a contingent remainder at her death was paid to a trustee, who invested it in certain Georgia land, the contingent remaindermen as a condition to their right to repudiate the sale were bound to return not only the amount so invested, with interest, but the present value of the investment of such share; such value being the proportion of the present value of the land in which the money was invested which the original investment bore to the entire investment made by the trustee.

[Ed. Note.—For other cases, see Partition, Cent. Dig. §§ 401-418; Dec. Dig. § 111.*]

3. PARTITION (§ 111*)—SALE—PROCEEDS—REPUTATION—SURRENDER OF BENEFITS.

Where contingent remaindermen were not made parties to a partition suit, and the court ordered \$1,000 of the share of one of the holders of the precedent estate to be used in the improvement of the family dwelling situated on the lands assigned to her in the original division made by the executors and held by her under testator's will, the remaindermen entitled to such property were not bound by such investment, but, it being impossible to ascertain to what extent the land was increased in value by the improvement, they were only bound to return the sum so invested with interest as a condition to their right to recover their interest in the land partitioned.

[Ed. Note.—For other cases, see Partition, Cent. Dig. §§ 401-418; Dec. Dig. § 111.*]

4. PARTITION (§ 109*)—SALE OF LAND—INVALIDITY—IMPROVEMENTS.

Where a purchaser of land under a partition decree invalid as against contingent remaindermen cut timber and brought more of the land under cultivation, but added nothing to its value by so doing, no allowance could be made to her for such alleged improvements in an accounting between her and the contingent remaindermen.

[Ed. Note.—For other cases, see Partition, Cent. Dig. §§ 375-397; Dec. Dig. § 109.*]

5. PARTITION (§ 77*)—SALE—DESIRABILITY.

Where the shares of many of the parties interested in land sought to be partitioned were very small, and it appeared impossible to adjust equities without a sale, it was properly ordered.

[Ed. Note.—For other cases, see Partition, Cent. Dig. §§ 211-223; Dec. Dig. § 77.*]

Appeal from Common Pleas Circuit Court of Fairfield County; R. C. Watts, Judge.

Action by Alice B. Walker and others against Sarah W. Des Portes. Judgment for plaintiffs, and defendant appeals. Modified and remanded.

Glenn W. Ragsdale and McCants & McCants, all of Winnsboro, for appellant. A. S. & W. D. Douglas, McDonald & McDonald and Hanahan & Traylor, all of Winnsboro, for respondents.

WOODS, J. The facts are clearly stated in the circuit decree, and will not be stated in detail here.

When Jemima Harrison, one of the children of Osmond Woodward, died without issue living, the land which had been assigned to her by the executors of the will of Osmond Woodward under authority of

the will vested in her sisters, with contingent remainders to their issue. The sisters, by an action for partition in the court of common pleas, procured a sale of the Harrison land without making the children, the contingent remaindermen in esse, parties. When Regina Dadsden, Sarah Cook, Rebecca Buchanan, and Lucy A. Keller, the sisters of Jemima Harrison, died, the interests of certain of the contingent remaindermen in the lands originally assigned to her became vested, and this action was brought to recover their interests in the lands as if no sale had been made. The defendant Sarah W. Des Portes is in possession, claiming through the purchase at the partition sale. She is also the owner by purchase of the one-fourth interest in remainder of the children of Regina Gadsden. It is admitted that the issue of Lucy A. Keller are entitled to recover one-fourth interest in the land.

The defense to the claim of the issue of Mrs. Sarah S. Cook and Mrs. Rebecca Buchanan are (1) that they intervened in the partition suit, and that by the intervention they became parties and are bound by the sale made in that suit; (2) that the sale was made for full value, and that the shares in the proceeds of the sale of the contingent remaindermen mentioned were invested for their benefit, and that they still retain the property in which the funds were invested. The record does not show that the issue of Mrs. Cook and Mrs. Buchanan were made parties to the partition suit by intervention or otherwise. But Thomas W. Woodward was appointed trustee for the share of Mrs. Cook, and as such received \$2,250 from the proceeds of the sale. In another proceeding instituted by Mrs. Cook and her husband, to which her only child was made a party, the court ordered the lands assigned to Mrs. Cook in the original division made by the executors to be sold. The proceeds of this sale and also the share of Mrs. Cook and her child in the proceeds of the sale of the lands originally assigned to her sister, Jemima Harrison, were paid to the trustee, and by him invested in lands in Georgia. The issue of Mrs. Cook, who are now claiming one-fourth of the lands originally assigned to Jemima Harrison, are still in the possession and enjoyment of the Georgia lands. It does not appear that the payment to the trustee of the share of the proceeds of the sale of the Jemima Harrison lands, the lands now in controversy, was ever authorized by an order of the court in any proceedings to which the contingent remaindermen are parties.

[1] The contingent remaindermen not being parties to the proceedings under which the Jemima Harrison tract of land was sold, the circuit court correctly held that they were not bound by the order of sale made therein. *Moseley v. Hankinson*, 22 S. C. 323.

But it was supposed at the time of the sale that the purchaser would get a good title, and that the interests of the contingent remaindermen would attach to the purchase money.

[2] It was under this mistake that the purchaser paid a full price, that \$2,250, the one-fourth share of the proceeds which it was supposed would go to Mrs. Cook with a contingent remainder over at her death, was paid to Thomas W. Woodward as trustee, and that the trustee invested the \$2,250 in the Georgia lands now representing that fund and in the possession of Mrs. Cook's issue. The Georgia lands have increased greatly in value. The circuit judge, we think, was in error in holding that the issue of Mrs. Cook, while holding the Georgia lands, could treat as a nullity the sale of the Harrison lands, and recover their one-fourth interest therein by paying back only the sum received by the trustee and invested in the Georgia land, with interest from the death of Mrs. Cook. Equity requires that, when they repudiate the sale of the Harrison land, they must surrender or account for every benefit they hold thereunder. *Bailey v. Boyce*, 4 Strob. Eq. 84. Inasmuch as other trust funds were also invested in the Georgia lands, it was not practicable for the issue of Mrs. Cook to separate the property representing the \$2,250 received from the sale of the Harrison lands, and on the death of Mrs. Cook repudiate ownership of it. For that reason, the general rule that the retention of the purchase money operates as an affirmation of the sale does not apply. For the same reason, it is not practicable for the court to require that the land representing the \$2,250 trust fund be surrendered as a condition of the recovery of the interest in the Harrison land, but the issue of Mrs. Cook should pay or account to Mrs. Des Portes for the present value of the investment made by the trustee of Mrs. Cook's share of the proceeds of the sale of the Harrison lands as a condition of their recovery of their one-fourth interest in those lands. The value of that interest is the proportion of the present value of the Georgia land which \$2,250 bears to the entire investment made by the trustee.

[3] The investment of the share of Mrs. Buchanan stands on a different footing. The court ordered \$1,000 of Mrs. Buchanan's share of the proceeds of the sale of the Harrison land to be used in the improvement of the family dwelling situated on the lands assigned to her in the original division made by the executors and held by her under the limitation of the will of Osmond Woodward. The issue of Mrs. Buchanan are now in possession of this property, but they were not bound by the order for the investment. It is manifestly impossible now to ascertain

to what extent the land was increased in value by the improvement. The only available measure of benefit is the amount of the money expended under the order of the court, and the utmost that a court of equity can do is to require that the issue of Mrs. Buchanan pay back that sum with interest as a condition of their recovery of their one-fourth interest in the land, as decreed by the circuit judge.

[4] Careful examination of the evidence confirms the conclusion of the circuit court that the value of the land was not improved by cutting the timber, and thus bringing more of it under cultivation. As nothing was added to the value of the land, no allowance can be made to Mrs. Des Portes for the alleged improvements. Civil Code, § 3202.

[5] The objection that there was nothing before the court tending to show that partition in kind was not practicable is not well founded. The entire record shows the advisability of a sale. The share of many of the parties is very small, and it seems impossible to adjust the equities of the parties without a sale of the land.

The judgment of this court is that the judgment of the circuit court be modified, and that the cause be remanded for such proceedings as may be necessary to carry out the conclusion herein expressed.

WATTS, J., disqualified.

(92 S. C. 573)

VISANAKA v. SOUTHERN EXPRESS CO.

(Supreme Court of South Carolina. Oct. 8, 1912.)

1. CARRIERS (§ 110*)—INTERSTATE COMMERCE ACT—VIOLATION—CARRYING RATES.

Where the rates of an express company for carrying a package of jewelry are based on the valuation placed thereon, which also determines the limit of its liability in case of loss—that is, the charge is a certain amount based on the assumption that the value does not exceed \$50, in case no value is declared, and a certain additional charge for each additional \$100 of value declared—its liability in case of loss being limited to the actual value of the property, not exceeding \$50 in case no value is declared, and not exceeding the declared value where there is a declaration, Interstate Commerce Commission Act (Act Feb. 4, 1887, c. 104, § 10, 24 Stat. 382 [U. S. Comp. St. 1901, p. 3160]), making it a misdemeanor to obtain by false billing, or otherwise, transportation of property at less than the regular established rates, from a carrier subject to such act, is not violated, with a consequent loss of right to recover of the carrier in case of loss of the goods by one delivering to the express company, for transportation, a package of jewelry of the value of \$700, marked "value \$400," and paying a rate on such declared value.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 497-500, 503, 504; Dec. Dig. § 110.*]

2. CARRIERS (§ 158*)—LIMITATION OF LIABILITY.

Where one delivered to an express company for transportation property worth \$700, and declared a valuation of \$400, to which amount the carriers' liability was thereby limited, its liability in case of loss of a part of the property not exceeding \$400 in value is the whole value of the part lost, and not merely four-sevenths thereof.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 663-667, 699-703½, 708-710, 718, 718½, Dec. Dig. § 158.*]

Appeal from Common Pleas Circuit Court of Richland County; Robt. Aldrich, Judge.

"To be officially reported."

Action by B. Visanaka against the Southern Express Company. From the judgment, both parties appeal. Modified.

Barron, Moore, Barron & McKay, of Columbia, for Southern Express Co. Weston & Aycock, of Columbia, for B. Visanaka.

WOODS, J. The plaintiff, a jewelry merchant, delivered to the defendant express company at Columbia on March 31, 1909, a package containing diamonds and other jewelry of the value of \$877.01, for shipment to M. Visanaka, in the city of New York. When the package was received by the consignee, two rings of the aggregate value of \$131.50 were missing. The defense to this action to recover the value of the lost rings rests on the allegations that the plaintiff falsely billed the goods shipped, in violation of the federal statute which forbids and declares to be a crime "false billing" by a consignor. The plaintiff indorsed on the package "value \$400," and obtained transportation for 95 cents, under a contract of shipment which contained this stipulation: "In consideration of the rate of charges for carrying said property, which is regulated by the valuation and classification thereof, and is based upon a valuation not exceeding fifty and 00-100 (\$50.00) dollars, unless a greater value is declared, and the shipper agrees that the value of said property is not more than fifty and 00-100 (\$50.00) dollars, unless a greater value is stated therein, and that the company shall not be liable in any event for more than the value so stated." On the 31st day of March, 1909, the regular schedule of express rates from Columbia to New York for carriage of goods, duly filed with the Interstate Commerce Commission as required by law, showed that the rates of defendant were regulated by the valuation and classification thereof, and based upon a valuation not exceeding \$50 in case of each shipment, unless a greater valuation was declared, and that, when value in excess of \$50 was so declared, an additional charge was made, which for jewelry was 15 cents for every hundred dollars, or fraction thereof. Paragraph 3 of section 10 of the Interstate Commerce Commission Law provides: "Any person and any officer or agent of any cor-

poration or company who shall deliver property for transportation to any common carrier subject to the provisions of this act, or for whom, as consignor or consignee, any such carrier shall transport property, who shall knowingly and wilfully, by false billing, false classification, false weighing, false representation of the contents of the package, or false report of weight, or by any device or means, whether with or without the consent or connivance of the carrier, its agent or agents, obtain transportation for such property at less than the regular rates then established and in force on the line of transportation, shall be deemed guilty of fraud, which is hereby declared to be a misdemeanor, and shall, upon conviction thereof, in any court of the United States of competent jurisdiction, within the district in which such offense was committed, be subject for each offense to a fine of not exceeding \$5,000, or imprisonment in the penitentiary for a term of not exceeding two years, or both, in the discretion of the court." A jury trial having been waived, the circuit judge made a decree in favor of the plaintiff for \$77.69, the proportion of the loss that the value indorsed by the plaintiff on the package, \$400, bore to the real value, \$877.01. Both parties appeal.

[1] We do not think the shipper was guilty of any violation of the federal statute. The statute is directed against and covers every device or means which a shipper may adopt to obtain an advantage over other shippers or the carrier. It does not expressly prohibit undervaluation, and undervaluation under such a contract of shipment as the plaintiff made gives the shipper no advantage over the carrier or over other shippers who make the same contract and take the same risk. The contract of carriage shows that the carrier based his charge entirely on valuation—that is, on the measure of his responsibility in case of loss. The recovery in case of loss being limited to the value as stated by the shipper, that, and not the actual value, was the measure of responsibility. Since the charges of the carrier and its responsibility are regulated by the value as stated by the shipper and not the actual value, the failure to state the actual value is not false billing or a device to obtain transportation "at less than the regular rates then established."

The defendant relies on the case of *Ellison v. Adams Express Co.*, 245 Ill. 410, 92 N. E. 277, as holding that such a shipment as this was in violation of the federal statute. In that case the shipper made the same contract of carriage as was made by the plaintiff in this case, but he intentionally failed to state any value and paid for the shipment on the basis of a valuation of \$50 for each package, thus accepting the stipulation of the contract that he had agreed that the value was not

more than \$50, and that the company should not be liable for a greater sum. The property was lost, and the shipper sued for the entire value of the property. The express company admitted liability for \$50, the agreed value of each package according to the contract, and tendered and paid into court \$100 in discharge of its liability. The court held that the plaintiff could not recover the full value after contracting for the valuation of \$50 and paying the charges on that basis, and that his recovery must be limited to the value contracted for and by which the charges had been measured. It is true that, in the course of its reasoning, the court does seem to hold that the failure to give the true value was an unlawful device for obtaining transportation of the goods at less than the regular charge, but that conclusion we think was not necessary to the decision of the case and was not sound. It would be sound and applicable under a law forbidding that the value stated by the shipper instead of the real value should be the measure of the liability of the carrier. As there was no violation of the federal statute, there is no obstacle to plaintiff's recovery.

[2] Since the decision in *Huguelet v. Warfield*, 84 S. C. 87, 65 S. E. 985, it cannot be doubted that under a contract of shipment fixing the value and limiting the liability of the carrier to that value, in case of loss of a part of the shipment, the shipper may recover the real value of the property lost, not exceeding, however, the limit of the liability stipulated in the contract of shipment.

It follows that the plaintiff was entitled to recover \$131.50, the value of the articles lost, and the judgment of this court is that the judgment of the circuit court be modified accordingly.

GARY, C. J., and HYDRICK, WATTS, and FRASER, JJ., concur.

(92 S. C. 528)

PINCKNEY v. ATLANTIC COAST LINE R. CO. et al.

(Supreme Court of South Carolina. Oct. 2, 1912.)

1. TRIAL (§ 139*)—MASTER AND SERVANT (§ 289*)—QUESTIONS FOR JURY—SUFFICIENCY OF EVIDENCE.

Where there is any testimony at all or where more than one inference can be drawn, the case must go to the jury to be determined by them; and to grant a nonsuit or direct a verdict under such a state of facts would be error.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 832, 833, 338-341, 365; Dec. Dig. § 139.* Master and Servant, Cent. Dig. §§ 1089-1132; Dec. Dig. § 289.*]

2. MASTER AND SERVANT (§ 286*)—INJURIES TO SERVANT—ACTIONS—QUESTIONS FOR JURY—CONTRIBUTORY NEGLIGENCE.

In an action for injuries to car repairer, evidence held to present a question for the jury

whether it was practicable for him to obtain a blue flag required by the rules of the railroad company, and whether he was directed by a superior officer to proceed with the work, knowing he had no flag.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1001, 1008, 1010-1050; Dec. Dig. § 286.*]

3. MASTER AND SERVANT (§ 137*)—INJURIES TO SERVANT—NEGLIGENCE OF FELLOW SERVANT.

The object of a blue flag required by the rules of a railroad company to be exposed while the car is being inspected or repaired, being to give notice and warning to the trains, if a conductor had actual notice that a car repairer was under a car, and, with such notice, ran back against the car and caused his injury, the railroad company would be liable.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 269, 270, 273, 274, 277, 278; Dec. Dig. § 137.*]

4. MASTER AND SERVANT (§ 285*)—INJURIES TO SERVANT.

In an action for injuries to a car repairer, evidence held to present a question for the jury whether the negligence of defendant was the proximate cause of plaintiff's injury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1002, 1003, 1007, 1016, 1035, 1043, 1063; Dec. Dig. § 285.*]

5. MASTER AND SERVANT (§ 289*)—INJURIES TO SERVANT—QUESTION FOR JURY—CONTRIBUTORY NEGLIGENCE.

In an action for injuries to a car repairer, evidence held to present a question for the jury whether he was in any manner negligent and contributed to the proximate cause of his injury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1089-1132; Dec. Dig. § 289.*]

6. MASTER AND SERVANT (§ 286*)—INJURIES TO SERVANT—QUESTION FOR JURY—WANTONNESS OF FELLOW SERVANT.

In an action for injuries to a car repairer, evidence held to present a question for the jury whether there was wantonness or a conscious advertent failure of the conductor who ran against the car under which plaintiff was working to observe due care.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1051-1067; Dec. Dig. § 286.*]

7. MASTER AND SERVANT (§ 289*)—INJURIES TO SERVANT—QUESTIONS FOR JURY—CONTRIBUTORY NEGLIGENCE—EMERGENCY.

In an action for injuries to a car repairer, evidence held to present a question for the jury whether the work to be done was an emergency.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1089-1132; Dec. Dig. § 289.*]

8. MASTER AND SERVANT (§ 226*)—INJURIES TO SERVANT—NEGLIGENCE OF FELLOW SERVANT—CONCURRENT NEGLIGENCE.

For a master to escape liability on the ground of negligence of a fellow servant, the master must not have been negligent at all as to any of the proximate causes of the injury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 659-667; Dec. Dig. § 226.*]

9. MASTER AND SERVANT (§ 284*)—INJURIES TO SERVANT—QUESTIONS FOR JURY—JOINT LIABILITY.

In an action for injuries to a car repairer in a yard owned by two railroad companies, evidence held to present a question for the

jury as to the joint liability of the two companies.

[Ed. Note.—For other cases, see Master & Servant, Cent. Dig. §§ 1000-1132; Dec. Dig. § 284.*]

10. APPEAL AND ERROR (§ 1062*)—REVIEW—HARMLESS ERROR—SUBMISSION OF QUESTIONS TO JURY.

Any error in submitting to the jury the question of punitive damages is immaterial where the jury found only actual damages.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4212-4218; Dec. Dig. § 1062.*]

Appeal from Common Pleas Circuit Court of Colleton County; Ernest Gary, Judge.

Action by J. B. Pinckney against the Atlantic Coast Line Railroad Company and another. From a judgment for plaintiff, defendants appeal. Affirmed.

At the conclusion of the testimony of both plaintiffs and defendants, the defendants made a motion to direct a verdict upon the following grounds: "First. There is no evidence tending to support the allegations of punitive damages against either defendant. Second. There is no evidence tending to establish actionable negligence against either defendant. Third. The entire evidence shows that the injury to the plaintiff was the result of his own negligence. Fourth. The entire evidence shows that the injury to plaintiff was the result of his contributory negligence as a proximate cause, and without which it would not have happened. Fifth. The entire evidence shows that the injury to plaintiff was the result of the act of a fellow servant, combining with plaintiff's negligence as a proximate cause. In addition to the grounds for the direction of a verdict already presented, the Atlantic Coast Line Railroad Company asks your honor to direct a verdict so far as it is concerned, for the reason that the testimony shows that the plaintiff in this case worked for both roads, and that at the time of his injury he was working for the Charleston & Western Carolina Railway Company upon a car of the Charleston & Western Carolina Railway Company, was injured by a train and officials of the Charleston & Western Carolina Railway Company and the Atlantic Coast Line Railroad Company had no part whatever in the infliction of the alleged injury to the plaintiff." The court refused the motion as to both defendants.

The exceptions on appeal were as follows:

"I. It was error in his honor to refuse the motion of the defendants to direct a verdict for the defendants on the fourth ground submitted in this behalf, to wit: 'The entire evidence shows that the injury to plaintiff was the result of his contributory negligence as a proximate cause and without which it would not have happened'—the error being:

"(a) Assuming that the testimony tended to establish actionable negligence as against the defendants or either of them in the mat-

ters complained of, which, however, defendants do not admit as a fact, the testimony shows conclusively that plaintiff was guilty of contributory negligence in undertaking to repair the car in the manner and way in which he did. It appears clearly from the testimony that there was no emergency, that plaintiff had the option to choose his own time within which to make the repairs, that the repairs to be made were of little consequence, which was well known to plaintiff before he undertook to make the same; that he did not undertake to provide himself with a blue flag before entering on the work and did not call to the attention of the chief car inspector, Mr. Rabb, that he was going about the work in violation of the blue flag rule, and did not ask at the time for a blue flag, and made no effort whatever of any kind to procure a blue flag; that he knew the work was dangerous, and knew the blue flag rule which absolutely required him to display the flag before going under the car, and knew that he was violating the rule, and admits that he knew it was a most dangerous thing to do.

"(b) Even if it be assumed that plaintiff's testimony was true that most of his flags were broken, yet the testimony shows that at least one flag was not broken, but was placed in the office where they were kept a day or so before the accident, and, further, that at least some of the flags which he claims were broken were in condition to be used, the same having been torn in half, and the testimony clearly showing that the same could be used in this condition by placing them at the end of the car or on a stick in the center of the track, yet, notwithstanding this, plaintiff made no effort whatever to find the flag which had been left in the office, and made no effort whatever to use the flags that were broken, and did not before undertaking the work ask Mr. Rabb whether a supply of flags had been received and were then available for use; it being respectfully submitted that it was the duty of the plaintiff to comply with this rule if by the exercise of reasonable care on his part he could have complied.

"(c) Taking the most favorable view to plaintiff of his testimony, it appears that several days before the accident he had requested Rabb to order a new supply of flags; that ample time had elapsed within which to receive the same, and yet on the morning of the accident, before undertaking the work of repairing the car, he did not ascertain and made no effort to ascertain whether the flags had arrived, but, without exercising any care whatever in undertaking to find out whether there were flags available, undertook the work with full knowledge of its dangers and of the perils likely to follow, relying for his protection on an alleged conversation with the conductor whom he does not advise, how-

ever, that he intended in doing the work to violate the blue flag rule and rely on the protection to be given him by his fellow servant, Freeman, substituting and relying on said conversation and Freeman for the protection afforded by the blue flag.

"(d) The testimony shows that the blue flags were available and could have been used, but instead of making use thereof, and complying with the blue flag rule, plaintiff deliberately and of his own free will violated defendants' rule, and substituted therefor his fellow servant Freeman and his alleged conversation with Conductor Partain.

"(e) Plaintiff, failing to procure a blue flag, should have refused to do the work, and should not have gone under the car without the protection of a blue flag. He knew the danger, and knew the rule absolutely requiring the blue flag to be displayed before going under a car, and with full knowledge of these conditions on his part, and with full knowledge of the almost certain danger that would follow his violation of the rule, and there being no emergency, was as a matter of law guilty of contributory negligence, and his honor should have so held.

"II. His honor committed error in not directing a verdict in favor of the defendants on the fifth ground submitted in this behalf, to wit: 'The entire evidence shows that the injury to the plaintiff was the result of the act of his fellow servant combined with plaintiff's negligence as a proximate cause'—the error being:

"(a) The evidence shows that Freeman was a fellow servant of plaintiff engaged in the same work as the plaintiff and on the same piece of work at the time of the accident, and in the same department of labor. It shows that plaintiff relied on Freeman to warn him of the approach of any train while he was under the car engaged in making repairs, that Freeman failed to notify him of the approaching car in time to enable him to escape without injury, and his honor should on this ground have directed a verdict for the defendants.

"(b) There is no testimony whatever tending to show that the injury to plaintiff was caused by the combined negligence of the master and fellow servant. There is no allegation in the complaint charging a failure to furnish sufficient appliances, but even if it be assumed that the complaint embraces this, and even if it be assumed that there is evidence tending to show a failure on the part of the defendants to furnish sufficient flags, and, further, that the conductor was told by plaintiff of his intention to repair the car, still it is respectfully submitted that there is nothing in this upon which to predicate any charge of combined negligence as causing the injury. The conductor was not told by plaintiff that he was without a flag, or that he intended to rely upon the notice

given to the conductor as a substitute for the blue flag rule. He was not advised that the blue flags were not available and had no notice or any information from which notice can be legally inferred or charged against the company that the flags could not be had, and that Pinckney intended in making the repairs to do so in violation of the blue flag rule, and it is therefore respectfully submitted that, even if it be held by this court that there is some evidence tending to establish negligence against the company in either or both of these particulars, still it cannot logically be said that the injury was the result of such negligence combined with the negligence of Freeman, a fellow servant. Each is entirely independent of the other, and there is no element of combination, and, in fact, no connection whatever, between the alleged negligence of the master and the admitted negligence of Freeman, the fellow servant.

"(c) In order for plaintiff to avail himself of the doctrine of combined negligence of the master and fellow servant, it must appear that the same was the proximate cause of his injury. If the proximate cause was the negligence of the fellow servant, then plaintiff cannot recover, and it is respectfully submitted in this case that it appears absolutely and to a mathematical demonstration that the proximate cause of the injury was the negligence of plaintiff in relying on his fellow servant, Freeman, and the negligence of his fellow servant in failing to notify him of the approach of the engine in time to escape from under the car.

"III. It is respectfully submitted that his honor committed error in charging the jury as follows: 'Therefore, when you are measuring and investigating the conduct of any person to a transaction, you will ask yourselves did he measure up to that standard, to wit, Did he do that which a man of ordinary prudence and care would have done? If he did, then he can not be said to be guilty of negligence'—the error being:

"(a) His honor in so instructing the jury charged in respect to matters of fact in violation of section 28, art. 5, of the Constitution of 1895.

"(b) What a man of ordinary prudence and care would have done in any given circumstances is, at most, only evidence to go to the jury on the question of negligence, but is not a conclusive test whether due care has been exercised and his honor in so instructing the jury as he did in the language complained of committed error of law.

"IV. It is respectfully submitted that his honor committed error in charging the jury as follows: 'So, gentlemen, when you come to the question of negligence, you will ask yourselves when you are taking up the question of the negligence of the defendants, their agents, and servants, you will ask yourselves this question, did the agents,

servants, and employes of the defendants on this occasion observe the care that a man of ordinary prudence and care would have observed under all the circumstances and the conditions then and there surrounding them, if you will find that they did then the plaintiff cannot recover. *If you find that they did not measure up to the standard of a man of ordinary prudence and care then you would find that they were negligent*, then take the conduct of the plaintiff and ask yourselves the question, Would a man of ordinary prudence and care have acted as you find he acted on this occasion? *If you find that he did that, then he could not be said to be guilty of negligence*. If you find that he did, or left undone anything that a man of ordinary prudence and care would not have done or left undone, then you will find and deem him to be guilty of negligence—the error being:

“(a) In instructing the jury that, if the agents and servants of the defendants did not measure up to the standard of a man of ordinary prudence and care, the jury should find that the defendants were negligent, his honor charged on the facts in violation of section 26, art. 5 of the Constitution of 1895.

“(b) His honor plainly instructed the jury what facts would constitute negligence.

“(c) The agents and servants of the defendants may not have measured up to the standard of a man of ordinary prudence and care, and yet in the circumstances of this case acted as careful men should have acted.

“(d) In instructing the jury that, in order to determine the question of plaintiff's negligence that they should ask themselves the question, would a man of ordinary prudence and care have acted as plaintiff acted on the occasion in question, and, if it was found that plaintiff did, that then they could not say that plaintiff was guilty of negligence, his honor charged on the facts in violation of article 5, § 26, of the Constitution of 1895, and told the jury what facts would constitute negligence.

“(e) A prudent and careful man may and frequently does act in a careless and negligent way, and his honor in instructing the jury in the language complained of in this particular gave the jury an entirely erroneous and illegal test. Instead of giving the jury a definition of negligence, his honor instructed them what facts would constitute negligence, and told the jury that if it should conclude that plaintiff acted on the occasion as the jury might think a man of ordinary prudence and care would have acted that they could not and must not find plaintiff negligent, whereas it is submitted that the usual and customary way that a man of ordinary prudence and care would perform a certain act is not a conclusive test as to whether due care was exercised therein. It is merely evidence which should go to

the jury along with other evidence in the case, leaving it to the jury to determine from all of it whether as a fact due care was exercised.

“V. It is respectfully submitted that his honor was in error in instructing the jury as follows, in reference to the negligence of a fellow servant, to wit: ‘Now on the subject of that very doctrine there is a different rule and a different law applicable to railroads, different from other parties’—and in this connection reading to the jury as applicable to this case article 9 of the Constitution of 1895; the error being:

“(a) That in telling the jury that the law of fellow servant as applied to railroads is different from that which obtains as to other parties was wholly misleading and erroneous when applied to the facts of this case because the only principle of law the jury could consider in this case was as to the combined negligence of the master and fellow servant, it being an admitted fact that plaintiff and Freeman were fellow servants, and that the negligence of Freeman, if a proximate cause of plaintiff's injury, would defeat his recovery. Therefore, in telling the jury that a different rule of law applied, his honor confused and misled the jury as to the point before it for determination.

“(b) Article 9 of the Constitution, which his honor read to the jury, in no wise changed or modified the general principles of law applicable to the question before the jury, and had absolutely no bearing whatever on the question, and could only tend to confuse the jury in its deliberation.

“VI. His honor committed error in instructing the jury in the language of plaintiff's third request as follows, to wit:

“‘That if the jury find as a further fact that the defendants failed and omitted to furnish plaintiff with a blue flag, plaintiff having exercised due diligence in bringing such failure to the attention of his superior officer, and that the plaintiff notwithstanding such failure on the part of the defendants and such notice on the part of the plaintiff, was instructed by his superior officer to repair the car, as alleged in the complaint, and that the plaintiff before engaging in inspecting and repairing the same, gave notice to Conductor Partain of his purpose, as alleged in the complaint, and was given assurance by the said conductor that he was through on the yard, and that the plaintiff could go to work on the said car without molestation by the said conductor, as alleged in the complaint, and that the plaintiff was injured by the negligent or willful act of the said conductor, as alleged in the complaint, then the jury will find for the plaintiff.’” I charge you that, provided you find that the plaintiff's conduct towards Conductor Partain under all the circumstances was the exercising of

due care and was not negligence'—the error being:

"(a) In saying, 'plaintiff having exercised due diligence in bringing such failure to the attention of his superior officer,' his honor charged on the facts of the case in violation of section 28, art. 5, of the Constitution of 1895.

"(b) The entire request could only be regarded by the jury as an instruction as to the existence of certain facts, to wit, the exercise of due diligence on the part of plaintiff and the giving of notice by plaintiff to the conductor and being assured by the conductor that he was through on the yard and might proceed with the work without molestation, and, if not a violation of the strict letter of section 28 and article 5 of the Constitution, is certainly a clear violation of its intent and spirit and within the meaning of its terms a charge on the facts.

"(c) In telling the jury, 'I charge you that provided you find that plaintiff's conduct towards the conductor was the exercise of due care and not negligence,' his honor assumed as a fact that there was some conversation with plaintiff and the conductor bearing on the material facts of this case, and thereby charged on the facts of the case in violation of the constitutional provision in this behalf (section 28, art. 5).

"VII. It is respectfully submitted that his honor committed error in not charging as submitted the defendants' first request, and in modifying the same as follows, to wit: "If you find from the testimony in this case that the plaintiff could by the exercise of due care have secured a blue flag and failed to do so and use it, then I charge you as a matter of law that he cannot recover a verdict at your hands in this case." I charge you that, provided the defendants, their agents, and servants were not guilty of willfulness and that willfulness was the proximate cause of his injury—the error being:

"(a) As modified by his honor the request was entirely emasculated.

"(b) The request as submitted contains a sound principle of law, to wit, that, if plaintiff's injury was due to his own negligence, he could not recover, and in modifying this his honor confused the jury by making it appear that this request was intended to cover contributory negligence by the plaintiff.

"(c) In any view of the matter, the modification was wrong, erroneous, and misleading, because it is an admitted fact that defendants did move the car which was a willful act in the sense that it was a voluntary act on behalf of the defendants. The jury, therefore, were instructed by his honor that if the car was moved deliberately and of the defendants' own volition and intention that plaintiff could recover, although it might also appear that his injury was due to his

own negligent conduct in not making use of the blue flag.

"(d) The modification must be construed with reference to the facts of this case, and, when so considered, the effect thereof is to absolutely destroy the proposition of law contained in the request and in effect and law amounts to a refusal to charge the said request.

"VIII. His honor it is respectfully submitted committed error of law in modifying the second request of the defendants, as follows, to wit: "In this case the Supreme Court has held that 'if the plaintiff disregarded the blue flag rule so essential to his own safety as well as the safety of other employes and the general public, when he could have complied with it by reasonable effort on his part, then he is not entitled to recover.' And I charge you in this case if it appears from the evidence that the plaintiff could have complied with this rule by reasonable effort on his part, and failed to do so, that he cannot recover and your verdict must be for the defendant companies." I charge you that, provided that you do not find that the defendants, their agents, servants, and employes were guilty of wantonness and willfulness, and that that wantonness and willfulness was the proximate cause of the injury to the plaintiff—the error being:

"(a) That the request contains a sound proposition of law vitally applicable to this case, and should have been charged without modifications.

"(b) There was not the slightest evidence of willfulness or wantonness in the case and the continued iteration and reiteration of this by his honor to the jury was misleading and impressed upon the minds of the jury the idea of his honor that there was willfulness shown by the testimony, and deprived the defendants of a fair consideration by the jury of the propositions of law applicable to the case.

"IX. His honor committed error in refusing to charge the defendants' fifth request as follows, to wit: "If you find in this case from the testimony that the plaintiff failed to afford himself the protection of the blue flag, but relied on Freeman as a substitute for the blue flag rule, he cannot recover." I cannot charge you that. I have got to modify all these charges. I think these charges must have been based on the ground that I would not submit to you the question of willfulness; that is, I cannot charge you that proposition as stated *because there are other elements that the jury must take into consideration*—the error being:

"(a) The request contains a sound proposition of law vitally applicable to this case and the refusal of his honor to so charge was, in effect, the direction of a verdict against the defendants and in favor of the plaintiff.

"(b) The charge of his honor in this behalf deprived the defendants of the defense of

negligence of a fellow servant as the proximate cause of the injury, and it is submitted that the testimony fairly considered abundantly establishes the fact that plaintiff's injury was due to the negligence of his fellow servant, Freeman, and that plaintiff relied on Freeman as a substitute for the blue flag rule.

"(c) His honor does not undertake to modify this request, but states that he is going to modify all the requests to charge, and states to the jury that there are other elements which they must take into consideration, and, if this language be taken as a modification, then it was error in his honor for the reason that he thereby told the jury that they must consider the question of willfulness and wantonness in considering this request, and in effect in so doing told the jury to disregard the request.

"(d) If plaintiff was injured by reason of his substituting his fellow servant for the protection of the blue flag, then it is submitted that willfulness could not be, and should not be, considered by the jury because it would preclude the idea of his injury having been occasioned by any act of the defendants.

"X. It is respectfully submitted that his honor committed error in refusing to charge the jury the defendants' request as follows, to wit: "You are further instructed that if you find that the plaintiff in this case did not observe the blue flag rule, and could have done so, but, instead, relied on his conversation with Conductor Partain as a substitute for the blue flag rule then he cannot recover." I refuse to charge you that—the error being:

"(a) That this request contains a correct proposition of law vitally applicable to this case.

"(b) If plaintiff failed to observe the blue flag rule when he could have done so, but relied on his conversation with the conductor then, as a matter of law, he could not be entitled to a verdict, and it was error in his honor to refuse this request.

"XI. It was error in his honor to refuse to charge the jury the defendants' seventh request as follows, to wit: "If you find from the evidence as a matter of fact that the plaintiff did tell the conductor that he intended to work under the car and should further find that the conductor negligently caused the car under which the plaintiff was working to be moved to his injury, still plaintiff could not recover if you should further find that, by the exercise of reasonable care, he could have procured a blue flag, and thereby could have given himself the protection of the blue flag rule. In other words, if the plaintiff by the use of reasonable care could have made use of the blue flag as required by the rules, he cannot recover in this case simply because the conductor failed to remember his statement

that he would be at work under the car." I refuse to charge you that—the error being:

"(a) That the request contains a sound proposition of law applicable to this case.

"(b) In refusing this charge his honor permitted a recovery on behalf of plaintiff, although as a matter of law he was guilty of contributory negligence as the direct and proximate cause of his injury.

"XII. His honor committed error of law in refusing to charge defendants' eighth request as follows, to wit: "If it is a fact established by the testimony in this case that the plaintiff did not have a blue flag, and could not by reasonable effort secure a blue flag, it was his duty in this situation to have advised the conductor that he had no flag, and that in going under the car he could not as a consequence observe the blue flag rule. It was not sufficient for him to have simply told the conductor he expected to work under a car, but he should have gone further and notified the conductor that he was unable to comply with the blue flag rule." I refuse to charge you that—the error being:

"(a) That the request contains a sound proposition of law applicable to the case and should have been charged.

"(b) It was the duty of plaintiff, if he intended to rely on the conversation with the conductor, to have advised the conductor that he was unable to comply with the blue flag rule.

"XIII. It was error in his honor to refuse the defendants' ninth request as follows, to wit: "There is no evidence whatever in this case even tending to establish a waiver of the blue flag rule." I refuse to charge you that—the error being:

"(a) There is not a particle of evidence in this entire record tending to show a waiver of the blue flag rule, and his honor should have so instructed the jury.

"XIV. His honor committed error in refusing to charge defendants' tenth request, as follows, to wit: "Counsel for the plaintiff argued that the defendant could waive the blue flag rule, and that there was evidence in this case tending to show a waiver of the rule, but I charge you that there is no evidence tending to establish a waiver of this rule in this case." I refuse to charge you that—the error being:

"(a) That there was no evidence in this case tending to establish a waiver of the blue flag rule and his honor in refusing this request permitted the jury to consider a question of this kind, vitally important to the case, upon the mere argument of plaintiff's counsel and without any evidence whatever.

"XV. His honor committed error in refusing to charge the jury defendants' eleventh request as follows, to wit: "The jury are further instructed that the conductor of the freight train, to wit, Conductor Partain, had

no power, and could not as a matter of law waive the blue flag rule in so far as the plaintiff in this case is concerned." I refuse to charge you that—the error being:

"(a) That the mere conductor on a freight train has no right whatever in law to waive a rule of the defendants intended for the protection of employes in an entirely different department of labor, and in no wise connected with the said conductor, and over whom he had no control whatever.

"(b) The conductor had no right or power to waive the blue flag rule in favor of the plaintiff in this case.

"XVI. His honor committed error of law in not charging defendants' thirteenth request to charge as follows, to wit: "I charge you that the rule as to the use of the blue flag cannot be violated by an employe, and, if he is injured because he violated it or contributed to his injury by not observing it, he cannot recover." I refuse to charge you that—the error being:

"(a) This request contains a correct proposition of law vitally important to this case, and should have been charged as given.

"(b) If an employe violates a rule of the company, and is injured by reason of his violation thereof, or if his failure to observe the rule contributes to his injury, then as a matter of law he cannot recover, and his honor should have so charged.

"XVII. His honor committed error in refusing defendants' fifteenth request to charge, to wit: "I charge you that, where there was no blue flag furnished the employe, he should have refused to work under a car, which is extra dangerous work, until the blue flag was furnished him, unless in a case of an emergency." I refuse to charge you that—the error being:

"(a) That the admitted evidence shows that plaintiff knew it was extra dangerous to go under the car without displaying a blue flag, and the evidence further shows that there was no emergency requiring him to do so. It is therefore submitted that plaintiff should have refused to go under the car in violation of the rule.

"(b) Where an employe knows that it is dangerous to violate a rule of the master, and there is no emergency which requires him to violate it, if he deliberately does so, he cannot recover as a matter of law against the master.

"XVIII. His honor committed error of law in not charging defendants' sixteenth request as follows, to wit: "I charge you that the testimony in this case does not show any emergency justifying the violation of the rule." I refuse to charge you that—the error being:

"(a) There is not a particle of testimony in this whole case suggesting any emergency in repairing this car, or tending to show any emergency to justify a violation of the blue flag rule, and his honor should have so instructed the jury as requested.

"(b) Where there is no testimony in a case tending to establish any material fact, it is the duty of the court on request to so instruct the jury.

"XIX. His honor committed error in refusing to instruct the jury in the language of plaintiff's seventeenth request, as follows, to wit: "I charge you that, in order to recover because a blue flag was not at hand for the use of plaintiff, the plaintiff would have to show that at the time he was ordered to do the work he demanded a blue flag for use in the work and the defendants refused to furnish him." I refuse to charge you that—the error being:

"(a) This request contains a sound proposition of law, and should have been charged.

"(b) It was the duty imposed on plaintiff to exercise some reasonable effort to procure a blue flag, and his honor should have instructed the jury as requested that it was his duty to demand a flag at the time he was ordered to do the work, and that defendants refused to furnish the same.

"(c) If plaintiff by the exercise of reasonable care could have procured a flag, it was his duty to have done so, and his failure so to do would not justify his violation of the blue flag rule.

"XX. His honor committed error in not charging defendants' nineteenth request, as follows, to wit: "I charge you that, if a car repairer or inspector of a railroad company complies with the blue flag rule, he gives notice to every employe of the railroad company not to move the car while he is working under it, and the company is liable for injury to him caused by any of its employes in moving the car. I charge you, further, that the plaintiff in this case cannot set aside this rule made for his protection by giving verbal notice to one employe, say a conductor, if another employe such as an engineer without such notice took part in moving the car." I refuse to charge you that—the error being:

"(a) This request contains a sound proposition of law applicable to this case.

"(b) Verbal notice to one employe certainly could not be said to imply notice to another employe. If the engineer without notice moved the car to the injury of plaintiff who had not observed the blue flag rule, he should not be permitted to recover.

"(c) The blue flag rule was intended to give notice to every employe of the company not to move the car, and the company is certainly liable for an injury caused by moving a car where the rule has been observed, and his honor should certainly have so instructed the jury, and in failing so to do he left the jury wholly uninstructed as to the true purpose and meaning of the blue flag rule, and wholly uninstructed as to the liability of the defendants in cases where an employe had complied with this rule, thereby leaving with the jury the impression that

defendant might not be liable, even if the blue flag rule had been observed.

"(d) It was important to a proper trial of this case that the jury should clearly understand that if the blue flag rule was observed that the company was absolutely liable, that if it was not observed when it could have been that the defendant was not liable that verbal notice to one employé that plaintiff intended to set aside the rule could not possibly be notice to another employé of this fact, and, where another employé in the absence of such notice took part in the movement of the car, plaintiff should not be permitted to recover.

"XXI. His honor committed error in not charging defendants' twentieth request to charge as follows, to wit: 'I charge you that the plaintiff cannot change the blue flag rule by relying on the protection of the conductor because the company not being a party to the change of the rule, unless the conductor has been appointed as a representative of the master to change this rule, of which there is no evidence in this case. If the plaintiff instead of placing the blue flag as required by the rules, relies on the notice given to the conductor he thereby constitutes the conductor his agent for protection, and cannot hold the defendants liable for failure of the conductor to protect him. The conductor in such case does not represent the master so as to give him protection, which protection the company has adequately provided for otherwise by the rule.' I refuse to charge you that—the error being:

"(a) It is respectfully submitted that this request contains a sound proposition of law applicable to this case.

"(b) If plaintiff, instead of complying with the rule, undertook to rely on the conductor as a protection, he certainly in law would constitute the conductor his agent, and could not recover for a failure of the conductor to protect him. The conductor in no sense could represent the master for the purpose of waiving the rule or for the purpose of giving him protection in violation of the rule; it being respectfully submitted that the rule is binding on the conductor as well as all other employés, and could not be waived without express authority so to do, and there was no evidence in this case tending to establish any such authority.

"(c) Plaintiff certainly could not change the blue flag rule by substituting verbal notice to the conductor, and it was error in his honor not to so instruct the jury as he was requested to do.

"XXII. His honor committed error in not charging the defendants' twenty-first request as follows, to wit: 'I charge you that, if you find that the plaintiff told the conductor that he was going to work under the car, this did not relieve him of the duty to place the blue flags. That the conductor had the right to assume, unless notified to the contrary,

that he would place a blue flag as required by the blue flag rule.' I refuse to charge you that—it being respectfully submitted:

"(a) That this request contains a sound proposition of law, and should have been charged.

"(b) It is submitted that as a matter of law and logic notice to a conductor that a car repairer intends to do some work on a car will not imply notice or knowledge that in doing so he intends to violate the blue flag rule.

"(c) All employés have the right to assume that other employés will observe the rules of the company in the absence of notice to the contrary, and in this case there is not a particle of testimony tending to show that plaintiff told the conductor that he was not going to observe the rule. All that he claims that he told him was that he was going to work on the car.

"XXIII. It was error in his honor to submit to the jury in this case the question of punitive damages, when there was not a particle of testimony in the entire case to indicate anything going to establish wanton or willful conduct on the part of the defendants or anything to entitle plaintiff in any view of the matter to punitive damages.

"XXIV. It was error in his honor not to direct a verdict for the defendants on the cause of action for punitive damages; the error being:

"(a) That there was no testimony tending to establish such cause of action.

"XXV. The Constitution of South Carolina requires and directs that judges shall in the trial of jury cases declare the law; that is, that they shall instruct the jury as to the principles of law which shall govern in the trial of the said case. It is respectfully submitted that the charge of his honor considered as a whole or in parts does not correctly instruct the jury as to the law applicable to this case, but, on the contrary, gave to the jury a wholly incorrect idea as to the law which should govern in the trial of this case. His honor refused outright most of the requests of the defendants and so modified the others as to entirely emasculate the same, and iterated and reiterated to the jury the idea of punitive damages when the decision in this case which was the law of the case eliminated that question from further consideration, and when the testimony wholly failed to even suggest any consideration of punitive damages or wanton or willful conduct. His honor's theory of this case was clearly impressed on the jury, and that theory was that plaintiff was entitled to recover a verdict both for punitive and actual damages, regardless of the fact that plaintiff violated the blue flag rule and without regard to the fact that he knew it was dangerous so to do and without regard to the fact that he admitted having made no effort at the time of undertaking the work to procure a blue

flag, and regardless of the fact that he admits that he relied on Freeman, his fellow servant, as a substitute for the blue flag rule, and his alleged conversation with the conductor in which it is not even claimed that he told the conductor that he was not going to comply with the rule. His honor was clearly of the opinion that the mere conversation with the conductor testified to by plaintiff of his intention to repair his car was sufficient in law to give to plaintiff a cause of action both for actual and punitive damages, and it is respectfully submitted that the entire charge is capable of this construction and this construction only, and in so charging the jury his honor committed prejudicial error.

"XXVI. His honor committed error in submitting to the jury the question of wanton and willful misconduct of the defendants or either of them, because there was no testimony in the entire record tending to establish any wanton or willful conduct on the part of either defendant.

"XXVII. His honor committed error in his refusal to grant a new trial on the first ground submitted, to wit, that there is no testimony whatever tending to support the verdict; the error being:

"(a) There is no testimony in this case, it is respectfully submitted, tending to support the verdict.

"XXVIII. His honor committed error in refusing to grant a new trial on the sixth ground submitted for a new trial, to wit: 'Because the evidence is that plaintiff was the author of his own injury, in that he knowingly and unnecessarily violated the blue flag rule without the presence of any emergency so to do, and without notifying the officers and employees in charge of the train that he intended to violate such rule, which rule was enacted for and vital to his own safety'—the error being:

"(a) That there was no emergency whatever requiring plaintiff to do this work in violation of the rule, and the testimony shows that he knowingly and unnecessarily violated the blue flag rule to his injury.

"XXIX. His honor committed error in not granting a new trial on the seventh ground submitted, to wit: 'Because the only inference to be drawn from the evidence is that, if plaintiff's negligence was not the sole cause, it was at least a contributory proximate cause of his injury, in that he violated an important rule, to wit, the blue flag rule, promulgated for and essential to his safety, without notifying the conductor of the train of his intention to violate such rule'—the error being:

"(a) That the entire testimony shows that the plaintiff was guilty of contributory negligence as a proximate cause of his injury.

"XXX. His honor committed error in not granting a new trial on the eighth and ninth grounds submitted as follows, to wit: 'In

charging the first and second requests to charge and in charging plaintiff's third request with the modification as charged.' 'In modifying the first, second, third, fourth, and fifth requests of defendants, and in refusing the remaining requests of defendants. It is submitted said requests each contained in themselves correct principles of law applicable to their respective parts of the case as made'—the error being:

"(a) In reference to the eighth ground as assigned and specified hereinabove.

"(b) In reference to the ninth ground as specified hereinabove, and for the further reason that the first, second, third, fourth, and fifth requests of the defendants contained sound propositions of law which should have been given to the jury in this case.

"XXXI. His honor committed error in holding in his order refusing motion for a new trial that there was some evidence of conscious failure to observe due care, whereas it is respectfully submitted that the testimony does not tend to establish such a conclusion of fact.

"In addition to the foregoing exception made on behalf of both defendants, the defendant, Atlantic Coast Line Railroad Company, takes the following exceptions:

"XXXII. The circuit judge erred in overruling the motion to direct a verdict so far as that company was concerned, for the reason that the testimony shows that, although plaintiff at times worked for both roads, yet at the time of his injury he was working for the Charleston & Western Carolina Railway Company, upon a car of the Charleston & Western Carolina Railway Company, situated on the siding of the Charleston & Western Carolina Railway Company, and that he was injured by a train of the Charleston & Western Carolina Railway Company operated by officials and employees of the Charleston & Western Carolina Railway Company, and that the Atlantic Coast Line Railroad Company had no part or responsibility whatever in the infliction of the alleged injury to the plaintiff and could in no way be held liable therefor under the pleadings and proof.

"XXXIII. The circuit judge erred in refusing the twenty-second request to charge, viz: 'I charge you that in this case you cannot find a verdict against the defendant the Atlantic Coast Line Railroad Company for the reason that there is no evidence that the injury received was the result of any negligence on the part of that defendant, its officers, agents or employees.' It is submitted there was no evidence that the injury complained of resulted from any negligence or wrongful act of the Atlantic Coast Line Railroad Company, and that defendant was entitled to have this request charged.

"XXXIV. The circuit judge erred in refusing the motion of the Atlantic Coast Line Railroad Company to set aside the verdict

upon the eighth ground of its motion, viz: '8) Because there was no evidence to support the verdict so far as the defendant Atlantic Coast Line Railroad Company is concerned.' It is submitted there was no evidence to support a verdict against that defendant, and therefore, in the absence of such evidence, it was error to refuse to set aside the verdict as to that defendant. We earnestly submit that the mere fact that two railroad companies at a junctional point at times employ the services of the same employé or employés and arrange between themselves as to the method of payment of his or their wages cannot in law make one of such railroad companies responsible for negligent or wrongful act of the other railroad company to such employé or employés while such employé is working for such other company.

"XXXV. In refusing to set aside the verdict as to the Atlantic Coast Line Railroad Company, the circuit judge said: 'Especially does counsel for the Atlantic Coast Line Railroad Company insist that there is no testimony to sustain a verdict against it. * * * The Supreme Court has held that in this case there was some evidence tending to show negligence on the part of defendants'. We submit the circuit judge erred in so holding; that he erred in holding that the Supreme Court had done or could do anything more upon the last appeal in this case than pass upon the specific exceptions and the questions raised by them; that he erred in holding that the separate nonliability of the Atlantic Coast Line Railroad Company was raised by these exceptions or consequently decided on that appeal; that he erred in holding that the question of the liability of the Atlantic Coast Line Railroad Company on appeal from a nonsuit in one trial can be held as conclusive and decisive of a motion for nonsuit upon a new trial where more or less evidence is or may be introduced; that he erred in holding the question res adjudicata, when upon a new trial a different question is necessarily presented depending upon the proof offered and he erred in holding that in this last trial there was any evidence tending to establish liability of the defendant Atlantic Coast Line Railroad Company."

James E. Peurifoy, of Walterboro, W. H. Fitz Simons, of Charleston, P. A. Wilcox, of Florence, and F. B. Grier, of Greenwood, for appellants. W. A. Holman, of Charleston, and Howell & Gruber, of Walterboro, for respondent.

WATTS, J. This was an action by plaintiff against defendant for personal injuries received while he was engaged at work as car repairer in the employ of defendant at Yemassee, S. C., on May 25, 1907. The cause was first tried in March, 1911, before Judge Ernest Gary, and resulted in a nonsuit. Plaintiff appealed, and the judgment of the circuit

court was reversed and a new trial ordered. The case is reported in 89 S. C. 525, 72 S. E. 394. The cause was then tried before Hon. Thos. S. Sease and a jury at the November term, 1911, and resulted in a verdict in favor of the plaintiff against the defendants for the sum of \$13,000 actual damages. At the close of plaintiff's testimony, defendants made a motion for a nonsuit on the grounds which are set out in the case, and which should be reported in the case. This motion was refused at the conclusion of the testimony of both plaintiff and defendants. The defendants made a motion to direct a verdict on grounds that should be reported in the case, and which was refused by the court. After verdict motion for a new trial was made and overruled. Defendants then appealed, and by 35 exceptions allege error on the part of the trial judge. These exceptions should be set out in the report of the case, and may be divided into three heads: First. In refusing to direct a verdict and to grant a new trial on the ground that the evidence showed plaintiff's negligence was the sole cause of his injury, or that plaintiff was guilty of contributory negligence, or that he was injured through the negligence of a fellow servant. Second error. In the judge's charge in charging certain propositions of law, and in refusing to charge certain propositions of law as requested. The exceptions of the defendant Atlantic Coast Line Railroad Company which are 32, 33, 34, and 35, which raise the exceptions that the testimony nowhere shows any liability on their part for any injury inflicted on the plaintiff.

[1] The law is so well settled in this state, at least, that where there is any testimony at all, or where more than one inference can be drawn, that the case must go to the jury to be determined by them, and to grant a nonsuit or direct a verdict under such a state of facts would be error, that no question of authority is necessary. In the former appeal in this case in 89 S. C. 529, 72 S. E. 395, this court held in reference to the negligence of the plaintiff: "There was no conclusive evidence that the blue flags were not used on this occasion, but, even if there had been, we are unable to agree that a nonsuit was proper without allowing the plaintiff to testify as to the condition of the flags furnished him, for it might have appeared that they were so broken as to be useless and that he was unable to procure others. * * * We think the evidence required that these issues and the issue of contributory negligence growing out of the rule requiring the use of a blue flag should be submitted to the jury."

[2] The rule, No. 989, introduced in evidence, provides: "They will make no inspection or repairs to cars, either in trains or where liable to be moved, except under the protection of the signal prescribed in rule No. 26." Rule 26 is the blue flag rule, and

requires that the workman shall display a blue flag by day and a blue light at night, and that, when a car is thus protected, it must not be coupled to or moved. The same workmen who place the flag are alone authorized to remove it. Other cars are not allowed to be placed on the same track so as to obstruct the view of the blue signal without first notifying the workman.

[3] It seems to us that there was sufficient testimony in this case to carry the case to the jury as to whether or not it was practicable for the plaintiff to obtain a blue flag, and whether or not at that time he was directed by a superior officer to proceed with the work, knowing he had no flag, and, inasmuch as the object of the blue flag is to give notice and warning to the trains, and if Conductor Partain had actual notice that plaintiff was under this car, and, with such notice, ran back against the car and caused his injuries, then the company would be liable. There was testimony that the plaintiff was 19 years old, and had been in the employ of the company about 2 months, and knew the rules in reference to the blue flag; that previous to the occasion of his injury flags, 6 in number, had been furnished by the defendant Atlantic Coast Line Railroad Company to the workman, and while repairing a car 10 or 15 days before the injury, with two flags displayed as required by rule of the company, a train was run against the car and one of the flags broken and torn to pieces, and the other carried away, and never seen by plaintiff afterwards. Two days before the injury to plaintiff, while at work with both flags displayed, he was again run into, and both flags broken, and he narrowly escaped serious injury on that occasion. His request to the chief car inspector to report the conductor for this was refused. Shortly before plaintiff's injury, he was again run into while at work, and the remaining two flags broken. There being no flags at all, and Rabb having full knowledge of this, directed the plaintiff on the morning of the injury to repair a car on the siding. At that time there was one train on the yard, a local freight, in charge of Conductor Partain. This train was on the main line headed for Augusta, then taking water at the tank. Plaintiff before going to work told Conductor Partain what he was about to do. The following is the testimony: "Q. After receiving instructions from Mr. Rabb to repair this car, what did you do next? A. I met the conductor going to the car. Q. How did you happen to meet him? A. I went down the yard to inspect a car after Mr. Rabb sent me to inspect this one, just a minute, and came back. On my way back to get the tools, I met this conductor as he was going to his train to take it to opposite side of main line. I went over and inspected that car, and came straight back to Mr. Rabb to get the tools, and get Mr. Freeman to help

me with this car, and on my way back to the shanty I met the conductor at about half-way between the car and the depot, and told him that I had this car to repair and told him what place, and all about the car, showed him the car." Before going to work on this car, there is evidence to show that the plaintiff placed Freeman, a repairer, to watch for other trains. We find the following testimony: "Q. Did you put out the flag? A. We had none to put out. Q. I asked you if you put it out? A. No, sir. Q. When Freeman came out, you went under? A. Yes, sir. Q. What did you ask him to do for you? A. I asked him to look out and see if any other trains arrived on the yard. He could give the alarm." Later we find: "Q. In going to work under the car, had you no blue flag to display? A. No, sir. Q. What did you rely on for your protection? A. What I relied on was the conversation I had with the conductor, relying on his not coming back in there. I merely put Mr. Freeman back, you might say, as a second precaution, mostly against other trains that might come in, extras."

[4, 5] Here we have evidence that plaintiff, notwithstanding the rule requiring the use of flags for his protection, had used them on three different occasions, and narrowly escaped death or serious injury previous to his injury. The flags had failed to accomplish the purpose they were intended to serve, and had been destroyed. There was none on hand to use the time he was actually injured, and he took the extra precaution to notify and warn the conductor of the only train there that he was going to inspect the car, and pointed out to the conductor the particular car he intended to inspect, and put out a person to watch for, and warn him against other trains, and went to inspect the car under orders of his superior, who was present and gave the orders to him. It was clearly competent for the jury to determine under all of the evidence and circumstances of the case whether it was the negligence of the defendants which was the proximate cause of plaintiff's injury, and whether he, by his acts, was in any manner negligent and contributed to the proximate cause of his injury.

[6] It was also for the jury to say, under the testimony as given, whether there was wantonness or a conscious advertent failure on the part of Conductor Partain to observe due care under the particular circumstances of the case. Could the placing of the blue flag have told the conductor more than what the plaintiff had told him? Plaintiff had given him explicit notice of what he intended to do, and in less than 10 minutes after the notice the conductor, without any notice to plaintiff, ran his car into him, and caused the injuries complained of. Plaintiff not only gave notice to the conductor as to what he intended to do, pointing out the car, but was assured by the conductor that he was going

to pull out for Augusta, and plaintiff could safely go to work on the car without molestation.

[7] Whether the work to be done was an emergency case was for the jury. There was evidence that it was broken down, and plaintiff was ordered to repair it by his superior, who had the right to give the order. It was his duty to obey. There is testimony that the superior knew the work would be done without the flags, and that plaintiff had made an effort to obtain flags and failed; that he had called for locks to lock switches and failed to get them. "If a master or superior orders an inferior into a situation of danger, the law will not charge him with assumption of risk, unless the danger is so glaring that no prudent man would have entered into it." 14 Eng. Law, 357, cited and approved in *New v. Railway Co.*, 55 S. C. 102, 32 S. E. 832. "Whether the matter of assumption of risk by an employé is to be tested by the law of waiver (*Hooper v. Railroad*, 21 S. C. 541, 53 Am. Rep. 691), or the law of negligence (*Bussey v. Railroad*, 52 S. C. 438, 30 S. E. 477), is a question of fact for the jury." *Mew v. Railway Co.*, 55 S. C. 103, 32 S. E. 828. His honor committed no error in refusing the motion made by the defendants for a nonsuit or to direct a verdict, and the exceptions raising these questions are overruled.

As to the second group of exceptions, which allege error in the judge's charge, a careful reading of the exceptions and the judge's charge as a whole will show that he has committed no error. Every question raised by these exceptions was virtually raised and decided in the case of *Carson v. Southern Railway Co.*, 68 S. C. 55, 46 S. E. 525, in the full, elaborated, and able opinion of Chief Justice Pope, and reaffirmed in the cases of *Wilson v. Railroad*, 73 S. C. 481, 53 S. E. 968; *Stephens v. Railroad*, 82 S. C. 542, 64 S. E. 601. In the case of *Moore v. St. Louis & P. R. R. Company (Mo.)* 21 Am. & Eng. R. R. Cas. 509, the pleadings and facts of that case show that it was a case very similar to the case at bar. Dealing with the legal principles involved, the court, at pages 513-514, say: "The defendant's refused instructions asserted the following general propositions, viz.: That, although plaintiff and Kestler were not fellow servants, Kestler was not authorized by the company to make the promise alleged to protect plaintiff while under the car, and that, notwithstanding such a promise, yet plaintiff could not recover if he failed to set out the red flag as required by the rule, or to set some one to watch for the approach of engines and trains. It being conceded, as it must be, that the company owed a duty to the men under the car to provide for their safety, can it be that the foreman had no authority in an emergency to use any other means than those adopted by the company—that the red flag, and nothing but the red flag, was the means he was to employ? If

for any reason that would clearly in a given case have been insufficient as a warning, can it be possible that the foreman would be restricted to the use of red flags? or, if in such case he had had the red flag set up, and one of the men was injured in consequence of its insufficiency to give the warning, that the company would not be liable to the injured party? Has it discharged its duty by simply adopting a means of protection ordinarily sufficient when the person in charge of the work knows that in the particular case it is not a sufficient warning? If the foreman has authority in such an emergency, that authority results from his general authority to perform the duty of the company in protecting the employés under his control in the performance of a dangerous work for the company, and he was authorized to make the promise to plaintiff for the company, and undertook to set out the red flag in his possession, or to adopt any other means necessary to secure the safety of the men, thereby absolving them from the duty of setting out the flag or setting the watch. As to the latter, there was no proof of a rule requiring one man to watch while the others worked; and it was in the proof that, while the work in question could possibly have been done by one man, it could not be conveniently or promptly done by less than two. It being the duty of the company to provide for the safety of the men while engaged in its dangerous service, if it delegates such authority as to the employment of men and their control and management to an agent, will the law, in the absence of an express stipulation to that effect, declare that such agent is under no obligation, and has no power, as the representative of the company, to provide means for the safety of servants whom he sends in a place of danger to work? If so, the duty of the company to provide such security may be easily evaded by having no one on hand to perform it. And by simply adopting reasonable rules, the observance of which will ordinarily afford protection, although in a given instance the observance of such regulation would afford no protection whatever, and the person representing the company in the direction of the work and the control of the hands knew the fact, such abdication of duty can certainly find no support either in reason or authority."

[8] As to the contention that the injury was the result of the combined contributory negligence of the plaintiff and the negligence of a fellow servant, *Freeman*, this court in the former decision in this case said: "If the negligence of *Freeman*, the fellow servant, was the sole proximate cause, or one of the proximate causes, the negligence of the plaintiff being the other, then the plaintiff could not recover, but if the proximate cause of the injury was the negligence of the defendants combined with the negligence of *Freeman*, the fellow servant, the plaintiff would

not be precluded from recovery. *Elms v. Sou. Power Co.*, 79 S. C. 502, 60 S. E. 1110; *Roberts v. Virginia C. C. Co.*, 84 S. C. 283, 66 S. E. 298. We think the evidence required that these issues and the issues of contributory negligence growing out of the rule requiring the use of a blue flag should be submitted to the jury." It will be seen that it was decided in this case, reaffirming the rule as laid down in *Elms v. Sou. Power Co.*, 79 S. C. 502, 60 S. E. 1110, and a long line of decisions, that the plaintiff would not be precluded in recovering if the defendants were negligent, because of the negligence of plaintiff's fellow servant, Freeman, if the negligence of the master, the defendants, combined and commingled with the negligence of such fellow servant. In order to escape liability on the ground of negligence of a fellow servant, it must appear that the master was not negligent at all as to any of the proximate causes of plaintiff's injury. It was for the jury to say under the evidence and what weight it would give to it that the act of the conductor in running his train back and striking the cars on the siding under the circumstances was negligence or not on the part of the defendants. There was ample testimony to go to the jury on the question of waiver of the blue flag rule, and we will not further discuss the testimony on this line, being content with what has already been said in reference to why they were not used on this occasion. As to these exceptions in reference to the judge's charge, the exceptions are overruled.

[8] As to exceptions 32, 33, 34, and 35, which are the exceptions of the defendant Atlantic Coast Line Railroad Company that there is no evidence to sustain the verdict against it on any view of the facts proved, the evidence conclusively shows that both of the defendants at the time of plaintiff's injury owned and jointly operated the yard at Yemassee, S. C., a station on the line of both defendants' roads, and that plaintiff was employed by both of the defendants to work as car repairer in their yard at Yemassee. There was evidence to show that he was paid by the Atlantic Coast Line Railroad Company; that the flags were furnished by this defendant, through Rabb, the chief car inspector, under whom plaintiff worked. It was not for plaintiff to inquire which road he was working for. It was his duty to obey the reasonable orders given him by his superior in the due course and within the scope of his employment, and he had every reason to assume that his superior would not require him to work for a road that it was not his duty to work for, and it was not expected of him to ascertain whether he was working for one or both roads when he was directed by his superior to work. Under the peculiar facts of the case, it would be difficult for him to determine when he ceased to become the servant of one road and became the servant of the other. As to that, possibly

some of the higher officials of the two roads knew what the agreement in reference to this was, but that secret was locked up with them, and may be would not be made known until it was to their interest to divulge it. He took the situation as he found it, and obeyed the orders of his superior. There was some evidence to show that both roads, by some agreement among themselves, jointly used this union yard at Yemassee, and there was sufficient evidence to infer that each furnished their proportionate share of machinery and men necessary to operate the same, and, if plaintiff was entitled to recover, he had the right to recover against one or both, and they can settle among themselves according to their agreement, if they have any. With that plaintiff is not concerned. This view is sustained by the cases of *Gulf, C. & S. F. R. Co. v. Dorsey*, 66 Tex. 148, 18 S. W. 444; *Vary v. Railroad Co.*, 42 Iowa, 246; *Wisconsin Railroad v. Ross*, 142 Ill. 9, 31 N. E. 413, 34 Am. St. Rep. 49; 2 *Wood on Railroads* (Minor's Ed.) 1558. These exceptions are overruled.

[10] As to the exceptions that his honor was in error in submitting to the jury the question of punitive damages: His honor instructed the jury that they were to find, if at all, separately, the actual and punitive damages and they only found actual damages; so it is immaterial now whether he was in error in submitting this question or not and this exception is overruled.

After a careful consideration of all the exceptions, it is the judgment of this court that the exceptions be overruled.

Judgment affirmed.

GARY, C. J., and HYDRICK, J., concur. WOODS and FRASER, JJ., concur in the result.

WOODS, J. I concur in the result. The rules of the railroad company required car repairers, before working under cars, to put blue flags to warn those operating trains not to run on them. The court held on the former appeal: "If the plaintiff proved that he did disregard such a rule, known to him to be in force and so essential to his own safety as well as the safety of other employes and the general public, when he could have complied with it by reasonable effort on his part, and thus prevented the injury, then the nonsuit was proper." The plaintiff could not excuse his disregard of the rule on the ground that he chose to adopt the substitute of telling the conductor of the train that he was going under the car and getting his promise not to run on him. "It concerns the public safety that courts should not sanction the attempts of employes of railroad companies to waive or disregard any of the rules adopted for the protection from injury of the employes themselves, as well as passengers." *Stephens v. Southern Ry.*, 82 S. C. 542, 548, 64 S. E. 601.

Disobedience of rules by a servant which combined with the negligence of the master proximately causes him injury will generally be held by the courts to be contributory negligence as a matter of law. *Mills v. Railroad Co.*, 85 S. C. 463, 67 S. E. 565. This doctrine was distinctly stated in the charge, but with the correct limitation that contributory negligence of the plaintiff would not avail the defendant if the act of those in charge of the moving train, in striking the car under which the plaintiff was working, was wanton and reckless. But I think there was some evidence that the defendant did not have blue flags for plaintiff's use, and that he was, therefore, not negligent in failing to use them. For these reasons, I think there was no error in refusing a nonsuit for contributory negligence, and that there was no error in the charge.

I concur in the conclusion of Mr. Justice WATTS that there was evidence to go to the jury on the issue of the joint liability of the Atlantic Coast Line Railroad Company and the Charleston & Western Carolina Railway Company.

(32 S. C. 577)

DEMPSEY et ux. v. WESTERN UNION TELEGRAPH CO.

(Supreme Court of South Carolina. Oct. 10, 1912.)

1. TELEGRAPHS AND TELEPHONES (§ 37*)—SERVICE MESSAGE—PLACE OF DELIVERY.

Where a telegram, sent from Y., contained a notice to "answer to M.," and the agents both at Y. and M. knew the sender lived at M., and that the telegram was not sent from there because, it being Sunday, the office was closed, it was the duty of the telegraph company, on being unable to deliver the telegram, to send its message of nondelivery to the sender at M., and not at Y.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. §§ 24, 29, 32; Dec. Dig. § 37.*]

2. TELEGRAPHS AND TELEPHONES (§ 37*)—SERVICE MESSAGE—DILIGENCE TO DELIVER.

It is as much the duty of a telegraph company to exercise diligence in the delivery of a message announcing nondelivery as to exercise diligence in the delivery of an initial message.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. §§ 24, 29, 32; Dec. Dig. § 37.*]

3. TELEGRAPHS AND TELEPHONES (§ 74*)—NONDELIVERY OF MESSAGE—INSTRUCTIONS.

Where, in an action for damages for nondelivery of a telegram and failure to give notice of nondelivery, the petition alleged that one plaintiff was prevented thereby from being present at the bedside of her dying daughter while she was yet conscious, it was not error to modify defendant's requested instruction that, under certain circumstances, the plaintiffs could not recover damages for failure to deliver the service message by adding thereto the words, "On the allegation that she was deprived of being with her daughter while she was yet conscious," the weight of the evidence being that she was unconscious when the message was sent; the instruction, as modified, being on the issues made by the pleadings, and not confining the jury to accept either view of

whether or not she would have arrived while her daughter was yet conscious.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. § 77; Dec. Dig. § 74.*]

4. NEW TRIAL (§ 81*)—PROCEDURE TO PRODUCE—PRELIMINARY MOTIONS.

A motion for a new trial was properly overruled where no motion was made for a nonsuit or to direct a verdict, as required by circuit court rule 77 (73 S. E. vii).

[Ed. Note.—For other cases, see *New Trial*, Cent. Dig. § 181; Dec. Dig. § 81.*]

Appeal from Common Pleas Circuit Court of Colleton County; Thos. S. Sease, Judge.

Action by *Barrie Dempsey* and wife against the *Western Union Telegraph Company*. From a judgment for plaintiffs, defendant appeals. Affirmed.

Geo. H. Feassons, of New York City, Nelson, Nelson & Gettys, of Columbia, and Peurifoy Bros., of Walterboro, for appellant. Padgett, Lemacks & Morser, of Walterboro, for respondents.

WATTS, J. This was an action by the plaintiffs against the defendant for actual and punitive damages for \$1,995 for alleged negligent and willful failure to deliver a telegram, and negligent and willful failure to notify the sender of its nondelivery. The telegram was filed with defendant at Youngs Island at 9.25 a. m., Sunday, July 3, 1910, and was as follows: "7-3-10. Mrs. Barney Dempsey, Cordova, S. C., Mrs. Platt is dying. Come at once. Answer to Meggetts. J. P. Gay." Cordova is a small station in Orangeburg county, and the telegraph office is only kept open from 7 to 7:30 a. m. and from 4:30 to 5 p. m. on Sundays. The evidence shows that the message from Youngs Island to Cordova had to be relayed in Charleston, S. C., and Augusta, Ga., and was received at 4:45 p. m. by the agent at Cordova on the day sent. Plaintiffs did not live in the town of Cordova, but some seven or eight miles in the country. Cordova was not their telegraph or post office. Their post office was Cope, a distance of several miles. Mrs. Platt was a daughter of Mrs. Dempsey, and lived near Meggetts. Her husband, in going for a doctor, requested Gay, a relative, to notify plaintiff to come to her daughter. Gay lived a short distance to the telegraph office at Meggetts, and was well known to the telegraph agent there. The office at Meggetts was not open for business on Sundays, and Gay went to Youngs Island, a distance of nearly two miles, to send the telegram. He paid for the telegram and impressed upon the agent the importance of the same. The agent at Cordova, as testified, was related to plaintiff, and knew plaintiff. After receipt of the message at Cordova at 4:50 p. m. and within half an hour, the agent sent a service message to Youngs Island, as follows: "Youngs Island, S. C. Yours to Mrs. Barney Dempsey

signed Gay undelivered. Party lives eight miles in the country. Cordova, S. C. July 3rd." Gay, after sending the message from Youngs Island, returned to his home at Meggetts and received no notice at all from Youngs Island or Meggetts of the nondelivery of the telegram. The agent at Youngs Island testified he knew Gay and knew where he lived. Failing either to see or hear from Mrs. Dempsey, the relatives of the sick daughter got into communication with her at her home by long-distance telephone late in the afternoon of Tuesday, July 5th, and in response to this communication Mrs. Dempsey reached her daughter's bedside on July 6th, at about 4:30 p. m. The daughter was unconscious on her arrival and never regained consciousness. The daughter died after plaintiff's arrival, Thursday, July 7th.

The cause was tried before Hon. Thomas S. Sease and a jury at November term of court 1911, and a verdict was rendered by them in favor of plaintiffs for \$650 actual damages. Defendant appeals, and alleges error on 10 grounds. At the argument of the case before this court, exceptions 1 and 6 were withdrawn by appellant's counsel. The second, third and fourth exceptions are as follows:

"Because the circuit judge erred in modifying the defendant's third request as follows: 'I also charge you that if the defendant was notified that the service message was to be delivered in another place, and the plaintiff's agent or those acting for her was within that delivery, I charge you that it would be the duty of the telegraph company to take notice of that information if a person of ordinary prudence and care would have taken notice of it, and been guided by it'—the error being that the jury were instructed in effect that the defendant was required to deliver the service message at Meggetts, a different point from the sending place, and contrary to the law and the rules of the company. (1) Because the jury was instructed that they could find that it was the duty of the company to deliver a service message two miles from the place of sending, when the uncontradicted testimony showed that the rules of the company only required the delivery of the service message within half a mile of the sending office. (2) Because the jury were led to believe that the defendant was under obligation to deliver a service message at a point other than the sending station.

"Because the circuit judge erred in modifying the defendant's third request by adding the following: 'On the allegation that she was deprived of being with her daughter while she was yet conscious'—the error being that the jury was led to believe that they could find for the plaintiff on these grounds, whereas the claim for damages as set out in the complaint was based upon her alleged inability to arrive at the bedside of her daughter and minister to her while she was

yet conscious, the weight of the testimony having shown that the deceased was unconscious at the time said message was sent, and remained so until the time of her death."

[1] Appellants contend that, although the telegram contained the notice "answer to Meggetts," the telegraph company was not required to notify Gay of the nondelivery of the telegram at Meggetts because the message was sent from Youngs Island, and a service message under the alleged rule of the company was not required to be delivered beyond a half mile of the sending office. We think this view not tenable. The evidence shows that Youngs Island and Meggetts were small places close together and sparsely settled, and the people knew each other; that Gay was well known to both the agent at Youngs Island and Meggetts, and it was well known to both that he lived within 100 yards of the telegraph station at Meggetts. It was well known that the office at Meggetts being closed on Sundays was the reason for sending the message from Youngs Island. Gay put the defendant on notice as to where he was to receive a reply to his telegram. There is no doubt but it was the duty of the defendant to notify Gay of the failure to deliver the telegram at Meggetts, where he had directed them to answer, and not at Youngs Island, where he had sent it from.

[2] It is as much the duty of a telegraph company to exercise diligence in the delivery of a service message as to exercise diligence in the delivery of an initial message. It has been held in numerous cases in this state, if from a lack of knowledge or other causes the company failed to exact in advance the extra charge for delivery outside the free delivery limits, it must upon ascertaining the facts of residence beyond such limits give an opportunity to pay the extra charge. *Campbell v. Telegraph Co.*, 74 S. C. 300, 54 S. E. 571; *Lyles v. Telegraph Co.*, 77 S. C. 174, 57 S. E. 725, 12 L. R. A. (N. S.) 534; *Busbee v. Telegraph Co.*, 89 S. C. 567, 72 S. E. 499; *Martin v. Telegraph Co.*, 81 S. C. 436, 62 S. E. 833. These exceptions are overruled.

[3] The fifth exception is as follows: "Because the circuit judge erred in modifying the defendant's fifth request by adding the following: 'On the allegation that she was deprived of being with her daughter while she was yet conscious'—the error being that the jury was led to believe that they could find for the plaintiffs on this ground, whereas the claim for damages as set out in the complaint was based upon her alleged inability to arrive at the bedside of her daughter and minister to her while she was yet conscious, the weight of the testimony having shown that the deceased was unconscious at the time the said message was sent and remained so until the time of her death." We see no error in the judge's charge. He submitted the question of fact to the jury on

the issues as made by the pleadings, and did not confine them as to whether or not she would have arrived while her daughter was conscious or not. To have done so would have been error. This exception is overruled.

[4] Exceptions 7, 8, 9, and 10 allege error in refusing a motion for a new trial. In addition to the fact that there was ample testimony to sustain the verdict, the appellant made no motion for a nonsuit or to direct a verdict as required by rule 77 (73 S. E. vii), circuit court rules. These exceptions are overruled.

Judgment affirmed.

WOODS, HYDRICK, and FRASER, JJ., concur. GARY, C. J., did not sit.

(138 Ga. 665)

GURR v. BRINSON.

(Supreme Court of Georgia. Sept. 24, 1912.)

(*Syllabus by the Court.*)

PLEADING (§ 362*)—DISMISSAL AND NONSUIT (§ 19*) — CROSS-DEMAND — MOTION TO STRIKE.

Under the facts of this case, the court did not err in overruling the motion to strike so much of the defendant's answer as sought to set up a cross-demand, nor in refusing to dismiss the whole case on motion of the plaintiff.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1147-1155; Dec. Dig. § 362.* Dismissal and Nonsuit, Cent. Dig. §§ 33-30; Dec. Dig. § 19.*]

Error from Superior Court, Wayne County; C. B. Conyers, Judge.

Action by F. B. Gurr against M. E. Brinson. Judgment for defendant, and plaintiff brings error. Affirmed.

F. B. Gurr instituted suit returnable to the November term, 1909, of the superior court, against Brinson, alleging that they became purchasers of certain electric lighting, ice, and turpentine plants, and entered into a contract to operate the same, each to receive from the earnings of the business specified amounts as monthly salary, and all of the net earnings to be turned over to the person from whom the property was bought, until the purchase money should be finally paid, when they should receive deeds to the property. Gurr alleged that the relation thus created between him and Brinson was that of partners, and that they carried on business under such arrangement for some three months, but that Brinson committed certain acts alleged to furnish grounds for dissolution of the partnership. The prayers were for injunction and receiver, dissolution of the partnership, an accounting between the parties, and general relief. The defendant's answer admitted the substantial allegations of the petition, except as to the charges relied on as grounds for dissolution, and set up specially that plaintiff and defendant entered into a contract with L. Carter, with

whom they had negotiated for the purchase of the partnership property, to the effect that defendant should receive \$60 per month for his services and Gurr \$20, and that when the property was paid for then Carter should execute to plaintiff and defendant a deed conveying the property "under said contract; that this defendant worked upon said contract, and continued to work and run said plant and place of business, for and during the term of near three months, at and for the sum of \$60, for which this defendant prays the right to recover in said case." This answer was lodged in the clerk's office for filing before the appearance term. On the 16th day of March, 1910, plaintiff's counsel, in vacation, entered an order of dismissal on the petition on file in the clerk's office. At the April term, 1911, the case was called in its order for trial, and counsel for defendant contended that the order of dismissal was ineffective, for the reason that the answer contained "a plea of set-off." Plaintiff's counsel demurred to that portion of the answer relied on as a set-off by the defendant, on the ground that it was "fatally defective and insufficient in law, because there was no allegation in said plea that plaintiff was indebted to the defendant in any sum whatever, nor was there any prayer for any judgment against plaintiff in said plea or answer, and because said plea did not allege any individual indebtedness due by plaintiff to defendant, nor did it allege that any balance had been struck between plaintiff and defendant, who were partners as shown by the pleadings, nor that plaintiff was due defendant anything on account of such balance, and because said plea did not allege that upon an accounting between the partners, and a settlement of the partnership matters, plaintiff was indebted to defendant in any sum whatever"; and upon such grounds the plaintiff moved to strike that portion of the defendant's answer, and also to dismiss the entire case. The judge overruled the motion to strike, and refused to dismiss the case. The plaintiff assigns error on these rulings.

Wilson, Bennett & Lamhdin, of Waycross, for plaintiff in error. Jas. R. Thomas, of Jesup, for defendant in error.

ATKINSON, J. (after stating the facts as above). A petitioner may dismiss his petition at any time, either in term or vacation, so that he does not thereby prejudice any right of the defendant. If claims by way of set-off or otherwise have been set up by the answer, the dismissal of the petition shall not interfere with the defendant's right to a hearing and trial on such claims in that proceeding. Civil Code, § 5548. The petition, among other things, sought an accounting between the plaintiff and the defendant as partners. The plea was not as full as might have been in regard to such amount

as might be due the defendant on an accounting, and might have been open to special demurrer made in due time; but it did set up in substance that the defendant was entitled to \$65 from the partnership. In view of the prayer in the petition for an accounting, this cross-demand contained in the defendant's answer was not so defective as to be a proper subject for dismissal on general demurrer, or on any of the grounds contained in the motion. Accordingly the judge did not err in refusing to strike this part of the answer, or in refusing to dismiss the entire case, on motion of the plaintiff.

Judgment affirmed. All the Justices concur.

(132 Ga. 673)

DAVIDSON v. BARTOW INV. CO.

(Supreme Court of Georgia. Sept. 24, 1912.)

(Syllabus by the Court.)

1. SPECIFIC PERFORMANCE (§ 114*)—PLEADING—PETITION.

In an action brought for the specific performance of an executory contract for the sale of land, it is essential that the contract be set forth in the petition, either in terms or in substance.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 356-372; Dec. Dig. § 114.*]

2. SPECIFIC PERFORMANCE (§ 114*)—PETITION—SUFFICIENCY.

Accordingly, where in such an action the petition alleged that the plaintiff was the owner and in possession of certain described city lots, and "that petitioner has sold said lots to [D., one of the defendants], on condition that title thereto was perfect, but he, while ready to take said property if title is good, says that title is doubtful in this," and there is nothing else in the petition indicating what was the contract, the court erred in overruling a demurrer to the petition, interposed by D., setting up that no cause of action was alleged against him.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 356-372; Dec. Dig. § 114.*]

Error from Superior Court, Chatham County; W. G. Charlton, Judge.

Action by the Bartow Investment Company against W. M. Davidson. Judgment for plaintiff, and defendant brings error. Reversed.

Geo. H. Richter, of Savannah, for plaintiff in error. Edward S. Elliott, of Savannah, for defendant in error.

ATKINSON, J. Judgment reversed. All the Justices concur.

(132 Ga. 669)

ATLANTA STEEL CO. et al. v. MYNAHAN.
(Supreme Court of Georgia. Sept. 24, 1912.)

(Syllabus by the Court.)

1. CORPORATIONS (§ 38*)—AMENDMENT TO CHARTER.

When a proposed amendment to a charter is fundamental, radical, or vital, the unanimous consent of the stockholders to its acceptance

is essential. *Winter v. Muscogee R. Co.*, 11 Ga. 438; *May v. Memphis Branch R. Co.*, 43 Ga. 109; *Snook v. Georgia Imp. Co.*, 83 Ga. 61, 9 S. E. 1104; *Alexander v. Atlanta, etc., R. Co.*, 108 Ga. 151, 33 S. E. 866.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 119, 120, 125-127; Dec. Dig. § 38.*]

2. CORPORATIONS (§ 38*)—CHARTER—FUNDAMENTAL AMENDMENT.

An amendment to a charter of a corporation, increasing its capital stock, whether common or preferred, is fundamental. 10 Cyc. 208; *Id.* 406 (g); *Id.* 569 (2).

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 119, 120, 125-127; Dec. Dig. § 38.*]

3. CORPORATIONS (§ 38*)—CHARTER—AMENDMENT—ACTION BY STOCKHOLDER—SUFFICIENCY OF PETITION.

According to the allegations of the petition, the defendant corporation, the Atlanta Steel Company, pending its application for an increase of its capital stock, entered into a written contract with the plaintiff, one of the terms of which was: "The capital stock of said company shall all be common stock of the same rank and dignity, and all preferences heretofore created shall be withdrawn and revoked, no stock having been issued thereunder, and the capital stock of said company shall be increased to a total of not exceeding \$750,000, all being said common stock." It further appears from the petition, and in a copy of the order allowing the amendment to the charter of the defendant corporation, attached as an exhibit to the petition, that the increase of stock was allowed, "provided all of the stockholders of said corporation had assented and do assent to said amendment." The petition further alleged that the plaintiff never assented to an amendment allowing the issuance of preferred stock, and never assented to the issuance of any preferred stock.

(a) According to the briefs filed by counsel for both parties, the real question made by the petition was whether the defendant corporation had the right to issue preferred stock, and, if not, was the plaintiff, under the allegations of the petition, entitled to have the preferred stock in the hands of the holders thereof declared illegal?

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 119, 120, 125-127; Dec. Dig. § 38.*]

4. GENERAL DEMURRER.

The original petition was not subject to general demurrer.

5. CORPORATIONS (§ 38*)—ACTION BY STOCKHOLDER—MULTIFARIOUSNESS.

Nor was it open to demurrer on the ground that it was multifarious, because the plaintiff stated that he sued for himself and others similarly situated, and relied for relief upon the contract entered into by the plaintiff and the defendant corporation, and also on the plaintiff's right as a stockholder, and because the petition so confusedly intermingled such respective rights as to make it impossible to determine which plaintiff was proceeding under, and that, therefore, he should be put to an election between his remedies.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 119, 120, 125-127; Dec. Dig. § 38.*]

6. CORPORATIONS (§ 38*)—ACTION BY STOCKHOLDER—SUFFICIENCY OF PETITION.

In view of the allegations of the petition, it was not subject to demurrer on the ground that it failed to disclose that plaintiff as a stockholder had exhausted all means within his reach within the corporation itself, and failed

to show that he had made an earnest effort with the managing body of the corporation to obtain relief.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 119, 120, 125-127; Dec. Dig. § 38.*]

7. AMENDMENT TO PETITION.

The amendment to the petition was not demurrable, either on the ground that it added new parties, or that it added a new cause of action.

8. PLEADING (§ 8*)—PETITION—DEMURRER.

Nor was the paragraph of the amendment which alleged that the Trust Company of Georgia held the issue of \$150,000 of preferred stock, issued to it in one certificate, as agent of the defendant to the action (except the Atlanta Steel Company), demurrable on the ground that it set forth a mere conclusion of the pleader.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 12-28½; Dec. Dig. § 8.*]

9. PLEADING (§ 248*)—ACTION BY STOCKHOLDER—DEMURRER—GROUNDS.

The petition as amended was not subject to the demurrer on the ground that it was a new and distinct application for injunction on grounds which were known, or could have been known, to the plaintiff prior to the institution of the amended application for injunction.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 686-709; Dec. Dig. § 248.*]

Error from Superior Court, Fulton County; W. D. Ellis, Judge.

Action by P. H. Mynahan against the Atlanta Steel Company and others. Judgment for plaintiff, and defendants bring error. Affirmed.

Anderson, Felder, Rountree & Wilson and Payne, Little & Jones, all of Atlanta, for plaintiffs in error. Smith, Hastings & Ransom, of Atlanta, for defendant in error.

FISH, C. J. Judgment affirmed. All the Justices concur.

(128 Ga. 670)

GEORGIA R. & BANKING CO. v. BENNEFIELD.

(Supreme Court of Georgia. Sept. 24, 1912.)

(Syllabus by the Court.)

1. CONSTITUTIONAL LAW (§§ 249, 309*)—RAILROADS (§ 24*)—SERVICE OF PROCESS ON LEASING RAILROADS—DUE PROCESS OF LAW.

The provisions for perfecting service on leasing railroads, as set forth in Civil Code, § 2801, do not contravene the state Constitution in respect to due process of law, nor the federal Constitution on the like subject, nor the latter Constitution as to the equal protection of the law.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 710, 929, 930; Dec. Dig. §§ 249, 309.* Railroads, Cent. Dig. §§ 52-56; Dec. Dig. § 24.*]

2. RAILROADS (§ 22*)—JURISDICTION—TRIAL IN COUNTY OF DEFENDANT'S RESIDENCE.

The court of the county where a cause of action originated against a lessor railroad company, by reason of the tort of an agent of the lessee company, has jurisdiction of the lessor company, though it has no agent or place of business in that county, but its office and principal place of business is in a different county

in this state. This ruling is not contrary to the provisions of the state Constitution that all civil cases, except those enumerated, shall be tried in the county where the defendant resides.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 46-50; Dec. Dig. § 22.*]

Error from Superior Court, Fulton County; J. T. Pendleton, Judge.

Action by John Bennefield against the Georgia Railroad & Banking Company. Judgment for plaintiff, and defendant brings error. Affirmed.

John Bennefield brought an action for damages for personal injuries against the Georgia Railroad & Banking Company. The defendant company, under charter power, had leased its franchise and railroad property to the Louisville & Nashville Railroad Company and the Atlantic Coast Line Railroad Company, which two companies were operating the railroad of the defendant company in the name of the Georgia Railroad. The injury for which the suit was brought was caused by an alleged tort of the conductor on one of the trains of the lessees upon which the plaintiff was a passenger, and occurred in Fulton county, where the action was instituted. The defendant conceded its liability to suit in the case under the provisions of Civil Code, § 2228, but contended that it had not been legally served, and that it was not subject to suit in Fulton county. These contentions were presented by objection to the method of service duly made, as well as by plea in abatement and plea to the jurisdiction. Service was made upon the defendant in accordance with the provisions of Civil Code, § 2801, providing for service on leasing railroads; that is, the plaintiff filed with the clerk of the superior court of Fulton county, where the action was commenced, a notice in writing, directed to the president of the company, Jacob Phinizy, at Augusta, Richmond county, Ga., informing him fully of the pendency of such suit and of its nature, which was inclosed in a stamped envelope, furnished by and at the expense of the plaintiff, which was sent by the clerk through the mail to the president of such company at his residence at least 15 days before the appearance term, and the clerk in addition delivered to the sheriff of Fulton county a copy of a writ, who served the same on the depot agent of the lessee companies, and return was made thereof as in other cases.

The defendant contended that it had no officer or representative in Fulton county, and that no agent or representative of the defendant company had been served, but that service had been perfected only upon an agent of the lessee companies, and notice merely of the pendency of the suit had been mailed to the president of the defendant company; that such service did not accord to the defendant company due process of law, and

was, therefore, contrary to article 1, par. 3, of the Constitution of this state, providing that "no person shall be deprived of life, liberty, or property, except by due process of law." It was further contended that such service, made in accordance with the Code section before referred to, tended to deprive the defendant company of its property without due process of law, and was therefore contrary to the Constitution of the United States, and was contrary to the fourteenth amendment to the Constitution of the United States, declaring that "no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law." The further contention was made that such service denied the defendant the equal protection of the law, as defendant was discriminated against by this method of service, in that all other corporations in the state are required to be served through an agent, officer, or representative, and for this reason that the method of service provided for by such code section is contrary to the fourteenth amendment to the Constitution of the United States, in that it denies to the defendant company the equal protection of the law. The contention of want of jurisdiction of the superior court of Fulton county over the defendant company was based upon the fact that the defendant company had no agent or agency in such county, and did no business therein, but that its place of business was in Richmond county, and that only the courts of the latter county had jurisdiction of the case, and that an attempt to sue the defendant company in Fulton county was contrary to article 2, § 16, par. 6, of the Constitution of this state, to the effect that "all civil cases shall be tried in the county where the defendant resides," etc.

Jos. B. & Bryan Cumming, of Augusta, and McDaniel & Black, of Atlanta, for plaintiff in error. Alonzo Field, of Atlanta, for defendant in error.

FISH, C. J. [1] We cannot concede the soundness of any of the contentions of the defendant company. An action for personal injuries against any railroad company must be brought in the county in which the cause of action originated, if such company has an agent in that county, and a judgment rendered in any other county is utterly void. Civil Code, § 2798. "If the company have no agent in the county in which the cause of action originated, the action may nevertheless be brought in that county; the court having power to perfect service upon the defendant." *Devereux v. Atlanta R. Co.*, 111 Ga. 855, 36 S. E. 939; *Mitchell v. Southwestern Railroad*, 75 Ga. 398; *Coakley v. Southern Ry. Co.*, 120 Ga. 960, 48 S. E. 372. See, also,

Bracewell v. Southern R. Co., 184 Ga. 537, 68 S. E. 98, and authorities cited.

[2] If, where an action is brought in the county in which the cause of action originated and where the defendant company has no agent, the court has power to perfect service upon the defendant, it must be true that the Legislature may provide for perfecting service upon the defendant in such a case, as is done in Civil Code, § 2801.

Judgment affirmed. All the Justices concur.

(133 Ga. 687)

SAWTELL et al. v. CITY OF ATLANTA.
(Supreme Court of Georgia. Oct. 2, 1912.)

(Syllabus by the Court.)

1. LICENSES (§ 7*)—OCCUPATION TAX—VALIDITY OF ORDINANCE—CONSTITUTIONAL LAW.

The ordinance of the city of Atlanta imposing a tax of a fixed amount upon all of the icehouses, ice manufacturers, or agencies not employing more than five wagons for selling or delivery purposes, and for each additional wagon above the number of five an additional tax of \$10, is not invalid upon the ground: (a) That it violates the constitutional provision that "all taxation shall be uniform upon the same class of subjects"; or (b) that it is placing a tax upon a mere incident of a business already taxed; or (c) that it amounts to double taxation.

[Ed. Note.—For other cases, see *Licenses*. Cent. Dig. §§ 7-15; Dec. Dig. § 7.*]

2. GROUNDS FOR INJUNCTION.

The court below did not err in refusing the injunction as prayed.

Error from Superior Court, Fulton County; Geo. L. Bell, Judge.

Action by T. R. Sawtell and others against the City of Atlanta. Judgment for defendant, and plaintiffs bring error. Affirmed.

Payne, Little & Jones, of Atlanta, for plaintiffs in error. J. L. Mayson and W. D. Ellis, Jr., both of Atlanta, for defendant in error.

BECK, J. Sawtell and others, who are engaged in the manufacture and sale of ice within the incorporate limits of the city of Atlanta, brought their petition seeking to enjoin the city from issuing tax executions and enforcing the provisions of an ordinance undertaking to impose a license tax upon the icehouses or agencies using and employing more than five wagons for delivery or selling purposes. The ordinance is in the following language: "Icehouses or agencies using or employing not more than five wagons for selling or delivery purposes, no license to issue for less time than to June 30, 1912, fifty dollars; each additional wagon used for selling or delivery purposes, ten dollars. Ice manufacturers or agencies, each plant using or employing not more than five wagons for delivery purposes, no license to issue for less time than to June 30, 1912.

fifty dollars. Each additional wagon used for delivery or selling purposes, ten dollars. Ice wagons, each, selling or delivering ice, ten dollars."

No attack is made on the right of the city to impose the \$50 license or occupation tax provided for in the ordinance; but it is insisted that the tax of \$10 for each additional wagon in excess of the five wagons is illegal, void, and unenforceable, and that the portion of the ordinance providing for the imposition of this tax of \$10 for each wagon in excess of five is violative of paragraph 1, § 2, art. 7, of the Constitution of the state of Georgia, which provides that "all taxation shall be uniform upon the same class of subjects"; that the portion of the ordinance attacked as void imposes upon petitioners a double tax; that the attempted classification by said ordinance for the purpose of taxation is arbitrary and unreasonable; and, moreover, that the ordinance is illegal and void, for the reason that the maintenance and use of ice wagons for delivering ice by petitioners is a mere incident or method of conducting their ice business, and, there being no tax upon the business of delivering as a business, no power is conferred upon the city to require a license for the incidents of a business or the methods by which it is carried on. The court below refused the injunction prayed for.

[1] Under the terms of an act of the General Assembly approved August 22, 1911 (Laws 1911, p. 556), entitled "An act amending an act establishing a new charter for the city of Atlanta," etc., the city of Atlanta has authority to "require any person, firm or corporation or company engaged in, prosecuting, or carrying on, or that may engage in, prosecute, or carry on any trade, business, calling, or avocation or profession, to register their names or business calling, avocation, or profession annually, and to require such person, company or association to pay for such registration and for license to engage in, prosecute, or carry on such business, calling or profession aforesaid, such fee, charge, or tax as said mayor and general council may deem expedient for the safety, benefit, convenience, and advantage of said city. Said tax, registration fee, or license herein provided for shall not exceed the sum of three hundred dollars." Section 51. In the exercise of the authority thus conferred the mayor and general council of the city of Atlanta passed the ordinance set forth in the statement of facts. The effect of the ordinance complained of, which was passed in the exercise of the authority to classify different businesses and occupations for taxation, was to place icehouses and agencies, and ice manufacturers and agencies, in a class for the purpose of taxation, and to impose upon them under this classification an occupation tax. And the ordinance in its scope contained, not only a provision for

the taxation of these occupations after having classified them, but also a scheme for an ascending scale of taxation according to the amount of business done. While the ordinance does not provide for a rate of taxation ascending in exact proportion to the amount of business done, it does in effect fix the tax upon that basis, or one nearly approximating it. As a starting point, it fixes an icehouse or an ice factory, or agency employing not more than five wagons as the unit of taxation, and then, in effect, for each additional wagon employed in addition to the five, imposes an additional tax of \$10.

We cannot see why the legislative body of the municipality could not have selected the icehouse or ice factory employing five wagons or less as a unit for taxing this class of business, just as they could have selected an icehouse or ice factory employing only one wagon for delivery purposes as a unit, and begun the ascending scale at that point for imposing an additional tax upon each wagon used. So far as this tax ordinance affects petitioners, it is not a tax upon wagons or vehicles employed in delivering, but is a tax upon the business upon a scale adjusted, in effect, to the amount of business carried on; and, so considered, it is not an unreasonable plan of classification. In the case of *Johnston v. Macon*, 62 Ga. 645, it was held: "A tax on the business of drayage, scaled according to the number of drays employed, and according to the capacity of the drays, whether one or two horse, is uniform; and whether the drays be employed in general business, or be confined to the business of their owners and their customers in and about transporting goods to and from their stores, the legality of the tax is not affected. The wear and tear upon the streets and bridges is as great in the one as in the other case, and the consequent expense to the city of this business is equal." And in the case of *Goodwin v. Savannah*, 53 Ga. 410, 415, it was said: "When the state levies a tax on business, professions, etc., it varies the tax from \$10 to \$200, and has done so every year since the ad valorem or uniformity rule was first in any Constitution. This being the rule, we cannot see the objection to a tax of \$50 on a business which employs 10 drays or wagons, and a tax of \$25 when 5 are employed. A tax on sales varies according to the amount of sales; and, if the government protects one selling \$500,000 worth, ought not that business to pay more than where only \$20,000 or \$50,000 worth are sold? * * * Such a tax should be apportioned according to the extent of such business, and we do not see in it any conflict with the Constitution. It is in accord with the spirit of an ad valorem and uniform tax." These cases are clearly in point, if we be correct in holding that the municipal authorities in the present case adopted a reasonable plan of classification in taking an icehouse or ice factory or agency employing not

more than five wagons or vehicles as the unit of taxation and the point at which to begin the ascending scale of taxation.

[2] So far as relates to the last provision of the ordinance in question, contained entirely in the last line of the ordinance as set forth in the statement of facts, it may be said that it nowhere appears that any attempt is being made to collect taxes against these petitioners under and by virtue of this provision, and that the only charge in the bill of exceptions of a threatened illegal levy of a tax execution is "upon each and every the wagons which petitioners have and use in excess of the five wagons prescribed by the said ordinance and authorized to be used by them upon the payment of the annual tax license." Wherefore we conclude that the court did not err in refusing the injunction as prayed.

Judgment affirmed. All the Justices concur.

(138 Ga. 672)

INTERNATIONAL HARVESTER CO. OF AMERICA v. ADAMS.

(Supreme Court of Georgia. Sept. 24, 1912.)

(Syllabus by the Court.)

1. NEW TRIAL (§ 41*)—GROUNDS—ADMISSION OF EVIDENCE.

It was not cause for a new trial that the court permitted the defendant to testify to the effect that a 10 horse power engine would operate a 70-saw gin, and that the witness knew this from experience, as he had run a 70-saw gin with an engine that was rated at 10 horse power; it appearing that the plaintiff introduced expert testimony that such a gin could be run by an engine of that horse power.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 67-71; Dec. Dig. § 41.*]

2. ASSIGNMENT OF ERROR.

The assignments of error upon the admission of other testimony were not meritorious; nor did the court err in the instructions of which complaint is made.

3. SUFFICIENCY OF EVIDENCE.

This case was before this court on a former occasion. 135 Ga. 104, 68 S. E. 1093. Subsequently to the decision then rendered, amendments were allowed to the defendant's pleas, and upon the last trial there was evidence materially different from that on the former trial.

4. REFUSAL OF NEW TRIAL.

There was evidence to authorize the verdict, and the court did not err in refusing a new trial.

Error from Superior Court, Screven County; B. L. Rawlings, Judge.

Action between the International Harvester Company of America and C. D. Adams. From the judgment, the Harvester Company brings error. Affirmed.

White & Lovett, of Sylvania, for plaintiff in error. H. A. Boykin, of Sylvania, for defendant in error.

FISH, C. J. Judgment affirmed. All the Justices concur.

(11 Ga. App. 586)

VALDOSTA ST. RY. CO. v. FENN.

(No. 3,741.)

(Court of Appeals of Georgia. Oct. 2, 1912.)

(Syllabus by the Court.)

1. CARRIERS (§§ 280, 320*)—TRANSPORTATION OF PASSENGERS—CARE REQUIRED.

A street railway company may be held liable for an injury due to the failure of its motorman to exercise extraordinary care in protecting a passenger from injury; and a jury may be authorized to find that a motorman who left his car, which was operated by electricity, in such condition that the car could be easily started or set in motion by a passer-by, was guilty of culpable negligence as to passengers who were permitted to remain in the car, while awaiting the arrival of a connecting car of the same street car company on which they were to proceed to their destination.

(a) A carrier is required to use such precautions as may be necessary to prevent any danger to his passengers which can be anticipated in the use of extraordinary diligence. In the exercise of extraordinary diligence, the carrier is required to anticipate that children of tender years will not act with the prudence of maturity, and are generally inclined to be inquisitive, meddlesome, and venturesome, and it is required to foresee that a very high degree of diligence may be necessary for the safety of those who may be injured by the thoughtlessness of children.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1085-1092, 1098-1106, 1109, 1117, 1118, 1126, 1149, 1153, 1160, 1167, 1179, 1190, 1217, 1233, 1244, 1248, 1315-1325; Dec. Dig. §§ 280, 320.*]

2. CARRIERS (§§ 247, 280*)—TRANSPORTATION OF PASSENGERS—CARE REQUIRED—WHO ARE PASSENGERS.

The carrier is charged with the duty of using that extreme care and caution which every prudent and thoughtful person would use under similar circumstances. A passenger upon a street car, who has not reached his destination, and who, in order to reach his destination, must change from one car of the carrier to another car of the same carrier, and who is permitted to remain in the car while awaiting the arrival of the connecting car, is still a passenger.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 984-993, 1085-1092, 1098-1106, 1109, 1117; Dec. Dig. §§ 247, 280.*]

3. NEGLIGENCE (§ 59*)—CARRIERS (§ 320*)—INJURIES TO PASSENGER—PROXIMATE CAUSE.

The question of proximate cause depends upon the facts of each particular case, and in ascertaining in a particular case what was the proximate cause of the injury the conclusion reached depends upon whether the injury alleged was such a natural and probable consequence, under the circumstances of the case, as that it might and ought to have been foreseen by the wrongdoer as likely to ensue from his act.

The jury were authorized to find in this case that the act of the child was not a proximate cause, but that the motorman, in leaving his car in such condition that a child could set it in motion, was the prime and underlying essential and efficient cause of the injury; for "if the character of the intervening act claimed to break the connection between original wrongful act and the subsequent injury was such that its probable and natural consequences could reasonably have been anticipated, apprehended, or foreseen by the original wrongdoer, the causal connection is not broken, and the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

original wrongdoer is responsible for all of the consequences resulting from the intervening act." *Southern Railway Co. v. Webb*, 118 Ga. 152, 42 S. E. 895, 59 L. R. A. 109.

[Ed. Note.—For other cases, see *Negligence*, Cent. Dig. § 72; Dec. Dig. § 59; * *Carriers*, Cent. Dig. §§ 1118, 1128, 1149, 1153, 1160, 1167, 1179, 1190, 1217, 1233, 1244, 1248, 1315-1325; Dec. Dig. § 820.*]

4. DEMURRERS OVERRULED—SUFFICIENCY OF EVIDENCE—NEW TRIAL REFUSED.

The court did not err in overruling the defendant's demurrers, nor in refusing to award a nonsuit or direct a verdict. The evidence authorized the jury's finding, and there was no error in refusing a new trial.

Error from City Court of Valdosta; W. E. Thomas, Judge.

Action by Lella Fenn against the Valdosta Street Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

E. K. Wilcox, of Valdosta, for plaintiff in error. Toomer & Reynolds, of Jacksonville, Fla., and Whitaker & Dukes, of Valdosta, for defendant in error.

RUSSELL, J. Judgment affirmed.

(11 Ga. App. 854)

SELL v. R. L. MOSS & CO. (No. 3,644.)

(Court of Appeals of Georgia. Oct. 2, 1912.)

(Syllabus by the Court.)

APPEAL AND ERROR (§ 1214*)—DISPOSITION OF CAUSE—EFFECT IN LOWER COURT OF DECISION ON APPEAL.

Where a case has been before this court on an assignment of error as to a judgment overruling a motion for a new trial, filed by a plaintiff, to set aside a verdict rendered for the defendant, and this judgment has been reversed, because, in the opinion of this court, the verdict was contrary to law, for the reason that it was without evidence to support it, and on a second trial the evidence is substantially the same as on the first trial, and no questions of law are raised, other than those passed upon at the first trial, it was not error for the trial judge to direct a verdict for the plaintiff.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 4715; Dec. Dig. § 1214.*]

Russell, J., dissenting.

Error from City Court of Jefferson; W. W. Stark, Judge.

Action by R. L. Moss & Co. against L. F. Sell. Judgment for plaintiffs, and defendant brings error. Affirmed.

J. A. B. Mahaffey, of Jefferson, Shackelford & Shackelford, and Jno. J. & Roy M. Strickland, all of Athens, and Little & Powell, of Atlanta, for plaintiff in error. T. S. Mell, of Athens, for defendants in error.

HILL, C. J. This is the second appearance of this case before this court. On the first trial the jury returned a verdict for the defendant, and on review by this court the verdict was set aside and a new trial granted on the general grounds. On the second trial

the presiding judge directed a verdict for the plaintiff. The material facts of the case are set out in the opinion heretofore rendered. *Moss v. Sell*, 8 Ga. App. 589, 70 S. E. 18. Where there was no substantial difference in the evidence on the first trial and that on the second, in order to illustrate the questions now raised it is necessary to make a brief statement of the facts.

Moss & Co., at Athens, Ga., bought from L. F. Sell, at Mulberry, Ga., 50 bales of cotton. Sell delivered the cotton to the Gainesville Midland Railroad Company and took therefrom a bill of lading. He indorsed this bill of lading, attached to it a draft for the price of the cotton as agreed on, and deposited the draft, with the bill of lading attached, in the Bank of Hoschton on the morning of October 27, 1906, and the bank credited Sell with the amount of the draft. On the same day and while the cotton was still on the platform of the railroad crossing at Sell's side track, 40 bales were consumed by fire. On the 29th of October Sell called Moss & Co. over long-distance telephone and informed them of the burning of the cotton, and, according to Moss, stated that he would replace the cotton burned with new cotton and forward a new bill of lading. In compliance with this request Moss & Co., on the same day the request was made, paid the draft by giving a check for the amount on the Georgia National Bank, which check was paid on the next day, the 30th. On the previous trial the evidence was in some conflict as to whether Moss & Co. paid this draft on the 27th or the 29th of October. On the present trial the evidence indisputably showed that the draft was not paid by Moss & Co. until the 29th, and subsequently, to the time when he received the telephone message from Sell. Subsequently Sell refused to replace the cotton according to his promise, and also refused to repay the money which Moss & Co. had paid on his draft.

The defense which Sell set up on both trials was: (1) That the title to the cotton at the time of the fire was in Moss & Co., as Moss & Co. had paid the draft before the fire occurred; (2) that Moss & Co.'s remedy was by suit against the railroad company, a common carrier; and (3) that Moss & Co. carried insurance which covered the cotton. On the first trial this court held that the title to the cotton at the time of the fire was in Sell, because the evidence showed that Sell had taken from the carrier a bill of lading covering the cotton, to his own order, and attached it to the draft which he drew on Moss & Co., transmitting the draft and the bill of lading to the bank for collection, this being a declaration on the seller's part that he did not part with the title to the cotton, but retained it until acceptance and payment of the draft; this court so holding in ac-

cordance with the well-settled doctrine announced in *Erwin v. Harris*, 87 Ga. 333, 13 S. E. 513, and citations. And we further held that under section 4126 of the Civil Code of 1910, relating to the title to agricultural products, the cotton remained the property of Sell until paid for.

The principal reason now assigned for another trial is that the brief of evidence in the former trial was "either deficient or erroneous," and misled the court, and that the decision of the Court was based upon a material mistake of fact; that this mistake was that the record stated that the bill of lading which Sell had taken for the cotton was to his (Sell's) own order, when, instead of this being the fact, the bill of lading itself showed that it was not to his own order, but was made directly to R. L. Moss & Co., as consignee. It is contended that, this being true, it follows that when the cotton was burned the title was out of Sell and in Moss & Co., and the loss should fall on them, and not on the plaintiff. The bill of lading is as follows: "Gainesville Midland Railway Co. No. 85. Bill of Lading. Mulberry Station, October 27th, 1906. Received of L. F. Sell fifty bales of cotton, marked, numbered, and weighed as below, consigned to R. L. Moss & Co., Athens, Georgia." It will thus be seen that the letter of the bill of lading makes R. L. Moss & Co. the consignees absolutely, without any mention of order or assigns. Sell treated the bill of lading as made to his own order, for he took it to the bank, indorsed it and attached to it a draft for the price of the cotton, and had the amount of the draft placed to his credit in the Bank of Hoschton. There could not have been any other purpose in doing this than to retain the title to the cotton until payment of the draft. There was no other reason why he should have indorsed the bill of lading. This is also manifest by his subsequent conduct; for, when the cotton was consumed, he called Moss & Co. over the telephone and requested them to pay the draft, although the cotton had been burned. This conduct on the part of Sell is a clear recognition, not only of his purpose when he took the bill of lading to retain the title to the cotton until payment of the draft, but a recognition by him that the title was in him at the time of the fire. But for his promise made to Moss & Co. to replace the cotton which had been consumed, it is certainly clear that Moss & Co. would not have paid the draft. He induced the payment of his draft by his promise to replace the cotton.

We think that all these facts clearly show that Sell's intention in shipping the cotton to Moss & Co. was to retain title thereto until payment of his draft. While the general rule is well settled that a delivery of property to a carrier is a delivery to the pur-

chaser, yet it is equally clear that any contemporaneous declaration on the part of the seller of an intention to retain title to the property until it is paid for constitutes an exception to this general rule. We conclude, therefore, that under all these facts, clearly indicating an intention on the part of Sell to retain the title to the cotton until payment of his draft, there is no substantial difference between the facts proved on the second trial and the brief of evidence in the record when the case was first here for review, which stated that the bill of lading was payable to the order of Sell. If this is not true, we think section 4136 of the Code, *supra*, is applicable to the facts of this case, and that under that statute the title to the cotton remained in Sell until payment for the cotton by Moss & Co.; and the draft was not paid until the 29th of October, and the cotton was consumed on the 27th. *Butler, Stevens & Co. v. Georgia & Alabama Ry.*, 119 Ga. 959, 47 S. E. 320.

We do not think it necessary to consider any of the other questions raised by this record. The same questions were made in the previous record, and the entire evidence was in substantial accord on both trials, and as this court held on the first trial that the verdict then rendered for the defendant was without any evidence to support it, and was contrary to law, there was nothing for the trial judge to do in the present instance but to direct a verdict for the plaintiff.

Judgment affirmed.

RUSSELL, J., dissents.

(11 Ga. App. 619)

DAVIS v. SAVANNAH LUMBER CO.

SAVANNAH LUMBER CO. v. DAVIS.

(Nos. 3,852, 3,853.)

(Court of Appeals of Georgia. Oct. 2, 1912.)

(Syllabus by the Court.)

I. NEGLIGENCE (§ 136*)—RELATION OF PARTIES—VOLUNTEER.

The court erred in ordering a nonsuit. Though the evidence justifies the conclusion that the plaintiff intended to volunteer his services for the purpose of throwing off a belt and stopping the saw, which burst and injured him, still it is uncontradicted that his attempt to intervene was futile, and that the bursting of the saw was not due to, nor in any wise affected by, his act. It burst without his interfering with it in any way, and before he had time to reach the lever with which he intended to throw off the belt. To constitute one a volunteer he must do some act, and not merely intend to do something, which may contribute to his injury. Under the evidence, the presence of the plaintiff near the saw in question was authorized. He was entitled to pursue his labor in the planing mill and at the saw, and the question as to whether his going to the particular point where he was injured, at the particular time of the injury, was such contributory negligence as would diminish or defeat a recovery, was for solution by the jury, and not the court.

[Ed. Note.—For other cases, see *Negligence*, Cent. Dig. §§ 277-353; Dec. Dig. § 136.*]

2. NEGLIGENCE (§ 73*)—RELATION OF PARTIES—VOLUNTEER.

Even if the plaintiff could be treated as a volunteer, the evidence in his behalf tended to show a contract by the terms of which the opposite party to the contract was bound to furnish him with the saw and keep it in good order; but the plaintiff, upon his part, was to operate it in the conduct of his own business. He, therefore, had an interest in the preservation of the saw for the promotion and continuance of his business, which authorized him to attempt to save it from injury, when he saw that the engine was "racing," by reason of the fact that the load of other machinery had been taken off, and that in consequence thereof the saw was running at such an excessive rate of speed that it might be detached or broken. One assisting the servants of another to facilitate his own business, or that of one to whom he sustains a contractual business relation, mutually beneficial, is not a volunteer.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 101; Dec. Dig. § 73.*]

3. FORMER CASE DISTINGUISHED.

The facts of the present case distinguish it from the case of *Allen v. Hixson*, 111 Ga. 460, 36 S. E. 810, in that in the *Hixson* Case it was clear that the act of Miss Allen was the proximate cause of her injury. In the present case the only real act done by the plaintiff was in moving his position from one portion of the planing mill to another, and only the jury can say whether or not the plaintiff's act in moving his position caused the injury.

4. PARTNERSHIP (§ 53*)—CORPORATIONS (§ 379*)—ACTIONS—NONSUIT.

The court did not err in refusing to nonsuit the plaintiff upon the ground that the evidence showed that a partnership existed between the parties. While liability for losses will generally be implied from proof that the contract stipulates for a division of the profits, and a sharing of the profits may imply a partnership, still the existence of a partnership is not to be implied, where it appears indisputably from the proof that there was not a common liability for losses. Under a contract of the nature testified to by the plaintiff, there is no connection or mutuality in any possible loss which might be sustained by either party. Apparently the defendant could not lose at all as a result of the contract, because it was the plaintiff's duty to pay over to it so much for each load of wood which he sold. But, even if the defendant could not be subject to a loss in the business relation created by the contract, it could not in any event participate in any loss which might be sustained by the plaintiff; for he furnished his own teams and drivers and paid them himself, he furnished his own labor in sawing the wood, and if the expense of cutting and delivering the wood and feeding his teams amounted to more than his proceeds, the loss which would result was, under the terms of the contract, the plaintiff's individual concern.

(a) Moreover, the defendant, being a corporation, could not enter into a partnership.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. § 76; Dec. Dig. § 53; Corporations, Cent. Dig. § 1538; Dec. Dig. § 379.*]

5. NEGLIGENCE (§ 136*)—ACTIONS—QUESTION FOR JURY.

The court did not err in refusing to nonsuit the plaintiff upon the ground that the evidence failed to show any negligence on the part of the defendant to the plaintiff. Under the terms of the contract relied upon, and under the evidence, the plaintiff was entitled to have the court submit to the jury the question of the defendant's negligence. Under the testimony, his presence at the scene of the injury at the time it was inflicted was authorized as that of a licensee, and the bursting of the

wheel was an extraordinary circumstance. The saw was in the possession of the defendant, and under the testimony it was its duty, under the contract, to exercise reasonable and ordinary diligence to keep it in good condition, so that it would not injure any one. For these reasons it was for the jury to say whether the circumstances themselves speak of negligence, and whether the evidential rule of *res ipsa loquitur* should be applied.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 277-353; Dec. Dig. § 136.*]

6. NEGLIGENCE (§ 136*)—ACTIONS—QUESTION FOR JURY.

The court did not err in refusing to nonsuit upon the ground that the plaintiff had equal or better opportunity than the defendant to know of the alleged defects. Under the terms of the particular contract relied upon by the plaintiff, he was not the defendant's servant, and was not charged with the same duty of knowing and observing defects in the machinery furnished for his use as a servant should be, and could be assumed to be, who undertook the duty of using the machinery. Under the terms of the contract, as proved by the plaintiff, no other duty devolved upon him than to exercise ordinary care for his own safety in using the saw; and the defendant was charged with the duty of using ordinary care and diligence in furnishing and keeping the saw in a sound, safe, and fit condition.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 277-353; Dec. Dig. § 136.*]

Error from City Court of Savannah; Davis Freeman, Judge.

Action by Enoch Davis against the Savannah Lumber Company. From the judgment, both parties bring error. Judgment on main bill of exceptions reversed, and judgment on cross-bill affirmed.

Shelby Myrick and Osborne & Lawrence, all of Savannah, for plaintiff in error. Adams & Adams, of Savannah, for defendant in error.

RUSSELL, J. Judgment on the main bill of exceptions reversed. Judgment on the cross-bill affirmed.

(11 Ga. App. 638)

CLARK v. HENDLEY. (No. 3,667.)

(Court of Appeals of Georgia. Oct. 4, 1912.)

(Syllabus by the Court.)

1. STRIKING PORTION OF PLEADING.

The judgment striking a portion of the defendant's plea did not deprive her of any defense which she was entitled to present.

2. SUFFICIENCY OF EVIDENCE—NEW TRIAL REFUSED.

The evidence upon the issue submitted authorized the verdict, and it was not error to refuse a new trial.

Error from City Court of Millen; R. P. Jones, Judge.

Action by W. M. Hendley against S. E. Clark. Judgment for plaintiff, and defendant brings error. Affirmed.

Jas. P. Brinson, of Millen, for plaintiff in error. Wm. Woodrum, of Millen, for defendant in error.

RUSSELL, J. Judgment affirmed.

(11 Ga. App. 662)

WILLIAMS v. STATE (No. 4,275.)

(Court of Appeals of Georgia. Oct. 9, 1912.)

*(Syllabus by the Court.)***CRIMINAL LAW (§ 562*)—EVIDENCE—WEIGHT AND SUFFICIENCY.**

Hearsay statements, even where admissible as part of the *res gestæ*, are not sufficient to convict, unless there is a principal fact established by other evidence. Applying this principle to the facts of the present case, the conviction of the accused was unauthorized, and his motion for a new trial should have been granted.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1263; Dec. Dig. § 562.*]

Error from Superior Court, Colquitt County; W. E. Thomas, Judge.

C. H. Williams was convicted of assault and battery, and brings error. Reversed.

The plaintiff in error was convicted of assault and battery. His motion for a new trial, based upon the general grounds and others, was overruled, and he excepted. The evidence for the state was in substance as follows: The accused, a carpenter, was working on a fence in front of a dwelling house, between 2 and 3 o'clock in the afternoon, when the mother of three small children living there left the house to find her husband. In a few minutes she and her husband returned together, and found the accused in one of the rooms of the house. The husband asked him what he was doing there, and he replied that he had come for a drink of water, and was tired, and was sitting down to rest. There was no water in the room; but the water was on the back veranda, on the shelf. Immediately after the mother had come into the house, one of the children—a girl five years old—ran to her from the room in which the accused was found. The mother testified: "My little girl came running to me. Her eyes were all bleared, and she was trembling and white. The child said: 'Mamma, are you going to whip me? I couldn't help it; it was him.' I said: 'Who?' I said: 'What?' And she up and told the circumstances." The child said that the accused took her hands, and made her place them upon his private parts, which he had exposed, and that, on hearing the parents coming, he shoved her out of the door.

W. A. Covington and Jas. Humphreys, both of Moultrie, for plaintiff in error. J. A. Wilkes, Sol. Gen., of Moultrie, for the State.

POTTLE, J. The court thinks that the evidence was insufficient to authorize the verdict. One cannot be convicted of crime upon mere hearsay testimony as to the sayings of a child, incompetent as a witness, because too young to appreciate the nature and sanctity of an oath. "Declarations are not competent as part of the *res gestæ*, un-

less there is a principal fact established by other evidence." 11 Encyc. Evidence, 291 (15). In the present case there was not a scintilla of evidence to corroborate the statement of the child as to the conduct of the accused. After the occurrence, she told her mother of it, and upon the testimony of the mother as to this hearsay statement of a child five years of age the accused was convicted. Human liberty is too sacred a thing to be taken away upon evidence so slight and inconclusive as this. We do not mean to say that, if there had been other evidence of the main occurrence, the spontaneous statement of this child might not have been admissible as a part of the *res gestæ*; but we are of the opinion that, without any corroborating circumstances whatever, the accused cannot be convicted upon proof merely of the declarations of the child. There is certainly nothing in the decision of the Supreme Court in the case of *McMath v. State*, 55 Ga. 304, nor in any other decision of that court, to demand a contrary conclusion. In the first place, what was said by the court in that case was obiter. But, beyond this, the charge in that case was assault with intent to rape, and there was conclusive evidence, apart from the declarations of the child, that the assault had been committed; and, this being true, spontaneous statements made by her immediately after the occurrence were admissible as a part of the *res gestæ*—that is to say, as a part of the main transaction. But the main occurrence itself cannot be proved by evidence of the mere declarations of the person who claimed to have been assaulted, in the absence of other evidence that an assault had been committed. A contrary doctrine would, in our opinion, be an extremely dangerous one.

Judgment reversed.

(11 Ga. App. 632)

SIKES v. MALLONEE (No. 3,627.)

(Court of Appeals of Georgia. Oct. 4, 1912.)

(Syllabus by the Court.)

1. FRAUDS, STATUTE OF (§§ 129, 131*)—CONTRACT OF GUARANTY—MODIFICATION—OPERATION AND EFFECT OF STATUTE.

Lee leased in writing from Sikes certain timber lands upon certain terms and conditions. Mallonee guaranteed payment of the purchase money as set out in Lee's contract. Subsequently the terms and conditions of the contract were materially modified. As Mallonee's contract of guaranty had to be in writing (Civ. Code 1910, § 3222, par. 2), so likewise, under the general rule, any proposed modification thereof, to be effective, must also have been in writing (*Southern Ry. Co. v. Smith*, 106 Ga. 864, 33 S. E. 28; *Miller v. Smith*, 6 Ga. App. 443, 65 S. E. 292). And a contract of guaranty is no less subject to the operation of the provisions of section 3223, Civ. Code, than are other contracts therein referred to.

[Ed. Note.—For other cases, see *Frauds, Statute of*, Cent. Dig. §§ 287-292; Dec. Dig. §§ 129, 131.*]

2. GUARANTY (§ 72*)—DISCHARGE OF GUARANTOR—MODIFICATION OF CONTRACT.

Consent of a guarantor to a material modification of the contract, the performance of which he guarantees, cannot be inferred from the mere fact that he had knowledge of the modification, or that he did not dissent from such modification. *Riggins v. Brown*, 12 Ga. 276.

[Ed. Note.—For other cases, see *Guaranty*, Cent. Dig. § 82; Dec. Dig. § 72.*]

3. FRAUDS, STATUTE OF (§ 131*)—DISCHARGE OF GUARANTOR — MODIFICATION OF CONTRACT.

Inasmuch as the rights and liabilities of a guarantor are stricti juris, and in this case the modification of the original contract was demanded by the obligee, and the change of the contract was for his profit and benefit, and there is nothing in the evidence to indicate that failure to perform either the original contract or the contract as changed would constitute a fraud on the part of the guarantor, unless the contract was fully performed, this case does not fall within the exception mentioned in the first headnote, and there was no error in directing the verdict.

[Ed. Note.—For other cases, see *Frauds, Statute of*, Cent. Dig. §§ 283, 284; Dec. Dig. § 131.*]

Error from City Court of Savannah; Davis Freeman, Judge.

Action by J. B. Sikes against J. C. Malonee. Judgment for defendant, and plaintiff brings error. Affirmed.

Twiggs & Gazan, of Savannah, for plaintiff in error. Lawton & Cunningham, of Savannah, for defendant in error.

RUSSELL, J. Judgment affirmed. POT-
TLE, J., not presiding.

(11 Ga. App. 646)

WADE v. ELLIOTT et al. (No. 4,188.)
(Court of Appeals of Georgia. Oct. 9, 1912.)

(Syllabus by the Court.)

1. BILLS AND NOTES (§ 363*) — TRANSFER — BONA FIDE PURCHASER.

A note payable to a certain person, or order, when indorsed in writing by the payee, becomes a negotiable instrument; and a subsequent innocent purchaser before maturity and for value is protected in his title.

[Ed. Note.—For other cases, see *Bills and Notes*, Cent. Dig. §§ 790, 791; Dec. Dig. § 363.*]

2. BILLS AND NOTES (§ 362*)—TRANSFER—BONA FIDE PURCHASER.

A purchaser of a negotiable note, although with notice of an equity as between the maker and the original payee, is protected in his title if he purchases the note from one who had previously purchased it from the original payee without notice of any infirmity in the note.

[Ed. Note.—For other cases, see *Bills and Notes*, Cent. Dig. §§ 937-943; Dec. Dig. § 362.*]

3. BANKRUPTCY (§ 265*) — ADMINISTRATION OF ESTATE—SALE OF NEGOTIABLE NOTE.

Where a negotiable promissory note is sold by a trustee in bankruptcy of the payee before the note has matured, and after it has been duly indorsed by the original payee, the sale being made under an order of the bankruptcy court, it is not necessary, in order to pass title to the purchaser at such sale, for the

trustee to indorse the note. Mere delivery by the trustee to the purchaser would be sufficient to pass title.

[Ed. Note.—For other cases, see *Bankruptcy*, Cent. Dig. § 565; Dec. Dig. § 265.*]

Error from City Court of Tifton; R. Eve, Judge.

Action by I. J. Elliott and others against Hardman Wade. Judgment for plaintiffs, and defendant brings error. Affirmed.

R. D. Smith, of Tifton, for plaintiff in error. R. E. Dinsmore, of Tifton, for defendants in error.

HILL, C. J. This was a suit on a promissory note against the maker. The plaintiffs alleged, in substance, that the note was negotiable, and that they were innocent holders for value, having purchased it before maturity; that it was originally given by the defendant, payable to the Farmers' Supply Company, or order, and, before it became due, the Farmers' Supply Company was adjudicated bankrupt, and the note was sold at public sale, after due advertisement and under order of the court, and was bought by Benton, McCommons & Co., who were the highest and best bidders at the sale, and who took the note as innocent purchasers for value and before maturity, and thereafter sold and transferred it for value, to the plaintiffs, duly indorsing it. The note was indorsed by the original payee, the Farmers' Supply Company. The plea admitted the execution of the note, its indorsement by the Farmers' Supply Company, and the sale of the note by the trustee in bankruptcy of that company, under an order of the court, before the note matured, and that it was bought by Benton, McCommons & Co. and duly indorsed by them to the plaintiffs. It was denied, however, that either Benton, McCommons & Co. or the plaintiffs were innocent purchasers; it being insisted that the note was not indorsed by the trustee in bankruptcy, and that without said indorsement it did not become a negotiable instrument. On demurrer the court struck the plea as insufficient, and this is the error assigned.

[1] We think the court did not err in striking the plea. The principle is well established that a note payable to a certain person, or order, becomes negotiable only where it has been regularly indorsed in such a way that the indorsement becomes a part of the paper; and, unless it is a negotiable paper, subsequent holders thereof are not protected from any equity that may exist between the maker and the original payee. *Sheffield v. Johnson County Bank*, 2 Ga. App. 221, 58 S. E. 386, and citations. Here it is admitted that the note was duly indorsed by the original payee, the Farmers' Supply Company. When it was indorsed, it at once took its place in the hands of any subsequent holder, clothed with the qualities and in-

cidents of negotiable paper, and the indorsees, Benton, McCommons & Co., subsequently indorsed it to the plaintiffs.

[2] It is specifically alleged by the amendment to the plea that the plaintiffs were not innocent purchasers, but took the note with knowledge of the equities of the maker as against the original payee. If, however, Benton, McCommons & Co. were innocent purchasers before maturity and for value, it would be wholly immaterial whether the plaintiffs were such or not; for it is well settled that if one without notice sells to one with notice the latter is protected. In other words, the purchaser with notice gets a good title from the purchaser without notice. Civil Code 1910, § 4535; *Well v. Carswell*, 119 Ga. 873 (1) 47 S. E. 217. The indorsement by the payee and the subsequent indorsement by Benton, McCommons & Co. are without date; but this is immaterial, because the law presumes that the holder of negotiable paper bought the same before due and for value. Civil Code 1910, § 4288; *Rhodes v. Beall*, 73 Ga. 641.

[3] The main point relied upon by the defendant is that there was no indorsement by the trustee in bankruptcy, and that this was necessary in order to pass title. We do not think it was necessary for the trustee in bankruptcy to indorse the note. Its negotiable character had already been determined by the indorsement of the original payee. But it is admitted in the answer that the trustee in bankruptcy sold it under order of the court and before maturity. The trustee in bankruptcy acquired no title to the note, except as the representative of the bankrupt; and, as the note was negotiable when it came into his possession as trustee, the sale by him under order of the court of the note, and delivery to the purchaser, were all that was necessary to pass the title.

Judgment affirmed.

(11 Ga. App. 648)

ROBERTS v. HARRIS. (No. 4,197.)

(Court of Appeals of Georgia. Oct. 9, 1912.)

(*Syllabus by the Court.*)

CHattel MORTGAGES (§ 282*) — FORECLOSURE — EVIDENCE — APPLICATION OF PAYMENT.

This was a foreclosure of a chattel mortgage, to which there was a counter affidavit setting up payment. Besides the indebtedness secured by the mortgage, the mortgagor was indebted to the plaintiff on open account. It was admitted that the mortgagor had made payments on his indebtedness to the plaintiff, and the issue, under the evidence, was as to the proper application of these payments. The plaintiff applied them in payment of the account, relying upon an alleged contract with the defendant authorizing him to do so. The defendant denied the contract, and insisted that the payments should have been credited on the mortgage, and that, if this had been done, the mortgage would have been fully paid. It was not contended by the defendant that he

had given to the plaintiff any express instructions as to the applications of the payments. On the controlling issue thus made the evidence was in direct and positive conflict, and the trial judge instructed the jury to the effect that if there was no agreement between the parties as to how the payments were to be applied, and if the jury should find that there had been payments sufficient to liquidate the mortgage, this would be a settlement of the mortgage, and that without such agreement the plaintiff would not have had the right to make an application of the payments to the open account. *Held*, the defendant could not complain of this instruction, and as no error of law was committed, and the evidence was in conflict on the controlling issue of fact, there was no error in refusing a new trial.

[Ed. Note.—For other cases, see *Chattel Mortgages*, Cent. Dig. § 568; Dec. Dig. § 282.*]

Error from City Court of Sandersville; E. W. Jordan, Judge.

Action by E. A. Harris against Will Roberts. Judgment for plaintiff, and defendant brings error. Affirmed.

Evans & Evans, of Sandersville, for plaintiff in error. J. J. Harris, of Sandersville, for defendant in error.

HILL, C. J. Judgment affirmed.

(11 Ga. App. 659)

FULTON v. GRAHAM. (No. 4,253.)

(Court of Appeals of Georgia. Oct. 9, 1912.)

(*Syllabus by the Court.*)

1. JUDGMENT (§ 386*)—MOTION TO SET ASIDE.

A motion to set aside a judgment must be filed within three years after the rendition of the judgment.

[Ed. Note.—For other cases, see *Judgment*, Cent. Dig. §§ 735-744; Dec. Dig. § 386.*]

2. TROVER AND CONVERSION (§ 40*)—EVIDENCE.

The evidence demanded a verdict in favor of the defendant, and it was error to overrule his motion for a new trial.

[Ed. Note.—For other cases, see *Trover and Conversion*, Cent. Dig. §§ 232-244; Dec. Dig. § 40.*]

Error from City Court of Savannah; Davis Freeman, Judge.

Action by A. D. Graham against E. A. Fulton. Judgment for plaintiff, and defendant brings error. Reversed.

Osborne & Lawrence, of Savannah, for plaintiff in error. Anderson, Cann & Cann, of Savannah, for defendant in error.

POTTLE, J. This was an action of trover to recover three head of cattle, or statutory damages in lieu thereof. The plaintiff prevailed, and the defendant filed both a motion to set aside the judgment and a motion for a new trial. Both motions were overruled, and the defendant excepted.

[1] 1. The motion to set aside the judgment was predicated upon the ground that the court was without jurisdiction of the person of the defendant, who did not reside

in the county where the suit was brought, and did not waive jurisdiction, or appear and plead, either in person or by an authorized attorney. A sufficient reply to the motion in arrest is that it was filed more than three years after the rendition of the judgment. Civil Code 1910, § 4358.

[2] 2. Upon the merits the defendant showed that the plaintiff had pastured some cows with the owners of a pasture, and had failed to pay the compensation agreed on for pasturage; that the owners of the pasture had foreclosed a lien for their fees, and the lien execution had been levied upon the cattle in dispute. It further appeared that an execution had been issued upon a common-law judgment against the plaintiff as principal and the defendant as surety; that the defendant had paid off this execution and had it transferred to him; and that the property in dispute had been likewise levied on under this execution and brought to a sale, at which defendant became the purchaser. The lien execution is not in the record, nor properly accounted for, so that the defendant did not make sufficient proof of title under the lien foreclosure proceedings, though it would seem that under our Code an agister would be entitled to a lien as a bailee for services rendered in pasturing cattle. Civil Code 1910, § 3491. *Wilensky v. Martin*, 4 Ga. App. 187, 60 S. E. 1074; 2 Cyc. 315 et seq. But, without reference to this, the execution transferred to the defendant as surety was apparently regular and valid, and passed title into the levying officer, even if the subsequent proceedings were irregular. Though the execution emanated from a justice's court, it was not necessary to show on its face all the proceedings essential to give the court jurisdiction. *Hamilton v. Moreland*, 15 Ga. 343. This execution showing title outstanding in the levying officer, the prima facie case made by the plaintiff was rebutted, and the evidence demanded a verdict for the defendant. Consequently his motion for a new trial should have been granted.

Judgment reversed.

(11 Ga. App. 649)

CITY OF MOULTRIE v. COOK. (No. 4,267.)
(Court of Appeals of Georgia. Oct. 9, 1912.)

(Syllabus by the Court.)

1. APPEAL AND ERROR (§ 690*)—REVIEW—OBJECTIONS TO EVIDENCE.

A ground of a motion for a new trial, assigning error in permitting a witness to answer a certain question, which does not disclose the answer objected to, presents no question for determination. *Southern Ry. Co. v. Wright*, 6 Ga. App. 175, 64 S. E. 703; *Smith v. State*, 119 Ga. 113 (1), 46 S. E. 79.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2897-2899, 2902-2904, 2906, 2908; Dec. Dig. § 690.*]

2. DAMAGES (§ 158*)—EVIDENCE—AGGRAVATION—PREVIOUS INJURY.

The trial court did not err in permitting the plaintiff to testify as to the fact and the extent of a previous injury; the instant suit involving the claim that the previous injury had been aggravated by the tort for which redress was sought. "Wrongfully to cause, aggravate, or protract illness is an injury to health." *Bray v. Latham*, 81 Ga. 640, 8 S. E. 64.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 441-446; Dec. Dig. § 158.*]

3. APPEAL AND ERROR (§ 690*)—REVIEW—EXCLUSION OF EVIDENCE.

A ground of a motion for a new trial, assigning error in permitting the introduction in evidence of a deed, which fails to set forth the deed objected to, or otherwise describe it, so that its admissibility can be determined, will not be considered. *Georgia Northern Ry. Co. v. Hutchins & Jenkins*, 119 Ga. 504 (5), 46 S. E. 659.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2897-2899, 2902-2904, 2906, 2908; Dec. Dig. § 690.*]

4. DAMAGES (§ 167*)—EVIDENCE—PROBABLE DURATION OF LIFE.

It is not necessary that the mortality table be introduced in evidence, in order to enable the jury to ascertain the probable duration of life, or the damages for permanent injuries, in a given case. The jury may reach a result from the evidence as to age, health, extent of injury, physical condition, habits, etc., of the particular person. *Merchants' & Miners' Transportation Co. v. Corcoran*, 4 Ga. App. 669, 62 S. E. 130.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 487-489; Dec. Dig. § 167.*]

5. REVIEW ON APPEAL.

No material error of law appears, and the verdict is supported by evidence.

Error from City Court of Moultrie; W. E. Thomas, Judge.

Action by J. H. Cook against the City of Moultrie. Judgment for plaintiff, and defendant brings error. Affirmed.

W. F. Way and J. A. Wilkes, both of Moultrie, for plaintiff in error. L. L. Moore and Shipp & Kline, all of Moultrie, for defendant in error.

HILL, C. J. Judgment affirmed.

(11 Ga. App. 660)

STEWART v. MULLIGAN. (No. 4,260.)

(Court of Appeals of Georgia. Oct. 9, 1912.)

(Syllabus by the Court.)

1. MALICIOUS PROSECUTION (§ 10*)—CIVIL ACTION—WHEN MAINTAINABLE.

An action for the malicious use of process in a civil suit will lie, where the person of the defendant is arrested or his property attached. *Woodley v. Coker*, 119 Ga. 226, 46 S. E. 89. The petition in the present case set forth a cause of action of the nature above indicated.

[Ed. Note.—For other cases, see Malicious Prosecution, Cent. Dig. §§ 11-15; Dec. Dig. § 10.*]

2. MALICIOUS PROSECUTION (§ 31*)—MALICE—EVIDENCE.

Evidence of a general disregard of the right consideration of mankind, directed by

chance against the individual injured, is sufficient proof of malice. Civil Code 1910, § 4451.

[Ed. Note.—For other cases, see Malicious Prosecution, Cent. Dig. §§ 64-66; Dec. Dig. § 31.*]

8. MALICIOUS PROSECUTION (§ 32*)—MALICE.
Malice may be inferred from a total want of probable cause. Civil Code 1910, § 4444; Hicks v. Brantley, 102 Ga. 264, 29 S. E. 450; Lockett v. Gress Mfg. Co., 8 Ga. App. 773, 70 S. E. 255.

[Ed. Note.—For other cases, see Malicious Prosecution, Cent. Dig. §§ 67, 68; Dec. Dig. § 32.*]

4. MALICIOUS PROSECUTION (§ 25*)—WANT OF PROBABLE CAUSE.

When the circumstances show that no reasonable grounds existed for suing out the process, want of probable cause is established. The fact that the process was sued out on advice of counsel is only one of the circumstances to be considered by the jury in passing upon the question of malice and want of probable cause. Hicks v. Brantley, supra.

[Ed. Note.—For other cases, see Malicious Prosecution, Cent. Dig. §§ 56-58; Dec. Dig. § 25.*]

5. MALICIOUS PROSECUTION (§ 58*)—EVIDENCE.

The action being one for the malicious use of a possessory warrant, sued out for the ostensible purpose of recovering a diamond ring, it was not error to reject evidence that the defendant was in possession of other articles of jewelry given her by the person to whom the plaintiff had loaned the ring.

[Ed. Note.—For other cases, see Malicious Prosecution, Cent. Dig. §§ 117-124; Dec. Dig. § 58.*]

6. MALICIOUS PROSECUTION (§ 59*)—EVIDENCE—PROBABLE CAUSE.

Evidence was not admissible that, before the suing out of the warrant, the plaintiff therein had stated to the witness his belief that the defendant was in possession of the ring described in the warrant. Mere belief, without evidence upon which to found it, would not show probable cause.

[Ed. Note.—For other cases, see Malicious Prosecution, Cent. Dig. §§ 125-137; Dec. Dig. § 59.*]

7. MALICIOUS PROSECUTION (§ 59*)—EVIDENCE.

It was competent to show that the plaintiff had never been in possession of the ring described in the warrant.

[Ed. Note.—For other cases, see Malicious Prosecution, Cent. Dig. §§ 125-137; Dec. Dig. § 59.*]

8. WITNESSES (§ 379*)—INCONSISTENT STATEMENTS.

The guardian of the defendant (who was a minor when the warrant was issued) having testified that he investigated the transaction with the defendant, and reached the conclusion, and was still of the opinion, that probable cause for the issuance of the warrant existed, it was not erroneous to admit evidence of a statement, made by the guardian after the trial of the possessory warrant case, that if he had known the facts he would not have permitted his ward to sue out the warrant.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1209, 1220-1222, 1247-1256; Dec. Dig. § 379.*]

9. APPEAL AND ERROR (§ 688*)—REVIEW—INSUFFICIENT RECORD.

There was no abuse of discretion in refusing to reopen the case for the purpose of allowing the defendant to testify in his own behalf, and especially will the court's discretion

as to this matter not be controlled, when the record fails to show what facts the defendant would have testified to, had the case been reopened.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2894-2896; Dec. Dig. § 688.*]

10. TRIAL (§ 193*)—INSTRUCTIONS—OPINION ON THE EVIDENCE.

The trial judge having correctly left to the jury the determination of the question of the existence of probable cause for the suing out of the process, it was not error to refuse to charge that, if the defendant had certain information which he contended had been given to him prior to the suing out of process, the jury should find that probable cause existed. Such an instruction would have been an expression of opinion upon the evidence, and in effect the direction of a verdict in favor of the defendant, and the evidence was not of such a character as to justify such a direction.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 436-438; Dec. Dig. § 193.*]

11. NEW TRIAL (§ 41*)—HARMLESS ERROR—INSTRUCTIONS.

The fact that the trial judge, in his charge, characterized the possessory warrant proceeding as a "criminal prosecution," was not sufficient cause for a new trial. The proceeding was of a quasi criminal nature, and under it the person of the defendant was arrested; but, treating it as a civil process, the instruction complained of was harmless.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 67-71; Dec. Dig. § 41.*]

12. MALICIOUS PROSECUTION (§ 72*)—DAMAGES—INSTRUCTIONS.

It was not error to charge: "The recovery should not be confined to the actual damages sustained by the accused, but should be regulated by the circumstances of each case." Civil Code 1910, § 4443.

[Ed. Note.—For other cases, see Malicious Prosecution, Cent. Dig. §§ 163-173; Dec. Dig. § 72.*]

13. MALICIOUS PROSECUTION (§ 72*)—"PROBABLE CAUSE."

The following instruction was not erroneous for any reason assigned: "Probable cause" is defined to be the existence of such facts and circumstances as would excite the belief in a reasonable mind, acting on the facts within the knowledge of the prosecutor, that the person charged was guilty of the crime for which she was prosecuted."

[Ed. Note.—For other cases, see Malicious Prosecution, Cent. Dig. §§ 163-172; Dec. Dig. § 72.*]

For other definitions, see Words and Phrases, vol. 6, pp. 5618-5627; vol. 8, p. 7765.]

14. REVIEW ON APPEAL.

The evidence fully warranted the verdict, and no sufficient reason has been shown for reversing the judgment overruling the motion for a new trial.

Error from City Court of Fitzgerald; E. Wall, Judge.

Action by May Mulligan, by next friend, against Henry Stewart. Judgment for plaintiff, and defendant brings error. Affirmed.

Haygood & Cutts, of Fitzgerald, and M. B. Cannon, of Abbeville, for plaintiff in error. McDonald & Grantham, of Fitzgerald, for defendant in error.

POTTLE, J. Judgment affirmed.

(189 N. C. 148)

MORRISEY et al. v. MOORE.

(Supreme Court of North Carolina. Oct. 9, 1912.)

1. WILLS (§ 614*) — CONSTRUCTION — ESTATE ACQUIRED.

A will gave real estate to the adopted daughter of the testator, "during her natural life, and if she marries and leaves heirs from such marriage, to such heirs in fee simple * * * if she dies and leaves no heirs from such marriage, all the real estate loaned her, to be divided" between certain persons. *Held*, that the will conferred upon such daughter a life estate, remainder to her possible children, and, upon her death without children or issue of her marriage then living, to the remaindermen named.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1393-1416; Dec. Dig. § 614.*]

2. WILLS (§ 587*) — CONSTRUCTION—PROPERTY DEVISED—"LEND."

A clause of a will bequeathed two separate parcels of land to the daughter of the testator, and, on her death, to her heirs and to her issue if living in fee simple, otherwise, "all the real estate loaned her to be divided between" certain persons. There was no punctuation or anything to indicate that the testator intended to differentiate the two parcels of property in reference to the quantity of the estate. *Held*, that as "lend" may be construed as synonymous with give, devise, or bequeath, unless it is manifest that a different meaning was intended, the testator must be held to have referred to all the property devised his daughter in the residuary clause.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1279, 1281-1291; Dec. Dig. § 587.*]

For other definitions, see Words and Phrases, vol. 5, pp. 4091, 4092.]

Appeal from Superior Court, Duplin County; O. H. Allen, Judge.

Ejectment by Raymond Morrisey and others by their guardian J. A. Faison and another against B. C. Moore. From a judgment for plaintiffs defendant appeals. Affirmed.

Rountree & Carr, of Wilmington, for appellant. Faison & Wright, of Clinton, for appellees.

HOKE, J. [1] The rights of these parties were properly made to depend on the construction of the will of D. G. Morrisey, deceased, more especially the fourth clause thereof, in terms as follows: "4. I give to my adopted baby Maggie L. Bass all my real estate on the south side of College street through to Bay street also all the land known as the Summerland land on the west side of the public road running out by Carlton's during her natural life and if she marries and leaves heirs from such marriage to such heirs in fee simple also one hundred dollars in money if she dies and leaves no heirs from such marriage all the real estate loaned her to be divided between Junius Chestnut son of my nephew Junius M. Chestnut and D. G. Morrisey Jr son of my nephew John M. Morrisey."

The Maggie L. Bass referred to went into possession of the land under said will, and

intermarried with defendant B. C. Moore, and died on the 31st of March, 1911, without leaving child or children or lineal descendants of a marriage then living. There had been issue of the marriage born alive during coverture. Plaintiffs are the Junius Chestnut and the three children and heirs at law of the D. G. Morrisey, deceased, the ultimate devisees in said fourth item of the will, and make their claim as such, contending that Maggie L. Bass took a life estate in all the property mentioned with remainder to said claimants. Defendant B. C. Moore contends that said Maggie L. Bass took the first portion of the land in fee, and that he is entitled to hold said portion as tenant by curtesy. Upon these, the controlling facts relevant to the inquiry, we think his honor correctly ruled that plaintiffs are the owners and entitled to the present possession of the property. Under our decisions, the will conferred upon Maggie L. Bass a life estate remainder to her children, and, in case she died without children or issue of her marriage then living, all the real estate loaned to her to be divided between Junius Chestnut and D. G. Morrisey, deceased, the father of the other plaintiffs. *Smith v. Lumbar Co.*, 155 N. C. 389, 71 S. E. 445; *Sain v. Baker*, 128 N. C. 256, 38 S. E. 858; *Rollins v. Keel*, 115 N. C. 68, 20 S. E. 209.

[2] Under the clause in question the property is treated as a whole. There is no punctuation, and nothing that gives indication that the testator intended to differentiate the one portion from the other in reference to the quantity of the estate. "The word 'lend' is not infrequently used as synonymous with give or bequeath or devise;" and this should be the interpretation, unless it is manifest that a different meaning was intended. *Sessoms v. Sessoms*, 144 N. C. 121, 56 S. E. 687. And, when the testator devised that in case Maggie L. Bass died leaving no heirs from her marriage "all the real estate loaned her should be divided," he clearly referred to the entire property included in the clause. On the question presented the case is not dissimilar to that of *Hyman v. Williams*, 34 N. C. 92, 93, and on authority as stated the judgment in plaintiffs' favor must be affirmed.

Affirmed.

WALKER and ALLEN, JJ., did not sit.

(159 N. C. 644)

YALE JEWELRY CO. v. JOYNER.

(Supreme Court of North Carolina. Oct. 9, 1912.)

GAMING (§ 30*)—GAMING CONTRACTS—INVALIDITY.

A plaintiff shipping to defendant a lottery device to facilitate the sale of goods, and goods on consignment under a contract by which title to all the property shall remain in plaintiff, and by which defendant agrees to sell

the goods for a commission and remit the proceeds of sales less the commission, may recover not only unsold goods, but also proceeds of sales in the hands of defendant.

[Ed. Note.—For other cases, see *Gaming*, Cent. Dig. § 69; Dec. Dig. § 30.*]

Appeal from Superior Court, Lenoir County; Carter, Judge.

Action by the Yale Jewelry Company against J. A. Joyner. From a judgment granting insufficient relief, plaintiff appeals. Reversed.

G. V. Cowper, of Kinston, for appellant.
G. G. Moore, of Kinston, for appellee.

BROWN, J. The plaintiff shipped to the defendant a "pull board," together with a quantity of jewelry, razors, etc., on consignment under a contract by which the title to all the property remained in the plaintiff. The defendant agreed to sell the same for 20 per cent. commission, the proceeds of sale to be kept separate from the defendant's other funds, and remitted to the plaintiff, less the commission. The plaintiff brings this action to recover the unsold merchandise and \$50 net proceeds of the sale. The court gave judgment for the plaintiff for the merchandise, and held that the pull board was a species of lottery or gambling device, to facilitate the sale of the goods, and that plaintiff was not entitled to recover the net proceeds of sales in defendant's hands. The plaintiff excepted to the latter ruling.

It is unnecessary more particularly to describe the pull board, or to discuss the question as to whether its operation constitutes a lottery or gambling scheme within the definition given in *State v. Perry*, 154 N. C. 621, 70 S. E. 387. We assume for the sake of argument that it does. This is not an action by the plaintiff against a purchaser to recover the purchase price of goods obtained by means of the pull board from its agent, the defendant, but an action to recover the goods in specie and the proceeds of sales from the plaintiff's own agent. Under the contract, neither the title to the goods nor to the proceeds of sale ever vested in the defendant. On the contrary, the contract specifically requires that they be kept separate and apart from the defendant's property. In our opinion the plaintiff has as much right to recover the proceeds of sale as the specific goods.

The leading and oldest case on the subject is *Terrant v. Elliott*, 1 Bos. & P. 3, in which it is held that A., having received money from C. to the use of B. on an illegal contract between B. and C., shall not be allowed to set up the illegality of the contract as a defense in an action brought by B. for money had and received. In that case *Eyre, C. J.*, said: "The question is whether he who has received money to another's use on an illegal contract can be allowed to retain it, and that not even at the desire of

those who paid it to him. I think he cannot." In *Farmer v. Russell*, 1 Bos. & P. 296, *Buller, J.*, said: "When it appeared that the agent had received the money to the plaintiff's use, it was immaterial whether the money was paid on a legal or illegal contract." The principle upon which the plaintiff's right to recover of his agent is recognized rests upon the ground that an indebtedness is created, from which an assumption in law arises, and on that an action on the case may be maintained. The purchaser had the undoubted right to waive the illegality of the transaction and pay the money, and when once paid to the seller either directly, or to his use to a third person, the money cannot be recalled, and the third person cannot be permitted to retain it. *Lemon v. Grosskopf*, 99 Am. Dec. 62, notes. A case very similar to this is to be found in Vermont—*Baldwin v. Potter*, 46 Vt. 403—in which it is held that a sales agent must account to his principal for money received in the course of his agency, although the sale as between principal and purchaser be illegal and void. See, also, *Willson v. Owen*, 30 Mich. 475; *Woodworth v. Bennett*, 43 N. Y. 275, 3 Am. Rep. 706.

Another reason given in some cases is that it is contrary to good policy and morals to permit an agent to retain the property of his principal, although it may be employed in an illegal business under the agent's control. As is said in 9 Cyc. p. 558: "No considerations of public policy can justify a lowering of the standard of moral honesty required of persons in those relations." The general subject is fully discussed in *Electrova Co. v. Insurance Co.*, 156 N. C. 237, 72 S. E. 306, 35 L. R. A. (N. S.) 1216, and *Cotton Press v. Insurance Co.*, 151 U. S. 368, 14 Sup. Ct. 367, 38 L. Ed. 195. There are a large number of cases cited in the notes sustaining these views.

The plaintiff is entitled to judgment upon the facts found for the \$50, as well as the goods.

Error.

(160 N. C. 253)

J. M. PACE MULE CO. v. SEABOARD AIR LINE R. CO.

(Supreme Court of North Carolina. Oct. 9, 1912.)

1. EVIDENCE (§ 529*)—OPINION EVIDENCE—EXPERT TESTIMONY.

An expert veterinarian, who dissected an animal alleged to have received injuries causing death while being transported by a carrier, may not give his opinion that the animal's death was caused by being jammed in the car, based on his knowledge and experience and post mortem examination, but he may testify whether the death of the animal could have been caused by being jammed in the car, as claimed by the shipper.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. § 2338; Dec. Dig. § 529.*]

2. EVIDENCE (§ 555*)—OPINION EVIDENCE—EXPERT TESTIMONY.

The opinion of an expert must be based on facts admitted or found, or on his personal knowledge, and not on the assumption of a fact, and the questions asked him should be hypothetical in form.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2376; Dec. Dig. § 555.*]

3. CARRIERS (§ 230*)—INJURIES TO ANIMALS DURING TRANSPORTATION — QUESTION FOR JURY.

Where, in an action by a carrier for the death of mules alleged to have been caused by injuries while being transported by a carrier, there was no proof of any intervening physical cause sufficient to account for the death, and the condition of the bodies and the internal organs of the mules, as disclosed by a post mortem examination, indicated that they had been subjected to very rough handling, the question whether the injuries could be imputed to the carrier's negligence in transportation was for the jury.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 961, 962; Dec. Dig. § 230.*]

Appeal from Superior Court, Wake County; Cline, Judge.

Action by the J. M. Pace Mule Company against the Seaboard Air Line Railroad Company. From a judgment for plaintiff, defendant appeals. Reversed, and new trial granted.

Murray Allen, of Raleigh, for appellant.
S. Brown Shepherd, of Raleigh, for appellee.

WALKER, J. This is an action to recover the value of two mules alleged to have been injured in the course of transportation from East St. Louis, Ill., to Raleigh, N. C., by defendant's negligence, and to have died from said injuries the day after they were delivered to plaintiff. The jury returned the following verdict:

"(1) Was plaintiff's stock injured by the negligence of the defendant Louisville & Nashville Railroad Company, as alleged in the complaint? Answer: No.

"(2) Was the plaintiff's stock injured by the negligence of the defendant Seaboard Air Line Railway, as alleged in the complaint? Answer: Yes.

"(3) Did the plaintiff comply with the contract of shipment as to giving of notice to the railroad company as to his claim for damages? Answer: Yes.

"(3½) Could the plaintiff, by an examination of the mules in question before their removal from the depot, have discovered any injury to them? Answer: No.

"(4) What damages, if any, is plaintiff entitled to recover? Answer: Four hundred and seventy dollars."

The mules were 2 of a car load of 26 shipped to plaintiff, and were accepted and a receipt given for them, as in good condition; it appearing that the injuries were not then discoverable upon inspection. The mules were received at Raleigh from defendant on February 23, 1911, and one J. J. Womble pur-

chased a pair of them from plaintiff, and had them driven the next day to Apex, where one of them died the night of February 24th. Plaintiff gave Womble another mule for the one that died. On February 24th another mule died from his injuries in the lot of plaintiff at Raleigh. When the mules were received at Raleigh by plaintiff, they seemed to be "tired and droopy," and their general condition was not good, though there was nothing in their appearance to indicate that there had been any permanent injury to them, and certainly none likely to result fatally. The mule sold to Womble, which died, was cut open and found to be internally injured.

[1] The other, which died in plaintiff's lot in Raleigh, was dissected and afterwards examined by Dr. McMackin, an expert veterinarian, who found, after the mule's skin had been removed, that his body was badly bruised, and his internal organs were in a state of congestion and decomposition. He was asked, substantially, the following question by plaintiff's counsel: "State your opinion as to the cause of the mule's death, if you have one, based upon your knowledge and experience and your post mortem examination of him?" He answered: "My opinion is that the mule was jammed up in the car." This evidence was improperly admitted. The question required him to testify, not only as to the condition of the mule when he examined him, which was proper, but to go further and give his opinion as to the existence of a fact, which was almost, if not quite, the equivalent of the one directly involved in the issue. It would have been competent to have asked him if the death of the mule could have been caused by being jammed in the car, or, if the jury should find from the evidence that the mule had been jammed in the car and had received no other injury, could the death, in his opinion, be attributable to the jamming as its cause; that is, was it sufficient of itself to cause the death.

[2] A question similar to the one admitted in this case by the court was asked in *Summerlin v. Railroad*, 133 N. C. 551, 45 S. E. 898, and excluded by the court, and we sustained the ruling upon the ground that the witness was called upon to state a fact of which he had no personal or competent knowledge, and not merely the opinion of an expert. The opinion of the witness should be based upon facts admitted or found, or upon his personal knowledge, and not upon the assumption of the fact. The question should, therefore, be hypothetical, or rather supposititious, in form, following the precedents as settled by our decisions. *State v. Bowman*, 78 N. C. 509; *State v. Cole*, 94 N. C. 958; *State v. Wilcox*, 132 N. C. 1120, 44 S. E. 625; *Summerlin v. Railroad*, supra. The court in *Hitchcock v. Burgett*, 38 Mich. 501, held that "a physician cannot be asked his opinion as

to the cause of an injury, judging merely from the condition in which he found the patient, and without any knowledge as to how it took place." See, also, *National Union v. Thomas*, 10 App. D. C. 277; *Carpenter v. E. T. Co.*, 71 N. Y. 574; *Van Zandt v. M. L. B. Insurance Co.*, 55 N. Y. 179, 14 Am. Rep. 215; *Lumber Co. v. Railroad*, 151 N. C. 217, and cases cited at page 222, 85 S. E. 920. We conclude that there was error in admitting the question and answer, over the objection of the defendant, which was made in the proper way and in due time.

A question was raised as to the right of plaintiff to recover for the loss of the mule sold to Womble, and which died in his possession. The plaintiff contends that, by giving Womble another mule in the place of the one that died, it acquired the right to sue for the value of the latter, while the defendant says that the act of giving another mule to Womble was purely voluntary and conferred no new right on the plaintiff, in the absence of an assignment of the cause of action by Womble to the plaintiff. As in the verdict all the questions of fact and law, including the damages, are so blended that the error we have noted permeates the entire record, it becomes unnecessary to decide this question, which is not free from difficulty. Besides, it may be that there was some express understanding and agreement between the parties with respect thereto, which may appear at the next trial, and an opinion upon the meager facts now presented may prove to be still more unnecessary.

[3] We cannot say that there was not more than a scintilla of evidence to sustain the plaintiff's case upon the motion to nonsuit. There was no proof of any intervening physical cause sufficient to account for the death of the mules, and the condition of the bodies and the internal organs which was disclosed by the post mortem examination indicated that they must have been subjected to very rough handling in some way. It was a question for the jury whether upon all the facts and circumstances the injuries to the mules could fairly be imputed to the negligence of the carrier in their transportation.

We order a new trial for the error in regard to the testimony of Dr. McMackin, the expert witness.

New trial.

(180 N. C. 143)

CARSON v. WOODROW.

(Supreme Court of North Carolina. Oct. 9, 1912.)

1. ATTACHMENT (§§ 145, 232*)—DISSOLUTION—DEFECTS OR IRREGULARITIES IN PROCEEDINGS.

While under Revisal 1905, § 758 et seq., authorizing a writ of attachment to issue when the requisite facts are shown to the court by affidavit of prescribed form and substance, and requiring the officer issuing it to require an

undertaking, the clerk when the terms of the law are complied with is without further discretion and the issuance of the writ is a ministerial act, yet important duties are imposed on the officer issuing the writ which may not be delegated to the parties or their attorneys; and hence, where an attachment was issued in blank on the assurance of plaintiff's attorney that the undertaking would be executed and the other papers properly filled out before service, the attachment was properly dissolved on motion.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. §§ 403-410, 796, 797; Dec. Dig. §§ 145, 232.*]

2. ATTACHMENT (§ 146*)—AUTHORITY OR CAPACITY TO SERVE.

Revisal 1905, § 765, providing that warrants of attachment shall be directed to the sheriff, or, if issued by a justice of the peace, to the sheriff or any constable, makes a clear distinction between writs issued from a superior court and those issued by a justice of the peace, and requires that those issued by the superior court shall be addressed to a sheriff, and not to a constable.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. §§ 411, 412; Dec. Dig. § 146.*]

3. ATTACHMENT (§ 146*)—AUTHORITY OR CAPACITY TO SERVE.

The various statutes, such as Revisal 1905, §§ 937, 2959, authorizing town and township constables to serve ordinary court process, does not authorize such service unless addressed to such constables by their official title, and hence does not authorize constables to serve writs of attachment issued by superior courts, which, under the express provisions of section 765, cannot be so directed, but must be directed to the sheriff.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. §§ 411, 412; Dec. Dig. § 146.*]

Appeal from Superior Court, Nash County; Carter, Judge.

Action by Merl J. Carson against O. S. Woodrow. From a judgment dissolving an attachment, plaintiff appeals. Affirmed.

On the hearing it was made to appear that the warrant of attachment purported to issue from superior court of Nash county and to the counties of Nash and Edgecombe, and that to Edgecombe, under which the property was levied on, being addressed "To Any Constable or Other Lawful Officer of Edgecombe County, Greetings," and return made thereon: "Seized and levied on the following property," etc. "[Signed] W. G. Bullock, Constable No. 12 Township, Edgecombe Co."

The other facts relevant to the question presented and embodied in the judgment are as follows: "That on the 23d day of December, 1911, the deputy clerk of the superior court of Nash county, at the request of one of the plaintiff's attorneys, signed and delivered to him the summons since returned in this action, the same being at the time of their said delivery filled out in part only, the caption and title of the cause, the name of defendant to be summoned, and plaintiffs' undertaking for costs not having been filled out until subsequently thereto, as hereinafter set out; that at the same time said deputy clerk signed and delivered to plaintiffs

said attorney the warrants of attachment thereafter issued to the counties of Nash and Edgecombe and since returned herein; that, when delivered to plaintiff's said attorney, said warrants of attachment were in blank, save the clerk's signature attached thereto, the date '23rd day of December, 1911,' appearing thereon, and the seal of court annexed to one of them, and the undertaking, justification of sureties, and affidavits annexed to said warrants of attachment were at the time of such delivery wholly in blank, the essential operative parts thereof having been subsequently filled in by plaintiff's said attorney, as hereinafter set out; that at the time of making application to and of receiving from said deputy clerk the said blank summonses, warrants of attachment, and other papers, plaintiff's said attorney informed said deputy clerk that it was his purpose to use the same in an action to be that day instituted by the plaintiff above named against the defendant above named, and of the facts involved therein, at the same time giving assurance that he would have the undertaking in attachment executed and other papers properly filled out before the service of warrant of attachment, and that as a result of such assurance said deputy clerk intrusted plaintiff's said attorney with the duty of taking bond, perfecting affidavit and filling out warrants of attachments and summonses herein, and this was thereafter done by plaintiff's said attorney, in accordance with the statement of fact made at the time aforesaid, which undertaking and affidavit are now considered sufficient by said deputy clerk; that, prior to the issuance of said warrants of attachment, no affidavit or undertaking in attachment was ever exhibited to or filed with said deputy clerk, or in the clerk's office, nor was this ever done until some time subsequent to January 3, 1912; that the warrant of attachment issued to Edgecombe county came into the hands of W. G. Bullock, constable of No. 12 township, in said county, on December 23, 1911, who, by virtue of the powers conferred upon him by his said office, proceeded to levy upon the property of the defendant thereunder, as set out in his return annexed thereto." There was judgment dissolving the attachment, and plaintiff excepted and appealed.

M. V. Barnhill and E. B. Grantham, both of Rockymount, for appellant. L. V. Bassett and F. S. Spruill, both of Rockymount, for appellee.

HOKE, J. (after stating the facts as above). [1] On the facts presented, we are of the opinion that the attachment in this case was properly dissolved. Our statute on this subject (Revisal, c. 12, § 758 et seq.) in general terms provides that the writ may issue when the requisite facts are shown

to the court by affidavit of prescribed form and substance and before issuing the same, the officer who issues for the purpose of indemnifying defendant shall require an undertaking with sufficient surety in a sum not less than \$200, etc. While our decisions are to the effect that, when the terms of the law are duly complied with, the clerk is without further discretion in the matter, and that the issuance of the writ in most of its aspects is a ministerial act permitting performance by regular deputy, a perusal of the statute will readily disclose that, in order to a valid writ, there are important duties imposed in express terms upon the officials, and which may not be delegated to the parties or their attorneys. It is true that such a custom has been allowed to prevail as to original process, the summons, and to ordinary subpoenas for witnesses, etc. (*Webster v. Sharp*, 116 N. C. 468, 21 S. E. 912; *Croom v. Morrissey*, 63 N. C. 591); but in the case of attachments, conferring as it does the present right to seize and sequester the property of the citizen before trial or opportunity to be heard, a stricter construction is required. Thus in 4 Cyc. p. 400, it is said: "Attachment being an extraordinary and summary remedy in derogation of the common law, the courts will usually, in the absence of statutory provision to the contrary, construe the statute strictly in favor of those against whom the proceeding is employed, both as to the subject-matter of the attachment and the method of enforcing the remedy, and will exact of the plaintiff a strict compliance with all statutory requirements." And in 2 Lewis, *Sutherland on Statutory Construction* (2d Ed.) § 566, p. 1049: "A party seeking the benefit of such a statute must bring himself strictly, not within the spirit, but within the letter. He can take nothing by intendment. * * * The remedy by attachment is special and extraordinary, and the statutory provisions for it must be strictly construed, and cannot have force in cases not plainly within their terms." And our decisions are in full approval of this position. *Skinner v. Moore*, 19 N. C. 138-146, 30 Am. Dec. 155; *Bank v. Hinton*, 12 N. C. 398, 399.

[2] Again, and by reason of the same rule of construction, it must be held that a writ of attachment issuing out of the superior court on causes within that jurisdiction shall be addressed to the sheriff of the county. On this question section 765, Revisal, provides as follows: "The warrant shall be directed to the sheriff of any county in which the property of such defendant may be, or in case it be issued by a justice of the peace to such sheriff, or to any constable of such county," etc. Thus making clear distinction between writs issuing from the superior court and courts of justice of the peace, and in express terms requiring that writs of attachment from the superior courts

shall as stated be addressed to the sheriff of the county.

[3] There are different statutes, general and special, conferring on town and township constables the power of serving ordinary court process, as in Revisal, §§ 937, 29-39. But the cases construing these statutes have thus far generally held that to make a valid service of process from the superior courts by constables the same should be specially addressed to such officer by his official title (*McGloughan v. Mitchell*, 128 N. C. 681, 36 S. E. 164; *Davis v. Sanderlin*, 119 N. C. 84, 25 S. E. 815), and these statutes could not apply, therefore, when, as in this case, the writ could not be so directed.

For the reason stated, we are of opinion that the attachment writ and the seizure of property under it were invalid, and the judgment of his honor discharging same must be affirmed.

Affirmed.

(159 N. C. 594)

GRAVES v. HOWARD et al.

(Supreme Court of North Carolina. Oct. 9, 1912.)

1. LIMITATION OF ACTIONS (§ 73*)—ADMISSIBILITY—STATUTES—COVERTURE.

Under the Constitution and Revisal 1905, § 2093, by which the property of any woman acquired before marriage, or to which she may become entitled after marriage, becomes her separate property, and Laws 1899, c. 78, which removes the disability of marriage, the statute of limitations, in the absence of any exception in favor of the wife holding a claim against her husband, runs against the wife during coverture.

[Ed. Note.—For other cases, see *Limitation of Actions*, Cent. Dig. §§ 399-412; Dec. Dig. § 73.*]

2. HUSBAND AND WIFE (§ 205*)—ACTION BY WIFE AGAINST HUSBAND—STATUTE.

Revisal 1905, § 408, which provides that the wife may sue without joining her husband when it concerns her separate property, or when it is between herself and her husband, permits a wife to sue her husband.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. §§ 744, 749-755; Dec. Dig. § 205.*]

3. LIMITATION OF ACTIONS (§ 76*)—DISABILITY ACCRUING AFTER STATUTE BEGINS TO RUN—COVERTURE.

Where the statute of limitations has begun to run upon a note before it is received by the maker's wife, her coverture, even if a disability, does not stop the running of the statute.

[Ed. Note.—For other cases, see *Limitation of Actions*, Cent. Dig. §§ 417-420; Dec. Dig. § 76.*]

4. CONTRACTS (§ 167*)—LAW A PART OF CONTRACT.

Laws in force at the time a contract is made become a part of the contract.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. § 750; Dec. Dig. § 167.*]

5. CONSTITUTIONAL LAW (§ 171*)—OBLIGATION OF CONTRACTS—MORTGAGE OR SALE—LIMITATION OF ACTION.

Revisal 1905, § 1044, which declared that, whenever an action to foreclose a mortgage was

barred by limitations, the authority to execute the power of sale obtained therein should be barred on January 1, 1907, more than five years after its enactment, was not unconstitutional as impairing the obligation of a power of sale executed when there was no limitation, since it goes only to the remedy, and gives a reasonable time for the execution of the power before the statute works a bar.

[Ed. Note.—For other cases, see *Constitutional Law*, Cent. Dig. § 506; Dec. Dig. § 171.*]

Appeal from Superior Court, Wilson County; Ferguson, Judge.

Controversy between W. W. Graves and Thomas Howard, executor, and others, heard upon agreed facts. Judgment for Graves, and Howard appeals. Affirmed.

This controversy is heard upon the following agreed facts:

"(1) That on the 4th day of January, 1900, J. B. Stickney and his wife, Martha H. Stickney, executed and delivered unto Mrs. M. P. Morgan, of the state of Alabama, and the sister of J. B. Stickney, a mortgage deed upon certain lands lying and being in the town of Wilson, county of Wilson, N. C., containing two acres, and being the residence of the said J. B. Stickney and his wife, Martha H. Stickney, the said J. B. Stickney being the owner in fee thereof, which mortgage is duly recorded in book No. 54, at page 579, in the office of the register of deeds of Wilson county, for the purpose of securing a note given by the said J. B. Stickney to the said M. P. Morgan, for the sum of \$1,000, due and payable on the 4th day of January, 1901.

"(2) That on the 17th day of January, 1903, for the purpose of securing the note given by the said J. B. Stickney to J. Alvin Clark, for \$1,000, due one year after date, the said J. B. Stickney and wife, Martha H. Stickney, executed unto the said J. Alvin Clark a mortgage upon the same property described in the mortgage of J. B. Stickney and wife to M. P. Morgan, above referred to, which said mortgage was duly recorded in book No. 66 at page 207 in the office of the register of deeds of Wilson county.

"(3) That thereafter, before the 6th day of May, 1907, the said Mrs. M. P. Morgan died domiciled in the state of Alabama, having first made and published her last will and testament, which said last will and testament was duly admitted to probate in a court of competent jurisdiction, and the executor therein named duly and properly qualified under the laws of the state of Alabama.

"(4) That by the terms of her last will and testament the said M. P. Morgan bequeathed the said note to Martha H. Stickney, and the said note was thereafter duly and properly transferred and assigned to the said Martha H. Stickney by her executor.

"(5) That thereafter, to wit, on about the 1st day of November, 1908, the said Martha

H. Stickney died domicile in the county of Wilson, state of North Carolina, having first made her last will and testament, in which said last will and testament she named Thomas Howard as executor, and the said last will and testament was duly admitted to probate in the superior court of Wilson county.

"(6) That by the terms of said last will and testament all the property of the said Martha H. Stickney was given to Thomas Howard, as trustee, to be held by him upon certain uses and trusts fully set forth in the said last will and testament.

"(7) Thereafter on the ——— day of September, 1911, the said J. B. Stickney died domicile in the county of Wilson, intestate, and no administration has been taken out upon his estate, he having left no property other than the real estate described and conveyed in the mortgage above referred to, and which had been allotted to him in appropriate proceedings as a homestead. At the death of the said J. B. Stickney, he owed various mortgage indebtedness, and there were various judgments docketed against him, the aggregate of which amounts to more than the value of his said homestead.

"(8) That nothing whatever was ever paid by the said J. B. Stickney, or by any one for him, on account of the note, which he gave to the said M. P. Morgan, and which was due on the 1st day of January, 1901, and which was secured in the mortgage given by him and his wife, Martha H. Stickney, to the said M. P. Morgan, being the mortgage heretofore referred to.

"(9) That on the 31st day of October, 1911, J. Alvin Clark, pursuant to the power of sale contained in the mortgage above referred to, sold the property conveyed therein at public auction to W. W. Graves, for the sum of seven thousand and seven hundred dollars (\$7,700).

"(10) That the said Thomas Howard, executor of Martha H. Stickney, has threatened to cause the said real estate to be sold pursuant to the power of sale contained in the mortgage given by J. B. Stickney and wife to M. P. Morgan, and to take all necessary steps to have the said power of sale executed.

"(11) The said W. W. Graves contends that the purchaser under such a sale would acquire no title as against him; his contention being that under the statute, more than 10 years having elapsed since the note, secured in the mortgage, fell due, and no payments having been made thereon, neither the mortgagor nor her executors or administrators can execute such power.

"(12) The said W. W. Graves has agreed to and with the said Thomas Howard, trustee and executor aforesaid, that, if the court shall be of the opinion that the power of sale contained in the mortgage aforesaid can be executed, he will pay off and discharge the

indebtedness secured therein, claiming that he has a right, as such purchaser, to discharge any and all valid and existing liens.

"Wherefore it is agreed that, if upon the foregoing facts the court shall be of the opinion that the authority to execute such power of sale is inoperative and barred by the statute, the said Thomas Howard, executor aforesaid, will not demand and cause the same to be executed, but, if the court shall be of the opinion that the authority to execute such power is not inoperative and barred, the said W. W. Graves will pay off and discharge the indebtedness secured in the said mortgage, without a sale being had."

The only legal question raised on these facts is whether the right of action and the right to foreclose under the first mortgage are barred by the statute of limitations, and it is admitted that the right of action on the note is barred if the time from May 6, 1907, to November 1, 1908, during which time the note and mortgage were the property of the wife of J. B. Stickney, is counted. It is also admitted that the right to sell under the power of sale is barred if the act of 1905 is applicable and is constitutional, as applied to the facts of this case.

His Honor held that the claim of the defendant under the first mortgage and the right to sell were barred, and he excepted and appealed.

Pou & Finch, of Wilson, and Thos. W. Shelton, of Norfolk, Va., for appellant. Connor & Connor, of Wilson, for appellee.

ALLEN, J. The learned counsel for the defendant referred us to the decisions of the highest courts of Indiana, New Jersey, Louisiana, Wisconsin, and Pennsylvania, holding that the statute of limitations does not run in favor of the husband against a claim owned by his wife, to which we have given careful and respectful consideration. The cases from these courts rest upon the principle of the common law that the wife cannot maintain an action against her husband, because of the unity of the person, or upon the ground that the removal of the common-law disability by statute generally does not confer upon the wife the right to sue the husband, in the absence of express legislative declaration to that effect, and, as she cannot sue, the period of coverture is not counted against her. If, therefore, the disability of marriage has been removed, and, in addition the right to sue the husband has been conferred on the wife by statute in this state, it follows that the authorities relied on are not applicable, and the conclusion would seem to be inevitable, in the absence of an exception in the statute of limitations, that the period of coverture would be counted against the wife.

[1] Under our Constitution and the Revised, § 2083, the real and personal property of any female in this state, acquired before

marriage, or to which, after marriage, she may become in any manner entitled, is her sole and separate estate and property, freed from any debts, obligations, or engagements of her husband, and by chapter 78, Laws of 1899, the disability of marriage was removed (*Bond v. Beverly*, 152 N. C. 63, 67 S. E. 55), and since then the statute of limitations runs against the wife during coverture.

[2] Revisal, § 408, further provides that the wife may maintain an action without the joinder of her husband—(1) when the action concerns her separate property, (2) when the action is between herself and her husband"; and our court has construed this section to confer upon the wife the right to maintain an action against her husband. *Shuler v. Millsaps*, 71 N. C. 297; *McCormac v. Wiggins*, 84 N. C. 279; *Manning v. Manning*, 79 N. C. 293, 28 Am. Rep. 324; *Robinson v. Robinson*, 123 N. C. 137, 31 S. E. 371; *Perkins v. Brinkley*, 133 N. C. 158, 45 S. E. 541. The statutes of limitations contain no exception in favor of the wife when she holds a claim against her husband. It therefore appearing that the common-law disability has been removed, that the wife may sue her husband, and that there is no exception in the statute of limitations, we are of opinion that the time from May 6, 1907, to November 1, 1908, must be counted against the defendant, and that the right of action upon the note secured by the mortgage is barred. This conclusion has been reached by other courts under statutes similar to our own. *Wilson v. Wilson*, 36 Cal. 447, 95 Am. Dec. 197; *Estate of Deaner*, 126 Iowa, 701, 102 N. W. 825, 106 Am. St. Rep. 375. The court says in the California case: "How is the wife to avail herself of the use of the property, or place it in the category of her separate estate, unless she can recover it from the debtor? The debtor claims that the statute of limitations is running against her. How is she to avoid the bar, if she cannot sue, and the debtor will not pay without suit? There is no provision to prevent the statute running in such case. * * * Section 7 of the practice act authorizes the wife to sue alone 'when the action concerns her separate property,' and also 'when the action is between herself and her husband.' There is no limitation as to the kind of actions that may be maintained 'between herself and her husband'; and section 395, as amended in 1865-66, authorizes the husband and wife to testify on their own behalf, or on behalf of each other, as witnesses in actions between themselves, except in actions of divorce. This provision contemplates that there may be actions between husband and wife other than those relating to divorces. What are they, unless relating to rights of property? Disputes with respect to property may arise between them when the separate existence of the wife, and a separate right of property, is recognized at law, as in this state, as

well as other matters; and, when they do arise, there is as great necessity for a judicial determination of the questions as when they arise between other parties. A litigation of the kind between husband and wife may be unseemly and abhorrent to our ideas of propriety, but a litigation in one form can be no more so than in another, and no more so than the necessity itself which gives rise to the litigation. The present policy of the law is to recognize the separate legal and civil existence of the wife, and separate rights of property, and the very recognition by the law of such separate existence, and rights at law as well as in equity, to hold and enjoy separate property, involves a necessity for opening the doors of the judicial tribunals to her, in order that the rights guaranteed to her may be protected and enforced." And in the Iowa case: "No exception in behalf of married women of actions against their husbands is found in the statute of limitations. It provides that 'actions may be brought within the times herein limited respectively, after their causes accrue, and not afterwards, except when otherwise specially declared. * * * Those founded on written contracts * * * within 10 years.' Code, § 3447. As all exceptions not 'otherwise specially declared' are excluded, we are not permitted to insert any, even though we might think that, owing to the relation of the husband and wife, she should be relieved from the necessity of pressing her claims against her husband in order to keep them alive. That was a matter for legislative consideration, and does not constitute a reason for refusal by the courts to give effect to a specific statute to the contrary. * * * The cases cited from states where the common-law prevails—that the husband may not sue the wife—are not in point, and those resting on statutes somewhat similar to ours do not meet our approval." The case of *Wilkes v. Allen*, 131 N. C. 280, 42 S. E. 616, is not in conflict with this view, as it was decided before the disability of marriage was removed.

[3] If, however, the rule was otherwise, and ordinarily the statute of limitations would not run in favor of the husband upon a contract with his wife, it appears in this case that the statute had begun to run before the wife became the owner of the note and mortgage, and as was said in *Cauley v. Snow*, 122 N. C. 329, 29 S. E. 360: "The statute of limitations had begun to run before she received it, and her coverture did not stop it."

The appellant further contends that, although the right of action on the note is barred, there was no limitation as to the power of sale prior to the Revisal of 1905 (*Menzel v. Hinton*, 132 N. C. 660, 44 S. E. 385, 95 Am. St. Rep. 647), that this became a part of the contract, and that the act of the Legislature (Rev. § 1044) declaring that

the power of sale in a mortgage shall be inoperative when the right of action to foreclose is barred, impairs the obligation of the contract, and is unconstitutional and void. The statute undoubtedly purports to deal with existing contracts because it says: "Whenever an action to foreclose any such mortgage or deed of trust is now barred by the statute of limitations, the authority to execute the power of sale contained therein shall be barred on the first day of January, one thousand nine hundred and seven." Did the Legislature have this power?

[4] It is true that laws in force at the time a contract is made become a part of the contract, but this does not prevent a change in the remedy.

[5] The rule, with its limitations, is well stated in *Cooley*, Const. Lim. 402 et seq. as follows: "Citizens have no vested right in the existing general laws of the state which can preclude their amendment or repeal, and there is no implied promise on the part of the state to protect its citizens against incidental injury occasioned by changes in the law. * * * The obligation of a contract consists in its binding force on the party who makes it. This depends on the laws in existence when it is made. These are necessarily referred to in all contracts, and forming a part of them as the measure of the obligation to perform them by the one party, and the right acquired by the other. There can be no other standard by which to ascertain the extent of either than that which the terms of the contract indicate, according to their settled legal meaning. When it becomes consummated, the law defines the duty and the right, compels one party to perform the thing contracted for, and gives the other a right to enforce the performance by the remedies then in force. If any subsequent law affect to diminish the duty or to impair the right, it necessarily bears on the obligation of the contract, in favor of one party, to the injury of the other; hence any law which in its operations amounts to a denial or obstruction of the rights accruing by a contract, though professing to act only on the remedy, is directly obnoxious to the prohibition of the Constitution. It is the civil obligation of contracts which (the Constitution) is designed to reach; that is, the obligation which is recognized by, and results from, the law of the state in which it is made. * * * Such being the obligation of a contract, it is obvious that the rights of the parties in respect to it are liable to be affected in many ways by changes in the laws, which it could not have been the intention of the constitutional provision to preclude. There are few laws which govern the general police of a state, or the government of its citizens, in their intercourse with each other or with strangers, which may not in some way or other affect the contracts which they have entered into or

may thereafter form. For what are laws of evidence, or which concern remedies, frauds, and perjuries, laws of registration, and those which affect landlord and tenant, sales at auction, acts of limitation, and those which limit the fees of professional men, and the charges of tavern keepers, and a multitude of others which crowd the codes of every state, but laws which may affect the validity, construction or duration, or discharge of contracts?" But the changes in these laws are not regarded as necessarily affecting the obligation of contracts. Whatever belongs merely to the remedy may be altered according to the will of the state, provided the alteration does not impair the obligation of the contract; and it does not impair it, provided it leaves the parties a substantial remedy, according to the course of justice as it existed at the time the contract was made. It has accordingly been held that laws changing remedies for the enforcement of legal contracts, or abolishing one remedy where two or more existed, may be perfectly valid, even though the new or the remaining remedy be less convenient than that which was abolished, or less prompt and speedy."

The Supreme Court of the United States in *Terry v. Anderson*, 95 U. S. 628, 24 L. Ed. 365, sustained a statute as reasonable, which gave only nine months and seventeen days within which to enforce a claim, and said upon the question now before us: "This court has often decided that statutes of limitation affecting existing rights are not unconstitutional, if a reasonable time is given for the commencement of an action before the bar takes effect. *Hawkins v. Barney*, 5 Pet. 457, 8 L. Ed. 190; *Jackson v. Lamphire*, 3 Pet. 280, 7 L. Ed. 679; *Sohn v. Waterson*, 17 Wall. 596, 21 L. Ed. 737; *Sturges v. Crowninshield*, 4 Wheat. 122, 4 L. Ed. 529. And it is difficult to see why, if the Legislature may prescribe a limitation where none existed before, it may not change one which has already been established. The parties to a contract have no more vested interest in a particular limitation which has been fixed, than they have in an unrestricted right to sue. They have no more a vested interest in the time for the commencement of an action than they have in the form of the action to be commenced; and, as to the forms of actions or modes of remedy, it is well settled that the Legislature may change them at its discretion, provided adequate means of enforcing the right remain. We have had occasion to consider this subject at the present term, in *Tennessee v. Sneed* [96 U. S. 69, 24 L. Ed. 610]. In all such cases, the question is one of reasonableness, and we have, therefore, only to consider whether the time allowed in this statute is, under all the circumstances, reasonable. Of that the Legislature is primarily the judge, and we cannot overrule the decision of that department of the

government, unless a palpable error has been committed. In judging of that we must place ourselves in the position of the legislators, and must measure the time of limitation in the midst of the circumstances which surrounded them, as nearly as possible; for what is reasonable in a particular case depends upon its particular facts." This case was approved in *Koshkonong v. Burton*, 104 U. S. 675, 26 L. Ed. 886, and in *Turner v. New York*, 168 U. S. 94, 18 Sup. Ct. 40, 42 L. Ed. 392; the court saying in the last case: "It is well settled that a statute shortening the period of limitation is within the constitutional power of the Legislature, provided a reasonable time, taking into consideration the nature of the case, is allowed for bringing an action after the passage of the statute and before the bar takes effect." The same doctrine has been announced by our court: "It is settled beyond controversy that, while the Legislature has the power to extend or reduce the time in which an action may be brought, this is subject to the restriction that, when the limitation is shortened, 'a reasonable time must be given for the commencement of an action before the statute works a bar.'" *Strickland v. Draughan*, 91 N. C. 103, and cases there cited; *Cooley*, Const. Lim. 450 (8th Ed.) and cases there cited." *Nichols v. Railroad*, 120 N. C. 498, 26 S. E. 643.

The right to sell under the power did not expire under the statute for more than five years after its enactment, which was an ample protection of the rights of the parties.

We find no error.

Affirmed.

(159 N. C. 556)

AMERICAN STEEL & WIRE CO. v. COPELAND et al.

(Supreme Court of North Carolina. Oct. 9, 1912.)

1. EVIDENCE (§ 442*)—PAROL EVIDENCE—SEPARATE ORAL CONTRACT.

In an action for the price of a car load of wire, where plaintiff claimed that there was no agreement except a written order for the car, and where defendant claimed that the entire contract was in parol, and that the order for the car was only in part execution of the contract, evidence as to what the entire contract was was admissible; the rule excluding parol evidence adding to or varying a written contract having no application.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1874-1897; Dec. Dig. § 442.*]

2. EVIDENCE (§ 243*)—ADMISSIONS—AGENT—ADMISSION AFTER EVENT.

Admissions by plaintiff's agent were inadmissible in an action for the price of goods sold, where they were made after the transaction or event.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 908-915; Dec. Dig. § 243.*]

3. WITNESSES (§ 390*)—CONTRADICTORY STATEMENTS—DEPOSITION.

Where a deposition of a seller's agent was on file denying a contract for the sale of goods as claimed by the buyer, and the seller, in an

action for the price, introduced such deposition, the declaration of such agent, admitting the making of the contract, though made after the transaction, was competent to contradict the deposition.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 1247; Dec. Dig. § 390.*]

4. TRIAL (§ 59*)—ADMISSION OF EVIDENCE—DISCRETION OF TRIAL COURT.

In the exercise of its discretion, the trial court may permit the introduction of evidence out of its order.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 138-140, 142, 143, 145; Dec. Dig. § 59.*]

5. CONTRACTS (§ 9*)—REQUISITES—CERTAINTY.

A contract must be definite and certain, or capable of being made so.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 10-20; Dec. Dig. § 9.*]

6. SALES (§ 22*)—CONTRACT—OFFER AND ACCEPTANCE.

An agreement by a manufacturer to furnish a dealer all the wire he needed for his trade constitutes a continuing offer on the part of the company to sell, which, when accepted pro tanto by an order before withdrawal of the offer, becomes effective as a contract.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 39-43; Dec. Dig. § 22.*]

7. SALES (§ 418*)—LOSS OF PROFITS—BREACH OF CONTRACT.

Where a manufacturer contracted to sell a dealer all the wire he needed to supply his customers and fixed the cost and selling prices, profits were recoverable by the dealer on a breach of contract, since they were within the contemplation of the parties, and were not difficult of ascertainment.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1174-1201; Dec. Dig. § 418.*]

Appeal from Superior Court, Lenoir County; O. H. Allen, Judge.

Action by the American Steel & Wire Company against A. S. Copeland and others, with counterclaim by defendants. Judgment for defendants, and plaintiff appeals. No error.

This action was instituted to recover \$610.94, as the purchase price of a car load of wire shipped by the plaintiff to the defendants. The defendants admitted the purchase of the car of wire at the price named, and set up a counterclaim for damages in the sum of \$650 for breach of contract by the plaintiff, under which they allege that the plaintiff agreed to furnish the defendant wire, which contract was entered into between the plaintiff and defendants on or about the 21st day of June, 1910, and that the car load of wire, for the purchase price of which the plaintiff was suing, represented only a portion of the wire which the plaintiff was to ship the defendants under the contract. The plaintiff denied the contract set out by the defendants.

The defendants offered evidence tending to prove: That they were general farm supply merchants in the city of Kinston, N. C. That on or about the 21st day of June, 1910, McKelcan, an agent and representative of the plaintiff company, approached the de-

defendants for the purpose of selling them wire. That the defendants at this time were using another brand of wire, and had a large demand for wire fences from their customers. That B. W. Canady & Son were handling the plaintiff's wire in Kinston, and on this account McKelcan stated to them that he could not ship them wire to Kinston, but would ship wire to Graingers, which is near Kinston, from which point the defendants could have it sent to Kinston. That the defendants stated to McKelcan that they would not care to purchase any wire from the plaintiff unless they could get all they wanted; that they would sell a car load a month, or at least five or six car loads a year, and probably more. That McKelcan thereupon agreed that the plaintiff would furnish the defendants all the wire that they wanted for their trade, and, in addition thereto, would help advertise this wire all through the different counties, and guaranteed to the defendants to furnish them all the wire that they would require. That in pursuance thereof, the defendants and the plaintiff's agent sent the order for the one car, for the purchase price of which this action is brought. That upon the request of the said McKelcan, the defendants furnished the plaintiff with the mailing list of their customers, containing about 500 names, to whom it appears the plaintiff wrote circular letters, which read in part as follows: "In order that you and others in your vicinity may see this fence and look into its good qualities, we have arranged that a liberal stock be carried by Copeland Brothers, Kinston, North Carolina, who will be glad to give you one of our complete catalogues." That the plaintiff also sent the defendants an electrotpe containing a photograph of the wire fences, which the defendants used in advertising in the Kinston Free Press at the rate of \$25 per month. That the one car load arrived and was sold by the defendants in about two or three weeks, and the second car ordered under the contract, and the plaintiff declined to ship the second car. That the defendants were out of wire about six weeks, during which time they could have sold a car at a profit of \$300 per car. This was based upon the demands made by their customers for the wire. One hundred and twenty half rolls of wire is a minimum car load lot. That the defendants could have bought some lighter wire, made by different people than the plaintiff, from L. Harvey & Son, at 5 per cent. discount, but not the same kind or grade of wire which the plaintiff should have furnished the defendants and which they were advertising as being sold by the defendants; but they could not have purchased from their competitors B. W. Canady & Son wire at any such per cent. advance. The plaintiff, by the depositions of McKelcan and Dietrich, denied that there was any contract except the order for the one car of wire, and fur-

ther attempted to deny that the agent had any authority to bind the plaintiff, although Dietrich stated that McKelcan's authority "was such as is generally given to a traveling salesman." Exception was taken by the plaintiff to the admission of the evidence tending to prove that the agent of the plaintiff agreed to furnish all the wire the defendants wanted, upon the ground that the order for the car, which was shipped, constituted the contract, and that parol evidence was inadmissible to add to or vary it. The defendants were permitted to prove that they had a conversation with the agent of the plaintiff, McKelcan, after the refusal to ship the second car, and that he admitted that he agreed to furnish all the wire the defendants wanted, and the plaintiff excepted. The plaintiff introduced the deposition of McKelcan, in which he denied the contract as contended for by the defendants.

His honor charged the jury on the question of damages, as follows: "You will confine the question of damages to the inquiry as to whether there was an agreement made with the defendants by the agent, approved by the plaintiff and ratified by them, by their conduct, correspondence, and if they refused to comply with the agreement, and by reason of that refusal the defendants were damaged, and, if so, in what amount they were damaged. That damages would have to be confined to such evidence as would enable you to ascertain reasonably the amount. That is to say, the defendants could not recover for what we call 'speculative damages.' He could not calculate that he might have sold large amounts of wire and make estimates upon that, but he would have to base his estimates as to what he could have sold upon the demands for wire made upon him by his customers, and such expenses as he went to preparatory to carrying out the agreement, like the advertising. The defendants cannot recover in their counterclaim more than they can show they have been damaged by advertising and by failure to be able to supply for the actual demands that were made upon them, and it was their duty to exercise care in restricting the amount of loss, if any, as much as possible, and, as I have already said, the defendants cannot recover speculative profits, nor remote profits for damage to his business, if any. I believe he is making no claim for that, nor can he recover for possible or probable profit on sales of goods, except such sales as he shows to the jury he could have made by reason of demands that were made upon them by their customers. And the burden is upon the defendants to prove by the greater weight of the evidence that they are damaged, and the amount of the damages." Plaintiff excepted.

The evidence as to damages was as to the loss of profits on one car of wire, and the jury awarded the amount claimed, \$300, and

from the judgment rendered the plaintiff appealed.

G. G. Moore, of Kinston, for appellant.
Rouse & Land, of Kinston, for appellees.

ALLEN, J. [1] The contention of the defendants is that the entire contract between them and the plaintiff was in parol, and that the order given for the car of wire, which was shipped, was in part execution of the contract, while the plaintiff contends that there was no agreement outside of the written order. It was competent for both parties to introduce evidence in support of their contentions, and the rule excluding parol evidence, which adds to or varies a written contract, has no application.

[2-4] The evidence of the defendants as to the conversation with the agent of the plaintiff was not strictly competent at the time it was offered, because it was a declaration after the event, but it appears that the deposition of the agent was on file, in which he denied the contract as contended for by the defendants, and that this deposition was introduced by the plaintiff, and the declaration of the agent was competent to contradict his evidence contained in the deposition. His honor could have permitted the introduction of the evidence out of its order, in the exercise of his discretion, and, if his ruling was not on this ground, it is not reversible error, because the evidence was made competent by the introduction of the deposition.

[5, 6] This brings us to the consideration of the principal question debated between counsel, and that is whether the agreement, as proven by the defendants, is wanting in mutuality, or is so uncertain that it cannot be enforced. We have said at this term in *Elks v. Insurance Co.*, 75 S. E. 808, that a contract must be definite and certain or capable of being made so, and the plaintiff contends that under this rule, an agreement on its part, if made, to furnish all the wire the defendants might want, would be too indefinite to create an enforceable contract. The authorities are not in harmony on this question, some sustaining in whole or in part the contention of the plaintiff, as in *Bailey v. Austrian*, 19 Minn. 535 (Gil. 465), *Tarbox v. Gotzian*, 20 Minn. 139 (Gil. 122), *Drake v. Vorse*, 52 Iowa, 419, 3 N. W. 465, *Railroad v. Bagley*, 60 Kan. 425, 56 Pac. 759, *Harrison v. Lumber Co.*, 119 Ga. 6, 45 S. E. 731; while others hold to the contrary view. A contract was sustained in *Nat. Fur. Co. v. Keystone Mfg. Co.*, 110 Ill. 427, to supply all the pig iron which the party should need, use, or consume in his business; in *Cooper v. Lansing Wheel Co.*, 94 Mich. 272, 54 N. W. 39, 34 Am. St. Rep. 341, to furnish such quantity of wheels as he may require during a certain season; in *Smith v. Morse*, 20 La. Ann. 220, to furnish all the ice they might require for two hotels for five years; in *Lumber Co.*

v. Coal Co., 160 Ill. 85, 43 N. E. 774, 31 L. R. A. 529, to furnish the coal company its requirements of coal for a certain season; in *Dalley v. Can. Co.*, 128 Mich. 591, 87 N. W. 761, to furnish all the tin cans that plaintiff might use in his factory for a stated time; and in *Wells v. Alexandre*, 130 N. Y. 642, 29 N. E. 142, 15 L. R. A. 218, to furnish the coal needed for steamers during one year. These authorities would justify us in sustaining the agreement as a valid contract, binding between the parties, at the time the agreement was made, but it is not necessary to go so far, as it appears that, after the shipment of one car, the defendants ordered another, which the plaintiff refused to deliver, and the evidence as to the amount of damages was directed to the loss of sales from this car, and his honor restricted the recovery to the profits that would have been made on sales to customers who applied for the wire, and could not get it.

In any event, the agreement constituted a continuing offer to sell, on the part of the plaintiff, which when accepted, before the withdrawal of the offer, became effective as a contract, and the order for the second car was an acceptance of the offer pro tanto. This was decided in *Railroad v. Witham*, 9 C. P. 19, and is approved in *Clark on Contracts*, 119, 120; 1 Page, Con. § 807; *Bish. Con.* § 78. The case from the court of common pleas is summarized in *Bishop*, supra, as follows: "In one case parties agreed that one of them should supply the other during a designated period with certain stores, as the latter might order. He made an order, which was filled, then made another, which was declined; and on suit brought the defendant rested his case on the lack of mutuality in the contract, which, he contended, rendered it void. Plainly it stood, in law, as a mere continuing offer by the defendant, but, when the plaintiff made an order, he thereby accepted the offer to the extent of the order, and it was too late for the other to recede. So judgment went for the plaintiff."

[7] We are also of opinion that the defendants were entitled to recover profits. This question has been discussed so clearly and elaborately by Justice Walker in *Machine Co. v. Tobacco Co.*, 141 N. C. 234, 53 S. E. 885, and by Justice Hoke in *Wilkinson v. Dunbar*, 149 N. C. 22, 62 S. E. 748, in which the leading authorities are reviewed, that we need do no more than refer to those cases. In the first the court says: "Generally speaking, the amount that would have been received if the contract had been kept and which will completely indemnify the injured party is the true measure of damages for its breach. Where one violates his contract, he is liable for such damages, including gains prevented as well as losses sustained, which may fairly be supposed to have entered into the contemplation of the parties when they made the contract—that is, such as might

naturally be expected to follow its violation—and they must be certain, both in their nature and in respect to the cause from which they proceed. It is the rule last stated which principally raises the doubt as to whether profits of the future should be included in the estimate of damages. They may be necessary to completely indemnify the injured party and they may also answer the other requirement, in that the loss of them may naturally be expected to proximately result from a breach of the contract; but there still remains another important element to be considered, and that is whether there is any reliable standard by which they can be ascertained, for we have seen that the damages must be certain, and this certainty which is required does not refer solely to their amount, but also to the question whether they will result at all from the breach. It is clear that, whenever profits are rejected as an item in the calculation of damages, it is because they are subject to too many contingencies and are dependent upon the fluctuations of markets and the chances of business to constitute a safe criterion for an estimate of damages. * * * It will be seen, therefore, that the earlier rule which excluded profits altogether, as an element of damages, as being in their very nature too uncertain to be considered (Hale on Damages, 72), has been modified so as to permit their inclusion in the assessment if they are proximate and certain," and in the second: "It is well established that where there has been definite and absolute breach of a contract which is single and entire that all damages, both present and prospective, suffered by the injured party, may and usually must be recovered in one and the same action, and, when prospective damages are allowed, they must be such as were in reasonable contemplation of the parties, and capable of being ascertained with a reasonable degree of certainty. This requirement as to the certainty of damages recoverable is frequently said to exclude the idea of profits, but this statement must be understood to refer to the profits expected by reason of collateral engagements of the parties, or the profits of a going concern to arise from current sales and bargains which are yet to be made and dependent, to a great extent, on the uncertainty of trade and fluctuations of the market. * * * But profits or advantages which are the direct and immediate fruits of the contract entered into between the parties stand upon a different footing. These are part and parcel of the contract itself, entering into and constituting a portion of its very elements, something stipulated for, the right to the enjoyment of which is just as clear and plain as to the fulfillment of any other stipulation. They are presumed to have been taken into consideration and deliberated upon before the

contract was made, and formed, perhaps, the only inducement to the arrangement. The parties may indeed have entertained different opinions concerning the advantages of the bargain, each supposing and believing that he had the best of it; but this is mere matter of judgment going to the formation of the contract, for which each has shown himself willing to take the responsibility and must, therefore, abide the hazard. Such being the relative position of the contracting parties, it is difficult to comprehend why, in case one party has deprived the other of the gains or profits of the contract by refusing to perform it, this loss should not constitute a proper item in estimating the damages."

In the case before us profits were within the contemplation of the parties. The defendants were merchants and supplied their customers with wire. They had 500 customers and sent their names to the plaintiff. They were not buying for their own use, but for sale, and the plaintiff knew of these facts. Nor were the profits difficult of ascertainment, as the cost and selling prices were fixed.

It is not at all certain that his honor on all the facts would not have been warranted in submitting to the jury the question of damages on the whole agreement; but, as he did not do so, and limited the right of recovery, we find no error of which the plaintiffs can complain.

No error.

(180 N. C. 11)

FIELDS v. COLEMAN et al.

(Supreme Court of North Carolina. Oct. 9, 1912.)

DISCOVERY (§ 41*)—APPLICATION—MATERIALITY OF MATTERS SOUGHT.

An application by a plaintiff in an action for a conspiracy to defame for an order to examine defendants preparatory to filing a complaint which sought to elicit information concerning and to compel the production of certain letters alleged in the supporting affidavit to have been written by a defendant to a woman, and to show an immoral relationship existing between them, but which neither shows that the plaintiff does not know the charges which were made against him nor the materiality of the letters to the cause of action, disclosed nothing essential to be known before the filing of the complaint, and no discovery could be had.

[Ed. Note.—For other cases, see Discovery, Cent. Dig. § 54; Dec. Dig. § 41.*]

Appeal from Superior Court, Wake County; Webb, Judge.

Isham Fields moved for an examination of parties defendant to discover matters necessary to the framing of a complaint. From a judgment confirming an order of the clerk revoking an order for the examination of the parties defendant and recalling subpoena duces tecum issued therewith, plaintiff appeals. Affirmed.

This is an appeal confirming an order of the clerk revoking an order for the examination of parties defendant, and recalling the subpoena duces tecum that was issued with the same. The order revoked was made upon affidavit for the examination of the defendants, and with a view particularly to obtaining two certain letters alleged to have been written by defendant Coleman to one Lovie Pitts; the plaintiff alleging that knowledge of the contents of said letters was necessary to the framing of his complaint. The defendants contended that said letters were neither material nor necessary; that, the object of the examination being to discover the said alleged letters, it was neither material nor necessary that said examination should be had; and that the application for said examination and subpoena duces tecum was in bad faith.

The plaintiff filed the following affidavit, upon which his motion was based:

"(1) That this action is brought against the defendants, James H. Young and W. T. Coleman, for conspiring together to defame and injure the plaintiff in his good name, reputation, character and business.

"(2) That he expects to allege upon securing from the said Young and Coleman the facts in relation thereto that pursuant to a conspiracy entered into between the said Young and Coleman that they, the said Young and Coleman, circulated and preferred false charges against the plaintiff, and procured his expulsion from the First Baptist Church, colored, of Raleigh, N. C., and otherwise injured the plaintiff in his character, reputation, and business.

"(3) That he expects to establish by the defendant James H. Young, which will enable him to allege in his said complaint that the said Young has in his possession or under his control certain letters which were written by the defendant Coleman, who was at that time the pastor of the First Baptist Church, colored, of Raleigh, N. C., to a certain woman by the name of Lovie Pitts, which letters tend to show that there were existing between the said Coleman and the said Lovie Pitts improper relations, and that tend to show gross immorality on the part of the said Coleman.

"(4) That the plaintiff expects in the said examination of the said Young and Coleman facts that will authorize him in his said complaint to allege that the said Coleman was the pastor of the said First Baptist Church, colored, at Raleigh, that plaintiff was a member thereof, and that plaintiff had certain information in reference to the relations existing between the defendant Coleman and the said Lovie Pitts, and as to the existence of the letters hereinbefore referred to, and that the plaintiff proceeded to take certain steps and preferred charges against the said Coleman as pastor, and attempted to have the said Coleman brought to trial

before the said church, on account of the letters written by the said Coleman to the said Lovie Pitts, when the said Young and Coleman conspired together to suppress said letters and other evidence against the said Coleman, and thereupon the said Young and Coleman preferred charges against plaintiff in the said church and circulated false and slanderous reports against the plaintiff, charging him with lying and with bringing false charges against the said Coleman, and, on account of said conspiracy and suppression of facts, false charges, and trickery and chicanery, procured the expulsion of the plaintiff from said church, and injured plaintiff in his reputation, character, standing, and business.

"(5) That the plaintiff demands the production of the said letters that he may set forth copies or the substance thereof in his complaint, so that he may justify himself in the action which he took in attempting to have the said First Baptist Church, of Raleigh, colored, deal with the said Coleman, and to show that said Coleman was guilty of gross immoral conduct and not a suitable person to be and remain as pastor of the said First Baptist Church, colored, and to show that said Young and Coleman suppressed said letters to shield and protect said Coleman, and to show that the suppression of the said letters and the charges against the plaintiff, which secured his expulsion from the said church, was in pursuance of the conspiracy between the said Young and Coleman and to injure the plaintiff in his good name and reputation.

"And, having thus submitted to the defendants a full and fair statement and bill of particulars, the plaintiff demands that said examination be proceeded with under the statute."

Douglass, Lyon & Douglass, of Raleigh, for appellant. Jones & Bailey, of Raleigh, for appellees.

ALLEN, J. The plaintiff is not asking for an examination of the defendants, after pleadings filed, preparatory to a trial, but that he may examine them to elicit certain information to enable him to file his complaint, and as was said by Justice Walker in *Bailey v. Matthews*, 156 N. C. 81, 72 S. E. 93: "In a proceeding of this kind, it is of the first importance that the application for an order of examination should be under oath, stating facts which will show the nature of the cause of action, so that the relevancy of the testimony may be seen and the court may otherwise act intelligently in the matter, and it should appear in some way, or upon the facts alleged, that it is material and necessary that the examination should be had, and that the information desired is not already accessible to the applicant. It should also appear that the motion

is made honestly and in good faith and not maliciously; in other words, that it is meritorious. 8 Enc. of Pl. & Pr. p. 41 et seq. Surely a clerk or judge is not bound to grant such an order if it appears to be unnecessary, or if the evidence sought to be elicited is immaterial, or the application appears to be made in bad faith. It is but just and right that the application should be made under the obligation and responsibility of an oath to protect the respondent against false and malicious accusations and vexatious proceedings. The law will not permit a party to spread a dragnet for his adversary in the suit, in order to gather facts upon which he may be sued, nor will it countenance any attempt, under the guise of a fair examination, to harass or oppress his opponent."

Tested by this principle, the ruling of the clerk revoking the order for an examination, and of his honor confirming his judgment, were in accordance with law. The affidavit of the plaintiff shows that this action is brought for that the defendants had conspired to injure his character by preferring false charges against him, and securing his exclusion from his church, and the information he is trying to procure is the production of certain letters alleged to have been written by the defendant Coleman to a woman, which he says will prove an immoral relationship existing between them. He does not allege that he does not know what charges were made against him, and it is not conceivable that he does not, and the materiality of the letters to his cause of action does not appear. If so, he has sufficient information for preparing his complaint, and the letters are not material for that purpose.

We find no error.

Affirmed.

(160 N. C. 15)

In re JONES.

(Supreme Court of North Carolina. Oct. 9, 1912.)

1. CONVICTS (§ 1*)—RESTORATION TO CIVIL RIGHTS—STATUTORY PROVISIONS.

Revisal 1905, §§ 2675, 2676, et seq., provide that a prisoner, convicted of an infamous crime and sentenced to imprisonment, may file his petition for restoration to citizenship at any time after the expiration of four years from the date of conviction. Section 2680 provides that where the judgment of the court does not include imprisonment, and pardon has been granted by the Governor, or judgment suspended on payment of the costs, and the costs have been paid, forfeited rights of citizenship may be restored upon a petition filed after the expiration of one year from such conviction. A person convicted for murder in the second degree, and sentenced to 20 years in the state's prison at the September term of one year, was pardoned and his pardon presented to the court which sentenced him at the March term of the next year, and he petitioned for restoration to citizenship at the succeeding September term. Held that, as imprisonment was a part of the judgment, the

petition could not be entertained after the expiration of only one year.

[Ed. Note.—For other cases, see Convicts, Cent. Dig. § 1; Dec. Dig. § 1.*]

2. CONVICTS (§ 1*)—STATUS—RESTORATION TO CIVIL RIGHTS.

Where the superior court could not entertain a petition for the restoration to citizenship of a person convicted of second-degree murder and pardoned, the court, on appeal from a judgment dismissing the petition, cannot consider the effect of the pardon in restoring his lost rights of citizenship.

[Ed. Note.—For other cases, see Convicts, Cent. Dig. § 1; Dec. Dig. § 1.*]

Appeal from Superior Court, Johnston County; Ferguson, Judge.

Petition by Jesse T. Jones, under Revisal 1905, § 2680, for restoration to citizenship. From a denial of the petition, petitioner appeals. Affirmed.

F. H. Brooks, of Smithfield, for appellant.

BROWN, J. The petitioner was convicted in the superior court of Johnston county for murder in the second degree at the September term, 1911, and sentenced to 20 years in the state prison. The petitioner was pardoned by the Governor, and the same presented to the superior court of Johnston county at March term, 1912, and the prisoner was released.

[1] It is evident that the superior court had no jurisdiction to grant the prayer of the petitioner. Under chapter 64 of the Revisal of 1905 (sections 2675, 2676, et seq.) a prisoner convicted of an infamous crime and sentenced to imprisonment may file his petition for restoration to citizenship at any time after the expiration of four years from the date of conviction. Section 2680 provides that where the judgment of the court does not include imprisonment, and pardon has been granted by the Governor, or judgment suspended on payment of the costs, and the costs have been paid, such person may be restored to such forfeited rights of citizenship upon application, by petition to the judge presiding at any term of the superior court held for the county in which the conviction was had, which petition must be filed after the expiration of one year after such conviction. As imprisonment was a part of the judgment of the court in this case, this petition cannot be entertained at this time, as the prisoner was convicted and sentenced only a year ago.

[2] It is unnecessary for us to consider the effect of a pardon. It is very elaborately argued in the brief of the counsel for the petitioner. It may be, as contended, that the pardon is such an act of grace as releases the offender from the consequences of his offense to the same extent as if the offense had never been committed. This question cannot be raised in petition for restoration to the rights of citizenship under the statute, for the court has no jurisdiction to entertain

it, except at the times and for the purposes named in the statute. If the petitioner is denied the right of suffrage and registration, or other rights of citizenship which he exercised before the commission of the offense, he may then, by proper legal proceedings, have the full scope and effect of his pardon determined by the courts.

The petitioner will pay the cost of this appeal. The judgment dismissing the petition is affirmed.

(160 N. C. 385)

COHARIE LUMBER CO. v. BUHMANN et al.
(Supreme Court of North Carolina. Oct. 9, 1912.)

1. ATTACHMENT (§ 250*)—VACATION—FINDINGS.

The court need not state, either in an order vacating an attachment or otherwise, his findings of fact upon which the order was based, unless requested by the adverse party to do so.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. §§ 877-889, 893; Dec. Dig. § 250.*]

2. APPEAL AND ERROR (§ 920*)—PRESUMPTIONS—INSUFFICIENCY OF RECORD.

Where the facts upon which an order vacating an attachment are based are not in the record, it will be presumed by the Supreme Court that the judge found such facts as would support the order; error not being presumed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3714-3721; Dec. Dig. § 920.*]

3. APPEAL AND ERROR (§ 257*)—EXCEPTIONS—NECESSITY—VACATING ATTACHMENT.

Fact findings made upon a motion to vacate an order of attachment are conclusive on appeal, unless the adverse party excepts there-to upon the ground that the findings are not supported by the evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1494-1497; Dec. Dig. § 257.*]

4. APPEAL AND ERROR (§ 272*)—PRESENTATION BELOW—EXCEPTIONS TO FINDINGS.

Exceptions to findings of fact upon a motion to vacate an attachment must be made in apt time and in the proper manner to be reviewable.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1611-1619; Dec. Dig. § 272.*]

5. ATTACHMENT (§ 261*)—VACATION—NECESSITY OF UNDERTAKING.

Revisal 1905, § 774, provides that defendant may apply for an order to discharge an attachment, and, if it be granted, all the proceeds of the sale of attached property, and all of the property held under the order shall be delivered to defendant and released from the attachment. Section 775 provides that, on such application, defendant shall deliver an undertaking with sureties to the effect that the sureties will pay plaintiff the amount of the judgment which may be recovered against defendant in the action, not exceeding the sum specified in the undertaking, which shall at least be double the amount claimed by plaintiff. *Held*, that the statute only applied where the attachment was properly issued under the statute, and an undertaking was not required if the attachment was invalid, or was improperly sued out.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. §§ 929-944; Dec. Dig. § 261.*]

Appeal from Superior Court, New Hanover County; Allen, Judge.

Action by the Coharie Lumber Company against W. C. Buhmann and another, in which attachments were issued. Judgment vacating the attachments, and plaintiff appeals. Affirmed.

Jos. W. Little and John D. Bellamy, both of Wilmington, for appellant. Davis & Davis, of Wilmington, for appellees.

WALKER, J. This is an action to recover \$3,000, the penalty of a bond given by W. C. Buhmann, as principal, and F. G. Buhmann, as surety, for the faithful performance, by W. C. Buhmann, of a certain contract between him and plaintiff, and for the further recovery of the amount of a note for \$2,500, made by W. C. Buhmann and indorsed by F. G. Buhmann, and deposited with plaintiff as collateral to secure the payment of three promissory notes, each for \$500, given by W. C. Buhmann to plaintiff, and of an open account for money advanced and supplies furnished by plaintiff to the said W. C. Buhmann. Warrants of attachment were issued and levied on property of defendants in this state. They were based upon affidavits which alleged that W. C. Buhmann is not a resident of the state, and that F. G. Buhmann, though alleged to be a nonresident, had secreted himself in the state with the purpose of avoiding the service of process, and had assigned, disposed of, and secreted, or was about to assign, dispose of, or secrete, his property in this state, for the purpose of defrauding his creditors. The case was heard in the court below, after special appearance by defendants, upon a motion to vacate the warrants of attachment, and the affidavits filed by the parties. The court ordered that the attachments be vacated, but without setting out the facts upon which the order was based.

[1]. The judge was not required to state his findings of fact in the order or otherwise, unless requested by the plaintiff to do so. This has been thoroughly settled by the authorities, and notably in *Millhiser v. Balsley*, 106 N. C. 433, 11 S. E. 314. As there seems to be some misapprehension upon this subject, we reproduce what is said by Chief Justice Merrimon in that case: "It was not necessary in this case that the court should set forth in the judgment vacating the warrant of attachment its findings of facts on which the same was founded. The statute does not so require, and to do so would more or less incumber the record without serving any necessary or useful purpose, unless a party should desire to assign error. In this and like cases, it is the province of the judge in the court below to hear the evidence, usually produced before him in the form of affidavits, find the facts, and apply the law

arising thereupon. *Pasour v. Lineberger*, 90 N. C. 159, and the cases there cited. If a party should complain that the court erred in so applying the law, then he should assign error and ask the court to state its findings of the material facts in the record, so that he might have the benefit of his exceptions on appeal to this court. In that case it would be error if the court should fail or refuse to so state its findings of fact, and the law arising upon the same. Such practice affords the complaining party reasonable opportunity to have errors of law arising in the disposition of incidental and ancillary matters in the action corrected by this court, while in very many cases it lessens the labor of the court below, expedites proceedings in the action, and saves costs." So we said in *Pharr v. Railroad*, 132 N. C. 418, 44 S. E. 37: "This court cannot pass upon the affidavits, but, in order to entitle the moving party to a review here of the ruling below, the facts must be found and spread upon the record, and the court must always find the facts when requested to do so"—citing *Smith v. Whitten*, 117 N. C. 389, 23 S. E. 320; *Albertson v. Terry*, 108 N. C. 75, 12 S. E. 392.

[2] Where the facts are not set out in the record, we will presume that the judge found such facts as would support the order, or judgment, as the case may be. We do not presume that error was committed by the court. It must be shown by the party alleging it. *Pharr v. Railroad*, supra; *State v. Taylor*, 118 N. C. 1262, 24 S. E. 526; *Albertson v. Terry*, supra.

[3] Likewise the findings of fact upon such a motion are not reviewable here, but are conclusive upon us. *Hale v. Richardson*, 89 N. C. 62; *Taylor v. Pope*, 106 N. C. 267, 11 S. E. 257, 19 Am. St. Rep. 530; *Burke v. Turner*, 85 N. C. 500; *Harriss v. Sneed*, 101 N. C. 273, 7 S. E. 801; *Love v. Moody*, 68 N. C. 200; *Travers v. Deaton*, 107 N. C. 502, 12 S. E. 373.

[4] This rule, of course, is subject to the qualification that a party may except to the findings of fact upon the ground that there is no evidence to support them, but the exception must be made in apt time and in the proper way. *Travers v. Deaton*, supra. Assuming that the judge found such facts as warranted the order, and being concluded by them, as much so as if they had been fully set out in the order, the necessary conclusion is that there was no error in vacating the attachment, as there is no foundation for it to rest upon.

[5] The learned counsel for defendant suggested in argument, and this is one of his assignments of error, that the defendants should have been required by the court to give an undertaking under Revisal, §§ 774, 775, but we do not think those sections will bear such a construction. They were intended to apply where the defendant comes in and moves to discharge the property from

the attachment upon giving the required security and without regard to the validity of the attachment. They are rather predicated upon the idea that the attachment was properly issued for one or more of the causes prescribed in the statute, and the defendant appears, submits himself to the jurisdiction of the court, and agrees to file an undertaking, with sufficient surety, in lieu of the attached property, and conditioned to pay the debt if the plaintiff succeeds in the action. A cursory reading of those sections will disclose this as the purpose of their enactment. It was not supposed that plaintiff should be entitled to security from the defendant if the attachment is invalid, or was not properly sued out. The attachment then falls, and the right to security is extinguished. It is said in 3 Enc. of Pl. & Pr. at page 77, citing cases in the notes: "Attachments may be dissolved by traversing in the motion for dissolution the facts alleged in the affidavit as grounds for the attachment by pleading some irregularity of a fatal character in the proceedings, or by giving bond to the sheriff to pay the debt, thereby releasing the property." And at page 84: "It is generally provided by statute that the attached property may be discharged from the attachment lien by executing in favor of the plaintiff, or, in some states, the officer who executes the attachment, a bond, with sufficient security, conditioned upon the faithful performance of whatever judgment shall be rendered in the action." But the point is determined in *Bear v. Cohen*, 65 N. C. 511, where it is said: "An attachment or other provisional remedy will be vacated without any undertaking by the defendant, by a judge, if on its face it appears to have been issued irregularly, or for a cause insufficient in law, or false in fact." *Rowles v. Hoare*, 61 Barb. (N. Y.) 266. The rule is well stated in *Bates v. Kilian*, 17 S. C. 553: "Attachments may be dissolved or defeated upon two grounds: (1) Where some irregularity of a fatal character appears on the face of the proceedings; and (2) because of the fact that the allegations upon which it may issue are untrue. The dissolution in either case may be had upon motion; the first being made upon the papers, and the second upon affidavits as to matters dehors the record. These causes go to the root of the attachment, especially in the last class of cases, and, when they exist, the effect of their interposition is not simply to release the property, but to entirely vacate and set aside the attachment proceedings. Besides this remedy, in cases where the attachment has been irregularly issued, or issued without warrant of law, section 265 of the Code, supra, provides for the release of the property attached, where the attachment has been legally issued, and there is no objection as to its regularity or want of observance of proper form, the effect of which provision, when adopted by the de-

pendant, is to convert the action from one in rem to one in personam, with security by the defendant for the payment of the debt. This is done by permitting the defendant to give bond for the payment of the debt, in the event that the plaintiff's action succeeds, the purpose of an attachment being to obtain security for the debt by securing a lien on property. The bond provided for is substituted in the place of this lien and the property is released." When there is any fatal defect in the attachment proceedings, parties would doubtless avail themselves of the chance offered to attack the process and vacate the same, thereby releasing the property from the lien, without any further liability. The relief provided by Revisal, §§ 774, 775, was without doubt intended primarily to provide for those cases where the attachments are regular and valid, and yet where it would be a hardship to the debtor if he is deprived of the use and enjoyment of his property during the pendency of the action. This remedy respects the interests of both creditor and debtor, as it gives the creditor a security in the form of an undertaking, which is, by the law, considered as reliable as the lien displaced by it, and an adequate protection, while the debtor is restored to the possession of his property. *Bates v. Killian*, supra.

It appears that an undertaking was given to the sheriff for the release of the property, but what effect it will ultimately have in securing the plaintiff's claim, if established, is not now before us for decision.

No error.

(160 N. C. 256)

THOMPSON v. SMITH et al.

(Supreme Court of North Carolina. Oct. 9, 1912.)

1. DESCENT AND DISTRIBUTION (§ 93*)—"ADVANCEMENT"—NATURE.

An "advancement" is an irrevocable gift in praesenti of money or other property real or personal to a child by a parent to enable the child to anticipate by so much his inheritance or succession.

[Ed. Note.—For other cases, see Descent and Distribution, Cent. Dig. § 389; Dec. Dig. § 93.*]

For other definitions, see Words and Phrases, vol. 1, pp. 218-222; vol. 8, p. 7567.]

2. DESCENT AND DISTRIBUTION (§ 115*)—ADVANCEMENTS—EVIDENCE—PRESUMPTIONS.

A gift of money or other property by a parent to a child is presumptively an advancement; but the presumption may be rebutted by parol, though there is a recital of the consideration in the instrument of conveyance, and the question whether there is a gift or loan, or an advancement, must be tested by the intention of the parent.

[Ed. Note.—For other cases, see Descent and Distribution, Cent. Dig. § 426; Dec. Dig. § 115.*]

3. DESCENT AND DISTRIBUTION (§ 98*)—ADVANCEMENTS—EVIDENCE—PRESUMPTIONS.

The rule that the question whether there was a gift, loan, or advancement by a parent

to a child must be tested by the parent's intention is not modified by Revisal 1905, § 133, and section 1556, Rule 2, relating to inheritance and the duty to account for advancements.

[Ed. Note.—For other cases, see Descent and Distribution, Cent. Dig. § 402; Dec. Dig. § 98.*]

4. APPEAL AND ERROR (§ 1022*)—FINDINGS—CONCLUSIVENESS.

The Supreme Court will not review a referee's findings of fact determined on a consideration of the evidence, and approved by the trial judge, on exceptions, provided there is some evidence to support them.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4015-4018; Dec. Dig. § 1022.*]

Appeal from Superior Court, Wake County; Webb, Judge.

Action by Fannie H. Thompson against Marcellus Smith and another, administrators of J. R. Smith, deceased. Judgment for defendants, and plaintiff appeals. Affirmed.

See, also, 74 S. E. 635.

J. H. Fleming, of Raleigh, for appellant.
Bart M. Gatling, of Raleigh, for appellees.

WALKER, J. This case was before us at a former term and is reported in 156 N. C. 345, 72 S. E. 379. We then held that the presiding judge committed an error in affirming the referee's findings of fact, merely because there was, in his opinion, some evidence to support the same, but without himself passing upon the evidence and its probative force, and exercising his own judgment as to whether the facts so found had been established by the proof. The case was remanded, to the end that it might be heard in accordance with this rule. It is now before us upon the findings of fact and conclusions of law of the referee, Mr. John W. Hinsdale, Jr., which have, upon due consideration of the evidence and the law, been confirmed by his honor, Judge James L. Webb. The matter as now presented to us seems to be largely, if not altogether, a question of fact. The action was brought by the plaintiff, Fannie H. Thompson, heir at law and distributee of her deceased father, J. R. Smith, against the defendant Marcellus Smith and A. M. Thompson, his administrators, for an accounting, and the controversy related principally to the question whether certain lands, which the father divided among his children, were to be regarded as gifts or advancements, and, if the latter, the prayer is to have them account for the value thereof, and for the value of the use and occupation of the lands before the title thereto was completely vested by conveyances.

[1] An "advancement" is said to be an irrevocable gift in praesenti of money or of property, real or personal, to a child by a parent, to enable the donee to anticipate his inheritance or succession to the extent of the gift. 14 Cyc. 162. It is thus defined by

Chief Justice Pearson in *Hollister v. Attmore*, 58 N. C. 373: "An advancement is a gift by a parent to a child, of a portion of his estate, in anticipation of the whole or a part of the share to which the child would be entitled at the death of the parent, under the statute of distribution, in the event of his dying intestate." And by Chief Justice Ruffin in *Meadows v. Meadows*, 33 N. C. 148: "Advancements are understood to be gifts of money or property for the preferment and settlement of the child in life, and not such as are mere presents of small value, or such as are required for the maintenance or education of the child, which the law throws on the father, at all events, or such small sums as are given to the child to defray the expenses of the ordinary pleasures and amusements of youth in their rank of life." It has been said that, "if a son has deserved a good turn at his father's hands, this is no advancement, but a recompense of that which was formerly deserved." *Hollister v. Attmore*, supra, at page 375. See *Tart v. Tart*, 154 N. C. 502, 70 S. E. 929, Ann. Cas. 1912A, 952.

If the lands so transferred by J. R. Smith to his children are not advancements, it is conceded that they were absolute gifts, and the donees are not therefore accountable for their value or the value of their use.

[2] The doctrine of advancements is based on the idea that parents are presumed to intend, in the absence of a will, an equality of division among their children. Hence a gift of property or money is prima facie an advancement; that is, property transferred or money paid in anticipation of a distribution of his estate, but the presumption thus raised may surely be rebutted, and parol evidence is competent for that purpose, even though there is a recital of the consideration in the deed or other instrument of conveyance. *Ex parte Griffin*, 142 N. C. 116, 54 S. E. 1007; *James v. James*, 76 N. C. 331.

[3] Making proper allowance for the burden of proof, as fixed by the presumption arising out of the nature or circumstances of the gift, the question of whether there was a clear gift, a loan, or an advancement is to be settled by ascertaining what was the intention of the parent. *Thornton on Gifts & Advancements*, 591; *Melvin v. Bulard*, 82 N. C. 33; *Harper v. Harper*, 92 N. C. 300; *Kiger v. Terry*, 119 N. C. 456, 26 S. E. 38. This rule as to the intention of the testator is not altered by our statutes. *Revisal*, § 133, and section 1556, Rule 2. So that, as the question is to be determined by the intention of the parent at the time of the transfer, it was, in this case, largely one of fact, which the referee and the judge have settled against the plaintiff, so far as the division of the lands is concerned, and as to the personalty they have properly allowed

the plaintiff the sum of \$50, which they found, as a fact, was required to make an equal distribution among the children. There is no question of law involved.

[4] We will not review the referee's findings of fact, which are settled, upon a consideration of the evidence, and approved by the judge, when exceptions are filed thereto, if there is some evidence to support them. *Boyle v. Stallings*, 140 N. C. 524, 53 S. E. 346; *Harris v. Smith*, 144 N. C. 439, 57 S. E. 122, and cases cited; *Thornton v. McNeely*, 144 N. C. 622, 57 S. E. 400; *Frey v. Lumber Co.*, 144 N. C. 759, 57 S. E. 464.

There is an exception as to the payment of a note for \$350, given by defendant Marcellus Smith to his father, J. R. Smith. The referee and judge found that this note had been paid by the maker to his father; the plaintiff having contended and offered much and very strong and persuasive testimony to show that it had not been. The referee and judge might very well have found as a fact that the payments, though alleged by Marcellus Smith to have been made by him, were not in truth so made, and such finding would have been fully supported by the evidence; but this exception comes within the same rule we have just stated and applied to the other branch of the case, and the finding must stand, as we will not review it. We concur with the referee and judge in their finding of fact that the transfers of land were clear gifts, for the purpose of equality in the division of his real estate by the donor among his children, and not advancements, and we can only say, as to the note, that plaintiff was merely unfortunate in not being able to convince the learned judge and referee that it had not been paid. In both instances, though, the plaintiff must abide by their decision as to the facts, and this overrules both exceptions.

There is no error in the case, and we therefore affirm the judgment.

Affirmed.

(159 N. C. 573)

TOWN OF WARSAW v. MALONE.

(Supreme Court of North Carolina. Oct. 9, 1912.)

1. MUNICIPAL CORPORATIONS (§ 918*)—FISCAL MANAGEMENT—ISSUANCE OF BONDS—SUBMISSION TO POPULAR VOTE.

Priv. Laws 1909, c. 204, providing for the issuance by the town of Warsaw of bonds to establish better sewerage and drainage systems and other public improvements, and requiring the question of issuing the bonds to be submitted to the qualified voters of the town, is a restriction on the power of the town to issue bonds without submitting the question to popular vote, even for necessary purposes, for which, in the absence of statute, the town would have the power to issue bonds.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1919-1923; Dec. Dig. § 918.*]

2. MUNICIPAL CORPORATIONS (§ 918*)—FISCAL MANAGEMENT—ISSUANCE OF BONDS—SUBMISSION TO POPULAR VOTE—"PUBLIC IMPROVEMENT."

The construction and maintenance of bridges is a "public improvement" within Priv. Laws 1909, c. 204, requiring the submission to a popular vote of the question of the issuance of bonds by the town of Warsaw for sewerage and drainage systems and other public improvements.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1919-1923; Dec. Dig. § 918.*]

For other definitions, see Words and Phrases, vol. 6, pp. 5791, 5792.]

Appeal from Superior Court, Duplin County; Carter, Judge.

Action by the Town of Warsaw against C. N. Malone. Judgment for defendant, and plaintiff appeals. Affirmed.

Johnson & Johnson, of Warsaw, for appellant. Charles N. Malone, of Asheville, for appellee.

CLARK, C. J. This is an action submitted without controversy under Rev. § 803. In July, 1912, the commissioners of the town of Warsaw passed an ordinance to issue \$5,000 in town bonds running 30 years and bearing 6 per cent. interest, to be sold at not less than par, "the proceeds to be used exclusively for the purpose of building and maintaining bridges in the town of Warsaw." The purchaser declined to accept the bonds, alleging their invalidity, and this is an action to compel him to do so.

[1, 2] The defendant does not contest that bridges are a necessary municipal expense, and that the town, in the absence of legislative restriction, would have the power to issue bonds for that purpose (*Fawcett v. Mt. Airy*, 184 N. C. 125, 45 S. E. 1029, 63 L. R. A. 870, 101 Am. St. Rep. 825), but he relies upon chapter 204, Private Laws 1909. The preamble and section 1 of that act provides for the issuance by the town of \$5,000 in bonds "to establish a better sewerage system and drainage system and other public improvements." The act provides that the question of the issuance of the said bonds should be first submitted to the qualified voters of said town. The above act of 1909, which fixes the amounts of bonds that could be issued and the purposes for which the proceeds could be used, and requiring the issuance to be first submitted to the qualified voters of the town, was intended as a restriction upon the power of the town to issue bonds even for necessary purposes. *Murphy v. Webb*, 156 N. C. 402, 72 S. E. 460. The words "sewerage system and drainage system and other public improvements" include bridges which are certainly a public improvement. And this attempted issue of bonds in excess of the \$5,000, and without submitting their issuance to the qualified voters, is in violation of the act which has thus restricted the amount of the bonds that could be is-

sued for public improvements, and which required even those to be submitted to the popular vote.

The judgment below which held the attempted issue of these bonds to be invalid is affirmed.

(93 S. C. 12)

MIDLAND TIMBER CO. v. J. F. PRETTYMAN & SONS.

(Supreme Court of South Carolina. Oct. 14, 1912.)

SPECIFIC PERFORMANCE (§ 106*)—RIGHT TO SUCH PERFORMANCE—COMPLETE DETERMINATION—CONTROVERSY.

In 1902 the owner of land conveyed the timber thereon by deed to plaintiff's grantor, which provided that it, its successors, or assigns, should have 10 years in which to cut and remove the timber, and such additional time as they desired on the payment of specified sums. Before the expiration of 10 years from the making of the deed, plaintiff contracted to convey the timber to defendant, and also notified the grantor of its desire for an extension of time, and tendered the required sum. Code Civ. Proc. 1902, § 143, provides that the court may determine any controversy between the parties before it, when it can be done without prejudice to the rights of others, or by saving their rights. *Held* that, as the determination would necessarily affect the rights of the grantor, specific performance of the contract between plaintiff and defendant should not be decreed in a suit to which the grantor was not a party.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 342-351; Dec. Dig. § 106.*]

Appeal from Common Pleas Circuit Court of Berkeley County; S. W. G. Shipp, Judge.

Controversy between the Midland Timber Company and J. F. Prettyman & Sons, submitted without action. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

Legare Walker, of Summerville, for appellant. Wilcox & Wilcox, of Florence, L. D. Lide, of Marion, and Octavus Cohen, of Charleston, for respondent.

WATTS, J. This is an appeal from a decree of his honor, Judge Shipp. The cause before him was a controversy submitted without action, and heard by him on an agreed state of facts, entered into between the appellant and respondent. The controversy involved the construction of a deed for timber on certain lands and the right of way for a railroad over and through the lands. On January 24, 1902, Emma A. Heape made and delivered to the Atlantic Coast Lumber Company the deed in question, which was duly recorded on February 22, 1902, and subsequently conveyed by them to the Midland Timber Company on June 30, 1910. The Midland Timber Company entered into a contract in writing and in proper form, by which J. F. Prettyman & Sons contracted to buy from the Midland Timber Company, and the

Midland Timber Company contracted to sell, the property so conveyed by Emma A. Heape. It is agreed in the agreed state of facts that the contract is valid and binding on both parties.

The Midland Timber Company is a corporation owning timber and timber lands, and Prettyman & Sons is a corporation engaged in the business of cutting, manufacturing, and selling timber and lumber. Under the deed of Heape to the Atlantic Coast Lumber Company, there is this: "Second. That said second party, its successors or assigns, shall have, and the same is hereby granted to it or them, the period of ten (10) years in which to cut and remove the said timber from said land, and that in case said timber is not cut and removed before the expiration of the said period, then that the said second party, its successors or assigns, shall have such additional time therefor as it or they may desire, but in the last-mentioned event the said second party, its successors or assigns, shall during the extended period pay interest on the original purchase price yearly, year in advance, at the rate of six per cent. per annum." In the same section, after the words "ten (10) years," and before the words "in which to cut," these words are stricken out, "beginning from the time the said second party, its successors or assigns, begins the cutting and removing of the aforesaid timber from the tract or tracts of lands above described." We find, also, in the deed that the "first party further reserves the right to use any timber from the aforesaid tract or tracts of land for ordinary plantation purposes, connected with the said land, this reservation not to include the right to clear the said land or any of it." The land contains 324 acres, more or less, and the amount paid by the Atlantic Coast Lumber Company to Emma A. Heape was \$300. The fourth section in the deed from Heape to the Atlantic Coast Lumber Company is this: "Fourth. That the said first party shall and will promptly pay all taxes that are now due or that hereafter may become due on the said land and timber." That neither the grantee nor his assigns, on January 18, 1912, or January 24, 1912, had commenced to cut and remove the said timber mentioned and described in the conveyance from Heape. That the Midland Timber Company desired to have 10 years' additional time for the purpose of cutting and removing the timber, and notified Heape in writing, on January 18, 1912, and at the same time tendered her \$18 for one year in advance, being 6 per cent. on the original purchase price of \$300, and obligated itself in said notice to make like payment yearly, by year, in advance, for the extension of 10 years.

A like tender was made to and refused by Heape on January 24, 1912. The Midland Timber Company tendered a deed to Prettyman & Sons as in compliance with its con-

tract to sell, and Prettyman & Sons declined to accept, as it doubted the right of the Midland Timber Company to demand an extension of 10 years beyond the original period named in the deed to the Atlantic Coast Lumber Company, for the purpose of cutting and removing the timber and raised this question. Upon the agreed state of facts, his honor made a decree, on May 23, 1912, sustaining the contention of the respondent, the Midland Timber Company, and decreeing that the appellant should accept the title tendered it by the Midland Timber Company and pay the purchase price as fixed by the contract between them. From this decree appeal is taken.

It will be observed that, notwithstanding the fact that Emma A. Heape has a vital interest in the questions involved in this appeal, the question as to whether she is a necessary party is not raised by any of the parties of record; and, as she is not a party to the action, any judgment herein is not intended in any manner to affect her rights. At the same time, we do not think we should determine this vital question as to the right of the parties to have the time extended, unless she is brought before the court. She has a vital interest in this serious question. The suit is in the nature of a suit to require specific performance; and if this court should determine this question it might seriously handicap her in any future litigation she might have with these parties, should the decision be contrary to her interests.

Justice Hydrick, in *Marthinson v. McCutchen*, 84 S. C. 265, 66 S. E. 123, uses this language in reference to specific performance: "It is well settled that specific performance rests in the sound discretion of the court, and that the court will not decree specific performance of hard and unconscionable bargains, or where the price is so grossly inadequate as to shock the conscience and raise a presumption of fraud (*Reese v. Holmes*, 5 Rich. Eq. 571), and certainly not where it appears that the contract sought to be enforced does not express the true agreement of the parties, either by reason of fraud, accident, or mistake. The general rule is that, to merit the interposition of the court, it must appear that the contract is fair, just, and equitable. *Cabeen v. Gordon*, 1 Hill, Eq. 51; *Holley v. Anness*, 41 S. C. 354, 19 S. E. 648."

Section 143 of Code of Laws, p. 73, says: "The court may determine any controversy between the parties before it, when it can be done without prejudice to the rights of others, or by saving their rights; but when a complete determination of the controversy cannot be had without the presence of other parties the court must cause them to be brought in."

In our opinion, there cannot be a complete determination of the controversy without

the presence of Emma A. Heape, and she should be brought in. It is the judgment of this court that the decree of the circuit court be reversed and case remanded, without prejudice to the rights of either party; and that either or both of them have the right to make Emma A. Heape a party to the suit.

GARY, C. J., and HYDRICK and FRASER, JJ., concur. WOODS, J., disqualified.

(93 S. C. 17)

WILSON v. SOUTHERN RY. CO. et al.
(Supreme Court of South Carolina. Oct. 14, 1912.)

RAILROADS (§ 400*)—PERSON ON TRACK—
NEGLECT—NONSUIT.

Where, in an action for the death of plaintiff's decedent from being struck by a train while returning to the station of his destination after being carried beyond by the train on which he had been riding, there was evidence from which it might be inferred that, when struck, he was lying on the track where he could have been readily seen by the engineer and fireman had they not been negligent, it was error to grant a nonsuit.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1365-1381; Dec. Dig. § 400.*]

Appeal from Common Pleas Circuit Court of York County; Ernest Moore, Special Judge.

"To be officially reported."

Action by C. Scott Wilson, as administrator of D. R. Wilson, against the Southern Railway Company and another. From an order of nonsuit, plaintiff appeals. Order set aside, and case remanded for new trial.

Henry & McLure, of Chester, for appellant. McDonald & McDonald, of Winnsboro, for respondents.

GARY, C. J. This is an action for damages alleged to have been sustained on account of the wrongful acts of the defendants in causing the death of plaintiff's intestate.

The allegations of the complaint, material to the questions involved, are as follows:

"(1) That heretofore, to wit, on the 31st day of October, 1906, one D. Rainey Wilson embarked as a passenger on a train of the defendant Southern Railway Company on said line of railway, of which train the defendant Ed. S. Mott was conductor and in charge, for passage from Columbia to Smith's Turnout, and paid his fare to that point, and notified the defendant Southern Railway Company, its officers and agents, of his wish to leave said train at that point, but was carried past said station to Ogden, near which station said D. Rainey Wilson, at the invitation of the agents of the defendant Southern Railway Company, alighted from said train, and was seen afterwards while still on the premises of the defendant Southern Railway Company as a passenger, and while leaving the same for his home,

and proceeding to make use of the nearest highway crossing for that purpose, was struck by another train of said Southern Railway Company operated in a wantonly, reckless, and negligent manner, was thereby horribly mangled and killed almost instantly, to the damage of the plaintiff and those for whom he sues, \$20,000. (2) That the death of the said D. Rainey Wilson as aforesaid was caused by the willful, wanton, and negligent conduct, omissions, and derelictions of the defendant Southern Railway Company, its servants and agents, as proximate causes thereof (a) in failing to notify the said D. Rainey Wilson of the approach to and arrival at his destination of said train on which he was a passenger; (b) in stopping the said train at Ogden in a dangerous and unusual place, and there inviting the said D. Rainey Wilson to alight; (c) in operating the train that struck the said D. Rainey Wilson in a willful, wanton, reckless, and negligent manner, in failing to give the signals required by law at highway crossings; (d) in failing to give the said D. Rainey Wilson a reasonable opportunity to alight at his destination, and by the joint and concurrent willfulness, wantonness, and negligence of the defendants in failing to notify the said D. Rainey Wilson of the arrival of the train on which he was riding at his destination, and in stopping said train at a dangerous and unusual place at Ogden, and inviting said D. Rainey Wilson there to alight, as proximate causes of said death."

The defendants served separate answers to the complaint, and merely interposed a general denial of its allegations. At the close of the plaintiff's testimony, the defendants made a motion for a nonsuit, on the ground that the undisputed evidence showed that the plaintiff's intestate was a trespasser, and that there was no testimony tending to show the breach of any duty which the defendants owed him as such.

In granting the motion for a nonsuit, his honor, the presiding judge, assigned the following reasons: "I will have to grant the motion for a nonsuit. I don't think there is any evidence of such willfulness, wantonness, or recklessness as would make them responsible to a man who was a trespasser on the track, and I think the evidence tends to show, *and only tends to show*, that at the time he was struck the deceased had ceased to be a passenger." (Italics ours.)

The appellant's first and second exceptions assign error on the part of his honor, the presiding judge, in holding: "That the deceased was a trespasser on the track of the defendant, when the questions should have been left to the jury, there being some evidence tending to show that said deceased was a passenger, or at least a licensee. That the evidence tends to show, and only tends to show, that the deceased had ceased to be a passenger, although it appeared by

the evidence that he had been wrongfully carried past his destination, and discharged at the wrong station, and while in the act of returning to his proper destination was struck without warning, or even being seen by those operating the passenger train; the status of the deceased at the time of the injury thus being a question of fact for the jury." There was testimony to the effect that the plaintiff's intestate purchased a ticket to Smith's Turnout, but that the defendant failed to give him notice of the station, when the train arrived at that point, and he was carried to Ogden, the next station, which was about three miles from Smith's Turnout; that the train ran into a side track at Ogden, where it remained about 30 minutes, waiting for the train to pass, which was going in an opposite direction; that plaintiff's intestate was drinking heavily, after leaving Columbia, where he had gone that morning to attend the Agricultural Fair; that, when the expected train arrived, it failed to give the required signals in approaching the station; that plaintiff's intestate left the train upon which he was a passenger before the expected train arrived, and was not seen alive thereafter, but one of his legs was discovered about 300 or 400 yards from the station on the railroad track, in the direction of Smith's Turnout, the main part of his body was also found upon the railroad track, about 50 yards nearer Smith's Turnout, and other parts of his body were scattered along the railroad track for several hundred yards nearer Smith's Turnout; that there is a path near where the leg was found, leading from the dirt road to the railroad track, and which has been used for years by those approaching and leaving the station.

The following testimony of Wm. O. Pearson, a witness for the plaintiff, is explanatory of this locality: "Q. Do you know where that path comes up from that neighborhood road to the depot? A. Yes, sir. Q. How long has that been used Mr. Pearson? A. Oh, ever since I can mind. Q. What did you say? A. I guess about 10 or 15 years. That is as far as I can mind about it. Q. The public used it going to the station? A. Pretty generally; yes, sir. Q. Do you recollect whether a leg was found north of where that goes out to the road or not? A. Found south of the path, where it goes up the railroad. Q. How far south of the path? A. I reckon something like 10 or 15 feet or yards, or something like that, right close to it. Q. Ten or 15 feet south of the path? A. Yes, sir. Q. A person in getting off at Smith's Turnout—oh, I mean at Ogden—which way would he go in getting to Smith's? A. They would go back down the railroad, if they were wanting to go. That would be the straightest way. Q. Have you any public road leading directly from there to Smith's? A. There is some roads go down the railroad. There is no public road,

unless you get in the old Saluda road. That is a public road. Q. That is considerably out of the way? A. Yes, sir, about a mile." Plaintiff's attorneys then propounded this question to the witness: "Q. People making time from Ogden to Smith, which way do they generally go?" Upon the objection of the respondent's attorneys, the court ruled that the testimony, which the plaintiff's attorney sought to introduce, was inadmissible. The motion for a nonsuit was granted upon a misinterpretation of the law. His honor, the presiding judge, did not grant the motion on the ground that the undisputed testimony showed that the plaintiff's intestate had ceased to be a passenger, but emphasized the fact that it only tended to show that such relation no longer existed between him and the railroad company. In other words, he passed upon the sufficiency of the testimony, which can be determined only by the jury.

There is another reason why the nonsuit was improperly granted. There was testimony tending to show that the defendant failed to announce the station at Smith's Turnout within the hearing of plaintiff's intestate, or those in the car with him. The complaint alleges negligence in this respect. The rule is thus stated in 5 Enc. of Law, 565: "It is a well-settled principle of law that a railroad company carrying passengers, in order to afford them opportunity to leave the train at their places of destination, is bound to have the name of the different stations announced upon the arrival of the train, and then to stop the train, for a sufficient length of time, for passengers to get off with safety, and that a railroad company is liable for any loss or injury, which may result to a passenger, by reason of a violation of this duty."

There is yet another reason why there was error in granting the motion for a nonsuit. After discussing the mangled condition of the dead body, the respondent's attorney thus explains the manner in which the accident occurred: "These physical facts appear to be conclusive, as to his position on the track, when he was struck by the train, as it is almost impossible to imagine any other position in which his body could have been that would have produced the injuries testified by these witnesses, except that he was lying down on the track, at the time he was struck." Let us even assume that he was a trespasser, and was killed while lying on the railroad track in a drunken and helpless condition. It does not, however, necessarily follow that the defendant could run over him with impunity. The testimony tended to show that it was a bright night; that the track was straight for about 700 yards from the place where the leg was found, towards the north, and was straight for more than 2 miles in the direction of Smith's. The rule in such cases is thus stated in a note to Cen-

tral R. R. v. Vaughn, 80 Am. St. Rep. 54, by Mr. Freeman, and quoted with approval in Smalley v. Railway, 57 S. C. 243, 35 S. E. 489, and Hiltiwanger v. Railway, 64 S. C. 7, 41 S. E. 810: "The true principle it is conceived is that the engineer should see that the track is clear; but that, when an obstruction is perceived, the proper course to adopt will depend upon whether it is a living or inanimate object, whether it is an intelligent human being, under ordinary circumstances, of discerning the means of securing safety, or a brute which has no guide but mere instinct. If the object seen is an intelligent human being, it seems to be generally agreed that the engineer has the right to presume that he will get out of harm's way before the engine reaches him, and that it is not negligence to act upon that presumption." In the case of Sentell v. Railway, 70 S. C. 183, 49 S. E. 215, the court uses this language in regard to a trespasser: "It makes no difference if the trend of the testimony was that Sentell was a naked trespasser; the defendant owed him no duty, viz., that he should not be treated by the defendant, without some regard to the dictates of humanity. There was positive testimony that the engineer could have seen Mr. Sentell in plenty of time to have stopped the train before reaching him and thus have saved his life. All in all, there was plenty of testimony to show negligence. Therefore the special judge should have refused the motion for nonsuit."

The last question is whether there was error on the part of the circuit judge in refusing the plaintiff's motion to amend the complaint, so as to conform to the facts proven. The reason assigned by him was that the amendment would substantially change the cause of action. Ordinarily motions to amend are addressed to the discretion of the presiding judge, and his rulings are not subject of appeal; but, if his ruling is based upon an erroneous principle of law, there may be an appeal. In the present case, an order conforming the complaint to the facts proved would not have changed substantially the plaintiff's cause of action. The exceptions raising this question are therefore sustained.

It is the judgment of this court that the order of nonsuit be set aside, and the case remanded for a new trial.

HYDRICK and WATTS, JJ., concur.

WOODS, J. (concurring in the result). There is no evidence whatever that the defendant's agent did not call out in the coach where Wilson was the station, Smith's Turnout, which was his destination; on the contrary, the plaintiff introduced evidence of other passengers who heard the station called in other coaches. Wilson was not a pas-

senger when he was killed, for the train had stopped at Ogden between 20 and 45 minutes before, and he had left the car and proceeded on his way towards home, several hundred yards up the track. Even if Wilson's station was not called, that negligence was not the proximate cause of his standing or lying on the track, and being run over at the next station. One or two of plaintiff's witnesses stated that they did not hear the train which probably ran over Wilson give the signal for Ogden station, but another testified positively that the signal was blown, and the engine was running with a brilliant electric headlight. The signal, the light, and the noise of the train were sufficient to warn even a licensee to get off the track if in his senses; and, if the defendant was merely negligent, it was contributory negligence in the deceased not to get off the track on the approach of the train, or to lie on the track in such a condition that he would be heedless of its approach.

But contributory negligence is not a defense against willfulness or wantonness. The duty of a locomotive engineer and a fireman to keep a vigilant lookout ahead, for the sake of passengers as well as those who may be helpless on the track, is urgent, and the failure to keep a lookout may be evidence of recklessness or wantonness. In this case the night of the fatality was bright, and the locomotive had a powerful electric headlight. There was evidence from which it might be inferred that Wilson was lying on the track asleep or drunk, or that he was crossing the track on his way home, and that the place was one where persons were to be expected crossing the track. The evidence also tended to show that those in charge of the engine did not see Wilson at all, for the train did not slow up or stop. From all this the jury might infer that no lookout was kept, and that this was a reckless disregard of the lives of those who might be on the track even as trespassers. Sentell v. So. Ry., 70 S. C. 183, 49 S. E. 215. The evidence warrants, also, a rejection of such an inference, but whether the inference should be accepted or rejected was a question for the jury.

FRASER, J., concurs.

(23 S. C. 45)

SMALLS v. LA ROCHE.

(Supreme Court of South Carolina. Oct. 17, 1912.)

1. EJECTMENT (§ 111*)—COMPLAINT—ISSUES AND PROOF.

Plaintiff in ejectment under his general allegation of title and right of possession to the land described and represented on the plat attached to the complaint was entitled to prove title to the land from any source, whether by conveyance or adverse possession, and hence a reference to the land in the complaint as "Lot No. 2," which was the number of the

tract shown on an original survey plat which did not conform to the plat attached to the complaint, did not render a verdict finding for plaintiff the "land in dispute" invalid for uncertainty because its limits as claimed did not correspond to the original plat.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. §§ 327-345; Dec. Dig. § 111.*]

2. APPEAL AND ERROR (§ 215*)—OBJECTIONS IN LOWER COURT—INSTRUCTIONS—MISUSE OF WORDS.

Manifest inadvertence in the use of the word "defendant," where "plaintiff" was intended in an instruction, was not ground for reversal, where the court's attention was not called to the error at the time.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1309-1314; Dec. Dig. § 215.*]

Appeal from Common Pleas Circuit Court of Charleston County; Ernest Gary, Judge. "To be officially reported."

Action by Guy Smalls against John J. La Roche. Judgment for plaintiff, and defendant appeals. Affirmed.

Wm. Henry Parker, of Charleston, for appellant. Logan & Grace, of Charleston, for respondent.

WOODS, J. The appeal of the defendant in this action for the recovery of possession of a small triangular strip of land involves the sufficiency of the form of the verdict and the correctness of some propositions of law laid down in the charge.

The plaintiff and defendant bought adjoining tracts of land from F. Schaffer, and the dispute arose over the boundary line. The jury found a verdict in this form: "Find for the plaintiff the land in dispute and two hundred dollars damages." A motion for a new trial was refused on condition that the plaintiff should remit \$100 from the damages assessed by the jury. The condition was complied with, and the judgment entered accordingly. The defendant contends that the verdict should have been set aside for uncertainty, because in limits and area "the land in dispute" as described in the complaint does not correspond with "the land in dispute" as represented on the plats, and the plats do not correspond with each other. Analysis of the issues will show that the objection is not well founded. F. Schaffer had a tract of 987 acres surveyed and divided by Simons & Howe, surveyors, in January, 1881, On January 20, 1892, he conveyed to Guy Smalls, the plaintiff, one of the lots of land, designated on the plat as No. 22, containing 20 acres, in pursuance of an agreement to sell under which Smalls had been in possession for several years. On August 22, 1907, the defendant, John J. La Roche, acquired his title from Schaffer to the lots designated on the Simons & Howe plat as "lots 23, 24, 25, 26, and the area to the southeast thereof." One of the boundaries of this purchase was the Rockville road, and another was "lands of Guy Smalls known as lot 22." The

plaintiff thus sets out the basis of his claim and the description of the land in the first paragraph of the complaint: "That he is now, and at the times hereinafter mentioned was, the owner of and entitled to immediate possession of a certain tract of land on Wadmalaw Island, in the county of Charleston, state of South Carolina, and has been the owner of and in possession of said tract of land for more than twenty years last past, to wit, from on or about the month of June, 1881, which said tract of land is described as follows: Being the western part of lot No. 22; measuring and containing on Rockville road 1.85 chains, and in depth running to the southwest corner of said lot No. 22 52.5 chains, more or less; butting and bounding east on remaining portion of lot No. 22; south by Cherry point; north by Rockville road; west by lot No. 23, which said lot of land is shown by being colored red on the plat hereto attached and made a part of this complaint." The plat referred to in the complaint is not that of Simons & Howe, but a plat made for plaintiff in 1909. Commencing with what appears to be an undisputed corner on the Rockville road, the variance in the plats is as follows: The Simons & Howe plat represents the distance to the line of Guy Smalls' lot 22 as 806½ feet; another, the Barbot plat, introduced by the plaintiff, represents it as 670 feet; and the plat attached to the complaint represents it as 693 feet. Had the jury intended to limit the holding of the plaintiff to lot 22 as laid down on the Simons & Howe plat, they must have found a verdict for the defendant; for measuring the defendant's line 806½ feet from the corner on the Rockville road would have brought the disputed strip within his lines. The Barbot plat introduced in evidence representing defendant's line as 670 feet from the corner on the Rockville road must be rejected, for it gave the plaintiff more than he claimed in his complaint. The Simons & Howe plat and the Barbot plat being thus necessarily eliminated, it is clear that the verdict must be referred to the land in dispute represented on the plat attached to the complaint. Thus all uncertainty disappears, and the meaning of the verdict is made clear.

[1] It is true that the plaintiff in his complaint describes his land as "lot No. 22," but he sets out its boundaries and dimensions by a plat attached, which did not correspond to the Simons & Howe plat. Under his general allegation of title and right of possession to the land described and represented on the plat attached, he had a right to prove title to the land so described from any source, whether conveyance or adverse possession; and the issue of title by adverse possession was therefore properly submitted to the jury. It may be that the plaintiff might have been required to make his com-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r indexes

plaint more definite and certain by stating whether he claimed only lot 22 as laid down on the Simons & Howe plat, but that point was not before the court.

[2] The court, in the following sentence of the charge, by a manifest inadvertence, used the word "defendant" where we have italicized it for "plaintiff," for the plaintiff and not the defendant had set up adverse possession, and the defendant had claimed that the plaintiff, and not himself, had dispossessed himself of the disputed land at the demand of the true owner, and had thus acknowledged defendant's title and broken the continuity of the alleged adverse possession: "Now the defendant's position is that he did not trespass upon the plaintiff's land, but that he is simply asserting his title to that which under his deed he is entitled to, and the possession which the *defendant* sets up is not continuous for 10 years. He admits that by dispossessing himself he recognizes the title of the plaintiff in that period, if such is a fact, and you are to say whether that is a fact." If counsel for defendant thought that the inadvertence of saying "defendant" when "plaintiff" was meant was not manifest to the jury, he should have called it to the attention of the circuit judge.

Affirmed.

GARY, C. J., and HYDRICK and FRASER, JJ., concur. WATTS, J., did not sit.

(93 S. C. 125)

HENRY v. SOUTHERN RY. CO.†

(Supreme Court of South Carolina. Oct. 10, 1912.)

1. DAMAGES (§ 55*)—MENTAL ANGUISH.

In the absence of statute, damages for mental anguish cannot be recovered in an action for injuries to personal property.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. § 100; Dec. Dig. § 55.*]

2. PLEADING (§ 381*)—ISSUES AND PROOF.

The trial court may properly exclude testimony tending to support irrelevant or immaterial allegations allowed to remain in the complaint or answer.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. §§ 1238, 1253-1279; Dec. Dig. § 381.*]

3. EVIDENCE (§ 501*)—OPINION EVIDENCE—NONEXPERT TESTIMONY.

A nonexpert witness cannot give an opinion, unless he states the facts on which it is based.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 2292-2305; Dec. Dig. § 501.*]

4. APPEAL AND ERROR (§ 179*)—RECEPTION OF EVIDENCE—EXAMINATION OF WITNESSES.

A party cannot complain of the exclusion of testimony, where the questions to elicit that testimony were never propounded to the witness.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 1137-1140; Dec. Dig. § 179.*]

5. TRIAL (§ 267*)—INSTRUCTIONS—MODIFICATION OF REQUEST.

Where the court fully covered the law in its charge, modifications of requests are not improper.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 668-672, 674; Dec. Dig. § 267.*]

6. WATERS AND WATER COURSES (§ 71*)—DAMAGES FOR POLLUTION OF WATER.

Where, at the time plaintiff rented a pasture, which was upstream from defendant's reservoir, the dam was already constructed, that fact gave him sufficient notice to put him on inquiry; and he cannot recover for injuries from the pollution of the stream by matter discharged into the stream by a third party and collected by the dam, save upon showing that defendant negligently constructed and maintained the dam, or willfully or wantonly operated it.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Dec. Dig. § 71.*]

7. WATERS AND WATER COURSES (§ 74*)—POLLUTION OF WATERS—RIGHT OF ACTION.

Where defendant erected a dam or reservoir under a valid agreement with the owner of the land, his entry being rightful, a tenant of the owner cannot maintain an action for injuries caused by the pollution of the stream by refuse discharged into the stream by a third person and collected by the dam, so long as defendant was not negligent in the erection of the dam.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. §§ 62, 63; Dec. Dig. § 74.*]

8. DAMAGES (§ 91*)—EXEMPLARY DAMAGES.

An act based on the belief that it was legal and done for the sole purpose of protecting the actor's right will not subject him to punitive damages.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. §§ 193-201; Dec. Dig. § 91.*]

9. WATERS AND WATER COURSES (§ 167*)—RIGHT OF EASEMENT.

One having an easement for the maintenance of a dam may do all acts necessary for the complete enjoyment of the same, provided there is no negligence.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. §§ 192, 194-202; Dec. Dig. § 167.*]

10. WATERS AND WATER COURSES (§ 156*)—GRANT—RECORDATION.

An instrument granting an easement for the maintenance of a dam need not be recorded.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. §§ 158, 174-183; Dec. Dig. § 156.*]

Appeal from Common Pleas Circuit Court of Fairfield County; John S. Wilson, Judge.

Action by Edward Henry against the Southern Railway Company. From a judgment for defendant, plaintiff appeals. Affirmed.

T. M. Cathcart, of Winnsboro, for appellant. McDonald & McDonald, of Winnsboro, for respondent.

WATTS, J. This was an action by the plaintiff against the defendant for actual and exemplary damages, and was tried before the honorable John S. Wilson, presiding judge, and a jury at Winnsboro, S. C., and resulted in a verdict for defendant. It

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

† Rehearing denied November 1, 1912.

appears from the evidence and pleadings in the case that the defendant entered into an agreement with W. B. Creight in 1901, and by that agreement the defendant acquired the right to erect and maintain a dam on a stream on Creight's land, for the purpose of operating a pumping station to supply its tank of water. The complaint alleges that the Fairfield Cotton Mills were situated on this stream, some distance above this dam, and the refuse from the mills was discharged into this stream. Plaintiff was in possession of a small pasture on this stream, which he had rented from Creight (Creight having died after making agreement with defendant, leaving no will affecting this property, and leaving as his heirs at law a widow and four children); that plaintiff's cattle drank from the water collected in defendant's dam; that in 1905 defendant raised this dam two feet, and it is alleged that this act on defendant's part caused the refuse from the factory to be deposited in the dam, causing the water to be poisoned and polluted, and causing the death of some valuable cattle. Plaintiff alleges that the construction and enlargement of the dam was both willful and negligent. The answer was a general denial, and at the trial the agreement of defendant with Creight was introduced, and defendant introduced testimony showing the death of the cattle was caused by Texas fever. After verdict, plaintiff appeals and files 27 exceptions. These exceptions raise practically four points, and we will adopt the classifications as made on argument before us, as far as possible.

First error, in excluding testimony and restricting cross-examination, as raised by exceptions 1, 2, 3, 4, 5, 6, 7, and 8.

[1] Exception 1 cannot be sustained, for the reason that damages for mental anguish, in the absence of bodily injury, cannot be recovered in cases of this character, except under special statutes.

[2] Even though it was alleged in the complaint that the plaintiff had suffered mental anguish, the court was not bound to receive evidence in support of it. In *Martin v. Railway*, 70 S. C. 11, 48 S. E. 616, the court said that the circuit court has power to exclude testimony tending to support irrelevant or immaterial allegations allowed to remain in the complaint or answer, and that it is not bound to receive such evidence. This is cited with approval in *Bromonia Co. v. Drug Co.*, 78 S. C. 485, 59 S. E. 364.

[3] Exception 2 cannot be sustained, as his honor ruled that a nonexpert witness could not give an opinion, unless he had detailed facts to base it on. *Jones v. Fuller*, 19 S. C. 70, 45 Am. Rep. 761; *Chemical Co. v. Kirven*, 57 S. C. 448, 35 S. E. 745.

Exceptions 3, 5, and 6, are overruled. His honor was correct in ruling out the testimony. *Hand v. Power Co.*, 90 S. C. 267, 73 S. E. 187.

Exception 4 is overruled, for the reason that his honor was satisfied that the wit-

ness had shown sufficiently that he was an expert on Texas fever to express an opinion, and let it go to the jury for what it was worth. In addition to this, the witness did not answer the opinion objected to, and only answered questions to which no objection was made.

[4] Exception 7 is overruled. The testimony sought to be introduced was incompetent and irrelevant, and was properly excluded; and an examination of the record will show that plaintiff's attorney failed to attempt to carry the cross-examination of this witness any further, and did not even ask him the questions which he complains he was not allowed to ask.

Exception 8 is overruled as the testimony of the witness was not in reply to any of the testimony brought out by the defendant. The ruling of his honor in reply to the objection was: "Correct, Mr. Cathcart; you proved that this morning, and there is nothing to contradict that." Here we have the ruling of the court to an uncontradicted fact.

Exceptions 9, 13, and 23 allege error in his honor's charge as to punitive damages; and exceptions 14, 17, 19, and 20 allege error in his charge as to negligent construction of dam, etc. Exceptions 9, 10, 11, and 12 in modifying plaintiff's request to charge.

[5] A careful reading of the charge, as a whole, fails to show that his honor committed any reversible error, or that his charge was prejudicial in any way to plaintiff. He fully covered the law of the case in his own language, and had the right to modify the request to charge submitted to him to conform to his ideas of the language he should use to convey his idea to the jury. *Joyner v. Atlantic Coast Line R. Co.*, 91 S. C. 104, 74 S. E. 825.

[6] While one of the requests to charge was modified to make it more favorable to the defendant than defendant was entitled to, and is somewhat in conflict with the case of *Frost v. Berkeley County*, 42 S. C. 409, 20 S. E. 283, 26 L. R. A. 693, 46 Am. St. Rep. 736, and cases therein cited, which holds: "If the owner of the land uses it for the prosecution of a business from which injury to his neighbor's property will necessarily or probably ensue, he is liable for damages so resulting, even though he may have used reasonable care in the prosecution of such business"—we think, however, in view of the fact that the dam was there when plaintiff rented the land, he had such notice as should have put him on inquiry as to the right of defendant, and could only recover damages upon showing that the defendant negligently constructed and maintained the dam, or willfully or wantonly operated it. The charge, as a whole, was in accordance with this principle.

[7] The evidence shows that the plaintiff rented from the widow, who, with four children, were the heirs of Creight, who had made the agreement with the defendant to erect the dam, in his lifetime; that the de-

fendant entered the lands, under this right from the owner, in his lifetime; that the entry of defendant was rightful and not tortious, and so long as the defendant was not negligent in the erection of the dam the plaintiff would have no cause of action for negligence. *Granger v. Telephone Co.*, 70 S. C. 528, 50 S. E. 193, 106 Am. St. Rep. 750; *Mason v. Telephone Co.*, 71 S. C. 153, 50 S. E. 782.

[8, 9] As to the exemplary damages, it is said in *Gwyn v. Telegraph Co.*, 69 S. C. 434, 48 S. E. 460, 87 L. R. A. 111, 104 Am. St. Rep. 819: "An act based on the belief that it was legal and done for the sole purpose of protecting actor's right will not subject actor to punitive or vindictive damages." We have examined the record, and failed to discover any evidence that would warrant a verdict for punitive damages. The testimony shows that the cotton mills and dam were both there when plaintiff leased the pasture, and he had notice of the situation when he put his cattle there.

The defendant has raised the height of the dam. "Where one has an easement, such as a right of way, he has the right to do all things necessary for the complete enjoyment thereof, provided there is no negligence." *Mills v. Railway Co.*, 13 S. C. 99; *Leltzey v. Power Co.*, 47 S. C. 464, 25 S. E. 744, 34 L. R. A. 215; *Jones v. Railroad Co.*, 67 S. C. 181, 45 S. E. 188; *Lampley v. Railroad Co.*, 71 S. C. 158, 50 S. E. 773.

[10] The other exceptions raise the point that the Orelight agreement should have been recorded. There is nothing in this exception, and it is overruled. We have considered all exceptions, and do not think any of them should be sustained.

Judgment affirmed.

GARY, C. J., and WOODS, HYDRICK, and FRASER, JJ., concur.

(93 S. C. 1.)

WATSON v. VIRGINIA-CAROLINA LUMBER CO. et al.

(Supreme Court of South Carolina. Oct. 11, 1912.)

1. CORPORATIONS (§ 120*)—SALE OF STOCK—AGREEMENTS TO REPURCHASE—CONSTRUCTION AND OPERATION.

The owner of all of the preferred stock of a corporation, who also owned a majority of all the stock, sold shares of common stock to plaintiff under an agreement to repurchase when plaintiff's husband should cease to be the general manager of the corporation at a specified price, plus the proportionate share of the net profits of the corporation during the time they were owned by plaintiff and less the proportionate share of any loss during that time. Under the terms of its incorporation, preferred stockholders of the corporation were entitled to 8 per cent. dividends, which in case there were no net profits were to be deferred until there were sufficient profits. While plaintiff was the owner of the stock, no profits were realized. *Held*, that it was intended to permit plaintiff to stand on an equal footing with the preferred stockholders, and the unpaid dividends did not constitute a proper item of loss

in computing the amount to be paid plaintiff for the stock.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. §§ 495, 504; Dec. Dig. § 120.*]

2. CORPORATIONS (§ 121*)—AGREEMENTS TO REPURCHASE—CONSTRUCTION AND OPERATION.

Under such contract, the burden of proving loss was on defendant, and no loss founded on surmise or conjecture could be allowed.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. §§ 504, 505; Dec. Dig. § 121.*]

3. CORPORATIONS (§ 120*)—AGREEMENTS TO REPURCHASE—CONSTRUCTION AND OPERATION.

Under such contract it was not proper to charge, as a loss, depreciation in the value of the corporation's plant to the extent of 10 per cent. in addition to charging \$1,500 expended in improvements as a loss, where the corporation had never before charged up depreciation as a loss.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. §§ 495, 504; Dec. Dig. § 120.*]

4. CORPORATIONS (§ 121*)—AGREEMENTS TO REPURCHASE—CONSTRUCTION AND OPERATION.

Under such contract, loss upon open accounts could not be charged in the absence of testimony that they were made during the time plaintiff's husband was manager, or of any definite evidence that they should be so charged for some other reason.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. §§ 504, 505; Dec. Dig. § 121.*]

5. CORPORATIONS (§ 120*)—AGREEMENTS TO REPURCHASE—CONSTRUCTION AND OPERATION.

Prior to the employment of plaintiff's husband as manager, the corporation had sold timber owned by it to a third person taking his notes for the purchase price to be paid by deducting \$2 a thousand feet for timber manufactured at the company's plant by such third person. The corporation guaranteed to the third person that there were 4,500,000 feet of timber. All the timber cut by the third person was delivered to the company. While plaintiff's husband was manager, the corporation repurchased this timber for the amount still due the company, assuming liability on the notes given on the original purchase. *Held*, that the corporation, having guaranteed the amount of timber and having received back all the timber, had suffered no loss and assumed no new liability by agreeing to pay the balance on the notes, since, being liable for any shortage, this was not a new liability, but one attaching at the time of the original sale.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. §§ 495, 504; Dec. Dig. § 120.*]

Appeal from Common Pleas Circuit Court of Sumter County; S. W. G. Shipp, Judge.

Action by K. E. Watson against the Virginia-Carolina Lumber Company and another. From a judgment for plaintiff, defendants appeal. Affirmed.

This action was for breach of a contract between plaintiff and the Virginia-Carolina Lumber Company, the owner of a majority of the stock of the Sumter Lumber Company, under which plaintiff purchased 66 shares of the common stock of the Sumter Lumber Company paying for 25 shares and giving her note for 41 shares. By the contract it was covenanted and agreed that, if plaintiff's husband ceased to be the manager of the Sumter Lumber Company, and if plaintiff should desire to sell her stock, the Virginia-Carolina

Lumber Company would purchase it, paying for the 25 shares at par in cash, and, if the Sumter Lumber Company had made money between the date of the contract and the date of the resale, the company obligated itself to pay for the 41 shares \$100 a share, plus the proportion of any profit to which those shares would be entitled in the distribution of profit between the shareholders, and, if it should lose money during such time, to pay \$100 a share less the fair share or proportion of such loss which would have to be borne by the 41 shares if the loss was made good by all of the shareholders of the company.

The decree mentioned in the court's opinion was as follows:

"This was an action brought by the plaintiff to require the defendant Virginia-Carolina Lumber Company to comply with the terms of a certain contract, between it and the plaintiff, dated September 1, 1909. The defendants all answered, and the defendant Virginia-Carolina Lumber Company denied that it had obligated itself by said contract to purchase the 66 shares of stock therein mentioned, and alleged that the Sumter Lumber Company had lost money between the periods, September 1, 1909 and May 31, 1910, in such an amount that the plaintiff's proportionate part of said loss exceeded the amount claimed by her. The cause was referred to the master for Sumter county to take and report the testimony. The testimony was taken by the master, except that taken de bene esse, all of which was reported to the court. The cause came on to be heard by me at the summer term of the court of common pleas for the county of Sumter. All of the testimony and exhibits were read, and the cause was fully argued on both sides.

"I agree with the attorneys for the defendants, who stated during the argument that practically the only question before the court was whether the Sumter Lumber Company had lost or made money between the periods above stated. The defendants submitted a statement made by Mr. Charles A. Peple, an expert accountant, which statement upon its face shows a loss between said periods of \$6,536.61.

"It appears from the evidence that when C. G. Watson took charge of the Sumter Lumber Company, as its manager, the real estate upon which the plant of the Sumter Lumber Company is located was being carried on said books at the value of \$3,500. It further appears from the evidence that, when said books were turned over to the expert accountant after the close of Mr. Watson's administration, said real estate had been put down at \$10,000, an increase of \$6,500. It further appears that this fact was called to the attention of Mr. Richard T. Yates, the president of said company, and this item was changed and carried back, and the real estate, instead of being carried at the beginning of Mr. Watson's administra-

tion at \$3,500, was changed to \$10,000. The evidence shows that this real estate gradually increased in value from the time it was bought until Mr. Watson ceased to be manager of Sumter Lumber Company, and that said increase was in about the same proportion for the entire time. This real estate was purchased by the Sumter Lumber Company the last of February in the year 1907 and had been owned by them two years and six months before the beginning of Mr. Watson's administration, and this administration continued for a period of nine months. Accepting Mr. Yates' statement that the real estate had increased in value in the sum of \$6,500 during the two years and six months, and accepting the statement of their witness, Mr. McLaurin, that the same ratio of increase continued during Mr. Watson's administration, I find that the increase in the value of said real estate during the nine months of Mr. Watson's administration would be about \$1,949.94. This increase should have appeared in the inventory of the balance sheets introduced in evidence as a credit, and this would have reduced the loss during said period by said amount. The apparent loss of \$6,536.61, reduced by this amount, would leave an apparent loss of \$4,586.67.

"Under the contract between the plaintiff and Virginia-Carolina Lumber Company, 41 shares of stock therein referred to should bear their proportionate share of this loss. The evidence shows that there were 400 shares of stock of the Sumter Lumber Company, and the proportionate share of the said 41 shares would be $\frac{41}{400}$ of the above-mentioned sum: $\frac{41}{400}$ of \$4,586.67 amounts to \$470.13, which would be the proportionate share which Mrs. Watson should bear of said loss. In addition to the loss which appears from the statements introduced in evidence, the Virginia-Carolina Lumber Company endeavors to have the following items charged as an additional loss during the period of Mr. Watson's administration: $\frac{2}{13}$ of 8 per cent. of \$20,000 preferred stock of Sumter Lumber Company, \$1,200; expense inventory, \$208.50; depreciation in plant, \$3,945; loss on open accounts, \$107.49; loss on Jackson timber deal, \$5,000. This defendant also has attempted to make Mrs. Watson responsible for what it alleges to have lost upon some timber deal in Virginia.

[1] "I find from the evidence that, at the time of the purchase by Mrs. Watson of the 66 shares of stock of the Sumter Lumber Company, the Virginia-Carolina Lumber Company was the owner of all of the preferred stock, and this is the stock upon which they wish to charge Mrs. Watson with dividends. I find from the instrument, increasing the capital stock of the Sumter Lumber Company, that the 8 per cent. dividend should be paid out of the net profits of the corporation, and there is no provision for paying said dividend out of any other sum before the final liquidation of the company. The contract under which this action was brought

provides that the 41 shares of common stock sold to Mrs. Watson should participate in any net profits which said company might realize during the term of said contract, and that it should likewise charge any proportion of any loss in case said company should lose money during the continuance of said contract.

"It appearing from the evidence that the company realized no net profit during this period, and it appearing from the contract between the Virginia-Carolina Lumber Company and Mrs. K. E. Watson that the said company who owned all of said stock agreed to allow the said 41 shares to participate in any profits, and to that extent stand upon an equal footing with the preferred stock, I do not think that the said company can now be permitted to claim a dividend and charge the same against Mrs. Watson's stock. I find that this was not contemplated by the parties when the contract was entered into. In addition to this, I find, as a further bar to this claim, the fact that, according to the terms of the instrument increasing the capital stock of the Sumter Lumber Company, in case there should be no net profits, then the 8 per cent. dividends upon the preferred stock would be deferred until there were net profits sufficient to pay the same, and, in case there should never be such net profits, then the payment should be deferred until final liquidation, and that it then should be paid from the proceeds of said liquidation. Therefore, if Mrs. Watson were now required to bear the proportion of said dividends which her stock represents, the company in subsequent years might realize sufficient net profits to pay all of these dividends, and Mrs. Watson would have sustained an injustice, and, further, this would amount to paying said dividends at this time from the capital stock held by Mrs. Watson when the instrument above referred to provides that the proceeds of the capital stock shall only be accountable for said dividends after final liquidation. Before this time arrives all of said dividends may be paid from the net earnings of the company.

"I therefore hold that this item of \$1,200 is not a proper charge as a loss during Mr. Watson's administration.

[2] "The next loss which the defendant seeks to charge up in addition to the loss shown by the statement is the item of expense inventory, amounting to \$208.50. I find from the testimony of Mr. Peple that there appears upon the books of the Sumter Lumber Company an asset of \$1,251 under the caption of expense inventory. Mr. Peple stated that this was doubtless made up of various items, such as taxes, insurance, interest, etc., which had not yet been expended, and he therefore omitted it from his loss column in the final statement of May 31, 1910. The attorney for the defendant sought to ascertain what proportion of this amount should have been charged into the loss column at that time. The testimony

of Mr. Peple upon this point is not sufficiently definite to warrant me in charging \$208.50 as a loss during this period. It was incumbent upon the defendant to make an accounting and show some definite loss, and I do not feel warranted in charging against the plaintiff any loss founded upon surmise or conjecture. I refuse to allow this item as a loss during Mr. Watson's administration.

[3] "The next item sought to be charged up as a loss is depreciation in plant account, \$3,945.

"The testimony shows that, during Mr. Watson's term, there were expended in improvements and repairs about \$1,500, and that this amount was charged to the expense account, which is a branch of the loss account. All the witnesses who testified upon this question said that the Sumter Lumber Company had never before charged up a depreciation upon the plant account, and I find as a matter of fact that such a charge was not in the contemplation of Mrs. Watson and the Virginia-Carolina Lumber Company when their contract was entered into. I do not think it would be just to charge as a loss the sum of \$1,500, expended in improving the plant, and also charge 10 per cent. upon the value of the plant as depreciation, which would also amount to a direct loss. This had not been the custom of the company, it had never been done before, it had not been charged up by the bookkeeper who kept the books for the company at the time Mr. Watson ceased to be manager, and I do not believe that Mrs. Watson ever agreed that the 41 shares of stock should bear any part in such a loss, in fact the company, would be under the necessity of actually earning \$3,945 in the operation of its plant in order to come out even at the end of the year and leave no profits in which the 41 shares could participate, if such a charge were permitted. I find from the testimony that most of the improvements, making up the sum of \$1,500 which I have allowed as a charge in the loss account, were improvements made upon the plant just a few months before Mr. Watson's administration ceased, and that they left the plant in better condition than it was on September 1, 1909, and, instead of the plant depreciating in value during his administration, it actually increased, and I therefore refuse to allow this item as a loss during the term of Mr. Watson's administration.

[4] "The next item sought to be charged up as an additional loss is loss of open accounts, \$107.49.

"The testimony of Mr. Yates shows that this amount is made up of several items from various individual accounts, and he could not tell which of these accounts were made during Mr. Watson's administration. Of course, they could not be chargeable against Mrs. Watson unless they were incurred during the continuation of her contract, unless there was definite evidence that for some other reasons they should be so charged. In the

absence of such testimony, I must refuse to allow this item.

"The next and the last additional item sought to be charged up as a loss is the loss on the Jackson timber alleged to be \$5,000. I find as a matter of fact that there was no such loss properly chargeable during this period. There are numerous reasons for my conclusion upon this matter, but it should be sufficient only to enumerate the following:

"The plaintiff contends that the Jackson timber deal was in reality only a method on the part of the Sumter Lumber Company of getting notes from Mr. Jackson upon which to raise some money, and that these were simply accommodation notes.

"The defendants contend that the sale to Mr. Jackson and repurchase were bona fide. In order to arrive at a just conclusion upon this matter, it is well to revert to the original purchase of this timber by the Sumter Lumber Company. Mr. Yates testified that the company had paid \$13,500 for this timber, when it originally bought the same. I find, as a matter of fact, that it paid not over \$3,500 for the same, and this was a fair market price for it. Mr. Yates testified that he had some claim against Mr. McLaurin which he estimated at \$10,000. There was no proof of the claim in any amount, and, even if there had been, it could not increase the value of the timber which was purchased with the money of the Sumter Lumber Company, and, if any loss was sustained in this timber transaction, it was sustained at the time McLaurin made the purchase for the Sumter Lumber Company and when the Sumter Lumber Company dropped this claim against McLaurin. As it appears from the testimony that the Sumter Lumber Company paid all the money that was paid for these several tracts of timber, and this did not exceed \$3,500, and the consideration for the McLaurin claim was a few days' service of McLaurin in negotiating the purchase of the timber referred to, I assume that the Sumter Lumber Company could not have had much faith in its claim of \$10,000 against McLaurin, if it was willing to settle same for a few days' services of Mr. McLaurin in negotiating the purchase of said timber. The timber therefore having cost only \$3,500, or thereabouts, there was nothing to show that it was worth anything like \$11,000 at the time of the contract with Mr. Jackson, and, in fact, subsequent events have shown that it was worth nothing like said amount. These facts, together with the testimony of Mr. Jackson, lead me to the conclusion that there was never a bona fide sale from the Sumter Lumber Company to Mr. Jackson, but that this transaction was primarily for the purpose of securing Mr. Jackson's notes upon which to negotiate a loan for a much larger amount than they would otherwise have been able to secure on this timber.

[5] "Even if I had not arrived at the conclusion as above set out, I would still decline to admit this item as a loss because the

contract or timber deed between the Sumter Lumber Company and Mr. Jackson provides that the notes for \$11,000 were to be paid in the following manner: That is to say, the Sumter Lumber Company should deduct \$2 per thousand feet for the timber manufactured at their plant by Mr. Jackson from this timber, and it appears from said contract that this was the only manner in which Mr. Jackson as between these parties could be compelled to pay the notes. In the contract, the Sumter Lumber Company also guaranteed that there were 4,500,000 feet of said timber. Upon this guaranty alone, which was made before the contract with Mrs. Watson, the Sumter Lumber Company made itself liable at the rate of \$2 per thousand feet for any shortage in said timber falling below 4,500,000 feet.

"Mr. Yates testified that the company got all the timber which Mr. Jackson cut under this contract, and that it amounted to 1,600,000 feet. This would have paid \$3,200 on the notes, and Mr. Yates further testified that they took back all the balance of said timber on said tracts of land, but that it was still upon the land, and they had lost this balance by reason of Mr. Watson's negligence in failing to cut and remove this timber before the expiration of the contracts. So far as this contention is concerned, I find from the testimony that Mr. Watson endeavored to have Mr. Yates locate mills upon the said tracts or allow him to do so for the cutting of this timber, and the testimony of their witnesses show that this was the only practicable means of removing the same. I find that Mr. Yates refused to allow this to be done, and even required Mr. Watson to cancel an agreement which he had made for the purchase of a mill outfit to cut this timber. Of course, if a loss had actually occurred from this source during Mr. Watson's administration, it should be charged up regardless of who was responsible for the same; but I find as a matter of fact that the contracts upon this timber did not expire until, in the case of the Abbott contract, the fall of 1910, and in the case of the other contracts, the summer of 1911, and the Sumter Lumber Company had ample time to cut and remove this timber after Mr. Watson ceased to be manager, and Mr. Yates testified that they were still cutting the short timber from some of these tracts. I therefore find that, if there was any loss upon this timber, it occurred after Mr. Watson's administration.

"The attorney for the defendant argued that in all events the Sumter Lumber Company actually paid \$7,768.14 for this timber when they took the same back from Mr. Jackson and assumed liability for the notes which Mr. Jackson had given in payment therefor. It should be remembered that the company had gotten all of the timber that Mr. Jackson cut from the land, and when they canceled the contract it took back the remaining timber standing upon said tract,

and, having guaranteed the quantity sold, they made themselves liable at the time of entering into that contract for any shortage in the quantity of timber sold, and, if there was a shortage, then by assuming to pay the balance upon the notes, they were not assuming a new liability, but simply recognizing one which had attached to them from the beginning. This, however, would not show any actual loss in this timber transaction, because, the timber having originally cost less than \$3,500, it is very clear from the testimony that the Sumter Lumber Company has received back a great deal more than this amount from said timber.

"So far as the contention of the defendants with respect to the loss upon the timber deal with the Danville Lumber Company is concerned, I find that they have failed both to show any loss in this transaction and to connect Mrs. Watson with the same. The Virginia-Carolina Lumber Company has not made any showing sufficient to enable the court to say that there has been a loss upon this timber.

"I find from the evidence that the timber was gone over before the purchase by Mr. Yates and his estimator, both of whom represented the Virginia-Carolina Lumber Company, and they both appeared to be timber men of equal experience with Mr. Watson, and the Virginia-Carolina Lumber Company in the purchase of said timber did not rely upon the estimate of Mr. Watson, as is shown by the evidence, and especially in the correspondence of Mr. Yates to Mr. Watson.

"I further find that there is no evidence of any representation made by Mr. Watson which would amount to a guaranty, and, even if there had been, there is no evidence which would make Mrs. Watson responsible in law for such representations, and this claim cannot be allowed as a loss in this accounting.

"In so far as the claim of the defendants is concerned that the Sumter Lumber Company lost large sums of money through the negligence of Mr. Watson, I hold from the terms of the contract that Mrs. Watson was only to be charged with her proportionate share of the loss actually sustained without regard to the negligence or faithfulness of any employé. Besides, I find as a matter of fact that there was no negligence shown on the part of Mr. Watson as manager of the Sumter Lumber Company.

"Having reached the conclusions above stated, I hold, as a matter of law, that the plaintiff is entitled to have the defendant Virginia-Carolina Lumber Company perform its contract, and repurchase said 66 shares of stock, paying for 25 shares of the same the sum of \$2,500 and for 41 shares of the same the sum of \$4,100, less \$470.13, and in settling for same the defendant shall have the right to cancel as part payment of these

amounts, the note for \$4,100, without interest, which would leave the said defendant indebted to the plaintiff in the sum of \$2,029.87, with interest thereon from the 1st day of June, 1910.

"It is therefore ordered, adjudged, and decreed that the plaintiff have judgment against the defendant Virginia-Carolina Lumber Company in the sum of \$2,029.87, together with interest upon said amount from June 1, 1910, at 7 per centum, together with the costs of this action, and that upon payment of said judgment the said 66 shares of stock shall become the property of the Virginia-Carolina Lumber Company, and the proper officer of the Sumter Lumber Company is hereby authorized and directed to make the necessary and usual transfer of said stock at such time."

Lee & Moise, of Sumter, for appellants.
L. D. Jennings, of Sumter, for respondent.

WATTS, J. For the satisfactory reasons set out by his honor in the circuit decree, it is the judgment of this court that the judgment of the circuit court be affirmed.

GARY, C. J., and HYDRICK and FRASER, JJ., concur. WOODS, J., did not hear this case.

(92 S. C. 188)

WALKER v. SOUTHERN BELL TELEPHONE & TELEGRAPH CO. et al.

(Supreme Court of South Carolina. Aug. 7, 1912.)

1. ELECTRICITY (§ 19*)—NEGLIGENCE OF TELEPHONE COMPANY—INJURY TO PEDESTRIAN.

In an action for injuries caused by alleged negligent mismanagement of a telephone company, whereby plaintiff was injured by coming in contact with a charged guy wire, evidence held to sustain verdict for plaintiff.

[Ed. Note.—For other cases, see *Electricity*, Cent. Dig. § 11; Dec. Dig. § 19.*]

2. TRIAL (§ 194*)—INJURIES TO PEDESTRIAN—STATEMENT OF ISSUES.

Where the court, in the instructions, explaining the contention of plaintiff, seeking to recover for injuries caused by coming in contact with an uninsulated guy wire of a telegraph company, stated that plaintiff contended that he did not know the wire was charged, that he went to help a man who had fainted, that there was nothing to warn him that the wire was charged, and he inadvertently made a circuit with it, it was merely a statement of the issues, and not a charge on the facts.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 413, 439-441, 446-454, 456-466; Dec. Dig. § 194.*]

Appeal from Common Pleas Circuit Court of Spartanburg County; Ernest Gary, Judge.

Action by Alexander Walker, by his guardian ad litem, Charles Walker, against the Southern Bell Telephone & Telegraph Company and the Spartanburg Street Railway, Gas & Electric Company. Judgment for plaintiff, and defendants appeal. Affirmed.

Bomar & Osborne, of Spartanburg, for appellants. Carlisle & Carlisle and Charles P. Wofford, all of Spartanburg, for respondents.

FRASER, J. [1] This is an action for damages for personal injury. Plaintiff alleges: "That said accident occurred on account of the negligence, carelessness, and mismanagement of the property of said defendants, by reason of their recklessly and willfully maintaining concurrently wires, either charged with electricity or conductors of electricity, erected or strung in close proximity, and in such a manner that one is likely to fall upon or come in contact with the other, thereby sending a heavy charge of electricity through the said guy wire, which was recklessly and willfully allowed to remain in a position that any passer-by acting in a lawful manner, and not as a trespasser would be likely to come in contact with thereby producing possible destructive consequences." Judgment was rendered for the plaintiff in the sum of \$345. From this judgment the defendants appealed.

There are 10 exceptions:

1. "(1) In permitting the plaintiff in reply to examine J. L. Lee on matters upon which neither of the respondents had introduced any evidence, and in asking the said witness the following questions, and allowing him to answer the same, against the objections of the respondents, to wit: Q. Did you ever see this guy wire that we have been talking about here that is said to have killed Mr. Huggins and injured Alexander Walker? A. Yes, sir. Q. Did you see it often? A. Yes, sir. Q. Did you ever notice it at night? A. Yes, sir. Q. What result did you see from the passing of that guy wire through that tree near the post? A. I have seen fire in the tree. Q. Did you see that more than once? A. Yes, sir. Q. How long before this accident, if you can fix the time? A. I do not know, sir. Q. Was there any other wire through that tree, except the guy wire we have been talking about? A. No, sir. The error being, as it is respectfully submitted, that this was allowing evidence to be introduced upon new matter in reply, and after the defendant had closed its case; such evidence not being in reply to any evidence which has been introduced in behalf of the respondents."

The time at which testimony shall be introduced is in the discretion of the trial judge. If the appellants desired to controvert the statements of the witness, they ought to have asked permission to do so. It was merely cumulative any way, as the witness Thomas Williams had testified on the same subject. This exception is overruled.

2. "(2) Because when his honor undertook to tell the jury what rule the Supreme Court has laid down in reference to the duty of a company using electricity over wires, charged the jury as follows: 'And that they

lay down the rule that I have just given you, that they must so construct them and so safeguard them—or so insulate them—they must use that degree of care in securing them and insulating them that a man of ordinary prudence and foresight and caution would be expected to use under the same circumstances, to prevent an injury to a citizen or his property'—charged upon the facts contrary to the provision of section 26, art. 5, of the Constitution of this state, and instructed the jury as matter of fact that it was the duty of an electrical company in using ordinary prudence and foresight to 'insulate' its wires. It being respectfully submitted that it depends upon the circumstances, conditions, and surroundings of each particular case whether it is the duty of an electrical company to 'insulate' its wires."

This is not a charge on the facts, but a proposition of law pure and simple. The statement that "that degree of care is required, that a man of ordinary prudence and foresight and caution would be expected to use under the same circumstances," extends from the highest degree to none at all and leaves the whole matter to the jury. This exception is overruled.

3. "(3) Because, it is respectfully submitted, his honor erred in refusing to charge the request of the respondents the Spartanburg Railway, Gas & Electric Company, No. —, without modification, such request being as follows: 'If a person, without having the right to do so, and being in a place where he had no legal right to be, voluntarily and without any necessity takes hold of a wire belonging to a company with which he is in no wise connected, then such person is a trespasser.' And in connection therewith in instructing the jury as follows: 'I am obliged to tell you, gentlemen, that under the laws of humanity that if a person traveling a highway is called to render aid to one who is suffering, and in response to that call he goes to the place, under those circumstances he would not be a trespasser.' The error being, it is respectfully submitted: (a) That as there was evidence tending to show that the guy wires, at the place where the plaintiff alleges he was injured, was outside of any path and some little distance from the place where the man was lying, who it is alleged Walker was called to assist, and was on private property, the request was sound law applicable to the case, and should have been charged without the addition made by his honor. (b) That by this addition to the defendant's request his honor led the jury to believe that, even if the plaintiff was outside of any traveled path and some little distance from where the injured man was lying, plaintiff would not be a trespasser, ever though he voluntarily, and without necessity, got hold of the guy wire and was injured. (c) Because that by this charge his honor placed it in the power of the jury and led

them to believe that a person who simply, because he goes to the assistance of an injured man, would not be a trespasser even though he voluntarily and without necessity, at a place where he has no legal right to be, takes hold of a wire of a company with which he has no connection.

"(4) Because, it is respectfully submitted, his honor erred in refusing the request of the respondent the Spartanburg Railway, Gas & Electric Company numbered No. 7, to wit:

'(7) An electrical company is not liable for injuries inflicted upon a trespasser unless it is willfully, wantonly, or intentionally done.' The error being as it is respectfully submitted, that as there was evidence tending to show that the plaintiff caught hold of a wire of a company with which he was not connected, and at a point where he had no legal right to be, and where there was no excuse for him to be, it was a question of fact for the jury to say whether or not he was under all of the circumstances a trespasser and, if so, whether he was injured and, if so, whether he was injured by any willful, wanton, or intentional act of the respondents.

"(5) Because, it is respectfully submitted, his honor erred in not charging requests numbered 6 and 7, submitted by the respondents the Spartanburg Railway Gas & Electric Company without modification and without qualification, the error being, as it is respectfully submitted, that as there was evidence tending to show that the plaintiff was injured at a point where there was no necessity for him to be, and where he had no legal excuse to be, it became a question of fact for the jury, under the evidence, to say whether or not he was a trespasser."

"(7) Because his honor erred in refusing to charge the fifth request submitted by the defendant Southern Bell Telephone & Telegraph Company, to wit: '(5) I charge you further that if this wire was at a place where the plaintiff had no right to be and he went there as a volunteer and took hold of the wire and the company had no reason to anticipate such an act on his part, that the company owes him no duty to keep such wire in a safe condition, and its failure to keep it in a safe condition would not render it liable for his injuries.' The error being, as it is respectfully submitted: (a) That this request embodied a sound proposition of law applicable to the facts of this case, and should have been charged by his honor. (b) That as there was evidence tending to show that the plaintiff was at a place where he had no right to be, and was a volunteer, and that the company had no reason to anticipate that he would take hold of the wire, the request embodied a sound proposition of law and should have been charged."

These exceptions are based upon the erroneous proposition that there was some evidence that the plaintiff was a trespasser as

to these defendants. There is not a word of testimony to show that either of these defendants was in possession of the place of the accident or claimed any right to its possession. In this sense "trespass" is the invasion of possession, and only he whose possession is invaded has the right to protection. A man may be a trespasser himself and yet have all the rights of ownership against all the world except the true owner. These exceptions are overruled.

4. "(6) Because, it is respectfully submitted, his honor erred in refusing to charge the second request submitted in behalf of the defendant Southern Bell Telephone & Telegraph Company, to wit: '(2) I charge you further that if you believe from the evidence that the plaintiff received his injuries by accidentally grabbing the wire in an effort to prevent himself from falling, and missed the post in attempting to lean up against the post, and that such accident was the proximate cause of his injury, then he is not entitled to a verdict in this case, and your verdict must be for the defendants.' The error being, as it is respectfully submitted, that there was evidence tending to show that the injury which came to plaintiff came to him by his attempting to lean against a post, and, being about to fall, he accidentally grabbed the guy wire to stop himself. This request was sound law and applicable to the facts of the case, and was designed to submit to the jury the question whether the injuries which came to the plaintiff came to him from an unforeseen accident, and should have been charged by the court."

His honor could not have charged this request. It is to guard against accidental contact with dangerous instrumentalities that safeguards are required when necessary. The deliberate contact, with full knowledge of the danger, is contributory negligence and a complete defense. This exception is overruled.

5. "(8) Because, it is respectfully submitted, his honor erred in refusing to charge request No. 6, submitted in behalf of the Southern Bell Telephone & Telegraph Company, to wit: '(6) I charge you further that the telegraph company does not guarantee safety of its guy wires, and freedom from the presence of the electricity. It is only required to use reasonable care to keep them in a safe position, and, if you believe from the evidence that the proximate cause of the injury was due to the placing of electric wires in contact with the guy wires, then your verdict must be in favor of the telephone company.'"

"The placing of electric wires in contact with the guy wires" was the negligence complained of, and if his honor had so charged he would have charged on the facts. This exception is overruled.

"(9) Error in charging the jury as follows: 'Now, the plaintiff in this case contends that

he did not know that this thing here, this guy wire, was charged with a live wire; that while passing a public highway his contention is that he was called by that old winking man there who was digging up the sod. He said he called to him to come and help with that man who he thought had fainted: and his contention is that in obedience to that call he went there, and had nothing to warn him that this wire was charged, alive with electricity, and inadvertently formed a circuit with it. You see, he was on the ground, which was negative, and if he caught a positive wire that was charged with electricity, that would make a connection.' The error being that in so charging his honor charged the jury in respect to matters of fact in violation of article 5, § 26, of the Constitution of 1895, in that: First, he stated to the jury what the testimony and contention of the plaintiff was in regard to matters of fact at issue; and, in the second place, he charged the jury 'that this guy wire was charged with a live wire' and 'had nothing to warn him that this wire was charged, alive with electricity, and inadvertently formed a circuit with it.' It being submitted that such charge was especially prejudicial to the defendants in view of the clear-cut issue of fact as to whether or not the guy wire was in fact charged with electricity, or whether the plaintiff, by unduly pulling it down, drew the other end of it up into contact with the electric wire, thus forming the circuit."

I think this was a charge on the facts, and this exception should be sustained.

6. "(10) Error in charging the jury as follows: 'And the plaintiff's contention is that a man of ordinary prudence and caution in erecting that guy wire there would have seen the possibility or probabilities of coming in contact with another wire, and they ought to have insulated that wire wherever the public came in contact with it.' The error being that in so charging his honor misstated the issues, in that there was no contention on the part of the plaintiff in the pleadings that the guy wire should have been insulated, and his honor's attention being called thereto, should have corrected said charge."

The complaint alleged that the wire, heavily charged with electricity, was so placed that a person not a trespasser would likely come in contact with it. His honor, explaining the contention of the plaintiff, said plaintiff claimed that the wire ought to have been insulated. That was a legitimate explanation, and not a misstatement of the issue. This exception is overruled.

[2] The majority of the court being of the opinion that the ninth exception should be overruled, because it was a mere statement of the issues between the parties, the judg-

ment of this court is that the judgment of the circuit court be affirmed.

GARY, C. J., and WOODS, HYDRICK, and WATTS, JJ., concur in result.

(93 S. C. 26)

BROUGHTON v. BROUGHTON et al.

(Supreme Court of South Carolina. Oct. 15, 1912.)

1. HOMESTEAD (§ 141*)—PERSONS ENTITLED—CHILDLESS WIDOW.

A childless widow has a right to have the homestead assigned to her in the lands of her deceased husband under the Constitution of 1895.

[Ed. Note.—For other cases, see Homestead, Cent. Dig. §§ 261-270; Dec. Dig. § 141.*]

2. HOMESTEAD (§ 141*)—PROPERTY SUBJECT—HOMESTEAD OF CHILDLESS WIDOW.

A homestead assigned to a childless widow is subject to immediate partition among her deceased husband's heirs.

[Ed. Note.—For other cases, see Homestead, Cent. Dig. §§ 261-270; Dec. Dig. § 141.*]

Appeal from Common Pleas Circuit Court of Clarendon County; Robert E. Copes, Judge.

"To be officially reported."

Action by Fannie Broughton, in her own right, and as administratrix of the estate of C. E. Broughton, deceased, against J. Eugene Broughton and others. From a judgment for plaintiff, defendants appeal. Affirmed.

P. D. Graham, of Manning, and Lee & Moise, of Sumter, for appellants. Wolfe & Berry, of Orangeburg, Purdy & O'Bryan, of Manning, and Purdy & Bland, of Sumter, for respondent.

WOODS, J. This action was brought in 1909 by Fannie Broughton, in her own right as the childless widow of C. E. Broughton and as administratrix of his estate, against his other heirs at law for the assignment of a homestead to her, for the partition of the lands of the estate alleged to consist of a tract of land containing 98 acres, and for the settlement of her accounts as administratrix. C. E. Broughton died in 1908, leaving unpaid a judgment in favor of J. W. Weeks for \$634.54 entered May 5, 1904. After this action for partition and assignment of homestead was commenced, Weeks had the sheriff to levy on and sell the 98 acres of land, and Charlton Du Rant became the purchaser at the price of \$857. After this credit, there remained a balance due on the judgment of \$80.48. Du Rant conveyed the land to A. Levi, and Weeks assigned the judgment to Du Rant. Afterwards Du Rant had the sheriff to advertise under the Weeks judgment the interest of C. E. Broughton in other lands, but the sale was enjoined, and Du Rant and A. Levi were made parties to this action. After the sheriff's sale of

the 98 acres of land, David Levi, as assignee of a mortgage executed by C. E. Broughton to Marion Maise, commenced an action for foreclosure. By consent the suit for foreclosure was consolidated with this action. By amendments all other persons interested in the estate of C. E. Broughton or in lands in which he had an undivided interest were made parties, and all the lands were brought under the complaint, so that the estate of C. E. Broughton might be settled and the legal and equitable rights of all parties adjusted. In this state of the case Judge Copes made a decree holding that the plaintiff as the childless widow of C. E. Broughton was entitled to homestead in the tract of 98 acres, and that this homestead was subject to immediate partition between the widow and the other heirs at law of C. E. Broughton. The homestead right and the right to partition being subject to the mortgage debt, the decree provided for the foreclosure of the mortgage and a sale of the land, and application of the proceeds to the mortgage debt and then to the homestead, and the remainder, if any, to A. Levi, who claimed under the execution sale. The decree further directed that the other lands should be sold, and that a special referee should call in creditors by advertisement, and take and report to the court all testimony offered concerning their claims.

It thus appears that the circuit court adjudged only two points about which there was any controversy: (1) That the childless widow was entitled to homestead against a judgment entered during her husband's lifetime in favor of one of his creditors for a debt which was contracted after the adoption of the Constitution of 1895, although the homestead had not been laid off to the husband; and (2) that such homestead was subject to immediate partition between the widow and the other heirs of the husband. All the rights of Charlton Du Rant, A. Levi, and other claimants, involving the validity and amount of their debts, the effect of the sale by the sheriff on the judgment debt, subrogation, and other legal and equitable claims of creditors against the estate and against each other, were left open. Nothing, therefore, can be considered under this appeal of Charlton Du Rant and A. Levi, except the two points above indicated as adjusted by the decree.

[1] As to the first point, counsel for the appellants admit that a childless widow had a right to have the homestead assigned to her in the lands of her deceased husband under the Constitution of 1868. That question has been long settled. *Moore v. Parker*, 13 S. C. 436; *Bradley v. Rodelsperger*, 17 S. C. 9; *Yoe v. Hanvey*, 25 S. C. 94; *Jeffries v. Allen*, 29 S. C. 501, 7 S. E. 828. The reasoning of the court in these cases was that the right of homestead was conferred on the head of the family as the representa-

tive of the family and for the benefit of its members, and that when the husband had the right in his lifetime, and died leaving no family except his wife, the right continued in her as the surviving member of the family. It will be observed that this conclusion was reached upon consideration of the language of the Constitution itself aside from the legislative enactments on the subject. Although the point was not particularly discussed, but rather assumed, a homestead was allowed to a childless widow in *Ex parte Ray*, 20 S. C. 246, under the constitutional amendment of 1880. Counsel have presented an elaborate argument in the effort to show that there is an essential difference between the Constitutions of 1868 and 1895, and that the Constitution of 1895 gives no warrant for the assignment of a homestead to a childless widow without a family. The distinction attempted becomes obviously technical and shadowy in view of the reasoning of the court above set out in the cases cited. It is to the head of the family that the exemption is given in the amendment of 1880 and in the Constitution of 1895 as well as in the Constitution of 1868, and, if the widow was entitled to the homestead under the Constitution of 1868 as the survivor of the husband's family, there can be no reason to refuse to regard her as the surviving member of the family and as such entitled to the homestead under the Constitution of 1895.

[2] There is no ground for serious argument that the homestead assigned to the childless widow of C. E. Broughton is not subject to immediate partition among his heirs at law. *Saunders v. Strobel*, 64 S. C. 489, 42 S. E. 429.

Affirmed.

GARY, C. J., and HYDRICK, WATTS, and FRASER, JJ., concur.

RHAME et al. v. DU RANT et al.
(Supreme Court of South Carolina. Sept. 30, 1912.)

Original proceeding by John C. Rhame and another against D. F. Du Rant and others, commissioners. Further hearing ordered before the Supreme Court and the judges of the circuit court because of a disagreement on a question of constitutional law.

Attorney General Lyon and B. Frank Kelley, of Bishopville, for petitioner. R. O. Purdy, of Sumter, for respondents.

GARY, C. J. It appearing upon the hearing of this case that there is involved a question of constitutional law, upon the determination of which the entire court is not agreed: Now, therefore, I, Eugene B. Gary, Chief Justice, do hereby call to the assistance of the Supreme Court all the judges of

the circuit court, to meet at Columbia, S. C., on Friday, the 6th day of December, 1912, at 10 o'clock a. m., for the purpose of hearing and deciding said case. It is further ordered that the clerk of the Supreme Court do send to each circuit judge a copy of the opinions in said case.

WOODS, J. A petition having been presented for the changing of the boundary line between the counties of Sumter and Lee, so as to annex a portion of Lee county to the county of Sumter, the Governor appointed the respondents, D. E. Du Rant, J. P. Kilgore, T. S. Du Bose, and Stanyarne Burrows, to investigate and report to him the facts as to area, population, etc., as provided by the act of 1911 (27 Stat. 43). Thereafter this proceeding was instituted to enjoin the respondents from proceeding, on the ground that Lee county, though created since the adoption of the Constitution, became immediately on its formation an "old county," within the meaning of the Constitution, and, not having over 500 square miles, its area cannot be reduced.

At the argument it was stated that whenever the question has arisen before the different Governors of the state they have adopted the view that the expressions "old county" and "old counties," as used in the Constitution, embraced all counties in active existence, whether created before or after the adoption of the Constitution; and that the expressions "new county" and "new counties" were limited in their meaning to counties in process of formation. It was further stated that Governor Blease had appointed the commissioners with the view of having the matter settled by judicial construction.

The following are the portions of article 7 of the Constitution bearing on the question:

"Section 1. The General Assembly may establish new counties in the following manner: Whenever one-third of the qualified electors within the area of each section of an old county proposed to be cut off to form a new county shall petition the Governor for the creation of a new county, setting forth the boundaries and showing compliance with the requirements of this article, the Governor shall order an election, within a reasonable time thereafter, by the qualified electors within the proposed area, in which election they shall vote 'Yes' or 'No' upon the question of creating said new county; and at the same election the question of a name and a county seat for such county shall be submitted to the electors."

"Sec. 3. No new county hereafter formed shall contain less than one one hundred and twenty-fourth part of the whole number of inhabitants of the state, nor shall it have less assessed taxable property than one and one-half millions of dollars as shown by the last

tax returns, nor shall it contain less area than four hundred square miles.

"Sec. 4. No old county shall be reduced to less area than five hundred square miles, to less assessed taxable property than two million dollars, nor to a smaller population than fifteen thousand inhabitants.

"Sec. 5. In the formation of new counties no old county shall be cut within eight miles of its courthouse building.

"Sec. 6. All new counties hereafter formed shall bear a just apportionment of the valid indebtedness of the old county or counties from which they have been formed.

"Sec. 7. The General Assembly shall have the power to alter county lines at any time: Provided, that before any existing county line is altered the question shall be first submitted to the qualified electors of the territory proposed to be taken from one county and given to another, and shall have received two-thirds of the vote cast: Provided, further, that the change shall not reduce the county from which the territory is taken below the limits prescribed in sections 3, 4, and 5 of this article: Provided, that the proper proportion of the existing county indebtedness of the section so transferred shall be assumed by the county to which the territory is transferred."

The first section shows clearly that the convention meant by "old county," as used therein, any county which might be in existence at any time in the future when it should be proposed to take action under it looking to the formation of a new county, and by "new county" only those counties proposed and in process of formation under the law. It will be observed that here the provision is that the General Assembly may establish a new county only when the petition comes from certain electors of an "old county" within the area of the "old county" proposed to be cut. There is no provision nor warrant in the Constitution for a new county to be formed from a section of another new county, or by the petition of electors of a "new county." Hence it follows that, if "old county" is restricted in its meaning to counties already in existence at the date of the adoption of the Constitution, there would be no authority in the Constitution for taking a part of any county formed since the adoption of the Constitution for the creation of a new county; and a county formed since 1895, whatever might be its wealth, area, population, and the need of its inhabitants, could never be divided for the formation of a new county.

Section 3, in providing that "no new county hereafter formed," etc., and section 6, in providing that "all new counties hereafter formed shall bear a just apportionment of the valid indebtedness of the old county or counties from which they have been formed," do not necessarily carry the meaning that counties thereafter formed should remain

new counties after their formation, but only that new counties formed after the adoption of the Constitution should not, when formed, contain less than the specified population, taxable property, and area, and should bear a just proportion of the valid indebtedness of the old county or counties from which they were formed.

Section 5 confirms most strongly the meaning we have attributed to "old county" and "new county" in the construction of section 1. Clearly the intention of the section was to protect any county of the state actually in existence, whether formed before or after 1895, from having its territory cut within eight miles of its courthouse. But if "old county," in this section, meant only a county in existence in 1895, then there would be nothing to prevent the line of a proposed new county being run to the courthouse door of any county formed since 1895.

From these considerations it seems clear that two of the first six sections of the article require the construction that, in the formation of counties, "old county" and "old counties" should mean any county or counties formed or in existence at any time that proceedings might be instituted looking to the formation of a new county; and that the other four sections are not in any wise inconsistent with this construction.

It will be observed that these sections all relate to the formation of new counties, and have no reference to the change of county lines. The journal of the convention shows that after these sections were agreed on section 7 was proposed as an amendment. It has no reference to the formation of new counties, but relates to an entirely different subject from that covered by the first six sections, namely, the mere alteration of county lines, by which territory would be transferred from one county to another. The words "new county" are not written in it, but by its proviso, "that the change shall not reduce the county from which the territory is taken below the limits prescribed in sections 3, 4, and 5 of this article," means the same thing as if the words of the sections referred to had been set out in it. So this section distinctly enacts that with respect to the change of county lines, there should be a difference between counties existing at the date of the adoption of the Constitution and those created after.

We think, therefore, it is reasonably clear that in providing for the formation of new counties from those already in existence the convention meant by "old county" and "old counties" any county or counties in existence at the date when it should be proposed to form a new county, and by "new county" and "new counties" a county or counties proposed and in the process of formation; but that in the amendment, providing merely for the alteration of county lines, the intention was to divide the counties with respect to popu-

lation, area, and taxable property into two classes, namely, counties existing at the date of the Constitution and those created after its adoption.

It is true that this construction is subject to the criticism that it gives to the words "new" and "old" different meanings in different sections of the same instrument; but that is not a cogent objection. The general presumption is that the meaning of a word used more than once in the same statute or constitutional provision is identical; but this presumption is by no means conclusive, and and must yield to the intention appearing from consideration of the entire statute or the entire article of a Constitution. The presumption is manifestly weakened when it appears that the words are used, as here, in connection with different subjects. 36 Cyc. 1132; 26 Am. & Eng. Enc. 610; Rhodes v. Weldy, 46 Ohio, 234, 20 N. E. 461, 15 Am. St. Rep. 584; James v. Du Bois, 16 N. J. Law, 293; Sunset Telephone Co. v. Pasadena, 161 Cal. 265, 118 Pac. 796; Ryan v. State, 174 Ind. 468, 92 N. E. 340; State v. Knowles, 90 Md. 654, 45 Atl. 877, 49 L. R. A. 695; Gernert v. Limbach, 163 Ala. 413, 50 South. 903.

The presumption cannot have any force in this case, where it is plain the constitutional convention could not have intended the unfair, not to say absurd, results which would flow from holding that section 7, in referring to old and new counties with respect to alteration of county lines, meant the same distinction between "old county" and "old counties" and "new county" and "new counties" as was clearly indicated in the preceding sections in providing for the formation of new counties.

On this reasoning I concur in the conclusion that Lee county, having been created since the adoption of the Constitution of 1895, is a new county, within the meaning of section 7 of article 7, providing for the alteration of county lines; but as soon as it was created it became an old county, within the meaning of the first six sections of the article, providing for the formation of new counties.

WATTS, J., concurs.

HYDRICK, J. The petitioners seek to enjoin proceedings which have been commenced to cut off a part of Lee county and annex it to Sumter county. Lee county was created in the year 1902, under the Constitution of 1895, and statutes enacted in accordance with its provisions. It contains 410½ square miles. The territory which it is proposed to take from it contains 9 square miles; therefore over 400 square miles will be left in the county.

The question is whether this reduction of its area can be made without violating the Constitution. Sections 3, 4, 5, and 7 of article 7, which provides the manner in

which new counties shall be established and existing county lines altered, are pertinent to this inquiry. They read as follows:

"Sec. 3. No new county hereafter formed shall contain less than one one hundred and twenty-fourth part of the whole number of inhabitants of the state, nor shall it have less assessed taxable property than one and one-half millions of dollars as shown by the last tax returns, nor shall it contain less area than four hundred square miles.

"Sec. 4. No old county shall be reduced to less area than five hundred square miles, to less assessed taxable property than two million dollars, nor to a smaller population than fifteen thousand inhabitants.

"Sec. 5. In the formation of new counties, no old county shall be cut within eight miles of its courthouse building."

"Sec. 7. The General Assembly shall have the power to alter county lines at any time: Provided, that before any existing county line is altered the question shall be first submitted to the qualified electors of the territory proposed to be taken from one county and given to another, and shall have received two-thirds of the votes cast: Provided, further, that the change shall not reduce the county from which the territory is taken below the limits prescribed in sections 3, 4, and 5 of this article: Provided, that the proper proportion of the existing county indebtedness of the section so transferred shall be assumed by the county to which the territory is transferred."

The contention of the petitioners is rested solely upon this construction of the foregoing sections of the Constitution, to wit, that as soon as a county is established it becomes an old county, within the meaning of the Constitution, relative to all counties thereafter created, and is entitled to the benefit of the limitations prescribed in sections 4 and 5 against the reduction of the area, wealth, or population of any old county in the creation of new counties, or in changing existing county lines.

It is but stating a truism to say that "new" and "old" are relative terms. What is new to-day may be relatively old to-morrow, and, as compared to some particular things or events, it may be new a hundred years hence. The meaning which these words were intended to have in the Constitution must be determined by the context and the general rules of construction.

The strongest argument in support of the contention of the petitioners is found in section 7, which gives the Legislature "power to alter county lines at any time, provided, that before any *existing* county line is altered," the question shall be decided by a two-thirds vote of the people of the territory affected. The words italicized, and the context, show the intention that the word "existing" should have not only its ordinary meaning, in which it refers to things of

the present time, but also a relatively future meaning, and refers to lines existing at any time in the future when it should be attempted to alter them. Therefore the lines of Lee county could not be changed without compliance with this provision, although they were not "existing" at the adoption of the Constitution. The second proviso also lends some support to that contention, in that it expressly makes the limitation of section 5, which, in terms, applies to old counties, applicable to all counties in the alteration of county lines, so that, in the formation of new counties, and in the alteration of county lines, no county, old or new, can be cut within eight miles of its courthouse. While there is force in this argument, we do not think it conclusive.

While the intention of the framers of the Constitution is somewhat obscured by a want of clearness in expression, and, perhaps, also, from oversight of and consequent failure to provide for the contingency presented by this case, yet, when we construe together the various provisions of the Constitution upon this subject, the conclusion cannot be resisted that the framers of the Constitution used the words "old" and "new," in the sections above quoted, with reference to the limits of area, population, and wealth of counties, relative to the time when they were speaking. At that time, and as to those matters, they contemplated only the then existing counties and counties thereafter to be created. The one class they denominated "old"; the other "new." Hence, in section 3, we find them saying, "No *new* county hereafter formed," etc., showing that they used the words "new county" and "county hereafter formed" synonymously. To say that no new county shall contain less than 400 square miles, and to prohibit the reduction of its area below 500 square miles, is such an incongruity of thought and expression as to forbid the adoption of the application of section 4 to counties which may contain less than 500 square miles. While it is true that a new county may contain over 500 square miles, still, when sections 3 and 4 are read together, the conclusion is inevitable that section 4 was not intended to apply to those counties whose minimum area was fixed at 400 square miles.

The second proviso to section 7, that in altering county lines "the change shall not reduce the county from which the territory is taken below the limits prescribed in sections 3, 4, and 5 of this article," seems to be conclusive of the question. If the construction contended for by petitioners is correct, the inclusion of the limitations contained in section 3 in the proviso to section 7 was useless, because in that event there is nothing to which the limitations of section 3 can apply, and the application of the limitations of sections 4 and 5 alone would have better expressed the intention of the lawmakers.

But we find the limitations of section 3 incorporated in the proviso, and we must conclude that they were intended to have some force and effect and apply to some thing. Furthermore, if the construction contended for by the petitioners is sound, the word "old" in sections 4 and 5 is useless. But we find it there, and the rules of construction require us to give it some meaning, if possible; and we must presume that, without it, these sections would not have expressed the intention of the lawmakers. The express incorporation of the limitation of section 5—a section which previously related to the formation of new counties—in the second proviso of section 7, and making it applicable to the alteration of all county lines, notwithstanding the use of the word "old" in that section, is significant as showing, at least, the opinion of the framers of the Constitution that a section which referred only to "old counties" would not apply in the alteration of *any* county line, unless made to do so by express reference, which tends to show that they did not think of counties thereafter to be formed as "old counties."

It follows that the inhibitions of section 4 do not apply to Lee county, as that is not an "old county," within the meaning of the Constitution, with respect to the limitations therein mentioned, and that the inhibitions of sections 3 and 5 will not be violated by the proposed alteration of the county line.

The petition is therefore dismissed.

GARY, C. J., dissents. FRASER, J., disqualified.

(113 Va. 694)

WASHINGTON-VIRGINIA RY. CO. v.
BOUKNIGHT.

(Supreme Court of Appeals of Virginia. June 18, 1912. Rehearing Denied. Sept. 21, 1912.)

1. PLEADING (§ 35*)—SURPLUSAGE.

In an action against a carrier for personal injuries, a count which alleged that plaintiff was a passenger upon defendant's car, that the car was derailed by the defendant's negligence, and that plaintiff was injured, was supplemented by a bill of particulars alleging that in such count the plaintiff relied upon the presumption of negligence arising from the derailment of the defendant's car, the reason for which was not known to plaintiff. *Held*, that the language alleging negligence on the part of the defendant in running its car upon which plaintiff was injured might be regarded as surplusage, and that the count without such language was sufficient to make out a case of presumptive negligence.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 76-80; Dec. Dig. § 35.*]

2. PLEADING (§§ 193, 313*)—MOTION FOR BILL OF PARTICULARS.

Where defendant desires a more particular statement of the grounds of complaint, his remedy is by motion for a bill of particulars, and not by demurrer.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 425, 428-435, 437-443, 949; Dec. Dig. §§ 193, 313.*]

3. CARRIERS (§ 316*)—ACTION FOR INJURIES—NEGLIGENCE—RES IPSA LOQUITUR.

Where the relation of passenger and carrier exists, a derailment resulting in an injury to a passenger raises a presumption of negligence on the part of the carrier.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1261; Dec. Dig. § 316.*]

4. NEGLIGENCE (§ 121*)—RES IPSA LOQUITUR.

Plaintiff by alleging acts of affirmative negligence did not thereby waive or lose the benefit of the presumption of negligence arising from the nature of the act alleged.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 217-220, 224-228, 271; Dec. Dig. § 121.*]

5. CARRIERS (§ 316*)—PRESUMPTIONS AND BURDEN OF PROOF—RES IPSA LOQUITUR.

In an action against a carrier for personal injuries received by the derailment of the car in which plaintiff was riding, the plaintiff makes out a prima facie case by proving the happening of the accident and his injury, and thereby casts upon the defendant the burden of rebuttal and of explaining the circumstances of the accident so as to relieve itself from liability.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1261, 1262, 1283, 1285-1294; Dec. Dig. § 316.*]

6. APPEAL AND ERROR (§ 1040*)—REVIEW—HARMLESS ERROR—RULING ON DEMURRER.

The overruling of demurrers to the several counts of a declaration of a complaint is not prejudicial to defendant, where the court, at the close of the evidence and on motion of the plaintiff, strikes out such counts.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4089-4105; Dec. Dig. § 1040.*]

7. PLEADING (§ 328*)—BILL OF PARTICULARS—NEW CAUSE OF ACTION.

Where plaintiff alleged facts and circumstances out of which the presumption of defendant's negligence arose as a matter of law, the allowance of a bill of particulars which alleged that plaintiff relied upon the presumption of negligence which the law created where the cause of the accident was unknown to the plaintiff was not objectionable as tending to make a new case shifting the burden of proof.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 984; Dec. Dig. § 328.*]

8. APPEAL AND ERROR (§ 971*)—REVIEW—DISCRETION OF TRIAL COURT—EXAMINATION OF WITNESSES.

The trial court has much latitude in the matter of recalling witnesses; and its action will not be reversed by the appellate court, except for palpable error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3852-3857; Dec. Dig. § 971.*]

9. APPEAL AND ERROR (§ 1047*)—REVIEW—HARMLESS ERROR—ORDER OF ADMISSION OF EVIDENCE.

In an action against a carrier for personal injuries, where plaintiff alleged both affirmative and presumptive negligence, and where defendant introduced evidence to show that its machinery was in good order, its track in proper condition, and its cars properly inspected, the admission on plaintiff's case in chief of evidence to sustain the issue of affirmative negligence, which after the case was closed, and his counts upon affirmative negligence had been stricken out on his own motion, would have been admissible in rebuttal of the defendant's evidence as to the condition of its machinery, etc., was not prejudicial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4132, 4133, 4146-4152; Dec. Dig. § 1047.*]

10. EVIDENCE (§ 550*)—ACTION FOR INJURIES—ISSUES, PROOF, AND VARIANCE.

Plaintiff, in an action against a carrier for personal injuries, showed the construction of the interior of the car and aisle, the seats on each side, the seat in which she was sitting, and that, by a derailment, she was thrown violently forward from her seat a distance of at least ten feet against the front door of the car, her head going down near the bottom of the door, and her attending physician stated that plaintiff has sustained an impacted fracture of the hip, to cause which a blow would have to be directed against the hip bone, or plaintiff would have had to fall on the hip. *Held* that, although there was some variance in the evidence, the physician's testimony was admissible, since the jury might have inferred therefrom that plaintiff was thrown against the seat so as to strike the hip.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2366, 2367; Dec. Dig. § 550.*]

11. CARRIERS (§ 316*)—ACTION FOR INJURIES—BURDEN OF PROOF—RES IPSA LOQUITUR.

Where an injury to a passenger happens as the result of a derailment, the burden of proof is upon the carrier to establish that there was no negligence whatever and that the injury was caused by inevitable casualty, or some cause which human care and foresight could not prevent, so that it was without fault.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1261, 1262, 1283, 1285-1294; Dec. Dig. § 316.*]

12. CARRIERS (§ 320*)—ACTION FOR INJURIES—QUESTION FOR JURY—NEGLIGENCE.

Where plaintiff, in an action against a carrier for personal injuries, makes a prima facie case of negligence, the question whether defendant had shown by a preponderance of the evidence that it was free from negligence was for the jury.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1118, 1126, 1149, 1153, 1160, 1167, 1176, 1190, 1217, 1233, 1244, 1248, 1315-1325; Dec. Dig. § 320.*]

13. TRIAL (§ 260*)—REFUSAL OF INSTRUCTIONS—INSTRUCTIONS ALREADY GIVEN.

Where instructions given have fully and fairly submitted every phase of a case presented by the evidence, the refusal of requested instructions is not error.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 651-659; Dec. Dig. § 260.*]

14. DAMAGES (§ 132*)—EXCESSIVE DAMAGES—PERSONAL INJURIES—PERMANENT INJURY TO HIP.

A verdict of \$7,500 on evidence that plaintiff, a passenger, about 30 years of age, in the possession of all her faculties, earning \$900 per annum as a government clerk, suffered an impacted fracture of the hip, causing her continuous and intense pain and a permanent injury, so that she would always limp, and the shortening of the limb would increase as time went on, was not excessive.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 372-385, 596; Dec. Dig. § 132.*]

Appeal from Circuit Court, Alexandria County.

Action by C. G. Bouknight against the Washington-Virginia Railway Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Moore, Barbour & Keith, of Fairfax, and J. R. & H. B. Caton, of Alexandria, for plaintiff in error. Moncure, Wampler & Gloth, of Rosslyn, and Thos. S. Martin, of Scottsville, for defendant in error.

CARDWELL, J. The Washington-Virginia Railway Company owns and operates a line of electric cars from Washington, D. C., to certain terminal points in the state of Virginia, and this action was instituted by the plaintiff in the court below, defendant in error here, against the said railway company to recover damages for personal injuries alleged to have resulted from the negligence of the defendant company. To the final judgment of the circuit court in favor of the plaintiff for \$7,500 and costs, the defendant company brings error.

Seventeen bills of exceptions have been taken and made part of the record, and are made the basis of eleven assignments of error in the trial court's rulings, which are relied on for a reversal of said judgment by this court; but, in the view we take of the case, it is not necessary to consider these assignments seriatim or at length.

The leading facts of the case are that the plaintiff on the 9th day of January, 1911, boarded a car of the defendant at East Falls Church, in Alexandria county, Va., paying her fare to Washington, D. C., where she desired to go; that, when about two miles from the city of Washington, the car upon which the plaintiff was riding was derailed, and she was thrown violently from her seat forward for some distance to the floor, and severely injured.

The declaration contains eight counts, to which and to each count thereof the defendant demurred and filed in writing five grounds for its demurrer, but these grounds, in fact, present but two questions: First, as to the sufficiency of the eighth count of the declaration; and, second, whether or not there can be joined in the same declaration counts charging affirmative negligence and counts relying upon the presumption of negligence arising by reason of the facts therein alleged.

[1] The eighth count in the declaration alleges that the plaintiff was a passenger upon the defendant's car; that the car was derailed and by reason of the derailment the plaintiff was injured. The court, upon motion of the defendant, required the plaintiff to file a bill of particulars to this count, which she did in these words: "That in said count the plaintiff relies upon the presumption of negligence arising from the derailment of the defendant's car, the reason for the derailment charged in said count, so far as said count is concerned, not being known to the plaintiff, and she relies upon the presumption of negligence which the law creates in such cases."

It is true that this count in the declaration went further, and charged that the defendant conducted itself so carelessly and negligently that the plaintiff was injured whilst upon its said car, "the said car being derailed by reason of the carelessness and

negligence of the said defendant," etc., but, when this count is read together with the bill of particulars filed by the plaintiff, it is made manifest that the defendant was thereby fully apprised of the case it had to meet.

[2] "If a defendant desires a more particular statement of the grounds of complaint, his remedy is not by demurrer, but by a motion for a bill of particulars." *Interstate R. Co. v. Tyree*, 110 Va. 38, 65 S. E. 500.

The language of the eighth count of the declaration in this case, charging carelessness and negligence on the part of the defendant in running its car upon which the plaintiff was injured, was to be regarded as surplusage, as the count without this language was sufficient to make out a case of presumptive negligence.

[3] Where the relation of passenger and carrier exists, and there is a derailment resulting in an injury to the passenger, a presumption of negligence on the part of the carrier arises. Therefore all that it is necessary for the declaration to allege in such a case is the relation of passenger and carrier, the derailment, and the injury by reason thereof, as was done in this case.

The case here is differentiated from the cases relied on for the defendant by the fact that in none of these cases was there, strictly speaking, the relation of passenger and carrier, and therefore the presumption of negligence on the part of the carrier did not arise upon the facts alleged.

[4] In discussing the second question presented by the demurrer, the learned counsel for the defendant make the contention that the plaintiff, by alleging acts of affirmative negligence in the first seven counts of her declaration, thereby waived her right to rely upon the presumption of negligence arising from the derailment of the car; in other words, that counts charging affirmative negligence cannot be joined with counts in which the presumption of negligence is relied upon.

The same contention was made and ably argued in *Walters v. Seattle Railroad Co.*, 48 Wash. 233, 93 Pac. 419, 24 L. R. A. (N. S.) 793, but was overruled; the opinion of the court saying: "This contention is not tenable. The plaintiff was not deprived of the case proved by a failure to prove all that was alleged. She was only obliged to prove the substance of the issue, and by the substance of the issue is meant the facts essential to a recovery. * * * Doubtless in many cases it is desirable to plead and prove the exact cause of an accident in order that the question of the defendant's negligence may be put beyond the peradventure of doubt, and thus insure a recovery, where otherwise a recovery might be doubtful, if the presumption alone were relied upon. Such was perhaps the purpose of the plaintiff in this instance. But the plaintiff is not to be deprived of the case her pleadings and

proof made, merely because she alleged a stronger case than she was able to prove."

The point made in that case and in this is that where a plaintiff does not content himself with alleging generally that he was a passenger on the car, that a derailment or a collision occurred, and that he was injured thereby, but went further and alleged particularly the cause of the accident, the cause alleged must be proved, otherwise the plaintiff cannot recover. In other words, that to such a case the doctrine of *res ipsa loquitur* cannot be applied.

In *Kluska v. Yeomans*, 54 Wash. 465, 103 Pac. 821, 132 Am. St. Rep. 1121, the court said: "We follow the rule announced in Massachusetts and other jurisdictions which holds in effect that a plaintiff who proves the happening of an accident and is otherwise entitled to certain presumptions arising therefrom does not lose the benefit of such presumptions because he has alleged what he conceived to be the specific cause of the accident." See, also, *McNamara v. Boston*, etc., R. Co., 202 Mass. 497, 89 N. E. 131, and cases there cited; *McNeil v. Durham*, etc., R. Co., 130 N. C. 256, 41 S. E. 383.

[5] It is well settled that the doctrine of *res ipsa loquitur* applies where the facts alleged in the eighth count of the declaration in this case are proven, and the burden is thereby cast upon the defendant of "explaining the circumstances of the accident so as to relieve itself from liability." *City & Sub. R. Co. v. Svedborg*, 20 App. D. C. 543; *Gleeson v. Va. Midland R. Co.*, 140 U. S. 435, 11 Sup. Ct. 859, 35 L. Ed. 458.

While the burden is always upon the plaintiff to establish his right to recover by the preponderance of the evidence, in cases where the causes of the accident are peculiarly within the knowledge of the defendant, proof of the happening of the accident establishes a *prima facie* case which calls for rebuttal and explanation on the part of the defendant. The plaintiff by proving the accident has adduced reasonable evidence, on which the jurors may, if they think fit, find a verdict for him. *Scott v. London Docks Co.*, 3 H. & O. 596; *Salmond on Torts*, p. 29; *Peters v. Lynchburg Trac. Co.*, 108 Va. 333, 61 S. E. 745, 22 L. R. A. (N. S.) 1188.

[6] In the case in judgment, the plaintiff, upon the close of the evidence adduced, moved the court to strike out the counts of her declaration from 1 to 7, inclusive, which was done. Therefore, the defendant could not possibly have been injured by the ruling of the court upon the demurrers to the declaration.

The defendant, pursuant to the statute (section 3370 of the Code, as amended Acts of Assembly 1910, p. 376), propounded and filed certain interrogatories to the plaintiff, to all of which she made answer, and the refusal of the court to strike out the answers of the plaintiff on the ground that they are

evasive and self-serving is made the basis of the defendant's second assignment of error.

We are unable to see any merit in this assignment of error, as the answers of the plaintiff to the interrogatories propounded to her appear to us as being directly responsive to the interrogatories, and are not amenable to the criticism of them made by the defendant. Nor did the court err in overruling the defendant's motion for a continuance of the cause, made because of its ruling refusing to strike out the answers of the plaintiff to said interrogatories which had been propounded to her.

The third assignment of error relates to the refusal of the court to require the plaintiff to file new and further particulars as to the eighth count of her declaration. Practically all that has been said with respect to the first assignment of error applies as well to the third.

[7] It is again insisted in the argument of the third assignment of error, as in the argument of the first, that, as the plaintiff alleged in her declaration negligence and carelessness on the part of the defendant which resulted in the injuries she sustained, she had assumed the burden of proof as to each and every count of her declaration, and was compelled before she could recover to establish by a preponderance of the evidence that her injury was the result of some act or acts of negligence on the part of the defendant; and that the plaintiff could not relieve herself of the burden of proving affirmative negligence on the part of the defendant under the eighth count of her declaration, and make a new case by her bill of particulars so as to shift the burden of proof upon the defendant to show that it was not guilty of any negligence in the performance of its duties towards the plaintiff.

We do not so read the bill of particulars filed by the plaintiff, which but states in plain terms that she relies upon the presumption of negligence which the law creates where the cause of the accident is unknown to the plaintiff; and the eighth count of her declaration, to which the bill of particulars applied, had alleged facts and circumstances out of which the presumption of negligence on the part of the defendant arises as matter of law.

It is needless to repeat in this connection what we have already said going to show that, because a plaintiff in a case like this alleges and attempts to prove more than he is required to do, the presumption of negligence is removed, or the rule of evidence with respect to the burden of proof is changed.

In *Dearden v. Railroad Co.*, 33 Utah, 147, 93 Pac. 273-274, the opinion of the court says: "When it is shown that a person has sustained an injury under circumstances where the maxim (*res ipsa loquitur*) applies, he is not required in the first instance to

prove any particular defect by evidence, other than by the *prima facie* presumption, although the facts with respect to some defect are unnecessarily alleged with particularity in the complaint. All that the plaintiff was required to aver and prove to entitle him to recover was the relation of passenger and carrier, that the accident through which he received his injuries was connected with the means, or instrumentality, used by the defendant in the transportation, and an injury resulting therefrom. * * * That the plaintiff averred and undertook to show a defective brake chain as evidence of negligence causing the collision did not waive or affect the presumption of negligence arising from the circumstances, etc. The evidence of a defective brake chain which the plaintiff produced was also proof of such negligence, and was in aid of and not adverse to the presumption." *McNeill v. Durham, etc., R. Co.*, supra; *Cassady v. Old Colony Ry. Co.*, 184 Mass. 156, 68 N. E. 10, 63 L. R. A. 288.

In the last-named case the court says: "The defendant contends that, even if originally the doctrine would have been applicable, the plaintiff had lost or waived her rights under that doctrine, because, instead of resting her case solely upon it, she undertook to go further, and show particularly the cause of the accident. This position is not tenable. * * * If at the close of the evidence the cause does not clearly appear, or if there is a dispute as to what it is, then it is open to the plaintiff to argue upon the whole evidence, and the jury are justified in relying upon presumptions, unless they are satisfied that the cause has been shown to be inconsistent with it. An unsuccessful attempt to prove by direct evidence the precise cause does not estop the plaintiff from relying upon the presumptions applicable to it."

[8, 9] The fourth and fifth assignments of error relate to the ruling of the court refusing to reject or to strike out, after the same had been admitted, the testimony of N. L. Martin and Clarence Harrison, witnesses introduced on behalf of the plaintiff to sustain the issue on her part in her case in chief.

There is much force in the contention of the defendant that, if the declaration in the case had contained only its eighth count in the first instance, the testimony of Martin and Harrison would not have been admissible in the plaintiff's case in chief; but it cannot be successfully maintained that, after the defendant had introduced evidence to show that its machinery was in good order, its track in proper condition, and its cars properly inspected, the testimony given by Martin and Harrison would not have been proper in rebuttal. So that, after the case was closed, and upon the plaintiff's motion the counts of her declaration from 1 to 7, inclusive, had been stricken out, the said witnesses might have been recalled to testify

for the plaintiff in rebuttal of the testimony that had been introduced by the defendant with respect to the condition of its machinery, track, cars, etc., and therefore the sole question for determination in this connection is, Has the defendant been prejudiced by the order in which the testimony given by Martin and Harrison was allowed to go to the jury for their consideration?

"The examination of witnesses lies chiefly in the discretion of the trial court, and its exercise is rarely, if ever, to be controlled by an appellate court. Much latitude of discretion should be allowed the trial court in the matter of recalling witnesses, and its action will not be reversed by an appellate court except for palpable error." *Burke v. Shaver*, 92 Va. 345, 23 S. E. 749; *Tate v. Bank*, etc., 96 Va. 765, 32 S. E. 476.

We are unable to find anything stated in the testimony of either Martin or Harrison that would not have been proper in rebuttal of evidence introduced by the defendant. Therefore, it was proper evidence to be considered by the jury along with all the other evidence in the case, and the court did not err in refusing to strike it out.

[10] Assignments of error 6 and 7 raise practically the same question, and will therefore be considered together.

Dr. Smallwood, the attending physician of the plaintiff, testifying for her, after explaining the difference between an impacted fracture and a straight fracture and stating that the plaintiff had sustained an impacted fracture of the hip—I. e., the bone was separated and by violence driven one piece into the other—said that, in order to sustain an impacted fracture of the hip, the blow would have to be directed against the hip bone; and in reply to the question, if that fracture could have happened by the plaintiff falling over on her face, the witness answered that she would have to fall on the hip to have a fracture, and the blow would have to come directly on the outside of the femur of the hip bone. The plaintiff and other witnesses introduced in her behalf testified as to the occurrence which resulted in the injuries to her that she was thrown from her seat forward violently to the floor, etc.; and at the close of all the evidence offered on behalf of the plaintiff to sustain the issue on her part the defendant moved the court to exclude from the record, and to instruct the jury that they must not regard in their consideration of the case the evidence relating to an impacted fracture of the hip bone, "for the reason that, according to plaintiff's own testimony, the blow must have come from the side, and directly on the hip bone, to have produced the character of fracture claimed, and there is no evidence in the record that she had such a blow, and the evidence of all the witnesses for the plaintiff is to the effect that she fell upon her face in the aisle of the car."

That there was some variance in the statements of the witnesses as to what took place and how the plaintiff fell upon the floor when she had been thrown violently from her seat is not at all remarkable or unnatural, and it would have been an unreasonable requirement of the plaintiff that she prove in the most minute detail just how she fell and what she struck. The evidence showed the construction of the interior of the car, the aisle, with seats on either side thereof; that the plaintiff was sitting in the second seat from the front of the car, and was thrown a distance of at least ten feet against the front door of the car, her feet going up and her head going down; and it was for the jury to say upon this and all the other evidence in the case whether or not the plaintiff could have sustained the injury of an impacted fracture of her hip bone. Had the jury been left alone to inferences to be drawn from the evidence, they might reasonably and properly have inferred that the plaintiff was thrown from her seat, across the aisle, against the seat, striking her right hip, then to the floor, and in that way had her hip broken.

The rulings of the trial court complained of in the assignments of error 6 and 7 were clearly right, and therefore these assignments of error are also without merit.

[11] The eighth assignment of error seems to be based upon an erroneous theory of the law that, upon the defendant showing inspection, good condition of track and machinery, the burden of proof shifted to the plaintiff, and she was required to show wherein the defendant had been in these respects negligent.

"Where an injury happens, as the result of an accident such as the record discloses, the presumption is that it occurred by the negligence of the railroad company, and the burden of proof is on the company to establish that there has been no negligence whatsoever, and that the damage has been caused by inevitable casualty, or by some cause which human care and foresight could not prevent." *Southern Ry. Co. v. Dawson*, 98 Va. 578, 36 S. E. 996.

"When the physical facts of an accident themselves create reasonable probability that it resulted from negligence, the physical facts themselves are evidential and furnish what the law terms evidence of negligence, in conformity with the maxim *res ipsa loquitur*." *Richmond Ry. Co. v. Hudgins*, 100 Va. 413, 41 S. E. 738.

The authorities both in England and America sustain the proposition that a presumption of negligence arises upon proof of a derailment, and that the burden of proof is upon the defendant to show that it is without fault. Among the very many authorities in this country are *B. & O. Ry. Co. v. Noell*, 73 Va. 399; *Gilmore v. Brooklyn*, etc., Ry. Co., 6 App. Div. 117, 39 N. Y. Supp.

417; *St. Louis, etc., R. Co. v. Cooksey*, 70 Ark. 481, 69 S. W. 259; *Southern P. Co. v. Cavin*, 144 Fed. 348, 75 O. C. A. 850; *Seybolt v. N. Y., etc., R. Co.*, 95 N. Y. 562, 47 Am. Rep. 75; *Whalen v. Consol. Trac. Co.*, 61 N. J. Law, 606, 40 Atl. 645, 41 L. R. A. 836, 68 Am. St. Rep. 723; *Louisville, etc., Ry. Co. v. Jones*, 108 Ind. 558, 9 N. E. 476. See, also, *Fetter on Carriers of Passengers*, 480 et seq; *Patterson's Ry. Acc. L.* 274, note 7, 13 L. R. A. (N. S.) note, p. 606; 14 Am. & Eng. R. R. Cases (N. S.) 289, note.

In *Louisville, etc., Ry. Co. v. Jones*, supra, the court says: "When the plaintiff made it appear that she was a passenger upon appellant's train, and while being carried as such the car in which she was seated left the track, and she suffered injuries thereby, she has shown a state of things upon which a presumption of negligence arose against the railroad company, which stood with the force and efficiency of actual proof of the fact, and was available for her benefit until negated and overthrown, and that such presumption can only be overthrown by proof that the casualty resulted from inevitable or unavoidable accident, against which no human skill, prudence, or foresight, as usually and practically applied to careful railroad management, could provide."

[12] As we have observed, the plaintiff in this case had shown that she was a passenger on a car of the defendant; that the car on which she was seated was derailed, and she was thereby injured, upon which proof the jury might have rendered a verdict for her, and whether or not the defendant had shown by a preponderance of the evidence that it was free from the charge of negligence was a question for the jury; and therefore the trial court did not err in refusing the request of the defendant for a peremptory instruction directing the jury to find a verdict in its favor.

The ninth assignment of error relates to the refusal of the court to sustain the objections of the defendant to certain instructions asked by the plaintiff, and, without citation of authorities, the assignment merely challenges the production of any authority to the effect that a defendant, in a case where the doctrine of *res ipsa loquitur* applies, must not only show that it is free from negligence, but must also give an explanation of the cause of the accident, and show by a preponderance of the evidence that it was guilty of no negligence whatever.

We think that we have already cited ample authority for the rule that where the plaintiff has shown that she was a passenger of the carrier, that while a passenger the car of the carrier upon which she was riding was derailed, and that she thereby sustained injury, she was entitled to recover damages for the injury, unless the defendant showed by affirmative evidence that the accident had

been caused by inevitable casualty, or by some cause which human care and foresight could not prevent; and how else, it may be asked, can a defendant in a case like this show that it was guilty of no fault whatever, except by affirmative proof of facts sufficient to account for the derailment and to explain the reason therefor? In the absence of a satisfactory explanation by the defendant of the cause of the accident, going to show that the defendant was free from fault, the plaintiff is entitled to a verdict. *Southern Ry. Co. v. Dawson*, supra; *Richmond, etc., Ry. Co. v. Hudgins*, supra; *McNamara v. Boston, etc., Ry. Co.*, supra; *Magee v. N. Y., etc., Ry. Co.*, 195 Mass. 111, 80 N. E. 869; *Snyder v. Wheeling, etc., Co.*, 43 W. Va. 661, 28 S. E. 733, 39 L. R. A. 502, 64 Am. St. Rep. 922; *Och v. Missouri, etc., Ry. Co.*, 130 Mo. 27, 31 S. W. 962, 36 L. R. A. 442; *Robinson v. St. L., etc., Ry. Co.*, 103 Mo. App. 110, 77 S. W. 498; *Green v. Pacific L. Co.*, 130 Cal. 435, 62 Pac. 747.

[13] The court in this case, in the instructions to the jury, propounded the law applicable to the facts which the evidence tended to prove in accordance with the views expressed in this opinion, and therefore the defendant was without just cause of complaint with respect to the instructions given; and, the case having been fully and fairly submitted to the jury upon every phase of it presented in the evidence, the court did not err in refusing other instructions asked by the defendant.

The remaining assignment of error requiring consideration raises the question, whether or not the verdict of the jury is contrary to the evidence, and whether or not the damages assessed by the jury are excessive.

[14] The evidence to which we have adverted is of itself sufficient to sustain the finding of the jury in favor of the plaintiff, and, in addition to the fact that there is nothing whatever in the record indicating that the jury in ascertaining the damages acted under the impulse of an improper motive, gross error, or misconception of the subject, the evidence very plainly shows that the plaintiff, about 30 years of age, in the possession of all her faculties, enabling her to earn for her services as a clerk in one of the departments of the United States government at Washington, D. C., \$900 per annum at the time she sustained the injuries of which she complains in this suit, suffered an impacted fracture of the hip, causing her continuous and intense pain; that this injury is permanent; that at the time of the trial of this cause her broken limb was one-half inch shorter than the other; that she would always limp, and as time went on the shortening of the limb would increase. In view of these facts, this court would not be justified in disturbing the verdict of the jury on the ground that the damages assessed to the plaintiff are excessive.

Upon the whole case, we are of opinion that there is no error in the judgment of the circuit court, and therefore it is affirmed.

Affirmed.

KEITH, P., absent.

(114 Va. 123)

STACY v. W. M. RITTER LUMBER CO.
(Supreme Court of Appeals of Virginia. Sept. 9, 1912.)

1. BOUNDARIES (§ 3*)—LOCATION—DETERMINATION.

Generally, where a boundary description calls for notorious landmarks, as corner trees or natural objects, they are to be regarded as termini, and a straight line is to be run from one terminus to another, regardless of course or distance; but if the description shows that a straight line was not intended, as where a river or other irregular line is clearly indicated, the irregular line must be followed, if by doing so the other terminus can be reached.

[Ed. Note.—For other cases, see Boundaries, Cent. Dig. §§ 3-41; Dec. Dig. § 3.*]

2. BOUNDARIES (§ 3*)—LOCATION—DETERMINATION.

In ascertaining the location of the boundaries of a tract, a call for the lines of adjoining surveys must be regarded as landmarks with which and to which the grantees of the particular tract had to go, though they were mistaken in supposing that certain trees were located at the corner of one of the adjoining surveys, and a call for the line of an adjoining tract should prevail over a call for course and distance, based on a survey made by one who was not on the ground.

[Ed. Note.—For other cases, see Boundaries, Cent. Dig. §§ 3-41; Dec. Dig. § 3.*]

3. BOUNDARIES (§ 1*)—LOCATION—DETERMINATION.

Where the exact location of a boundary line is uncertain, that construction is favored which gives effect in a measure to every call of the description, and which does least violence to the calls.

[Ed. Note.—For other cases, see Boundaries, Cent. Dig. § 1; Dec. Dig. § 1.*]

Appeal from Circuit Court, Buchanan County.

Action by A. C. Stacy against the W. M. Ritter Lumber Company. Judgment for plaintiff, and defendant appeals. Affirmed.

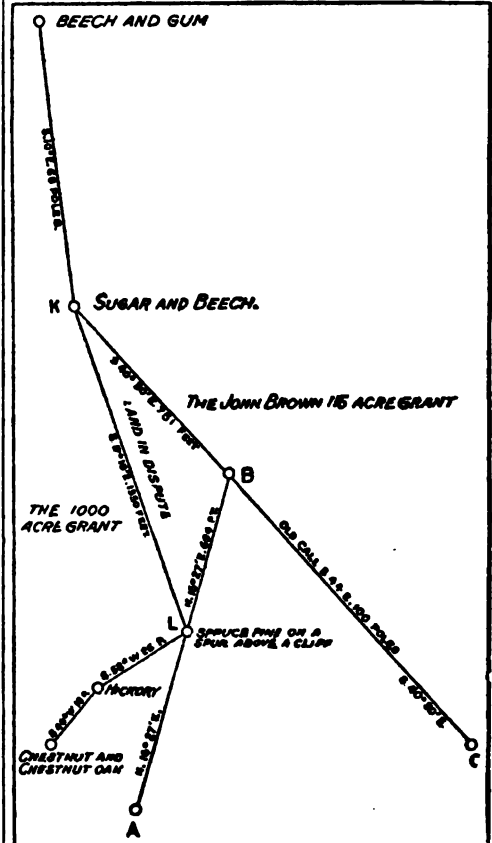
M. O. Litz and Greever & Gillespie, for appellant. W. A. Daugherty and Roland E. Chase, for appellee.

BUCHANAN, J. The controversy in this case turns upon the description of the land contained in the grant under which the appellee claims. That grant is dated in 1887. The grant under which the appellant claims is dated in 1900. If, therefore, the descriptive calls in the grant under which the appellee holds embrace the land in controversy, there is no error in the decree appealed from.

The grant to Graham and others, under which the appellee claims, after setting out several lines and corners about which there is no dispute, calls for running with a 23-acre survey "N. 70° E. 32 poles to two beech

stumps, corner of 115 acres patented in the name of John Brown, with same S. 28° E. 116 poles to a beech and gum; S. 10° E. 68 poles, crossing the creek twice, to a sugar and beech on the bank, corner of a survey in the name of Daniel Blankenship; with the reverse of a part of one line of the same, S. 13° W. 58 poles, to a spruce pine on a spur above a cliff, a corner to Martin Blankenship; with his lines S. 58° (W.) 26 poles to a hickory; S. 40° W. 18 poles to a chestnut and chestnut oak."

A diagram below shows the lines in controversy.



The land in controversy is the triangle shown in the diagram by the lines "K" to "B," "B" to "L," and "L" to "K." The contention of the appellant is that the line from "K" to "L" is the true boundary line of the 1,000-acre grant. The appellee, on the other hand, insists, and the trial court so held, that the lines from "K" to "B" and from "B" to "L" are its boundary lines between the points "K" and "L," which points are recognized corners of the 1,000-acre grant.

[1] The general rule is (and it is not controverted in argument) that where notorious landmarks, as corner trees or natural objects, are called for, they are to be regarded as termini, and a straight line is to be run from

one terminus to the other, without respect to course or distance. *Smith v. Davis*, 45 Va. 50; *Marlow v. Bell's Lessee*, 54 Va. 527, 531.

While this is the true rule where no other call is found in the grant, but the call to run from one terminus to another, "there certainly may be," as was said by Judge Allen in delivering the opinion of the court in *Marlow v. Bell's Lessee*, supra, at page 531, "other calls which show the line was not intended to be a straight line, as where a call is to run with a river or a public road from one terminus to another, the stream or road, if it leads to the other terminus, must be followed, though it may diverge from a direct line between the two points. The same rule would apply to a marked line, if there was enough to show that such line, though not a direct line, was intended as a boundary, provided, by following the marked line, the other terminus can be reached."

[2, 3] In the case under consideration, in addition to the call S. 13° E. 58 poles from the sugar and beech at "K" to the spruce pine on a spur above a cliff at "L," there is the further call, running with the reverse of a part of one line of a survey in the name of Daniel Blankenship. That survey does not corner on the sugar and beech at "K," and a straight line run from "K" to "L" does not touch the survey in the name of Daniel Blankenship. If, instead of running direct from "K" to "L," the line is run from "K" to "B" and from "B" to "L," the line from "B" to "L" runs with the Daniel Blankenship survey to the spruce pine called for at "L," which is a corner to Martin Blankenship; but this adds a line to the calls in the 1,000-acre grant. In construing the description in the 1,000-acre grant, a line must be added, as claimed by the appellee, or the call for running with the Daniel Blankenship survey must be disregarded, and a straight line run from "K" to "L," as contended for by the appellant.

It appears that the survey upon which the 1,000-acre grant was issued was not actually made along the disputed boundary, or immediately on either side of it. The maker of that survey testifies that he did not go upon the ground along the disputed boundary line when the survey was made, but took "the metes and bounds of the description of the adjoining tracts." While it appears that the marks on the corner trees at "K" and "L" indicate that they were marked as if the line ran straight from "K" to "L," it further appears that those marks were not made when the survey upon which the 1,000-acre grant was issued was made, and not until after the year 1900. These marks upon the trees at "K" and "L" cannot, therefore, be of any value in determining the location of the boundary of the 1,000-acre grant between those two points.

That grant was of waste and unappropriat-

ed lands. It was bounded in many places by the lines of previous grants. This clearly appears from the calls of the grant. The survey upon which it was issued calls for it to begin at a corner of Andrew Baker and Joseph Dougherty, thence with the latter's lines. It calls for a corner in the line of James May, and thence with his line, and for corners in and running with lines in surveys, respectively, to John B. Justus, Jacob Justus, John Brown, Daniel Blankenship, Martin Blankenship, Abner Kerr, and Ashville Smith. These calls, together with a plat of the survey, show pretty clearly that the effort of the grantees in the 1,000-acre grant was to include the vacant land along the lines called for. The land seems to have been vacant along many of these lines, and certainly was along the lines of John Brown and Daniel Blankenship, according to the appellant's own showing; for his claim to the land in controversy is based upon a grant junior to the 1,000-acre grant. It clearly appearing that the boundary of the 1,000-acre grant from "K" to "L" was not actually surveyed, but the description in it taken from the descriptions of the adjoining tracts, that the land up to the line "K" to "B" was then vacant and adjoined the 115-acre grant of John Brown, and that the land along the line from "B" to "L" was also vacant and adjoined the survey of Daniel Blankenship, the fair inference is that the land in controversy was intended to be embraced within the boundaries of the 1,000-acre grant.

There is no question that the line from "K" to "B" runs with a line of the John Brown 115-acre survey, nor that the line from "B" to "L" runs with a line of the Daniel Blankenship survey. The call for these objects must, we think, in legal construction, be regarded as landmarks with which and to which the grantees in the 1,000-acre grant had to go, although they were mistaken in supposing that the sugar and beech was a corner of the survey in the name of Daniel Blankenship. By running to those trees, and then with the John Brown survey until a line of the Daniel Blankenship survey is reached, and then with the reverse of one of its lines to the spruce pine at "L," corner to Martin Blankenship, effect is given in a measure to every call of the grant, and much less violence is done to the calls than if that which is most material should be entirely disregarded, as would be the case if the appellant's contention were sustained and a straight line should be run from "K" to "L."

This case is very similar in its circumstances to the case of *Shultz v. Young*, 25 N. C. 385, 40 Am. Dec. 413, cited with approval in *Marlow v. Bell's Lessee*, supra, at page 534, and also to the last-named case. In the former case the deed called to run south with A. B.'s line 310 poles to C. D.'s old corner. A. B.'s line did not reach the corner, but at the end of A. B.'s line it was necessary to

run at right angles to reach C. D.'s corner. It was held that the line should be run 310 poles on A. B.'s line, and then a straight line to C. D.'s old corner, as that best conformed to the description of the deed, though it was necessary to run two lines, instead of the one called for.

In the case of *Marlow v. Bell's Lessee*, the patent of S. called to commence at a certain point admitted to be a corner of M.'s survey, and to run with his line a certain course and distance to a white oak, corner of C., and thence with C.'s line a certain course and distance to another corner of C. Following the first call, it came to a white oak corner of M., but not the corner of C.; but to get to C.'s corner the line must leave the second corner of M. at nearly right angles and run 79 poles, not running on the line of either M. or C. for that distance. The call for the line of M. was, under the circumstances, held to be the correct call, and S.'s patent was construed to include all the land up to the line of M. In disposing of this last-named case, Judge Allen used language which is pertinent and peculiarly applicable to this case. "The [trial] court," he said, "was of opinion that there were manifest and strong reasons for believing that the line called was well known to the parties, and, so believing, determined that the call for the terminus should not overrule the rest of the description. It is equally manifest, from the calls of this grant, the locator here knew that the waste land he was appropriating was bounded in part by older surveys; that he knew the general position of those surveys, and where the lines run; that the surveys were before him; and that he intended to adopt and did adopt the lines of such surveys where called for, precisely as they had been run originally, and to make them the boundaries of his survey. And, those things being so, it seems to me the call for McCoy's line cannot be rejected."

The facts and circumstances of this case are equally as strong, if not stronger, for holding that the call for running with Daniel Blankenship's line cannot be rejected, and should prevail over a call for course and distance in a grant based upon a survey made by a surveyor who was not upon the ground.

We are of opinion that the decree of the circuit court should be affirmed.

Affirmed.

(138 Ga. 667)

CAPITAL CITY TOBACCO CO. v. ANDERSON et al.

(Supreme Court of Georgia. Sept. 24, 1912.)

(Syllabus by the Court.)

1. APPEAL AND ERROR (§ 80*)—DECISIONS REVIEWABLE—FINALITY OF DECISION—TAXING TEMPORARY RECEIVER'S FEE.

A temporary receiver was appointed for the assets of the defendant upon the presenta-

tion of a petition, and without notice to the defendant. Subsequently other parties, by intervention, were made coplaintiffs. Upon the hearing of a motion by the defendant, the order appointing a temporary receiver was rescinded, and a receivership refused, which ruling was affirmed by the Supreme Court. Later a sum of money belonging to the defendant in the hands of the temporary receiver was ordered paid to the defendant, and upon the same date, upon an application of the temporary receiver, it was ordered that he be paid a given amount for services rendered, and that the same be taxed against the original plaintiff in the case. The following was incorporated in this last order: "It is the opinion of the court that the receiver's duties are permanently ended, and there can arise no further need for his services; but if it should ever occur that the receiver is called upon to perform any other services, he may then apply to the court for a further order in respect to additional compensation, and in respect to the question of who, and for what amount, any or all of the parties to the cause may be required to contribute to this compensation, the court holding in its breast the right, under such circumstances, to determine whether any part thereof to be paid in the future, or any part of that already paid, should be contributed by the parties, or any of them, including the defendant company." The plaintiff excepted to the granting of both of these orders. The exception to the order taxing the plaintiff with the amount of the fee of the temporary receiver was excepted to on the following grounds: (a) The court was without jurisdiction to pass a final decree in the case at the time; (b) and was without jurisdiction to render judgment against plaintiff in favor of the temporary receiver while the case was pending and before the merits of the plaintiff's case had been determined; and (c) that, if the order were otherwise invalid, the receiver's fee should have been taxed against the two interveners "jointly, or jointly and severally with the plaintiff." In this court the defendants in error moved to dismiss the bill of exceptions, on the ground that it was prematurely sued out. *Held*, the order or judgment taxing the amount of the temporary receiver's fee against the original plaintiff in the case was final as to the plaintiff. An execution could be issued upon such judgment, and such fee thereby collected from plaintiff. The mere fact that the court reserved the right subsequently to require some or all of the parties to the case to contribute, in order to refund to the plaintiff a portion of the sum which it was ordered the plaintiff should pay, did not prevent the judgment from being final as to plaintiff.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 429, 432, 450, 456, 457, 494-509; Dec. Dig. § 80.*]

2. APPEAL AND ERROR (§ 984*)—RECEIVERS (§ 55*)—DISCRETION OF TRIAL COURT—REVIEW.

In an equitable action it is the province of the judge to determine upon whom costs shall fall; and this determination will not be reversed, unless the discretion of the judge be abused. Civil Code, § 5423, and cases cited in *Epps v. Thomas*, 131 Ga. 65, 61 S. E. 1117; *Fitzpatrick v. McGregor*, 133 Ga. 332 (4), 344, 65 S. E. 859, 25 L. R. A. (N. S.) 50. The judge's discretion was not abused in adjudging that the fee of the temporary receiver should be taxed against the plaintiff, upon whose petition alone the receiver was appointed, which appointment was rescinded as improvident. The receiver having performed all his duties, for which compensation was allowed him in the order, there was no reason why he should have been required to wait until the case had been disposed of before an order should be passed for the payment of his fee; and the judge was

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexer

not without jurisdiction to grant the order when he passed it.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3881-3888; Dec. Dig. § 984; Receivers, Cent. Dig. §§ 94, 400; Dec. Dig. § 55.*]

3. APPEAL AND ERROR (§ 1078*)—REVIEW—ABANDONMENT OF ERROR.

The assignment of error in the bill of exceptions upon the order directing the temporary receiver to pay to the defendant below the money belonging to it, and in the hands of the receiver, is not referred to in the brief of counsel for the plaintiff in error, and will be considered as abandoned.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4256-4261; Dec. Dig. § 1078.*]

Error from Superior Court, Fulton County; W. D. Ellis, Judge.

Action by the Capital City Tobacco Company against J. H. Anderson. Other parties were made coplaintiffs by intervention. To an order rescinding the appointment of a temporary receiver, and that he pay the amount in his hands to defendant, and taxing the compensation to be paid the receiver by plaintiff Tobacco Company, it excepts. Affirmed.

Moore & Pomeroy and Dorsey, Brewster, Howell & Heyman, all of Atlanta, for plaintiff in error. Wimlish & Ellis, Edgar Watkins, Moore & Pomeroy, Paul E. Johnson, and J. L. Anderson, all of Atlanta, for defendants in error.

FISH, C. J. Judgment affirmed. All the Justices concur.

(123 Ga. 625)

STEPHENS v. CENTRAL OF GEORGIA RY. CO.

(Supreme Court of Georgia. July 11, 1912. Rehearing Denied Sept. 18, 1912.)

(Syllabus by the Court.)

1. CONSTITUTIONAL LAW (§§ 89, 242, 298*)—CARRIERS (§ 12*)—DUE PROCESS OF LAW—EQUAL PROTECTION OF LAWS—RIGHT OF PRIVATE CONTRACT—SELECTION OF AGENT.

A statute which provides a penalty against a common carrier for "refusing to put on sale," or to sell, tickets of a connecting carrier for the transportation of passengers over the connecting line, or any portion thereof, at the rate prescribed by the railroad commission of the state, does not violate the provisions of article 1, § 1, par. 3, of the Constitution of the state, which declares that no person shall be deprived of property except by due process of law.

(a) Nor is such a statute obnoxious to the fourteenth amendment of the Constitution of the United States, which declares that no state shall deprive any person of property without due process of law, nor deny to any person the equal protection of the laws.

(b) Nor does such a statute violate the provision of the Constitutions above referred to because it interferes with and destroys the right of private contract.

(c) Nor because it compels a railroad company to become the debtor of another railroad company against its consent.

(d) Nor because it compels a railroad company to become the agent of another railroad

company, or to appoint another railroad company its agent, against its consent.

(e) Nor because it deprives a railroad company of the right to select its own agents, and compels it, against its consent, to transact its business through the agents of another railroad company.

(f) Nor for the reason that it requires a railroad company to enter into contractual relations with another railroad company against its consent.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 157, 691, 847; Dec. Dig. §§ 89, 242, 298.* Carriers, Cent. Dig. §§ 7-20; Dec. Dig. § 12.*]

2. CARRIERS (§ 20*)—REGULATION—PENALTIES—REFUSAL TO SELL TICKETS.

Where a connecting line of railroad, having an office or agency, has on sale tickets furnished by another connecting railroad for the transportation of passengers over the latter, and refuses to sell said tickets to a prospective passenger, who applies to the agent of the initial carrier for such tickets at the price fixed by the railroad commission of this state, the railroad so refusing is subject to the penalty provided by Civil Code, § 2755.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 33-49, 133, 927; Dec. Dig. § 20.*]

3. SUFFICIENCY OF PLEADING.

The petition, as amended, set forth a good cause of action, and the demurrer thereto should have been overruled.

Error from Superior Court, Carroll County, R. W. Freeman, Judge.

Action by S. T. Stephens against the Central of Georgia Railway Company. Judgment for plaintiff, and defendant brings error. Reversed.

Watkins & Latimer, of Atlanta, and S. Holderness, of Carrollton, for plaintiff in error. Lloyd Cleveland, of Griffin, Hall & Hall, of Macon, and R. D. Jackson, of Carrollton, for defendant in error.

HILL, J. Stephens brought his action against the Central of Georgia Railway Company to recover the penalty provided in the Civil Code, §§ 2752 to 2755, inclusive. The petition, as amended, shows substantially the following: The defendant company is a common carrier operating passenger trains from Whitesburg, Carroll county, Ga., to and beyond Newnan, Coweta county, and the defendant is directly and indirectly connected with the Atlanta & West Point Railroad at Newnan, Ga., their tracks crossing there. The most direct route from Whitesburg to Atlanta is over the defendant railway, via Newnan and the Atlanta & West Point Railroad. The rate of fare fixed by the railroad commission from Whitesburg to Newnan is 28 cents and from Newnan to Atlanta, 78 cents making a legal passenger charge from Whitesburg to Atlanta of \$1.06, as fixed by the railroad commission. The plaintiff demanded of the defendant, on the dates named in the petition, tickets from Whitesburg to Atlanta, over the connecting line of railroad, and the defendant refused to sell such tickets at the lawful rate fixed by the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes 75 S.E.—66

commission, but charged and secured 15 cents in excess of the legal rate. The failure to sell such tickets at the rate fixed by the commission was in violation of Civil Code, § 2755, and subjected the defendant to the penalty of \$1,000, prescribed by that section, for each offense, and suit was brought for \$2,000 for the two offenses. It was also alleged that, while the defendant refused to put on sale or to sell tickets as aforesaid, it had, at all times since the rate was fixed by the railroad commission on September 2, 1907, sold tickets from Whitesburg to Newnan for 28 cents, and the Atlanta & West Point Railroad Company sold tickets from Newnan to Atlanta for 78 cents. On and from the above date the defendant was authorized to sell and did sell tickets of the Atlanta & West Point Railroad and its own line from Whitesburg, via Newnan, to Atlanta. Tickets reading from Whitesburg to Atlanta over the lines of the defendant company and the Atlanta & West Point Railroad Company to Newnan and Atlanta had been placed by the latter company with the defendant company at all times since the 2d day of September, 1907, and it was within the power of the defendant company to sell the plaintiff the ticket applied for over the connecting lines, at the price fixed by the railroad commission. The tickets sold to the plaintiff, reading over such connecting lines of the defendant and the Atlanta & West Point Railroad Company, were received by these companies for passage over their connecting lines; but, notwithstanding it was within the power of the defendant to sell tickets on the dates on which the plaintiff sought to buy them from Whitesburg to Atlanta over the connecting lines of the two companies, the defendant refused to sell such tickets, though requested to do so, at the price fixed by the railroad commission, but sold such tickets at a price and rate in excess of that fixed by the railroad commission of Georgia. The defendant filed its demurrer to the petition, which was sustained by the trial judge, and the petition dismissed. To this judgment the plaintiff excepted, and brought the case here for review.

[1] 1. This is a suit to recover the penalty provided by Civil Code, § 2755. The facts are substantially set forth above. The material portions of sections 2753, 2754, and 2755 of the Code are as follows:

"No railroad company having an office or agency within the state of Georgia shall refuse to put on sale, or refuse to sell, any ticket of any other railroad company, with which the same may be directly or indirectly connected, at the price or rate fixed by the railroad commission of this state, for passage over lines of such connecting roads, less such amount as may be directed to be deducted from such rate by any one or more of said connecting lines."

"No railroad company operating or doing

business wholly or partly within this state shall refuse to put on sale with the agents of any other railroad company, wherewith it may be directly or indirectly connected, tickets for any point upon its line of road, or refuse to receive such tickets for passage over its lines, or refuse to receive and transport baggage which may be checked upon tickets so sold."

"For every violation of any of the provisions of the two preceding sections, the railroad company shall be subject to a penalty of one thousand dollars, which may be recovered in any superior or city court of the county in which such violation may occur. Suit may be brought by the railroad company whose road may be discriminated against, or by the person offering to buy a ticket over such road; and such penalty may be recovered by each of said parties, and the recovery by one shall not be a bar to the recovery by the other."

It is alleged that the defendant company refused to sell tickets of the Atlanta & West Point Railroad Company, its connecting line of railroad, from Newnan to Atlanta, and its own tickets from Whitesburg to Newnan, at the price fixed by the railroad commission of this state, although the defendant had received from the Atlanta & West Point Railroad Company and had on sale and did sell tickets over that line and over its own to the plaintiff at a price in excess of the rate fixed by the railroad commission. There is no question raised as to the form of the tickets had and sold.

It is insisted by the defendant in error that the above-recited statute, on which this suit is founded, is invalid and unconstitutional, because it violates the provisions of article 1, § 1, par. 3, of the Constitution of this state (Civil Code, § 6359), which declares that no person shall be deprived of property except by due process of law and of the fourteenth amendment to the Constitution of the United States, which declares that no state shall deprive any person of property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws. Civil Code, § 6700. We think the case, on this point, is controlled by the decision in the case of *Wadley Southern Ry. Co. v. State*, 137 Ga. 497 (3), 504, 73 S. E. 741, and therefore no further discussion of it is necessary. See, also, *Atlantic Coast Line Railroad Co. v. State*, 135 Ga. 546 (3) 557, 69 S. E. 725, 32 L. R. A. (N. S.) 20.

But it is insisted that, even if the act quoted from is not unconstitutional upon the above grounds, it interferes with and destroys the right of private contract with reference to the matters dealt with in said statute, and requires a railroad company to become the debtor of another railroad company and to become its agent against its consent, etc. We do not think that these contentions are sound. The right of the Legislature to

pass laws regulating common carriers has been constantly questioned in this state, but this is no longer an open question. The opinion in the case of Georgia Railroad Co. v. Smith, 70 Ga. 694, and the uniform line of decisions subsequent thereto, are to the effect that the Legislature, within its constitutional limitations, has that right. In the Smith Case, *supra*, it was ruled: "The object of the constitutional provision conferring power upon the Legislature to regulate railroad freights and passenger tariffs, to prevent unjust discrimination and require reasonable and just freights and tariffs, and making it the duty of the Legislature to pass laws in furtherance of this provision, was to give proper protection to the citizens against unjust rates for the transportation of freights and passengers over the railroads of the state, and to prevent unjust discrimination, even though the rates might be just."

The principle of the right of a state or government to regulate carriers and rates for public services performed is not new, but seems to date back to a very ancient period. So far as the writer's research extends, it goes at least as far back as about 2250 years before the birth of Christ, to the reign of Hammurabi, the king of ancient Babylon, who had a complete code of laws for that time. Indeed, our laws of the present day have few underlying principles that do not seem to be contained in this primitive code. In it we read that "if a man be on a journey and he give silver, gold, stones, or portable property to a man with a commission for transportation, and if the man do not deliver that which was to be transported where it was to be transported, but take it to himself, the owner of the transported goods shall call that man to account for the goods to be transported which he did not deliver, and that man shall deliver to the owner of the transported goods five-fold the amount which was given to him." The Code of Hammurabi (2d Ed., University of Chicago Press, 1904) § 112. Again we read: "If a man hire an ox for a year, he shall give to its owner four gur of grain as the hire of a draught ox, and three gur of grain as the hire of an ox." *Id.* §§ 242, 243. "If a man hire a sailboat he shall pay 2½ se of silver as its hire." *Id.* § 276. "If a man hire oxen, a wagon, and a driver, he shall pay 180 ka of grain per day." *Id.* § 271. "If a man hire a wagon only, he shall pay 40 ka of grain per day." *Id.* § 272. "If he hire an ass to thresh, 10 ka of grain is its hire." *Id.* § 269. Numerous other instances from this ancient code could be cited. So the principle of regulation is not new, but has come down to us from the ancients.

But we are not remanded to ancient history, or law, for precedent on this question. The constitutional and statutory right to regulate common carriers in this state, within the limitations imposed, is too well settled to

require argument or citation of authority. Our Reports abound in decisions on the subject of railroad regulation. The question to be determined in this case is: Has the Legislature the right to compel one railroad to place its tickets on sale with another connecting railroad, and to require the latter railroad to sell them, at the price fixed by the railroad commission? In this case the question does not really come to that, for the defendant railroad had on sale the tickets alleged to have been placed by the railroad connecting with it, and sold them; and the real question is: Is the railroad selling the tickets at a greater rate than that prescribed by the railroad commission of Georgia, subject to the penalty provided by law for the violation of the statute here sought to be enforced? The penalty is "for every violation of *any* of the provisions of the two preceding sections." Is the sale of the tickets at a rate in excess of that fixed by the railroad commission a violation of *any* provision of the statute? We think it is. A simple reference to the statute quoted above is sufficient to establish this. If the position of the defendant in error is sound, and can be maintained, the whole law regulating common carriers and requiring railroads to connect, interchange freight, to prevent discrimination, to make physical connection, and the like, is wiped out.

In some of the cases coming to this court on this and similar questions, the same argument was used in those cases as here. In the case of Atlantic Coast Line Railroad Co. v. State, *supra*, it was argued that the Legislature could not, under the police power conferred upon it, require a railroad company to furnish a certain kind of headlight; but this court (135 Ga. 557, 69 S. E. 731, 32 L. R. A. [N. S.] 20) said: "All property is held subject to the police power of this state. The determination by the railroad company that the reflector and the light in use by it constitute an adequate light cannot be conclusive on the General Assembly, which has the authority to exercise the police power of the state, and in the interest of public safety to declare such light inadequate. It is a matter of great importance for the protection of persons and property in the train, the persons on the locomotive, persons and property on the track, and persons and property on other trains with which a collision may be had, that there should be an adequate headlight on such locomotive. The General Assembly, in the exercise of the police power of the state, had the right to require adequate headlights on such engines; and if in conformity to the requirements of such law the railroad company is compelled to do away with the headlights already in use by it and substitute others therefor at its own expense, there is no taking of property without just compensation, in violation of the due process clauses of

the state and federal Constitution. In such a case there is no taking of property. The due process clauses are not intended to limit the right of the state to properly exercise the police power in the enhancement of the public safety. The fact that the railroad company will, in order to equip its engines with the required headlights, be forced to do away with the reflectors and lights which it has in use, is only incidental to a compliance with the police regulation and requirement made in the act, which is a valid and reasonable requirement." In the case of *Minneapolis & St. Louis R. Co. v. Minnesota*, 186 U. S. 257, 22 Sup. Ct. 900, 46 L. Ed. 1151, it was held: "The act of the Legislature of Minnesota, creating a railroad commission, is not unconstitutional in assuming to establish joint through rates or tariffs over the lines of independent connecting railroads, and apportioning and dividing the joint earnings." "Without deciding whether or not connecting roads may be compelled to enter into contracts as between themselves, and establish joint rates, it is none the less true that, where a joint tariff between two or more roads has been agreed upon, such tariff is as much within the control of the Legislature as if it related to transportation over a single line." See, also, *Beale & Wyman on Railroad Rate Regulation*, § 830; *Wadley Southern Ry. Co. v. State*, supra.

It is true this court has held that a shipper cannot require a carrier to issue a through bill of lading (*Coles v. Cent. R. Co.*, 86 Ga. 253, 12 S. E. 749; *State v. Wrightsville, etc., R. Co.*, 104 Ga. 437, 30 S. E. 891), not for constitutional reasons, but for lack of statutory legislation on the subject. Our statute requires one railroad company to receive and take cars from another railroad, as well as freight for transportation. Civil Code, § 2758. The argument here against requiring one connecting railroad to furnish and the other to sell passenger tickets is the same that has been held not sound by this court, and others, in the numerous cases on that question. If the contention is sound that a given railroad has the power to contract with one railroad, and not with another, and it is held that it cannot be required to do so, because you force them to contract with one another, the effect would be to obliterate all the law preventing discrimination. We hold, therefore, that the act under review is not void on the ground that it interferes with and destroys the right of private contract with reference to the matters dealt with in the statute; nor on the ground that it requires one railroad company to become the debtor of another railroad company, or to become the agent of another railroad company against its consent.

[2] 2. In the case of *Jones v. L. & N. R. Co.*, 132 Ga. 11, 63 S. E. 627, the plaintiff

alleged neither that the "defendant had been furnished tickets of this kind for sale by such connecting carrier, nor that it had been tendered such tickets for sale and had refused to put them on sale," and hence no cause of action was stated under the statute, and the case was properly dismissed. But here the case is different, and the amendment seems to have been drawn with special reference to the *Jones Case*, supra, and brings this case within the reasoning in that. It is alleged here that the Central of Georgia Railway Company was furnished the tickets by the Atlanta & West Point Railroad Company, its connection, and, having the tickets, refused to sell them to the plaintiff at the rate prescribed by the railroad commission, but sold them at a price or rate in excess of that fixed by the railroad commission, and that these tickets were accepted by the two railroad companies, respectively. This case, therefore, comes clearly within the reasoning in the *Jones Case*, supra. We hold that, when one railroad places its tickets with another railroad, which has an office or agency and physical connection with the former, this is substantially a request to sell such tickets. And if the carrier having them for sale refuses to sell them at the rate fixed by the railroad commission of this state, this constitutes a discrimination within the purview of the statute, and the carrier so refusing violates the sections of the Civil Code first above cited, and is liable for the penalty provided by that statute.

[3] 3. The learned judge in sustaining the demurrer did not state the ground of his decision; hence we look with especial care to each ground, and in doing so conclude that the petition, as amended, set forth a good cause of action, and that the demurrer, both on the general and the special grounds thereto, should have been overruled.

Judgment reversed. All the Justices concur.

(133 Ga. 656)

TERRY v. INTERNATIONAL COTTON CO.
(Supreme Court of Georgia. Sept. 20, 1912.)

(Syllabus by the Court.)

1. PRINCIPAL AND AGENT (§ 24*)—EXISTENCE OF AGENCY—QUESTIONS FOR JURY.

There was evidence sufficient to authorize the court to submit to the jury the question whether the person claimed to be the agent of the plaintiff in fact acted as such or not.

[Ed. Note.—For other cases, see *Principal and Agent*, Cent. Dig. §§ 722, 723; Dec. Dig. § 24.*]

2. PRINCIPAL AND AGENT (§ 194*)—EXISTENCE OF AGENCY—INSTRUCTIONS.

It being in issue whether a person was bound by the acts of another claimed to have been his agent, either under original authority or by reason of ratification, there was no error

in explaining to the jury the rule of law as to the extent of an agent's authority.

[Ed. Note.—For other cases, see *Principal and Agent*, Cent. Dig. §§ 727-731; Dec. Dig. § 194.*]

3. PRINCIPAL AND AGENT (§ 103*)—AUTHORITY OF AGENT—SCOPE AND EXTENT.

Authority to a special agent to obtain the signature of a seller to a prepared written contract for the sale of a certain amount of cotton, without more, does not include within itself authority to make a parol agreement that the cotton shall not in fact be delivered, but that the parties shall settle on the basis of the difference between the agreed price and the market price at the time for delivery.

[Ed. Note.—For other cases, see *Principal and Agent*, Cent. Dig. §§ 278-293, 353-359, 367; Dec. Dig. § 103.*]

4. PRINCIPAL AND AGENT (§ 171*)—RIGHTS AS TO THIRD PERSONS—UNAUTHORIZED ACTS OF AGENTS.

If one desiring to buy cotton to be delivered at a future time sent to a special agent a written contract already signed by him, for the purpose of obtaining the signature of the intended seller, and the seller refused to sign the contract, except on the understanding that no cotton was to be delivered, but that the parties would settle on the basis of the difference between the agreed price and the market price at the time for delivery (an agreement prohibited by law), and thereupon the agent made such agreement in parol, and the contract was signed and transmitted to his principal, the bringing of a suit by the buyer against the seller for the nondelivery of the cotton did not of itself operate to ratify the parol agreement of the agent; there being no authority in the agent to make such a contract, no evidence of knowledge by the principal, and no act of ratification other than the bringing of the suit.

[Ed. Note.—For other cases, see *Principal and Agent*, Cent. Dig. §§ 644-655; Dec. Dig. § 171.*]

Error from Superior Court, Randolph County; Frank Park, Judge.

Action by the International Cotton Company against W. R. Terry. Judgment for plaintiff, and defendant brings error. Affirmed.

The International Cotton Company brought suit against W. R. Terry for a breach of a written contract dated July 12, 1909, whereby the plaintiff agreed to purchase and the defendant to sell 50,000 pounds of cotton at 12 cents per pound, to be delivered in merchantable bales at any warehouse in Shellman, Ga., during the month of October. It was alleged that the plaintiff was engaged in the business of buying cotton from producers and selling it to various cotton mills, and this was known to the defendant, and that he was engaged in farming, raising annually approximately 100 bales of cotton. The defendant admitted a prima facie case, and claimed the right to open and conclude the case before the jury. He pleaded that the contract really entered into between him and the plaintiff was a wagering contract, which was illegal, contrary to public policy, and unenforceable; that the written contract attached to the plaintiff's petition was a mere cloak to cover up and conceal the illegality of the trans-

action between the parties; and that the real understanding and agreement entered into between them was that no cotton was to be delivered under the contract, but that it was to be a mere speculation in "futures."

On the trial the evidence for the defendant, so far as it need be stated, was as follows: He first saw the paper which he signed in the office of J. M. Wooten, at the warehouse of the latter in Shellman. Defendant was passing Wooten's warehouse, and Wooten called him in and told him that he (defendant) could sell some cotton at 12 cents per pound, and that Wooten had a contract ready that the defendant could sign. Defendant told Wooten that he would not sign anything but a "future" contract; that he did not expect to deliver any cotton to anybody. Wooten said that it would be all right; he did not expect any cotton. Defendant then signed the contract. He received from Wooten the dollar recited as a consideration of the contract. About the middle of October the defendant saw Dunn, the manager of the plaintiff. Defendant made an offer to settle the matter by paying a certain amount; but Dunn demanded more, on the ground that the market price was higher, and no settlement was effected. At the time when the question of settlement in money was discussed, Dunn did not say anything about preferring to receive cotton. He did not say anything about wanting cotton. On cross-examination defendant testified: "My idea in making a contract and not delivering the cotton was to hedge, like I have done before. * * * Yes; Mr. Wooten runs a warehouse there, and he and I are good friends. I keep cotton at his warehouse sometimes. I did in 1909. I don't hold any spot cotton. I give him authority to sell it as it comes in. * * * I have been doing business with him that way a long time. We were in the fertilizer business together. I had him hired for wages that year, my recollection is. I don't know whether we were connected, or whether he was hired for wages." One Mizell testified that he was in the warehouse and heard defendant say to Wooten, "I don't expect to deliver any cotton on the contract, but we will settle on the difference, one way or the other," and that the witness walked out and did not hear the reply of Wooten. On cross-examination he testified that he heard Wooten tell the defendant, "I have got the contract here for Mr. Dunn," and "I have sold your cotton and got the contract here," and also mentioned that there were others.

On behalf of the plaintiff, in addition to introducing the written contract on which the suit was based, Dunn, the manager of the agency of the plaintiff at Cuthbert, testified, among other things, as follows: He employed the employees for that territory with the approval of the home office. Any

extra help he needed, he decided for himself. He never employed Wooten to represent him or the company. Wooten called him up by telephone during the month of July, prior to the date of the contract, and asked him if he could handle some cotton "over there" at 12 cents per pound. On that day Dunn did not have the price limit from the Albany office that would justify him in paying that price, and answered Wooten in the negative, but said he would see if he could get it later on. The next day he obtained a price by which he could handle the cotton at 12 cents. He called up Wooten, and asked the latter who were the parties that wanted to sell, and Wooten gave him a list of three or four, including defendant, and said he could buy so many bales from each of the parties. Dunn replied that the plaintiff would take the cotton. Dunn prepared the contracts complete, signed them for the plaintiff, and sent them to Wooten. "I had no intention whatever to sell on differences based on the market price, rather than the acceptance of the delivered cotton. At the time the purchase was made, my intention was to get the cotton. That's what they told me from the house—to buy from parties that would deliver the cotton. I never mentioned to a soul about settling on differences until Dr. Terry approached me over there one day when I was shipping cotton. Mr. Wooten had no authority whatever to represent me or the company. * * * Yes; I did make a request of Dr. Terry to deliver me that cotton. When he offered to make the settlement there, I told him and Wooten both that I preferred to have the cotton. That was before this contract was due. * * * When I sent that contract for Dr. Terry's signature, it was not my idea to make a settlement of that kind, based on the cash value. I expected to get the cotton." He sent the contracts to Wooten by mail, and received them back the same way, signed.

The jury found for the plaintiff \$1,000 principal, besides interest. The defendant moved for a new trial, which was refused, and he excepted.

R. Terry, of Outhbert, and Glessner & Park, of Blakely, for plaintiff in error. Jas. W. Harris, of Outhbert, and I. J. Hofmayer, of Albany, for defendant in error.

LUMPKIN, J. (after stating the facts as above). The plaintiff sued the defendant on a written contract, dated July 12, 1909, by which the former agreed to purchase and the latter to sell 50,000 pounds of cotton at 12 cents per pound, deliverable in the fall. The defendant pleaded that the contract was a wagering contract and unenforceable; the real understanding and agreement between the parties being that no cotton was to be delivered under the contract, but that it was to be a mere contract

for "futures," whereby the parties speculated on the market price of cotton, and the losing party was to settle with the winner by paying to the latter the difference between the contract price and the market price. He admitted a prima facie case, and assumed the burden of proof. The jury found for the plaintiff, and, a new trial having been refused, the defendant excepted.

[1] 1. It was contended that there was no evidence to authorize the submission to the jury of the question whether Wooten was the agent of the plaintiff and acting for it in the transaction, and that it was error to submit any such question to them. We cannot agree to this contention. On cross-examination the defendant stated that he and Wooten were good friends and were in the fertilizer business together, that during the year when this transaction occurred Wooten was either employed by him for wages or was his business associate, that Wooten conducted a warehouse, and that the defendant gave him authority to sell his cotton as it came in. The testimony of the manager of the plaintiff's agency at Outhbert was to the effect that he never employed Wooten to represent him or the company; that Wooten called him up by telephone, and asked him if he could handle some cotton "over there" at 12 cents per pound. Another witness testified that he heard Wooten tell the defendant, "I have sold your cotton and got the contract here." While there was evidence tending to show that the manager of the plaintiff made Wooten the plaintiff's agent for the purpose of obtaining the signature of the defendant to the written contract of sale which had been prepared, there was enough to authorize the judge to submit to the jury the question as to whether Wooten was the agent of the plaintiff.

[2] 2. The jury being laymen, and not skilled in the rules of law as to the extent of an agent's authority, it was proper to inform them as to its extent, and what it comprehended under the law.

[3] 3. If Wooten was the agent of the plaintiff, he was a special agent, under the evidence. As matter of authority he was limited by the terms of his agency. Authority to obtain the signature of the defendant to a prepared written contract for the purchase and sale of cotton did not include any authority to make a parol agreement that the cotton should not be in fact delivered, but that the parties should settle on the basis of the difference between the agreed price and the market price at the time for delivery. If Wooten made such a contract, it was beyond the scope of his authority, under the evidence, and could not affect the rights of the plaintiff under the written contract, unless his conduct was ratified. Civil Code, § 3595. If such agreement was made and ratified, then the plaintiff was affected

by it as if it had been originally authorized.

[4] 4. If both of the parties to the written contract for the purchase and sale of the cotton intended or understood, when the contract was made, that there should be no actual delivery, but a settlement on the difference between the agreed price and the market price, the transaction was invalid. Civil Code, § 4258. But a contract for actual sale and future delivery would be valid. *Forsyth Mfg. Co. v. Castlen*, 112 Ga. 199, 37 S. E. 485, 81 Am. St. Rep. 28; *McCall v. Herrin*, 118 Ga. 522, 45 S. E. 442. There was no evidence that the company, or any agent authorized to bind it in that regard, had any understanding or intent that the contract should be a dealing in "futures," or that the company was engaged in that character of business. If Wooten was the agent of the company, he was only a special agent. The written contract was prepared and signed, and sent to him to have it signed by Terry, and perhaps to pay to the latter the \$1 recited as a consideration. The evidence showed no authority on his part to have any additional understanding with Terry as to nondelivery. The question arises whether there was a ratification of his conduct. The presiding judge submitted generally the rule that ratification of an unauthorized act of an agent binds the principal as well as though there had been original authority. But it is contended that, when the company brought suit on the written contract, it necessarily ratified the conduct of Wooten in obtaining it. Terry was charged with notice that the agreement which he asserts he made with Wooten as the agent of the company was beyond the scope of the latter's authority, and one which would render the whole transaction invalid and constitute a misdemeanor. Civil Code, §§ 4258, 4259; Penal Code, § 403. Yet he says he made such an agreement.

In its last analysis, the defense is that a legal written agreement for the purchase and sale of cotton was signed by the buyer and sent to a special agent to obtain the signature of the seller; that the latter, with notice of the want of authority in the agent, nevertheless caused the agent to make in parol an additional criminal agreement, which, if chargeable to the principal, would render the whole void; and that the principal cannot set up the legal contract without ratifying the illegal one. This is no case of obtaining a signature from an innocent party by fraud or misrepresentation; nor is it one where an agent is authorized to make a contract and fix its terms. Terry was not an innocent or defrauded party. According to his defense, he caused a special agent to violate his authority and commit a misdemeanor, which he insists the principal must ratify for his protection. The doctrine that a principal cannot ratify the acts of his agent in part, but must adopt the whole, or none, has no application to

such a case, so as to compel the principal to ratify the unlawful agreement of his special agent, made with one who had notice if he seeks to set up the written agreement, which is lawful on its face and authorized. The purchasing company desired to make a legal contract for the purchase of cotton. The seller signed such a contract. He now seeks to set up a supplemental parol agreement with the plaintiff's special agent, who presented the contract for his signature, which would make the contract illegal and invalid. The law declared that the seller could not make such a contract with the principal or the agent. He was charged with knowledge that it was criminal to do so, and that the agent was without authority to do it. Nevertheless the seller declares that he made such an illegal parol agreement with the special agent, and that the principal must ratify the crime if he attempts to set up the legal contract.

A similar rule to that now declared has been applied in a case where an agent for a lender charged a borrower a sum as a commission for making the loan, besides reserving the maximum legal rate of interest on the loan; but this was unknown to the principal and unauthorized by him, and no part of the commission was received by him. *McLean v. Camak*, 97 Ga. 804, 808, 25 S. E. 493, 494. In that case a deed was made to secure a debt, and in a suit to recover the land the defense was that the deed was void because tainted with usury. Civil Code, § 3442. In the opinion it was said: "The borrower has no right to assume that even a general agent has power to bind his principal by such an agreement; for, the same being illegal and prohibited by law, the borrower is put upon immediate notice that the agent is transcending his general powers and going beyond the legal scope of his agency. Only by showing that the agent was in fact authorized by his principal to reserve the commission can the borrower claim immunity because of an act by the agent which he is bound by law to know was illegal and not binding upon the principal, unless previously authorized or subsequently ratified by the latter." Bringing a suit to recover the land, based on the deed which the agent took for his principal, was not treated as ratification of the taking of commissions. While that decision has been somewhat discussed, the leading principle announced in it has been adhered to, and the language quoted has been copied with approval. *Clarke v. Havard*, 111 Ga. 242, 252, 36 S. E. 837, 51 L. R. A. 499, where suit was brought by the principal on the note taken for the loan.

The rule that notice to an agent of any matter connected with his agency is notice to the principal (Civil Code, § 3599) does not apply where an agent conspires with the other party. In such a case, the principal is

not bound thereby, or charged with knowledge of the facts thus acquired by the agent. Civil Code, § 3800. But really the question here involved is not one of charging the principal with notice of a fact, but whether, outside of the written contract, there was a parol agreement or understanding, not by one of the parties, but by both, and whether, if an unauthorized and unlawful collateral agreement was made by a special agent in parol, the principal was bound to ratify it, if he sued on the written contract.

If there were any errors committed, they were not such as to require a new trial.

Judgment affirmed. All the Justices concur.

(138 Ga. 651)

W. E. AUSTIN CO. v. T. L. SMITH CO.

T. L. SMITH CO. v. W. E. AUSTIN CO.

(Supreme Court of Georgia. Aug. 10, 1912.)

(Syllabus by the Court.)

1. TRIAL (§ 141*)—TROVER AND CONVERSION (§ 66*)—DIRECTION OF VERDICT—ALTERNATIVE JUDGMENT.

It is not error for a trial judge to direct a verdict for the plaintiff, where there is no conflict in the evidence introduced, and it, with all reasonable deductions therefrom, demands a verdict for the plaintiff.

(a) Under a contract between a supply company and another company, the latter was made the agent of the former for the sale of certain concrete mixing machines in a given territory, at a named per cent. discount on the selling price. The machines in issue were placed with the agent, to be paid for at the selling price agreed upon, less 15 per cent. Before the sale of the machines by the agent, the supply company failed, and sold part of its assets, including the machines in question, to the original manufacturer, from which the supply company had originally purchased. The agent company received from the supply company, after the failure and sale, the paper given for the payment of the machines; no payment having been made by the agent thereon. Correspondence between the sales agent and the vendee of the supply company showed that the agent held the machines on consignment for the benefit of the vendee, the plaintiff in this suit, and the former offered to return the machines to the latter. The agent later sold the machines, and, on demand for them made on the agent and the latter's failure to deliver, the plaintiff brought his suit in trover to recover them, and on the trial elected to take a money verdict. The agent company denied that the title to the machines was in the plaintiff, but claimed it was in the defendant. *Held*, that the trial judge did not err in directing a verdict for the plaintiff against the defendant for the admitted value of the machines sued for.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 336; Dec. Dig. § 141;* Trover and Conversion, Cent. Dig. §§ 288-294; Dec. Dig. § 66.*]

2. CORPORATIONS (§ 582*)—POWERS AND LIABILITIES—CONTRACTS BETWEEN CORPORATIONS.

It appears from the contract, which was executed in the state of Illinois, that the selling corporation was an Illinois corporation and the purchasing corporation was a Wisconsin corporation, and that the latter did not purchase the franchise of the former, or all

of its assets, and the latter did not assume the debts and liabilities of the former, but the former corporation continued to do business in its own name until its failure, some time after the sale. *Held*:

(a) The transaction between the selling corporation and the purchasing corporation was one of sale, and not of merger.

(b) Where there has been a bona fide sale of the property of one corporation to another, the vendee is not responsible for the existing debts of the vendor, unless the vendee expressly assumes such debts and liabilities.

(c) The court erred in directing a verdict for the defendant against the plaintiff.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2330, 2331; Dec. Dig. § 582.*]

Error from Superior Court, Fulton County; J. T. Pendleton, Judge.

Action by the T. L. Smith Company against the W. E. Austin Company. From the judgment, both parties bring error. Affirmed on defendant's bill of exceptions, and reversed on plaintiff's bill of exceptions.

John L. Hopkins & Sons, of Atlanta, for plaintiff in error. Westmoreland Bros., of Atlanta, for defendant in error.

HILL, J. The T. L. Smith Company, a nonresident corporation, filed a trover suit against the W. E. Austin Company for the recovery of two machines known as "Smith concrete mixers," and of the alleged value of \$1,805. Demand for the machines and refusal to deliver were alleged. The plaintiff elected to take a money verdict. The defendant denied the plaintiff's right to recover the machines, set up a cross-action against the plaintiff, on an account alleged to be due by the Contractors' Supply & Equipment Company, the predecessor in title of the T. L. Smith Company, for commissions claimed to be due on "concrete mixers" sold by the Contractors' Supply & Equipment Company in the exclusive territory named in the contract between the W. E. Austin Company and the Contractors' Supply & Equipment Company, said sales running through a certain period of time and amounting to \$6,113.75, besides interest. An itemized statement of said account was attached to the petition.

It was alleged in the cross-action that the T. L. Smith Company (hereinafter called the plaintiff) had purchased the Contractors' Supply & Equipment Company, an Illinois corporation, and was liable to the W. E. Austin Company (hereinafter called the defendant) on said account. No charge of fraud was alleged as to the purchase of the assets of the Contractors' Supply & Equipment Company, but the petition, seeking to fix the liability on the plaintiff, alleged that "the plaintiffs in taking over the assets, contracts, property, liabilities, etc., of the Contractors' Supply & Equipment Company, and having, in its own interest and to serve its own ends, caused said company to cease doing business, became, was,

and is liable in its place and stead to this defendant for said commissions and said sums." It was also alleged that the plaintiff "took over the business and assets of said Contractors' Supply & Equipment Company. * * * The contract then of force, and which had been entered into with the supply company, was and became binding and obligatory in all of its terms and conditions upon the Smith Company and this defendant."

At the conclusion of the evidence, each side moved the court to direct a verdict—the plaintiff asking for a verdict against the defendant for the value of the property sued for, with interest; and the defendant moving for a verdict disallowing plaintiff's claim, and allowing the defendant to recover the amount of the commissions as contained in the account attached to the cross-action, with interest. The court directed a verdict in favor of the plaintiff for the value of the property sued for, with interest to date, and also directed a verdict for the defendant for the amount sued for in the cross-action, with interest to date, and directed that the amount found in favor of the plaintiff be deducted from the amount found in favor of the defendant, leaving the amount due the defendant by the plaintiff, \$4,917.68, and judgments were entered accordingly. To this direction each party excepted.

[1] 1. We will consider both cases together, as they embrace the same transactions. Was the direction of the verdict for the plaintiff for the value of the property sued for right, under the facts of this case? We think it was. There was no conflict in the evidence, and the verdict was demanded. The record shows that the defendant entered into a contract, dated June 19, 1907, with the Contractors' Supply & Equipment Company, of Chicago, Ill. (hereafter called the Supply Company), by the terms of which the defendant was to become the sole agent of the Supply Company for the sale of certain concrete mixers within certain territory named in the contract. For the sale of the machines the defendant was to be allowed a named per cent. as discount on the selling price agreed upon. In pursuance of this contract, the defendant from time to time did order from the Supply Company mixing machines, and sold them. One order was for the two machines in controversy. Pending the sale of these machines by the defendant, the Supply Company went into liquidation, and sold, on February 11, 1908, a part of its assets to the plaintiff, including the two machines in question, which were originally manufactured by the plaintiff and sold by it to the Supply Company. After the sale of the machines by the Supply Company back to the plaintiff, the defendant company took up the paper given for them to the Supply Company. After the trade between the plaintiff and the Supply

Company, the correspondence with reference to the machines in the possession of the defendant was between the plaintiff and the defendant. Defendant in its answer averred, among other things, that "it was not expected, under the course of dealing between defendant and the Supply Company, that the defendant should pay for said machinery until it had sold the same, but at the request and instance of an officer of said company, defendant, as related above, did make out and deliver its two notes. These notes were renewed once or twice; defendant, in the meantime, attempting to dispose of the property, which it failed to do. In the meantime the T. L. Smith Company had taken over the contract of the Supply & Equipment Company, and had assumed ownership of the notes, and by mutual agreement the two notes in question were canceled and returned to this defendant. With this transaction the plaintiff made out and forwarded a form of consignment contract, to which this defendant objected, and which it declined to sign. It was then willing under proper conditions, and if plaintiff demanded it, to treat the goods as being upon consignment, when in fact they were not, and in turn made out a counter contract of consignment, which was forwarded to the plaintiff, and which it in writing declined to accept. No contract of consignment was, therefore, ever entered into between the plaintiff and this defendant."

In addition to other evidence offered by the plaintiff was a letter addressed to the plaintiff by the defendant under date of October 19, 1908, as follows: "We, as previously stated, are perfectly willing to carry the two concrete mixers referred to on consignment account here for you, although they have cost us a great deal more money now for warehouse charges and insurance than we will ever get out of them, or we will accept your proposition to return the mixers to you to Milwaukee, and if you desire us to do so we will, as per our proposition made you recently, prepay the freight on them to Milwaukee. If you desire to have them shipped back, rather than carry them here on consignment, advise us, and we will ship them immediately." The letters of the defendant to the plaintiff recognize the title to the machinery to be in the plaintiff; one of these referring to the mixers as being "here on consignment, for your account." And: "If you have to have them shipped back, rather than carry them here on consignment account, advise us, and we will ship them immediately." Pending negotiations as to a written form of assignment (about which the parties could not agree) of the mixers to the defendant, the latter sold them, and, failing to deliver them to the plaintiff on demand, the trover suit was brought.

The one question, therefore, is: Was the

title to the property in the plaintiff or in the defendant at the time of the sale by the latter? We think, when the Supply Company failed, and sold part of its assets back to the plaintiff, including the machines in controversy, and the defendant then took up the paper given to the Supply Company for the property, and recognized by its letters to the plaintiff that the property was held on consignment, that it was a novation of the original contract, which vested the title to the machines in the plaintiff, and made the defendant liable to the plaintiff as the owner of the property in controversy. The contract executed between the defendant and the Supply Company made the defendant the sales agent of the latter, and did not vest the title to the machines in the defendant. The evidence and all the reasonable deductions therefrom demanded the verdict, and therefore the court did not err in directing a verdict for the plaintiff for the value of the property sued for.

[2] 2. Whether the direction of the verdict for the defendant against the plaintiff for \$4,917.68 was error depends on whether the transaction between the Contractors' Supply & Equipment Company and the plaintiff on February 11, 1908, was a merger of the two companies, or a sale of one to the other. We think the latter is true, and that the transaction was one of sale, and a partial sale at that. The record shows that the plaintiff did not purchase all of the assets of the Supply Company. It did not purchase the franchise of the corporation. It did not assume the debts and liabilities of the selling company. It was not the successor of the Supply Company, and the latter did not go out of business at the time of the sale. There is nothing to show that the plaintiff had any knowledge of any existing contract between the defendant and the Supply Company, nor that there was any fraud in the transaction with intent to injure the creditors of the selling company. The Supply Company continued to do business in its own name, and was to collect its own accounts and pay off and discharge its own liabilities, and had a given time within which to do this. In the case of *Hawkins v. Central Ry. Co.*, 119 Ga. 159, 46 S. E. 82, this court held that, "where there has been a lawful and absolute sale of a railroad, the grantee is not responsible for the existing debts of the grantor." And see *Culberson v. Ala. Const. Co.*, 127 Ga. 599 (4), 56 S. E. 765, 9 L. R. A. (N. S.) 411, 9 Ann. Cas. 507; *Southern Bell Telephone, etc., Co. v. Jacoway*, 131 Ga. 483, 485, 62 S. E. 640; *Atlanta, etc., R. Co. v. Atlantic Coast Line R. Co.*, 138 Ga. 353, 75 S. E. 468. But in the *Hawkins Case*, supra, it was also ruled that "where there has been no sale, but a merger, and no provision made for the payment of the debts of the absorbed company, the consolidated

corporation is liable for the debts of the former, at least to the extent of the value of the property received." In *Atlantic & Birmingham Ry. Co. v. Johnson*, 127 Ga. 392 (2), 56 S. E. 482, 11 L. R. A. (N. S.) 1119, it was ruled: "Where two corporations effect a consolidation, and one of them goes entirely out of existence, and no arrangements are made respecting the liabilities, the resulting corporation will, as a general rule, be entitled to all the property and answerable for all the liabilities of the corporation thus absorbed."

It does not appear in this case that there was any merger or consolidation of the Supply Company with the plaintiff company, or that the former had gone entirely out of business; but, on the contrary, the transaction was simply a contract of sale by the Supply Company of a portion of its assets to the plaintiff company, and the latter did not agree to be bound for the debts or obligations of the former company. The elements of merger were therefore lacking, and those of sale were present. We rule, therefore, that there was no merger in this transaction, but a sale; and, as the vendee did not assume the debts and liabilities of the vendor, it was not bound therefor, and the court erred in directing a verdict for the defendant.

Judgment affirmed on the bill of exceptions of Austin Company, and reversed on the bill of exceptions of Smith Company. All the Justices concur, except LUMPKIN, J., disqualified.

(138 Ga. 663)

GREER et al. v. ANDREW.

ANDREW v. GREER et al.

(Supreme Court of Georgia. Sept. 24, 1912.)

(Syllabus by the Court.)

1. REFERENCE (§ 101*)—MOTION FOR RE-REFERENCE.

While the method of setting out the rulings of the auditor in regard to evidence admitted or excluded was not one to be commended, and some of the findings were not perfect in form, under the facts, this does not require a reversal of the order overruling the motion for a re-reference.

[Ed. Note.—For other cases, see Reference, Cent. Dig. §§ 169-180; Dec. Dig. § 101.*]

2. PARTIES (§ 65*)—OBJECTIONS—STRIKING OUT PARTIES.

An equitable petition alleged, among other things, as follows: The owner of a lot of land contracted with the plaintiff to improve it, the plaintiff furnished a sum of money for that purpose, and that after the land was improved it should be jointly owned by them. The contract was executed; the improvements being erected, and a conveyance of a half interest being made to the plaintiff. The other half interest was conveyed to the son of the cotenant. The original cotenant purchased an adjoining lot, ostensibly for the benefit of the plaintiff and himself. Half of the purchase money was paid by the plaintiff, but her cotenant caused a deed to be made in the name of his son. The

cotenant and his son conspired, and used funds arising from the property, which properly belonged to the plaintiff. Partition of the whole, equitable accounting, judgment against both father and his son, and the charging of the interest in the property other than her own with a lien in her favor, were prayed. There was evidence tending to support these allegations. *Held*, that there was no error in refusing to strike the son as a party defendant, in the nature of a nonsuit.

[Ed. Note.—For other cases, see Parties, Cent. Dig. §§ 100-107; Dec. Dig. § 65.*]

3. EVIDENCE (§ 78*)—PRESUMPTIONS—SPOILIATION.

Spoiliation of evidence raises a presumption against the spoliator.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 98, 100; Dec. Dig. § 78.*]

4. APPEAL AND ERROR (§ 1050*)—EVIDENCE (§ 357*)—DOCUMENTARY EVIDENCE—AUTHENTICATION—PAROL EVIDENCE AFFECTING WRITINGS.

A woman and man had business dealings, and during her absence from the place where he resided certain letters passed between them. In a litigation between them some years later, the woman offered in evidence parts of two letters cut from the balance with scissors, and apparently containing statements touching the property involved. She testified, in effect, that she was traveling, and had no place to keep a large number of letters which she had received, and destroyed them, except that she thought these two parts of letters might be useful, as they contained memoranda in regard to the property, that they contained all that was in the letters in relation to business matters, and that she destroyed the letters only because she thought they were useless. The defendant did not deny writing the letters, but substantially admitted so doing, and that the parts preserved contained the reference to the business, except that he stated that substantially the same thing as that in one of the excerpts was repeated later for emphasis. *Held*, that the admission in evidence of the parts of the letters was not error.

(a) Nor was there reversible error in admitting parol evidence of the plaintiff, explaining the mutilation and showing that the language of the writing mentioning "our lot," etc., referred to the land in controversy.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1068, 1069, 4153-4157, 4166; Dec. Dig. § 1050.* Evidence, Cent. Dig. §§ 1492-1499; Dec. Dig. § 357.*]

5. AUDITOR'S REPORT — EXCEPTIONS — NO GROUND FOR REVERSAL.

In an equitable action, numerous exceptions of law and of fact were filed to the auditor's report. The presiding judge overruled the exceptions of law, disapproved the exceptions of fact, and entered a decree based on the auditor's report. In the brief of counsel for plaintiffs in error, some of these exceptions were urged, and some were not mentioned. Upon a consideration of the whole case, while there are some parts of the report which may be subject to criticism, nothing appears which requires a reversal.

6. APPEAL AND ERROR (§ 984*)—REVIEW—DISCRETION OF COURT—APPORTIONMENT OF COSTS.

The decree against the defendants being affirmed, and it being the province of the judge in an equitable action to determine upon whom the costs shall fall, it furnishes no ground for reversal on behalf of the defendants that the judge decreed that the costs should be divided between the parties. Civil Code, § 5423;

Fricker v. American Mfg. & Improvement Co., 124 Ga. 165 (19), 167, 52 S. E. 65.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3815, 3881-3888; Dec. Dig. § 984.*]

Error from Superior Court, Ben Hill County; U. V. Whipple, Judge.

Action by M. O. Andrew against Samuel Greer and another. From the judgment, both parties bring error. Judgment on main bill of exceptions affirmed. Cross-bill of exceptions dismissed.

L. Kennedy, of Fitzgerald, for plaintiffs in error. Haygood & Cutts, of Fitzgerald, and Bolling Whitfield, of Brunswick, for defendant in error.

PER CURIAM. Judgment on main bill of exceptions affirmed. Cross-bill of exceptions dismissed. All the Justices concur.

(128 Ga. 646)

LEE v. PEARSON et al.

(Supreme Court of Georgia. Aug. 14, 1912.
Rehearing Denied Sept. 24, 1912.)

(Syllabus by the Court.)

1. INJUNCTION (§ 123*)—ACTIONS—PLEADING AND PROOF.

In an action by an owner of land to enjoin a trespass, the plaintiff is not required to plead his muniments of title as a condition precedent to their introduction in evidence.

(a) The partition proceedings were regular, and not open to any objection made to them.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 270; Dec. Dig. § 123.*]

2. EVIDENCE (§ 186*)—BEST AND SECONDARY EVIDENCE—CERTIFIED COPY.

A certified copy of the record of a duly recorded mortgage is admissible in evidence, on proof of the existence and loss of the original.

(a) The existence and loss of the original were shown in this case.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 64, 661-673; Dec. Dig. § 186.*]

3. MORTGAGES (§ 442*)—JUDGMENT (§ 490*)—FORECLOSURE OF MORTGAGE—SERVICE OF RULE NISI—COLLATERAL ATTACK ON JUDGMENT.

If the service of a rule nisi to foreclose a mortgage is not made before the term of the court to which it is returnable, and such term intervenes, a subsequent service of a copy of the same rule nisi, without a previous order of court, is insufficient of itself to authorize a judgment of foreclosure. But a judgment of foreclosure rendered under these circumstances is not void, and open to collateral attack, which recites personal service of the rule nisi, that the judgment is rendered by consent, and that a stay of execution is granted to the defendant.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 1301; Dec. Dig. § 442.* Judgment, Cent. Dig. §§ 926-928; Dec. Dig. § 490.*]

4. MORTGAGES (§ 499*)—FORECLOSURE—DESCRIPTION OF LAND.

Where a mortgage on land is foreclosed on the petition of an assignee of the mortgage, in which it is alleged that the mortgage was assigned to the petitioner, and the rule nisi and absolute conform to these allegations, the *fi. fa.* issued on the judgment absolute, which iden-

tifies the previous proceedings, is not invalid because, after the description of the land, the same is designated as the land described in a mortgage given to the transferee and foreclosed by him.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 1478-1485; Dec. Dig. § 499.*]

5. EVIDENCE (§ 353*)—APPEAL AND ERROR (§ 1050*)—DOCUMENTARY EVIDENCE—DEED PENDING ACTION—HARMLESS ERROR.

Where a plaintiff's right to recover depends upon his having title to the land in controversy, his title must be complete at the beginning of the action. Hence a deed in his chain of title, executed pending the action, is inadmissible, notwithstanding a recital therein that it is executed in lieu of a lost deed, where the defendant is not a privy to the person making the recital; but the admission in evidence of the deed in this case was harmless error, because it was made to appear by extraneous evidence that the grantee in such deed, long before the bringing of the suit, bought the land from the grantor, paid the entire purchase money, went into possession of the land after purchasing it, and remained in possession until he conveyed it to a prior grantor of the plaintiff (which deed was produced). Such facts constitute a perfect equity between the vendor and the purchaser, effectual to transmit the title of the vendor to the purchaser.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1404-1481; Dec. Dig. § 353.* Appeal and Error, Cent. Dig. §§ 4153-4160, 4166; Dec. Dig. § 1050.*]

6. RECOVERY OF POSSESSION OF LAND—COMMON SOURCE OF TITLE—DIRECTION OF VERDICT.

In its ultimate development the case narrowed to an issue of title to the land in controversy; and as the plaintiffs and defendant claimed title from a common propositus, and that of the plaintiff was prior in time, and was not invalid for any of the reasons assigned in the defendant's attack upon it, the direction of a verdict in favor of the plaintiff was proper.

Error from Superior Court, Crawford County; W. H. Felton, Judge.

Action between L. L. Lee and J. W. Pearson and others. From the judgment, Lee brings error. Affirmed.

Robt. L. Rodgers, of Atlanta, for plaintiff in error. H. A. Mathews, of Ft. Valley, for defendants in error.

EVANS, J. There are many assignments of error, but all depend upon the success of the attack made on the plaintiff's title. The plaintiff alleged ownership and possession of a tract of land, and prayed an injunction against the defendant's alleged trespass. The defendant in his answer set up an adverse title. Both parties claimed title from John S. Lee. According to the evidence submitted by the plaintiff, John S. Lee died intestate, leaving a widow, Sarah M. Lee, and five children. His estate was partitioned in the superior court among his heirs, and the land in controversy was assigned to Sarah M. Lee. She mortgaged the land, the mortgage was foreclosed, and the land was sold. The plaintiff derives title by mesne conveyances from the purchaser at the sheriff's sale.

[1] 1. The petition for partition of the es-

tate of John S. Lee was filed by the guardian of one of the heirs, who was a lunatic. Service was acknowledged and 20 days' notice waived by the other co-owners, who filed an answer praying that their share be also assigned to them in severalty. A writ of partition duly issued, partition was made by the commissioners, and a return made, wherein the land in controversy was assigned to Sarah M. Lee. The return was duly made the judgment of the court. Objection was made that evidence of title could not be introduced without reference to it in the pleadings; that it was not shown that the applicant was a duly appointed guardian, or that his ward was of unsound mind, and that the statutory notice was given; nor that the commissioners were duly sworn. None of these objections to this evidence are meritorious.

[2] 2. The evidence was sufficient to show the existence and loss of the mortgage from Sarah M. Lee to the Georgia Loan & Trust Company, and there was no error in receiving in evidence a certified copy of it.

[3] 3. The mortgage from Sarah M. Lee to the Georgia Loan & Trust Company was foreclosed on the petition of Dwight M. Bank, who alleged himself to be the assignee of the mortgage and of the notes to secure the payment of which the mortgage was given. The rule nisi was granted at the March term, 1895, returnable to the succeeding October term, and two entries of service appeared thereon; one dated March 22, 1895, and reciting service of the defendant by leaving it at his most notorious place of abode, and the other dated November 6, 1895, and reciting personal service on the defendant. A rule absolute was granted at the March term, 1896, which contained a recital that, "the plaintiff having agreed with the defendant thereto, it is further ordered that execution upon this judgment be stayed until November 15, 1896." No formal order was shown for the second service, but the bench docket contained these entries by the judge: "Continued to perfect service." "Rule absolute in this case granted by consent, March term, 1896." Several objections were interposed to this record being received in evidence. It will be only necessary to notice one of them, as the others are palpably without merit.

It is contended that there was no authority of law, in the absence of an order by the court, for the sheriff to serve the defendant with a copy of the rule nisi after a term of court at which the money was directed to be paid. Mortgages on realty are foreclosed by petition and rule nisi. The statute provides that, upon filing the petition, "the court shall grant a rule directing the principal, interest and costs to be paid into court on or before the first day of the next term immediately succeeding the one at which such rule is granted, which rule

shall be published once a month for four months or served on the mortgagor, or his special agent or attorney, at least three months previous to the time at which the money is directed to be paid into court as aforesaid." Civil Code, § 3276. Service of a rule nisi subsequently to the term of court at which the defendant was directed to pay the money would not be in compliance with the statute. The paper served was functus officio. If at the term of court at which the defendant is directed to pay the money into court no legal service of the rule nisi has been made, the court should either issue a new rule nisi, or pass an order extending the time of payment of the money to the next term of the court. A docket entry alone will not suffice. But the judgment absolute in this case is not void on this account, for the reason that it recites that the judgment was rendered by consent, and a stay of execution was granted to the defendant. This recital will be taken as true, unless the contrary is made to appear.

[4] 4. The petition to foreclose the mortgage was in the name of Dwight M. Bank as transferee, and the rule nisi and absolute followed the petition. The *fi. fa.* referred to these papers sufficiently to identify each, and an erroneous recital in the *fi. fa.* that the mortgage was given to the transferee, instead of his transferor, did not render the *fi. fa.* invalid on the ground of the alleged discrepancy.

[5] 5. The purchaser at the mortgage foreclosure sale was Dwight M. Bank, and the sheriff made a deed to him. It was shown by parol that Bank sold the land to H. A. Mathews, who went into possession of the same under his purchase about the year 1898. The plaintiff introduced in evidence a deed from Dwight M. Bank to H. A. Mathews, bearing date after the bringing of the suit, and reciting that it was executed in lieu of a deed between the same parties to the same land, executed on February 23, 1898, which deed was said to have been lost. Objection was made to this deed coming in evidence, on the ground, among others, that it was executed after the suit was begun. The plaintiff alleged title in himself, and sought to enjoin the defendant from trespassing on the land. The deed was inadmissible as evidence of title, because it was executed after the commencement of the suit, and the recital in the deed could not bind the defendant who did not claim under it. *L. & N. R. Co. v. Ramsay*, 134 Ga. 107, 67 S. E. 652. But the reception of the deed in evidence was harmless error, as no objection was urged to the plaintiff's proof that Bank sold to Mathews, who paid the purchase money and went into possession of the land. These facts constitute a perfect equity, as effectual to pass title as if the original deed had been produced. *Grace v. Means*, 129 Ga. 638, 59 S. E. 811.

[6] 6. The defendant's title was derivative from Sarah M. Lee, and originated subsequently to the mortgage of Mrs. Lee to the Georgia Loan & Trust Company. Inasmuch as the plaintiff's title was not invalid for any of the reasons assigned, and as the defendant claimed possession of the land, it was proper to direct a verdict in favor of the plaintiff.

Judgment affirmed. All the Justices concur.

(188 Ga. 650)

FIRST NAT. BANK OF SUMTER, S.
C., v. JONES et al.

(Supreme Court of Georgia. Aug. 19, 1912.
Rehearing Denied Sept. 24, 1912.)

(Syllabus by the Court.)

1. EXECUTION (§ 172*)—INJUNCTION—LEVY—PLEADING.

A petition was filed by the trustee in bankruptcy of the Ajax Lumber Company, a corporation, against J. E. Plowden, a bank which held a judgment against him, and the sheriff, seeking to enjoin a sale of the property levied on under a common-law *fi. fa.* issued upon the judgment in favor of the bank as the property of Plowden, and to have the title decreed to be in the trustee in bankruptcy. It was alleged that Plowden, being the president and acting manager of the Ajax Lumber Company, to whom former owners of the property were indebted, received from such owners a deed for the property in his individual name, but that the consideration therefor was paid by the corporation by Plowden entering a credit for the amount of the purchase price on the account of such former owners on the books of the corporation, and that Plowden, as president, received the property for the corporation; Plowden thereby becoming the mere naked trustee for the use of the corporation. After the deed was so received, Plowden, as president of the corporation, borrowed from T. J. Treadwell \$1,050, and gave him as security a deed covering the property conveyed by the deed above mentioned, signing the deed individually. Later a loan of \$375 was made under similar circumstances. The total amount of these loans was paid over to Plowden as president of the corporation, and the corporation received the full benefit and use of same. The trustee in bankruptcy did not contest these matters, but set up their validity, and alleged the value of the equity of redemption, and that he was seeking to recover the property in order to apply that for the benefit of his trust. Treadwell was not made a party. The judgment against Plowden was of older date than the deed to Plowden, and the debt on which it was founded had not been created on the strength of the title to the property in question being vested in Plowden. On interlocutory hearing for injunction the sheriff was restrained until further order, and on the final hearing a demurrer filed by one of the judgment creditors of Plowden, setting up (a) that there was no equity in the petition, (b) that there was a misjoinder of parties, in that the Ajax Lumber Company was not a proper or necessary party plaintiff, and (c) that there was a nonjoinder in that Treadwell was not made a party, was overruled; and the judge, to whom the case was submitted on all questions of law and fact, without the intervention of a jury, after hearing the evidence, entered a judgment in favor of the trustee in bankruptcy. *Held*, the petition was not subject to the de-

murrer. See *Dodd v. Bond*, 88 Ga. 355, 14 S. E. 581.

[Ed. Note.—For other cases, see *Execution*, Cent. Dig. §§ 519-539; Dec. Dig. § 172.*]

2. ADMISSIBILITY OF EVIDENCE—EXAMINATION OF WITNESSES—OPINION EVIDENCE.

The assignments of error on the rulings of the judge on the admissibility of evidence, objected to on the grounds of irrelevancy, that the questions propounded by interrogatories were leading, that the foundation had not been laid for the introduction of parol evidence of certain documents, and that certain answers of witnesses were mere expressions of opinion, were without merit.

3. EVIDENCE SUFFICIENT.

The evidence was sufficient to support the judgment.

Error from Superior Court, Fulton County; Geo. L. Bell, Judge.

Action by R. M. Jones, as trustee in bankruptcy of the Ajax Lumber Company, against the First National Bank of Sumter, S. C., and others. From a judgment for plaintiff, the defendant bank brings error. Affirmed.

Geo. B. Rush, of Atlanta, for plaintiff in error. Moore & Pomeroy, Etheridge & Etheridge, and Alvin Richards, all of Atlanta, for defendants in error.

ATKINSON, J. Judgment affirmed. All the Justices concur.

(138 Ga. 632)

CITY OF BLAKELY et al. v. SINGLETARY et al.

(Supreme Court of Georgia. Aug. 13, 1912. Rehearing Denied Sept. 23, 1912.)

(Syllabus by the Court.)

1. SCHOOLS AND SCHOOL DISTRICTS (§ 71*)—BOARD OF EDUCATION—CONSTRUCTION OF SCHOOL BUILDING.

Where the city of Blakely had issued and sold bonds to a given amount for the purpose of erecting a new school building, the board of education of that city had authority to select the site for and to construct the building. *Chipstead v. Oliver*, 137 Ga. 483, 73 S. E. 576. This authority, in the absence of anything to the contrary in the charter of the city, carried with it, by necessary implication, power in such board to possess, control, and expend the fund so raised, in the performance of their public duty in erecting the building.

[Ed. Note.—For other cases, see *Schools and School Districts*, Cent. Dig. § 176; Dec. Dig. § 71.*]

2. MANDAMUS (§ 147*)—SCHOOLS AND SCHOOL DISTRICTS (§ 52*)—DEPARTMENTS—PARTIES TO MANDAMUS PROCEEDINGS.

The charter of the city of Blakely (Acts 1900, p. 219), creating the board of education of that city, required the city council of the city of Blakely to convey by deed to the board of education "the property on which the Blakely Institute is located"; and the act further provided that "any other persons or trustees may deed or sell said city board of education property for school purposes." The members of such board are therefore in the nature of statutory trustees. They are public officers. *Coleman v. Glenn*, 103 Ga. 458, 30 S. E. 297, 68 Am. St. Rep. 108. And as "a joint authority given to any number of persons, or officers, may be executed by a majority of them, un-

less it is otherwise declared" (Civil Code, § 4, par. 5), a majority of the members of the board of education of the city of Blakely had authority to institute mandamus proceedings against the mayor and council of that city to compel them to pass a resolution, directing a named bank to pay to the board the fund raised by the sale of the bonds referred to in the preceding headnote, and which had been deposited in the bank by the mayor and council.

(a) The act creating such board of education did not make it a corporate body, and no formal action on the part of the board as such was necessary for the institution of such mandamus proceedings by a majority of the board.

(b) The ruling here made is not in conflict with the decision in *Woodward v. Westmoreland*, 124 Ga. 529, 52 S. E. 810, 4 Ann. Cas. 472. There the state board of health sought an injunction to restrain the local board of health of the city of Atlanta from interfering with the enforcement of the rules and regulations of the state board. It was held that the act creating the state board made it simply an agency of the state government to have supervision and control over matters relating to the public health, and that it neither incorporated the board nor authorized its members to bring suit to enforce its rules and regulations.

The act creating the board of education of the city of Blakely did not make the board a mere agency of the city, but, as we have stated above, conferred upon it, among other important rights and duties, the right to hold property for school purposes, to select a site for the school building, to erect such building, and to control and expend the fund raised by the city from the sale of bonds to erect the school building.

[Ed. Note.—For other cases, see *Mandamus*, Cent. Dig. § 288; Dec. Dig. § 147.* *Schools and School Districts*, Cent. Dig. § 126; Dec. Dig. § 52.*]

3. MANDAMUS (§§ 100, 141*)—AUTHORITY OF JUDGE IN VACATION—SUBJECTS OF RELIEF—ACTS OF CITY OFFICERS.

As the city board of education was entitled to the fund raised by the sale of the city's bonds issued for the erection of a school building, the judge of the superior court did not err in granting, upon the application of the majority of the members of such board, a mandamus absolute during vacation (there being no material issues of fact involved), requiring the mayor and council of the city to pass a resolution directing the bank in which the fund had been deposited by the mayor and council to pay the fund over to the board of education.

(a) This is true, although the mayor and city council had, prior to the institution of proceedings for mandamus and at a special meeting of the council, passed a resolution directing the bank to pay such fund to the board of education, and in pursuance of this resolution the clerk of council drew a check in favor of the city school commissioner, the executive head of the board of education, for the amount of the bond fund in the bank, which check was paid by the bank, and the fund upon which it was drawn was placed by the bank to the credit of the city school commissioner, and subsequently, at a regular meeting of the council, a resolution was adopted rescinding such former resolution, upon the ground that it was void, because the special meeting of council at which it was passed was not called in accordance with certain provision of the charter of the city, and the bank was therefore directed not to pay the bond fund to the city school commissioner, and still later, at a regular meeting of the council, another resolution was adopted, rescinding the second resolution referred to above; the contention of the petitioners being that the adoption of these various resolutions tended to deter the bank from pay-

ing the fund to the board of education or the city school commissioner.

[Ed. Note.—For other cases, see *Mandamus*, Cent. Dig. §§ 205-210, 276-278; Dec. Dig. §§ 100, 141.*]

4. OTHER ASSIGNMENTS WITHOUT MERIT.

The assignments of error not dealt with in the rulings above announced are without merit.

Error from Superior Court, Early County; W. C. Worrill, Judge.

Action by A. J. Singletary and others against the City of Blakely and others. Judgment for plaintiffs, and defendants bring error. Affirmed.

Victor L. Smith, of Atlanta, and Glessner & Park, of Blakely, for plaintiffs in error. Pope & Bennet, of Albany, for defendants in error.

FISH, C. J. Judgment affirmed. All the Justices concur.

(138 Ga. 673)

CHALKER et al. v. USRY et al.

(Supreme Court of Georgia. Sept. 7, 1912.)

(Syllabus by the Court.)

HOMESTEAD (§ 96*)—PROPERTY EXEMPT—PROCEEDS OF HOMESTEAD.

Where a homestead was duly set apart to one who was the head of a family, and subsequently an order for the sale of the homestead property and the reinvestment of the proceeds thereof in a particular tract of land was duly obtained, and the proceeds of the sale were used by the head of the family, who was designated as trustee to make the sale and reinvestment, as a partial payment upon the tract of land which was to be purchased, the vendor taking the promissory note of the head of the family for the amount of the unpaid purchase money and giving his bond conditioned to convey title upon the payment of the note, and where the purchaser, the head of the family, failed to pay the note at maturity, and the same was sued upon to judgment, and the fl. fa. based on such judgment, after the execution of the escrow deed contemplated by the statute, was duly executed and filed by the vendor, and the land was duly sold under such levy, the head of the family was not entitled to recover the land, in an equitable petition brought for the recovery of the same.

[Ed. Note.—For other cases, see *Homestead*, Cent. Dig. §§ 147-153; Dec. Dig. § 96.*]

Error from Superior Court, Glascock County; D. W. Meadow, Judge.

Action by Mrs. Nannie Usry and others against Augustus Chalker and others. Judgment for plaintiffs, and defendants bring error. Reversed.

Samuel H. Usry filed an equitable petition, in which he set out that some years prior to the year 1896 a certain tract of land which he owned was set apart as a homestead for the benefit of his wife and minor children; that in August, 1896, on application therefor, the judge of the superior court of Glascock county granted an order permitting the sale of said homestead property for the purpose of reinvesting the proceeds thereof in a designated tract of land, and petitioner was appointed trustee

to make such sale and to reinvest the proceeds as contemplated; that in pursuance of said order the homestead property was sold, and the proceeds were reinvested in the land designated in the order to be purchased, but these proceeds were not sufficient, by about \$166, to pay for the new tract of land, which was purchased from Eli Harris; that petitioner took from Harris a bond for title, and gave his promissory note for \$166, the balance of the purchase price for the land; that he and his family went into possession of this new tract of land in 1896, where they continued to reside until the year 1900, when petitioner was convicted of the offense of murder, and was sentenced to imprisonment in the penitentiary of the state, where he was confined until the year 1908; that in 1902, Harris having died, his executor sued to judgment the promissory note of petitioner above referred to; that a fl. fa. was issued and levied upon the land purchased from Harris, and the same was sold by the sheriff to J. W. Whiteley, who received a deed from the sheriff and evicted petitioner's tenants; that the judgment on the promissory note was void; that the sheriff's sale, and consequently the sheriff's deed, was null and void, because based on a fl. fa. which was invalid, being founded on a void judgment; that the land being incumbered with a homestead, and being homestead land, the sheriff was without authority to sell it. Whiteley has sold or in some way let said land to Augustus Chalker, who is in possession of the same. It was prayed that Whiteley be required to produce in court the sheriff's deed to himself, and that it be canceled as a cloud upon petitioner's title; that the same be ordered as to all papers which Chalker took from Whiteley; that Chalker be required to surrender possession of the land to petitioner; and that petitioner have judgment against Chalker for a named amount for rent and use of the land, and have such other and further relief as the case demands.

The case was tried upon an agreed statement of facts, in substance as follows: The homestead was lawfully set apart to S. H. Usry, as set out in the petition. The homestead land was lawfully sold, being under an order obtained by E. B. Rogers, attorney for the homestead. All of the money realized from the sale was paid to Eli E. Harris (who knew the facts) on account of the purchase money of the land involved in this suit, and a bond for title was given to Usry individually; he giving his note for the balance of the purchase money. In this transaction E. B. Rogers represented Usry. Harris died, and his executor obtained a lawful judgment against Usry on said note for the balance of the purchase money represented by said note. The land was prop-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

erly reconveyed to Usry for the purpose of levy, and was sold according to law to J. W. Whiteley. Rogers represented the executor of Harris in obtaining the judgment, and he submitted the bid for Whiteley, who was not present, according to Whiteley's directions. The land was sold for \$705. Of this amount about \$225 was paid in settlement of the judgment, and the balance was paid by Whiteley to Mrs. S. H. Usry; Usry being at the time in the penitentiary. Chalker holds the land under a bond for title from Whiteley, and has made valuable improvements thereon. Chalker had heard, prior to his purchase, that the land was claimed by Usry as homestead land. He was relying on Whiteley to protect him. The beneficiaries of the homestead are still in life; the wife being one of such beneficiaries. All defendants are eliminated except Chalker and Whiteley. The court decreed that the sheriff's sale of the land was illegal and void, that the sheriff's deed be surrendered and canceled, and that the plaintiff recover the land, subject to the homestead estate. The defendant excepted.

W. H. Barrett, of Augusta, and E. B. Rogers, of Warrenton, for plaintiffs in error. Jno. T. West, of Thomson, for defendants in error.

BECK, J. (after stating the facts as above). Treating this as an action for the recovery of land by the plaintiff as the head of a family, and not as an action for the recovery of land by the plaintiff individually, we are of the opinion that the plaintiff could not recover the land. The homestead property referred to in the petition had been properly sold. An order had been granted by the judge of the superior court for the reinvestment of the funds arising from the sale of homestead property in a certain designated and described tract of land. The plaintiff invested the proceeds of the sale of the homestead property in the land contemplated and designated as the property to be purchased in the order for the sale of the homestead. But with the proceeds of the sale of the homestead property only a partial payment of the purchase price of the acquired property could be made, and the vendor of the property sought to be acquired in the purchase made to the vendee, the plaintiff in this case, a bond for title, and took for the unpaid balance of the purchase money the promissory note of the vendee. The vendee could take, by virtue of the transaction between himself and the vendor of this land, only that interest in the land which was contemplated in the trade between them, and which was embodied in the written instrument executed by the vendor, the bond for title. The vendee acquired only an equity, a right to have the title vested in him by a written instrument upon his compliance with the condition

in the bond for title. He did not, as an individual or as a trustee, acquire a title which could be the basis of an action for the recovery of land. The vendor, who took a promissory note for the unpaid part of the purchase money, had the right, under our statute, to sue the note to judgment, and it is admitted in the agreed statement of facts that there was a lawful judgment rendered on the note; and he had the right to enforce that judgment by levy and sale, after executing to the vendee the escrow deed provided by the statute, which put title in the vendee for the sole purpose of effecting the transmission of title by the judicial sale. The judgment rendered by the court was unauthorized by the evidence; this being an equitable suit for the recovery of land, and not a proceeding instituted to trace and recover trust funds which had been diverted or misapplied.

Judgment reversed. All the Justices concur.

(11 Ga. App. 654)

CROMER v. EVETT. (No. 4,239.)

(Court of Appeals of Georgia. Oct. 9, 1912.)

(Syllabus by the Court.)

CONTRACTS (§ 128*) — CONSIDERATION — LEGALITY.

Where a father, while his son was under arrest on the charge of cheating and swindling in the purchase of a mule, was induced by the seller to sign, as joint maker with the son, a promissory note for the purchase price of the mule, the inducement being an agreement by the seller that if the father would sign the note he would withdraw the warrant under which the arrest had been made and release the son from arrest and stop the prosecution, the conduct of the payee of the note in thus inducing the father to sign it was both illegal and immoral, and constituted a valid defense, on the part of the father, to the payee's suit on the note.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 633-653; Dec. Dig. § 123.*]

Error from Superior Court, Walker County; J. W. Maddox, Judge.

Action by W. C. Evett against C. C. Cromer. Judgment for plaintiff, and defendant brings error. Reversed.

Suit in a justice court was brought against C. C. Cromer on a note made by him and Will Cromer jointly, and payable to Evett, the plaintiff. The trial resulted in a verdict against the defendant. A certiorari sued out by him was overruled, and final judgment entered against him, and he excepted.

The single issue in the case was whether the note was a binding contract; the defense being that the defendant signed the note under duress, and for the purpose of settling a criminal prosecution against his son. The evidence as to this issue was undisputed, and was in substance as follows: The note was for the purchase price of a mule sold by Evett, the plaintiff, to Will Cromer, the son. The defendant told Evett that he "need

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes.

not sell his son the mule, thinking he would go on the note with him; for he would not do it." Subsequently Evett had Will Cromer, the son, arrested for obtaining goods under false pretenses. It does not distinctly appear what was the false pretense which formed the basis of the criminal charge against the son; but it is fairly inferable from the evidence that it was a statement made to Evett by Will Cromer that his father would sign with him the note for the mule, and that by this false pretense the mule was obtained. The son was arrested under a warrant for this offense; and, while he was under arrest, Evett told the father that if he would sign the note with his son he (Evett) would withdraw the warrant and release the son. The defendant testified: "I signed the note for that reason, and stopped the prosecution." It was admitted, on the hearing of the certiorari that the evidence before the justice showed credits on the note amounting to \$18, which were made before the suit was brought; but it does not appear whether these payments were made by the son or the father.

John W. Bale and D. F. Pope, both of La Fayette, for plaintiff in error. Jas. E. Rosser, of La Fayette, for defendant in error.

HILL, C. J. (after stating the facts as above). It was insisted by the defendant in error that the consideration for the note was the purchase of the mule, and not duress or the settlement of a criminal prosecution; and, that even if the signature to the note was obtained by an illegal consideration in the first instance, the payments thereon were a substantial ratification, and made it a valid and binding contract upon both makers. We may dispose of these two contentions by the statement that as to the son the consideration of the note was clearly the mule; for the evidence is undisputed that he, and not his father, bought the mule from the plaintiff. But the evidence is equally clear and undisputed that the only reason why the father signed the note was the promise made by the plaintiff that if he would do so the plaintiff would dismiss the warrant, by virtue of which his son was then under arrest, and would stop the prosecution. According to the evidence, this promise and agreement was clearly the only consideration which moved the father to sign the note with his son. It does not appear whether the father or the son entered the credits on the note; and the burden was on the plaintiff to show, in support of his claim of ratification by the father, that the payments were made by the father, and not by the son.

As to the main contention of the plaintiff in error, that this note was obtained under duress and for the purpose of settling a

criminal prosecution against his son, there is no issue; for the evidence is undisputed that before the purchase of the mule he refused to sign the note with his son, and only consented to do so when the son was actually under arrest for a criminal offense, and on the express promise of the payee that, in consideration of his signing the note, he would withdraw the warrant and release the son, and stop the prosecution. In *Jones v. Dannenberg*, 112 Ga. 426, 37 S. E. 729, 52 L. R. A. 271, it is held that "it is both an illegal and an immoral act to make an agreement, for a consideration, to suppress the prosecution of a criminal offense, whether the offense be of the grade of felony or misdemeanor; and the fact that a note and mortgage were executed by a wife and delivered to the payee of the note on consideration that he would cease to prosecute, and would settle a criminal offense for the commission of which the husband was at the time under arrest on a warrant sued out by such payee, may be pleaded and proved as a defense to the foreclosure of the mortgage so given, even in the hands of one who is the bona fide holder of such note for value, before due, and without notice." See, also, the decision of this court in *Lucas v. Castelow*, 8 Ga. App. 812, 70 S. E. 184.

In the present case the suit is not by an innocent holder, for value, but by the original payee of the note, whose illegal and immoral act in securing the note to be signed is set up as a defense. In the Penal Code 1910, § 329, it is declared that "if any person, informing or prosecuting under pretense of any penal law, shall compound with the offender, or direct the suit or information to be discontinued, unless it be by leave of the court where the same is pending, he shall be guilty of a misdemeanor."

It was insisted by learned counsel for the defendant in error that there was no proof of the allegation in this case that the prosecution was illegal, and that the burden was on the plaintiff to show it, as, under section 4255 of the Civil Code 1910, "legal imprisonment, if not used for illegal purposes, is not duress." Unquestionably this is true; but in this case, assuming that the arrest of the defendant's son was legal, it was clearly used for an illegal purpose when used for the express purpose of coercing the father to sign the note, in order to have the son released from arrest, and to stop the prosecution. Whether the arrest was legal or illegal is immaterial, as it was used for an illegal purpose. Penal Code 1910, § 329; *Deen v. Williams*, 128 Ga. 265, 57 S. E. 427.

We conclude that the learned judge of the superior court erred in overruling and dismissing the certiorari and entering up final judgment against the plaintiff.

Judgment reversed.

(11 Ga. App. 664)

INTERNATIONAL LIFE INS. CO. v. NIX.
(No. 4,288.)

(Court of Appeals of Georgia. Oct. 9, 1912.)

*(Syllabus by the Court.)***1. INSURANCE (§ 198*)—PREMIUMS—RECOVERY OF PREMIUMS PAID.**

There being evidence for the plaintiff that the policy of insurance described in his application was not delivered to and accepted by him, that the policy actually tendered to the applicant was for a different sum and of a different kind from that applied for, and was never accepted, the verdict against the insurance company for the amount of the premium paid when the application was made was authorized.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 457-467; Dec. Dig. § 198.*]

2. INSURANCE (§ 198*)—PREMIUMS—RECOVERY OF PREMIUMS PAID.

Evidence was admissible that, after defendant's refusal to issue the policy applied for, the applicant obtained insurance of a similar character from another company. Such testimony was of some evidentiary value upon the issue as to whether the applicant intended to accept the policy actually issued by the defendant, though of a different character from that applied for.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 457-467; Dec. Dig. § 198.*]

3. EVIDENCE (§ 471*)—OPINION EVIDENCE—CONCLUSIONS OF LAW.

It was not permissible to ask the plaintiff if he was insured under the policy issued by the defendant, since this question sought a conclusion of law from the facts proved.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2149-2185; Dec. Dig. § 471.*]

4. INSURANCE (§ 198*)—PREMIUMS—RECOVERY OF PREMIUMS PAID.

Evidence that the plaintiff's application for insurance had been rejected by another company some time prior to issuance of the policy by the defendant was irrelevant.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 457-467; Dec. Dig. § 198.*]

5. INSURANCE (§ 198*)—PREMIUMS—RECOVERY OF PREMIUMS PAID.

It was permissible to prove that the defendant's agent, who took the application and delivered the policy actually issued, stated to the plaintiff that he had been unable to obtain the kind of policy applied for, but thought he could do so at a later date.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 457-467; Dec. Dig. § 198.*]

6. EVIDENCE (§ 471*)—OPINIONS—ADMISSIBILITY.

It was not permissible to prove that a general agent of the defendant had stated that the plaintiff "was covered by insurance" in his company. Such evidence was merely opinionative.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2149-2185; Dec. Dig. § 471.*]

7. INSURANCE (§ 198*)—PREMIUMS—RECOVERY OF PREMIUMS PAID.

The question whether the agent who took the application had or had not settled with his principal for the premium was irrelevant to any issue in the case.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 457-467; Dec. Dig. § 198.*]

8. TRIAL (§ 29*)—CONDUCT—REMARKS OF JUDGE.

It was not prejudicial error for the court to remark: "I want to make a statement about

what I think about this case. I will confine you to that proposition, whether Mr. Nix accepted this \$5,000 policy in lieu of the \$10,000 policy. If he did, he would be bound by it. That is all I care to go into." The issue there referred to was the only material question involved in the case.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 80-84, 508; Dec. Dig. § 29.*]

9. INSURANCE (§ 198*)—PREMIUMS—RECOVERY OF PREMIUMS PAID.

The receipt for the premium was not inadmissible for any reason assigned.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 457-467; Dec. Dig. § 198.*]

10. APPEAL AND ERROR (§ 690*)—PRESENTATION OF QUESTIONS IN LOWER COURT—EXCLUSION OF EVIDENCE.

Complaint of the refusal to permit a witness to answer a question cannot be considered, when it does not appear what answer was expected.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2897-2899, 2902-2904, 2906, 2908; Dec. Dig. § 690.*]

11. INSTRUCTIONS—AUTHORITY OF JUDGE.

There was no error in the instructions in reference to the authority of the defendant's agent.

Error from City Court of Carrollton; Jas. Beall, Judge.

Action by W. L. Nix against the International Life Insurance Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Newell & Fielder, of Carrollton, for plaintiff in error. Leon Hood, of Carrollton, for defendant in error.

POTTLE, J. Judgment affirmed.

(11 Ga. App. 667)

COOK v. T. E. HIGHTOWER & SON.

SAME v. HIGHTOWER & CO.

(Nos. 4,203, 4,204.)

(Court of Appeals of Georgia. Oct. 9, 1912.)

*(Syllabus by the Court.)***HUSBAND AND WIFE (§ 235*)—ACTION—PLEADING—PLEA OF DURESS—QUESTION FOR JURY.**

The pleas in these cases contain two defenses: (1) That the notes sued on were obtained from the defendant by duress and threats, and to settle a criminal prosecution against her husband, and were not her contract; (2) that the notes were made to pay her husband's debt, and were therefore void. In each case the trial judge, on oral motion, struck the plea as to duress, and the case went to trial on the issue made by the other plea. Held: (1) The pleas setting up duress in avoidance of the notes were sufficiently full and specific in their allegations, and the trial judge erred in striking them. *Whitt v. Blount*, 124 Ga. 671, 53 S. E. 205; *Lucas v. Castellow*, 8 Ga. App. 812, 813, 70 S. E. 184. (2) As to the second defense, that the consideration of the notes was the payment of a debt of the defendant's husband, she being a married woman at the time, the facts were clearly in issue under the evidence, and the trial judge erred in directing a verdict for the plaintiffs. The judgment overruling the motion of the de-

defendant for a new trial must be reversed. Civil Code 1910, § 2993.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 849-852; Dec. Dig. § 235.*]

Error from City Court of Miller County; L. M. Rambo, Judge.

Action by T. E. Hightower & Son and by Hightower & Co. against Zenie Cook. Judgment for plaintiffs, and defendant brings error. Reversed.

W. I. Geer, of Colquitt, for plaintiff in error. Bush & Stapleton, of Colquitt, for defendants in error.

HILL, C. J. Judgment reversed.

(11 Ga. App. 645)

KIRBY PLANING MILL CO. v. HUGHES.
(No. 4,169.)

(Court of Appeals of Georgia. Oct. 9, 1912.)

(Syllabus by the Court.)

1. CONTINUANCE (§ 26*)—GROUNDS—ABSENCE OF WITNESS—DILIGENCE.

There was no abuse of sound legal discretion in refusing to continue the trial of the case for the purpose of enabling the defendant to procure the testimony of witnesses residing in Boston, Mass.; the showing for continuance indicating laches, since there was no effort made to procure this testimony until eight days before the case was called for trial, and no reason was shown for this delay.

[Ed. Note.—For other cases, see Continuance, Cent. Dig. §§ 74-93; Dec. Dig. § 26.*]

2. PLEADING (§ 290*)—AMENDMENT—ANSWER—FAILURE TO VERIFY.

The proffered amendment to the plea being after the time for answer had expired, and setting up new facts, of which the original plea failed to give any notice, and the amendment not being verified by affidavit as required by section 5640 of the Civil Code of 1910, there was no error in refusing to allow the amendment, as the allegations of the amendment did not bring it within the exception to the terms prescribed by that section. Besides, the evidence discloses that the defendant had the benefit of the allegations made in the proposed amendment; the trial judge permitting the defendant, over objection of the plaintiff, to introduce testimony covering the matters alleged in the proposed amendment.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 859-863, 881, 886½; Dec. Dig. § 290.*]

3. APPEAL AND ERROR (§ 303*)—RECORD—GROUNDS FOR NEW TRIAL—APPROVAL BY JUDGE.

The notes of the trial judge, attached to the approval of the grounds for new trial in the amended motion, practically amount to a disapproval of these grounds; and this court, therefore, will not consider any of the questions made in these grounds of the amended motion. Shierling v. Richland Grocery Co., 9 Ga. App. 271, 70 S. E. 1126.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1756; Dec. Dig. § 303.*]

4. EVIDENCE (§ 457*)—CUSTOMS AND USAGES (§ 15*)—PAROL EVIDENCE AFFECTING WRITINGS—IDENTIFICATION OF SUBJECT-MATTER—OPERATION OF CUSTOMS.

Where a written order for lumber designated it as "standard 1905," parol evidence

was admissible of a general custom among lumber merchants to interpret this description or designation as meaning "short-leaf pine." The testimony was admissible for two reasons: (a) Because it identified the subject-matter of the contract; (b) because it tended to prove the universal custom of the lumber business or trade, which became by implication a part of the written contract. Hartwell Grocery Co. v. Mountain City Co., 8 Ga. App. 727, 70 S. E. 48; Civil Code 1910, section 1, subsec. 4; Barrie v. Miller, 104 Ga. 312, 30 S. E. 840, 69 Am. St. Rep. 171.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2104, 2107, 2108; Dec. Dig. § 457.* Customs and Usages, Cent. Dig. §§ 30-33; Dec. Dig. § 15.*]

5. APPEAL AND ERROR (§ 1151*)—DISPOSITION OF CAUSE—MODIFICATION.

The uncontradicted evidence showing that the plaintiff had received a double payment of \$140.61, for which the defendant had been given no corresponding credit, and that the verdict against the defendant included this double payment, direction is given that the sum of \$140.61, with interest thereon, be written off from the amount of the verdict and judgment.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4498-4506; Dec. Dig. § 1151.*]

6. COSTS (§ 234*)—APPEAL—MODIFICATION OF JUDGMENT.

No material error of law appears, and the verdict and judgment, modified as indicated above, being supported by the evidence, the judgment of the lower court is affirmed, with direction as above indicated. And since the plaintiff in error secured by his appeal to this court a material modification of the verdict against him, the cost of the writ of error is taxed against the defendant in error.

[Ed. Note.—For other cases, see Costs, Cent. Dig. §§ 892-899; Dec. Dig. § 234.*]

Error from City Court of Thomasville; W. H. Hammond, Judge.

Action by J. R. Hughes against the Kirby Planing Mill Company. Judgment for plaintiff, and defendant brings error. Modified and affirmed.

Roscoe Luke and J. H. Merrill, both of Thomasville, for plaintiff in error. Theodore Titus, of Thomasville, for defendant in error.

HILL, C. J. Judgment modified and affirmed.

(11 Ga. App. 650)

SLAUGHTER v. MANNING. (No. 4,218.)
(Court of Appeals of Georgia. Oct. 9, 1912.)

(Syllabus by the Court.)

1. JUSTICES OF THE PEACE (§ 43*)—JURISDICTION—AMOUNT IN CONTROVERSY.

An application to foreclose a landlord's lien for supplies against a tenant, where the amount claimed exceeds \$100, cannot be made to a justice of the peace; and where such application is made, and the justice of the peace has issued an execution thereon for a sum exceeding \$100, the execution is absolutely void, and any lien thereon and all further proceedings thereunder are absolutely invalid. Civil Code 1910, § 3366, subsecs. 3, 4.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 149-156; Dec. Dig. § 43.*]

2. JUSTICES OF THE PEACE (§ 135*)—EXECUTION—CLAIM BY THIRD PERSON.

Where a landlord's lien for supplies exceeding the sum of \$100 is foreclosed before a justice of the peace, who issues an execution thereon for the sum claimed, and the execution is levied upon the property in the possession of the tenant, and a claim is interposed, the claimant, on the trial of the claim case, can challenge the legality of the foreclosure proceedings and the validity of the execution issued thereunder.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 428-447; Dec. Dig. § 135.*]

Error from City Court of Vienna; W. H. Lasseter, Judge.

Claim by H. C. Slaughter to property levied on by B. F. Manning. Judgment for the execution plaintiff, and the claimant brings error. Reversed.

T. H. Kirkland, of Unadilla, W. V. Harvard, of Vienna, and Jule Felton, of Montezuma, for plaintiff in error. D. L. Henderson, of Vienna, for defendant in error.

HILL, C. J. Judgment reversed.

(11 Ga. App. 650)

FIRST DIST. AGRICULTURAL AND MECHANICAL SCHOOL et al. v. REYNOLDS. (No. 4,222.)

(Court of Appeals of Georgia. Oct. 9, 1912.)

(Syllabus by the Court.)

1. COLLEGES AND UNIVERSITIES (§ 10*)—ACTION—WHAT CONSTITUTES SUIT AGAINST STATE.

The industrial and agricultural schools organized, established, and maintained in each congressional district of this state in accordance with the provisions of the act of 1906 (Laws 1906, p. 72 [Civil Code 1910, § 1552 et seq.]) are not such public institutions of the state as would exempt them from suit for contract made by their trustees within the scope of authority delegated to them by the terms of the act in question.

[Ed. Note.—For other cases, see Colleges and Universities, Cent. Dig. §§ 29-31; Dec. Dig. § 10.*]

2. COLLEGES AND UNIVERSITIES (§ 10*)—INDUSTRIAL AND AGRICULTURAL SCHOOLS—RELATION TO STATE.

These branch schools are made departments of the University of Georgia by the act creating them, and the University of Georgia is expressly incorporated as a body corporate and politic, with the right to sue and be sued; and it was the purpose of the Legislature in creating these branch schools that they should stand in the same relation to the state and to the public in this respect as the University stood.

[Ed. Note.—For other cases, see Colleges and Universities, Cent. Dig. §§ 29-31; Dec. Dig. § 10.*]

3. COLLEGES AND UNIVERSITIES (§ 7*)—CONTRACTS—VALIDITY.

A contract made by the trustees of the First District Agricultural and Mechanical School for the purchase of furniture for the purpose of equipping the school was within the scope of the authority delegated to them, and

is enforceable against the school and the trustees thereof in their official capacity.

[Ed. Note.—For other cases, see Colleges and Universities, Cent. Dig. §§ 16-19; Dec. Dig. § 7.*]

Error from City Court of Statesboro; H. B. Strange, Judge.

Action by J. H. Reynolds against the First District Agricultural and Mechanical School and others. Judgment for plaintiff, and defendants bring error. Affirmed.

T. S. Felder, Atty. Gen., and Brannen & Booth, of Statesboro, for plaintiffs in error. Dean & Dean and J. M. Hunt, all of Rome, and Johnston & Cone, of Statesboro, for defendant in error.

HILL, C. J. The Ware-Hatcher Furniture Company of Atlanta sold some furniture on open account to the First District Agricultural and Mechanical School, located at Statesboro. \$1,000 was paid on the account, leaving a balance of \$627.60 due. The vendor was subsequently adjudicated bankrupt, and the trustees, under an order of the bankruptcy court, sold and transferred this account to J. H. Reynolds, who sued out a purchase-money attachment in the city court of Statesboro, naming as defendants in his suit the school and its trustees by name. The defendants, at the appearance term, made a motion to dismiss the suit, on the ground that the school was an integral part of the state, being a state institution, and was therefore exempt from suit, in the absence of legislative consent. The motion was overruled, and, in the absence of any defense, the plaintiff made out formal proof of his account and took judgment. The defendants excepted.

[1-3] The First District Agricultural and Mechanical School was authorized and established under the provision of the act of 1906 (Georgia Laws 1906, p. 72), as codified in section 1552 of the Civil Code of 1910. By this act it is declared that said schools "shall be branches of the State College of Agriculture, a department of the University of Georgia." By section 1553 provision is made for the maintenance of these schools from fees received from the inspection of fertilizers, oils, and other inspection fees received by the department of agriculture in this state. By section 1554 the Governor is authorized to appoint trustees of these schools; and section 1555 provides for the acceptance by the trustees of donations made by any citizen of land, or other property, for the maintenance of said schools, and for the location of such schools; and other sections of the Code give to the trustees authority to equip the schools, and to build and rent property in connection with the schools; and it is contemplated by the act that these schools shall be supported and maintained, not only by limited appropriations made annually by the state, but by private and personal donations. It may be stated that the

agricultural and mechanical schools thus established and declared to be branches of the State College of Agriculture, the latter being a department of the State University, are state institutions to a certain extent.

A careful examination of the act creating these schools in the different congressional districts of the state makes it apparent that it was the intention of the Legislature to make them all a part of the State University, standing in the same relation to the state that the State University stands. Now, the trustees of the University are expressly created "a body corporate and politic, by the name of the 'Trustees of the University of Georgia,' by which they shall have a perpetual succession, have and use a common seal, and be a person in law, able to plead and be impleaded, to hold and acquire real and personal estate, with power to lease and otherwise manage the same for the good of the University. All money or property granted by the state, or individuals, for the advancement of learning in general, is vested in such trustees." Civil Code, § 1384. And section 1397 designates the branches of the University, naming among them the State College of Agriculture.

It would seem to follow from the fact that the University of Georgia itself, which may be called the trunk of the tree of education in the state of Georgia, was incorporated as a body politic, with power to sue and be sued, all of its branches, distinctly made a part of the trunk, would be clothed with the same power and be subject to the same law. When the state expressly gave its consent for its University to be sued, this was express consent that all the branches of the University could also be sued. The Supreme Court of North Carolina, in the case of County Board of Education v. State Board of Education, 106 N. C. 83, 10 S. E. 1002, holds that, where the state incorporates an institution and provides, among other things, that it "may sue and be sued as such," this is sufficient consent to its being sued. In *Medical College of Georgia v. Rushing*, 1 Ga. App. 468, 57 S. E. 1083, this court held that "the Medical College of Georgia is not a public institution of the state because it is designated by law as a branch of the University of Georgia, and it is liable for the torts of its agents in the conduct of its business and within the scope of their authority," and we think, also, that these agricultural and mechanical schools, established under the provisions of the act of 1906, although they are made branches of the State College of Agriculture, are a department of the State University, and that the whole scheme of the legislation relating to their establishment, management, and maintenance contemplates that, although in a measure largely supported by the state, yet when the appropriation is made it ceases to be the property of the state and becomes the property of the individual school, and is held

by the trustees of the school for its benefit, and not for the benefit of the state at large. These trustees are authorized to equip these schools, and to maintain and operate them; and it would seem that this would include the right to buy furniture for the school and such other property as would be necessary in its maintenance and operation. In the case of *Knight v. State*, 137 Ga. 537, 73 S. E. 825, it is held that, where funds arising partly from oil inspection fees and partly from private donations had been turned over to and were in the hands of trustees of a school of agriculture and mechanical arts, established in a particular congressional district, under Civil Code, § 1552 et seq., and were deposited by the treasurer of the board of trustees in his own name, as such, in a bank which was a state depository, and which failed, this did not constitute such a debt due to the state as created a lien in its favor by virtue of its general sovereignty. From that decision it follows that the money of these schools arising from inspection fees and private donations is not the property of the state, but the property of these institutions, and subject to the debts created by the trustees.

A careful study of the legislation relating to the entire system of schools and colleges composing the University of Georgia would seem to indicate that it intended to make all these subsidiary institutions stand in the same relation to the state and the public as the University stands, and be subject to sue and be sued. This is the only reasonable construction to be placed upon such legislation. The Legislature could not have intended to authorize the trustees to maintain these schools, to authorize private donations to be made to them, to authorize their equipment and management, and to put the public on notice of the right to deal with them, without the necessary implication that as to these schools the state would not claim the constitutional exemption from suit. If the public understood that in dealing with these schools through their boards of trustees it was dealing with the state in its sovereign capacity, and would have to resort to the Legislature of the state to be paid debts created by the trustees for the purpose of equipping and maintaining the schools, both the management and usefulness of such schools would be largely impeded, if not altogether destroyed. In embarking in an enterprise which is usually carried on by private individuals or companies, it was the intention of the state to waive, as to this enterprise, its sovereign character, and to confer upon individuals the right to enforce by suit contracts made by the trustees in pursuance of the powers delegated to them by the act. *Western & Atlantic Railroad Co. v. Carlton*, 28 Ga. 180.

It follows from what we have said that the contract for the purchase of furniture, made by the trustees in behalf of the First

District Agricultural and Mechanical School, was clearly within the scope of the authority delegated to them as such trustees. It was a part of their express work in equipping the school; and the vendors of this furniture, or their lawful assignees or transferees, were fully authorized to sue out a purchase-money attachment for the balance due on the furniture, and the lower court did not err in refusing to dismiss the suit.

Judgment affirmed.

(11 Ga. App. 621)

PELHAM & H. R. CO. v. ELLIOTT.
(No. 3,579.)

(Court of Appeals of Georgia. Oct. 4, 1912.)

(Syllabus by the Court.)

1. TRIAL (§ 210*)—INSTRUCTIONS—CREDIBILITY OF WITNESSES.

"Under the previous rulings of this court, if a witness has been impeached, it is the duty of the jury to disregard his testimony unless corroborated in material particulars." *Powell v. State*, 101 Ga. 9 (5a), 29 S. E. 309, 65 Am. St. Rep. 277. It is therefore error, in a case in which the determination of the issue depends almost entirely upon the credibility of a witness whom it is sought to impeach, to refuse a request that section 5884 of the Civil Code of 1910 be given in charge to the jury; the request being in the exact language of that section.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 490-494; Dec. Dig. § 210.*]

2. NEW TRIAL (§ 46*)—GROUNDS—SEPARATION OF JURY.

A new trial should not be granted for an irregularity as to the separation of the jury, which was known to counsel at the time, and yet was not brought to the attention of the court until after the verdict.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 86½, 87; Dec. Dig. § 46.*]

3. APPEAL AND ERROR (§ 972*)—REVIEW—DISCRETION OF TRIAL COURT—TIME FOR ARGUMENT OF COUNSEL.

Extension of the time allowed to counsel for argument, when there is no express rule upon the subject, is a matter addressed to the sound discretion of the trial judge, and his discretion will not be controlled, unless it is manifestly abused.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3847; Dec. Dig. § 972.*]

4. APPEAL AND ERROR (§ 1060*)—REVIEW—HARMLESS ERROR—ARGUMENTS OF COUNSEL.

"Side bar" remarks and irregular comments of counsel, during the course of a trial, cannot be approved as conducive to the decorum of the courts; but they will not be held by a reviewing court to be cause for new trial, unless it is manifest that the conduct or remarks of counsel were necessarily prejudicial to the opposite party, and that the trial judge abused his discretion in not applying sufficiently drastic measures to remove their injurious effect and to enforce order.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4135; Dec. Dig. § 1060.*]

5. TRIAL (§ 133*)—NEW TRIAL (§ 29*)—APPEAL AND ERROR (§ 1060*)—ARGUMENTS OF COUNSEL—ACTION OF JUDGE.

It is illegal and highly prejudicial to a fair and just administration of the rights of the parties for counsel, in addressing the jury, to comment upon matters not proven, and not growing out of the pleadings. It is the duty

of the trial judge to prevent such comments, and he should at least, upon a timely and appropriate request of the party likely to be prejudiced thereby, direct the attention of the jury to the impropriety of the argument and caution them against it. If statements of fact, or comments, unjustified by the evidence, are made by counsel, and it is apparent that the impropriety may be prejudicial to the opposite party, and yet the court takes no action to apply any corrective measure, though requested to do so, a new trial will be granted.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 316; Dec. Dig. § 133.* New Trial, Cent. Dig. §§ 43, 44; Dec. Dig. § 29.* Appeal and Error, Cent. Dig. § 4135; Dec. Dig. § 1060.*]

Error from City Court of Cairo; J. R. Singletary, Judge.

Action by A. C. Elliott against the Pelham & Havana Railroad Co. Judgment for plaintiff, and defendant brings error. Reversed.

R. C. Bell, of Cairo, and Lane & Park, of Macon, for plaintiff in error. W. J. Willie, of Cairo, and Smith, Hastings & Ransom, of Atlanta, for defendant in error.

RUSSELL, J. A. C. Elliott brought suit against the Pelham & Havana Railroad Company, alleging that while in the discharge of his duty as a conductor on one of the company's trains on December 3, 1909, he was compelled to ride on the top of a car, because there was no caboose; that the car became derailed, and turned over, throwing him from the top of the car to the ground, wrenching his ankle and knee, and tearing and bruising the muscles and nerves of his spine; that his capacity to labor was thereby entirely destroyed, and that he had suffered and always would suffer great pain; that he was 37 years old, and was earning \$600 per year, at the time of his injury. The defendant denied that it was operating a railroad at the time of the injury, admitting only that its proposed railroad was in process of construction, and further denied the allegations of negligence, and all other allegations of the petition. The trial of the case resulted in a verdict for \$6,000, and the defendant excepted to the refusal of a new trial.

Some of the assignments of error do not present any sufficient reason for the grant of a new trial. Some of the requests to charge were properly refused, because they were imperfect and defective. The instructions requested in some of the requests, to the refusal of which exception is taken, were presented, not in the language requested, it is true, but in the judge's own language, in substantial compliance with the requests. There are a number of exceptions predicated upon the conduct of the judge in failing to prevent certain incidents of the trial, which, it is claimed, prejudiced the defendant's case before the jury, and which were objected to at the time, and several assignments of error predicated upon in-

structions to the jury which it is insisted were erroneous; but we do not think that any of the above-mentioned assignments of error present sufficient cause to authorize a reversal of the judgment refusing a new trial. Disregarding, however, all those assignments of error which we deem to be immaterial, and ignoring those which are without merit, it is our deliberate opinion that upon three grounds of the motion for new trial a new trial is required, if we follow, as we are bound to follow, the previous adjudications of the Supreme Court, as well as of this court.

[1] 1. It is with the utmost reluctance that we set aside the verdict of the jury in any case where there is evidence to authorize it, and this court has not ordered and will not order the grant of a new trial in any case where the trial has been free from substantial error, or even in a case where error has been committed, if the error is not likely to have affected the result, where there is, as in this case, enough evidence to support the finding of the jury. But in a case where the verdict rendered is not the only verdict that could have been reached under the evidence submitted, and it appears that there were errors in the trial which may have affected the result, and especially where, in a close case, all those errors may have tended to influence the jury to believe the witness for one party rather than the testimony for the other party, our duty requires that a new trial be granted, in order that the guaranty that every person shall have a fair trial shall be made effectual. Pretermittting for the present any discussion as to whether the defendant sustained its contention that it was only in the process of construction and had not become a common carrier, it is manifest, upon a review of the evidence, that the case turned upon whether the injuries from which the plaintiff claimed to suffer were received as a result of negligence of the defendant, or whether his suffering was not caused by injuries received prior to his employment by the defendant. Another controlling issue was whether the injury was due to the negligence of the defendant or the negligence of the plaintiff. The controlling issues of the case were largely dependent upon the credibility of the plaintiff himself.

An effort was made to impeach him by proof of contradictory statements, and a proper request to charge the jury upon the subject of impeachment was refused by the court. The court further certifies that the jury were not instructed upon the subject at all. It is well settled, of course, that in the absence of a request a judge is not required to charge the jury upon the law as to the impeachment of witnesses; but it is no less well settled that to refuse an appropriate request upon the subject is error. Though

in some cases the refusal of a request that the jury be properly instructed as to the law with relation to the impeachment of witnesses, while error, might not require the grant of a new trial, the question as to whether the failure to charge upon the subject is or is not error must always be determined by the importance of the testimony to the issue, as well as its materiality. In the case at bar the testimony of the plaintiff was most material, and the success or failure of the defendant in discrediting the plaintiff's testimony before the jury was of as vital importance to the defendant as that the jury should believe it was essential to the plaintiff. Though it is usually unimportant that the attention of an intelligent jury be directed to circumstances that may have affected the credibility of a witness who has testified in the case, yet in such a case as the one now before us, where the credibility of the witness as to the very vitals of the case is attacked, not only by testimony denying the facts to which he testifies, but by an attempt to show that his character is such that he is not worthy of belief, it may be a substantial right (and frequently is) to have the court call the attention of the jury to the impeaching testimony, and instruct them as to the effect they must legally give it, in case they believe the testimony introduced for the purpose of impeachment is true. It is true the law leaves it in every case to a party to say how important he considers it to be to his case that the jury shall be instructed as to the rules governing the consideration of such testimony and its effect upon the case; and for that reason, therefore, it is not error for the judge to omit to refer to the subject, if he is not requested to do so. But if a party considers it material, he cannot be deprived of the right to have the jury properly instructed upon this branch of the law merely because he may at his option exercise the right or decline to avail himself of it.

Even if the jury believes the testimony of previous contradictory statements relating to matters material to the issue, and even though the proof of these contradictory statements may impeach the witness to the satisfaction of the jury, they may overlook their right to disregard his testimony entirely, if they are satisfied that he swore willfully and knowingly falsely. For this reason the court should have charged the jury, as requested, that, "when a witness is successfully contradicted as to material matter, his credit as to other matters is for the jury; but if a witness swear willfully and knowingly falsely, his testimony ought to be disregarded entirely, unless corroborated by circumstances or other unimpeached evidence. It is for the jury to determine the credit to be given the testimony, where impeached for general bad character or for contradictory statements out of court." The

instruction requested was in the very language of section 5884 of the Civil Code of 1910, and, under our view of it, the principle was not inapplicable for any of the reasons stated by the learned counsel for the defendant in error. This section of the Code may be subject to the criticism suggested by Prof. Wigmore (2 Wigmore on Evidence, § 1111); but the only point which we can consider is the applicability of the section, for it is the duty of the courts to enforce the law as they find it, and, until repealed, this section is a part of the law. *Harris v. State*, 1 Ga. App. 136 (3), 57 S. E. 937; *Southern Railway Company v. Peek*, 6 Ga. App. 43 (1), 64 S. E. 308; *McCullough v. Sawtell*, 134 Ga. 512 (3), 68 S. E. 89; *Powell v. State*, 101 Ga. 9 (5), 29 S. E. 309, 65 Am. St. Rep. 277; *Rouse v. State*, 136 Ga. 356 (4), 71 S. E. 667 (4).

[2] 2. Exception is taken to the court's permitting the jury to disperse and remain separate during the night, while the case was in progress and after a considerable portion of the evidence had been submitted, without consent of the defendant's counsel, and without cautioning the jury or giving them any instruction whatever in regard to the consideration of the case by them, or the making up of their minds upon the same, and without cautioning them not to talk with or accept any courtesies from any one connected with the case; the jury being dismissed without any instructions, caution, or reference of any kind whatsoever. It is insisted that this was especially prejudicial, because the trial of the case attracted attention in the city court of Cairo, the courtroom was crowded, and the case was almost the sole topic of conversation about the hotel and on the streets of the city. This ground of the motion is not fully approved by the trial judge, and hence could not be considered. But in no event should a new trial be granted for an irregularity as to the separation of the jury, which was known at the time to the counsel for the defendant, and yet was not brought to the attention of the court until after the verdict. *Riggins v. Brown*, 12 Ga. 272; *Waller v. State*, 2 Ga. App. 636 (3), 58 S. E. 1106.

[3] 3. Error is assigned because the court allowed Hon. Hoke Smith, counsel for the plaintiff, in his concluding argument to the jury, over the written protest of defendant's counsel, to speak several minutes beyond the time allowed by the rules of the court for argument; no additional time having been asked for. It is alleged that the court erred in refusing to grant a mistrial because of this additional allowance of time, and that "it was particularly hurtful to the defendant, because of the great personal influence of said counsel, and the position occupied by him as Governor-elect of the state of Georgia, and because the courtroom was crowded with the friends, admirers, and political supporters of the counsel, who constantly mani-

festated the greatest interest in and approval of his argument, which could not but be observed by the jury," and, movant insists, influenced them against the defendant. To this ground the court only gives qualified approval, by certifying that the plaintiff's counsel did speak several minutes longer than counsel for the defendant, and adds that, under the practice in the city court of Cairo, argument of counsel is not limited, and counsel are permitted to argue as long as they please. The court further certifies that, if there was any interest manifested in the argument of counsel or approval thereof, the court's attention was not called to it by movant's counsel. Under this qualifying note, nothing is left for us to pass upon but the fact that counsel for one of the parties spoke longer than the other, and that the court declined to grant a mistrial for this. We certainly could not hold that this was error, or that, under the circumstances as they really occurred, and as certified to by the judge, there was any abuse of his discretion. There are occasions where the circumstances require the judge to intervene *ex mero motu*, and stop conduct or language in the presence of the jury which may be prejudicial to the rights of the litigant or derogatory to the dignity of the court; but such matters as are referred to in the present assignment of error cannot properly be made ground for exception, unless the attention of the court is called to them at the time. We do not think that the mere fact that counsel exceeds the limit of time allowed by law for argument would ordinarily be good ground for mistrial, for, if time is the only thing the counsel is consuming, he will be more apt to benefit the opposite party, by wearying the jury and thus prejudicing them against his own client than otherwise.

[4] 4. The practice of indulging in "side bar" remarks is not to be approved. The trial judge should do everything in his power to maintain the decorum of his court and advance justice by orderly procedure. However, irregular comments of counsel during the course of trial will not be held by the reviewing court to be error, unless it is manifest that the trial judge abused his discretion, in not applying sufficiently drastic measures to enforce order in a case where it is plain that the conduct or remarks of counsel cannot fail to be prejudicial.

[5] 5. In the fifteenth ground of the amended motion for a new trial complaint is made that the leading counsel for the plaintiff in the lower court, Hon. Hoke Smith, who was then Governor-elect of the state of Georgia, in his concluding argument, referred to his previous knowledge of the plaintiff in the city of Atlanta, when he was a street car conductor in that city, and stated that he believed in the plaintiff, knew that he was injured, believed in his testimony, and believed he was injured to the full extent he claimed. The defendant's counsel objected

to these statements, and requested the court to charge the jury that they must try the case on the evidence, and not on the personal belief of counsel. The court declined to do this, and did not even caution the jury in regard to the statements of belief by plaintiff's counsel. In the instructions of the court to the jury there is no reference to the matter, and it does not appear that the remarks to which objection was made were withdrawn or explained. If the question presented were a new one, we should not be inclined to consider that the exception presented a good ground for a new trial in a case in which the evidence would authorize the result reached by the jury, and we would not feel justified in setting aside their verdict merely because of counsel's expressions of his belief. If the question were here presented for the first time, we would unhesitatingly declare our confidence in the ability of a jury of ordinary intelligence to disregard improper argument, and their ability to place their finding upon the facts derived from the sworn testimony of the witnesses and the law as it should be given them in charge by the court. But the question before us is not a new one in Georgia, and the only duty which devolves upon us is to determine whether the argument complained of falls within the well-settled rule, for the infraction of which the grant of a new trial is mandatory, and to inquire whether there is anything in the circumstances of the present case, as they are set before us by the record, which so distinguish it from the cases heretofore adjudicated that we can truthfully say it is not within the general rule.

It may be said, in passing, that the statement, which appears more than once in the motion for new trial—that the distinguished counsel was at the time "Governor-elect of the state of Georgia" has no other bearing than that the effect of improper argument, or of counsel testifying in argument, is always more damaging in proportion to the admitted character and standing of the counsel. A remark or improper argument from an insignificant barrister might be highly improper and illegal, and yet, as a matter of fact, be but little prejudicial or entirely harmless in its effect, while the same remark from one whose learning, character, and ability made him a tower of strength could not be lightly turned aside, and might work untold injury to its object. The statements made by the counsel in the present case must be admitted to trench more largely on the rights of the witness than the remarks of the solicitor general in *Georgia Railway & Electric Company v. Dougherty*, 4 Ga. App. 614, 62 S. E. 158; but the rule is an old one. Without deciding the question in finality, the court, in *Berry v. State*, 10 Ga. 511, condemned the practice. In *Mitchum v. State*, 11 Ga. 616, the court proceeded to deal with

the question at length, and to lay down a definite rule, which has been followed ever since. In view of our personal opinion, as well as of the importance of the matter to the profession, we deem it not inappropriate to quote, in extenso, the reasons of Judge Nisbet:

"We have had occasion to consider the habit of counsel, in addressing the jury, of commenting upon matters not proven and not growing out of the pleadings before, and have been content with visiting it with a decided and emphatic disapproval. *Berry v. State*, 10 Ga. 522, 523. We entertain no shadow of doubt as to the necessity of pronouncing it, as we now do, illegal and highly prejudicial to a fair and just administration of the rights of parties, either on the criminal or civil side of the court. It is the duty of the court to prevent such comments, and in all cases where this is not done we shall hold, as we rule in this case, that it is good ground for a new trial. There was, it is true, some excuse for the license conceded the solicitor general in this case, in the fact that the counsel for the prisoner had already taken the same liberty in his argument to the jury. The solicitor general, no doubt, felt called upon by the obligations of his office to remove any wrong impression which the argument of the counsel for the prisoner had made as to the credibility of the witness. Disregarding, however, these things, we have no option but to make this the occasion of establishing a rule upon this subject. In doing this, I am sure that it is scarcely necessary to say that we disclaim any purpose of inflicting a personal censure upon the able and upright judge who presided in the cause, or upon the counsel and the prosecuting officer. If no other reason existed for this disclaimer (and there are many), sufficient reason would be found in the usage of our courts, which has gone very far to sanction the habit referred to. Its practical tendency is bad upon the court, the bar, and the jury. If this were all, perhaps our duty would stop with the expression of such an opinion; but this is not all, for in our judgment it is violative of the rights of the citizen litigant in the courts of justice, and, if so, we are not at liberty to stop short of making it cause for new trial.

"It is not foreign to the subject to say that it is the duty of counsel to guard, by the most scrupulous propriety of demeanor, in the conduct of a cause, the dignity and honor of the profession. Connected as it is, most intimately, with the administration of justice, it should be protected most vigilantly from falling into popular disrepute. It ought, as I verily believe it does, to command the respect of the wise, and the reverence of the good. Power and place, hereditary wealth, stupidity in high social position, and even genius, pandering to a popular taste for caricature, jealous of the power which it wields upon governments, have labored to degrade it. Still

in this country and in England, if nowhere else, the bar is the ladder upon which men mount to distinction, the lawyer is the champion of popular rights, the class to which he belongs is more influential than any other, and counsel, yes, feed counsel, is indispensable to a fair and full administration of justice. When learning and character, and practiced skill, and eloquence, and enthusiasm, chastened by discretion, are enlisted in behalf of the litigant, he may rest assured that he holds in his counsel the very best guaranty against all forms of wrong and oppression in the administration of the law. It is true that he is paid for his services—and what of that? Are not princes and premiers, presidents and priests, also paid? One thing never yet was bought with money, and that is the soul-engrossing identification of counsel with his client. It is the gratuitous bestowal of his sympathy, drawing forth the masterly powers of his genius and the rich treasures of his learning, that makes the great lawyer, the honored and influential citizen. The approval of conscience and the respect of good men are his reward—far richer than the stipulated fee of these days, or the honorarium of the Roman advocate. If I thus magnify the office of the counsel, it is for the purpose of saying that its very importance makes indispensable the exclusion of the habit which we now condemn.

"But I proceed, claiming the indulgence on account of these general remarks, of the critical professional reader, to test the rule we lay down by strictly legal considerations. That rule is that it is contrary to law for counsel to comment upon facts not proven. He represents his client; he is the substitute of his client; whatever the client may do in the conduct of his cause, therefore, his counsel may do. In relation to his liberty of speech, the largest and most liberal freedom is allowed, and the law protects him in it. The right of discussing the merits of his cause, both as to the law and the facts, is indispensable to every party; the same right appertains to his counsel. The range of discussion is wide—very wide. He is entitled to be heard in argument upon every question of law that may arise in the cause; in his addresses to the jury it is his right to descant upon the facts proven or admitted in the pleadings, to arraign the conduct of parties, impugn, excuse, justify, or condemn motives, so far as they are developed in evidence, assail the credibility of witnesses, when that is impeached by direct evidence, or by the inconsistency or incoherence of his testimony, his manner of testifying, his appearance, or by circumstances. His illustrations may be as various as are the resources of his genius; his argumentation as full and profound as his learning can make it; and he may, if he will, give play to his wit, or wing to his imagination. To his freedom of

speech, however, there are some limitations. It has been found difficult to prescribe a legal limitation to the lawyer's liberty of speech in the performance of his duties in a cause. That the discussions should be *free* is perfectly obvious; and even abuses should be tolerated, rather than a privilege so valuable should be abridged. We feel the delicacy of the ground upon which we tread, and are solicitous of being understood as carrying our present ruling no farther than to cover the precise question made in the assignment.

"Statements of facts not proven, and comments thereon, are outside of a cause; they stand legally irrelevant to the matter in question, and are therefore not pertinent. If not pertinent, they are not within the privilege of counsel. Trial by jury! How imperfect a privilege would that be, if the forms of law were abandoned—if the rules of evidence were disregarded! An essential element in the trial by jury is that their verdict shall be rendered according to the facts of the case, legally produced to them. They are sworn to give their verdicts according to evidence, and if they find without evidence, or against evidence, a new trial will be granted. They cannot even render a verdict upon knowledge within their own breasts; but, if a jurymen has knowledge of facts pertinent to the issue, he may be sworn. The law, with great carefulness, prescribes rules by which facts are to be submitted to the jury. Testimony must be relevant; the best evidence the nature of the case admits must be produced; hearsay is excluded; interest in the witness will disqualify, etc.; and by our own Constitution in criminal cases the witnesses are to be confronted with the prisoner. He has in all cases the right of cross-examination. All these and many more rules are prescribed for the ascertainment of the truth of these facts upon which verdicts are to be rendered. The law to be administered may depend upon the facts proven. 'Ex facto oritur jus.' 'And if the fact,' writes Blackstone, 'is perverted or misrepresented, the law which arises from thence will unavoidably be unjust or partial; and in order to prevent this, it is necessary to set right the fact, and establish the truth contended for, by appealing to some mode of probation or trial, which the law of the country has ordained for a criterion of truth and falsehood.' 3 Black. Com. 330.

"When counsel are permitted to state facts in argument, and to comment upon them, the usage of the courts regulating trials is departed from, the laws of evidence are violated, and the full benefit of trial by jury is therefore denied. It may be said, in answer to these views, that the statements of counsel are not evidence, that the court is bound so to instruct the jury, and that they are sworn to render a verdict only ac-

ording to the evidence. While this is true, yet the effect is to bring the statements of counsel to bear upon the verdict with more or less force, according to circumstances; and if they in any degree influence the finding, the law is violated, and the purity and impartiality of the trial are tarnished and weakened. If not evidence, then without doubt the jury have nothing to do with them, and the lawyer no right to make them. And just here the argument might be rested. It is not reasonable to believe the jury will disregard them. They may struggle to disregard them, and still be left involuntarily to shape their verdict under their influence. That influence will be greater or less, according to the character of counsel, his skill and adroitness in argument, and the naturalness with which the statements stand connected with other facts and circumstances in the case. To an extent not definable, yet to a dangerous extent, they are evidence, not given under oath, without cross-examination and irrespective of all precautionary rules by which competency is tested.

"In this case the statements and comments had reference to the character and credibility of the witness. I know of no rule of law which authorizes the credibility of a witness to be impeached or fortified thus. The manner of attacking or defending the character of a witness is fixed by law, and fixed, among other things, that he may not be subject to irregular and irresponsible assaults upon his veracity and fairness. He, as well as parties and counsel, has rights, which it is the duty of the court to protect. It were a cruel injustice to permit his character to be driven to and fro, like the shuttlecock, by outside statements of counsel. Where shall the license stop? If allowed against the credibility of a witness, then with equal reason they are to be allowed as touching the merits of the issue. If crimination is granted, recrimination cannot be refused. If statements on one side are permitted, counter statements on the other cannot be denied. If allowed to men of the highest honor, they cannot be denied to those few to be found in every profession destitute of all honorable principle. The concession, carried out in its legitimate consequences, would convert the stern, inflexible law and order of a court of justice into confusion, uncertainty, and injustice."

Judgment reversed.

POTTLE, J., not presiding.

(11 Ga. App. 658)

EDWARDS v. PRICE et al. (No. 4,243.)
(Court of Appeals of Georgia. Oct. 9, 1912.)

(Syllabus by the Court.)

1. CHATTEL MORTGAGES (§ 291*)—FORECLOSURE—AFFIDAVIT AS TO DEBT.

In the foreclosure of mortgages on personality, the statute provides that the mort-

gagee, in person, or by his agent or attorney in fact or at law, shall make an affidavit before a proper officer, designated by the statute, of the amount of principal and the interest due on the mortgage, etc. This affidavit is a necessary basis of the mortgage foreclosure, and without it the foreclosure proceeding, and the fi. fa. and levy based upon it, are mere nullities, and are subject to collateral attack for lack of such affidavit in any court. Civil Code 1910, § 3286; Meadows v. Alexander, 1 Ga. App. 40, 57 S. E. 901.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. § 580; Dec. Dig. § 291.*]

2. CHATTEL MORTGAGES (§ 283*)—ACTION ON FORTHCOMING BOND—DEFENSES.

Where property levied upon under an execution based upon an alleged mortgage foreclosure was replevied, and a forthcoming bond made by the plaintiff in the mortgage foreclosure, and it appeared, in a suit on the forthcoming bond, that no affidavit was made as a basis of the foreclosure, the suit was properly dismissed; there being no authority for the levying officer to make the levy or to take the forthcoming bond. The lack of an affidavit as a basis of such foreclosure extended to the validity of the process. Smith v. Lockett, 73 Ga. 104; Oliver v. Warren, 124 Ga. 551, 53 S. E. 100, 4 L. R. A. (N. S.) 1020, 110 Am. St. Rep. 188.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. §§ 569, 572; Dec. Dig. § 283.*]

3. CHATTEL MORTGAGES (§ 271*)—REQUISITES AND VALIDITY—SIGNATURE—ATTESTATION.

A paper purporting to be an affidavit made by the attorney at law for the mortgagee in foreclosure proceedings, but which appears not to have been signed by the affiant or attested by any officer, is not an affidavit, and cannot be the basis of a mortgage foreclosure. In this state the signature of the affiant is necessary to the validity of the affidavit. Riley v. Warrenton, 120 Ga. 368, 47 S. E. 972.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. §§ 555-558; Dec. Dig. § 271.*]

Error from City Court of Albany; D. F. Crosland, Judge.

Suit on a forthcoming bond by F. G. Edwards, as sheriff, for the use of E. F. Jackson, against S. F. Price and others. From a judgment dismissing the petition on demurrer, plaintiff brings error. Pending the writ of error the sheriff died, and Fanny T. Edwards, his executrix, was made party plaintiff in error. Affirmed.

L. L. Ford, of Albany, for plaintiff in error. Ed. R. Jones and R. J. Bacon, both of Albany, for defendants in error.

HILL, C. J. Judgment affirmed.

(11 Ga. App. 635)

R. P. WILLIAMS & CO. et al. v. UNITED STATES FIDELITY & GUARANTY CO. (No. 4,270.)

(Court of Appeals of Georgia. Oct. 9, 1912.)

(Syllabus by the Court.)

1. PRINCIPAL AND SURETY (§ 175*)—CONSTRUCTION OF CONTRACT—ACTION FOR BREACH.

Where, in consideration of the execution of a bond by a surety company, the condition

of which was the faithful performance by the principal of a certain building contract, the principal executed a written instrument as a part of the application for the bond, agreeing to indemnify the surety company "against all loss, costs, damages, charges, and expenses whatever resulting from any act, default, or neglect" of the principal which the surety might "sustain or incur," the indemnity agreement of the principal was not merged in and extinguished by the bond, but suit for its breach could be brought thereon at any time within the statutory period.

[Ed. Note.—For other cases, see *Principal and Surety*, Cent. Dig. §§ 505-509; Dec. Dig. § 175.*]

2. BANKRUPTCY (§ 316*)—PROVABLE DEBTS—"SUSTAIN OR INCUR."

The liability of the principal to the surety in the bond, under the indemnity agreement set forth above, does not constitute a claim provable in bankruptcy against the estate of the principal until the surety has actually paid the obligee in the bond the damages sustained by reason of the principal's default. No such damage has been sustained or incurred by the surety, within the meaning of the agreement, until after actual payment.

[Ed. Note.—For other cases, see *Bankruptcy*, Cent. Dig. §§ 474-476; Dec. Dig. § 316.*]

For other definitions, see *Words and Phrases*, vol. 4, pp. 3527, 3528.]

(Additional Syllabus by Editorial Staff.)

3. BANKRUPTCY (§ 314*) — "ALLOWABLE DEBTS"—"PROVABLE DEBTS."

A deed is not allowable in bankruptcy, unless it is provable; but it may be provable, without being allowable. Allowability implies, not only provability, but also validity; and if for any reason the claim is improper, or if there is a good defense to it, it is not allowable, though it may be provable, as a debt.

[Ed. Note.—For other cases, see *Bankruptcy*, Cent. Dig. §§ 469-473, 473, 483-487, 489, 490; Dec. Dig. § 314.*]

For other definitions, see *Words and Phrases*, vol. 6, pp. 5746, 5747.]

4. INDEMNITY (§ 1*)—NATURE OF.

"Indemnity" consists in the obligation or duty resting on one person to make good any loss or damage another has incurred while acting at his request or for his benefit.

[Ed. Note.—For other cases, see *Indemnity*, Cent. Dig. § 1; Dec. Dig. § 1.*]

For other definitions, see *Words and Phrases*, vol. 4, pp. 3539, 3540.]

Error from City Court of Atlanta; H. M. Reid, Judge.

Action by the United States Fidelity & Guaranty Company against R. P. Williams & Co. and others. Judgment for plaintiff, and defendants bring error. Affirmed.

The case as made by the petition was substantially as follows: The defendants entered into a contract for the building of a schoolhouse in the state of Florida. They executed to the trustees of the school a bond in the penal sum of \$7,500, conditioned to faithfully comply with all of the terms of the contract. The bond further provided that, if the principals should fail to comply with the conditions of the contract to such an extent that the same should be forfeited, the surety should have the right to assume the contract and to sublet or complete the building, whichever the surety might elect

to do; that in the event of a breach of any of the conditions of the bond the surety should be subrogated to all the rights of the principals under the contract, and all deferred payments and all money and property at that time due and payable, or which might thereafter become due and payable, to the principals under the contract, should be credited upon any claim which the trustees might make upon the surety because of the breach of contract. The bond was issued pursuant to a written application made to the surety company by the contractors, in which application they agreed to indemnify the surety "against all loss, costs, damages, charges, and expenses whatever resulting from any act, default, or neglect of ours that said United States Fidelity & Guaranty Company may sustain or incur by reason of its having executed said bond or any continuation thereof." The agreement further provided: "And we further agree, in the event of our being unable to complete or carry on the aforementioned contract, to assign such plant as we may own, or have upon said work, to the said United States Fidelity & Guaranty Company, that it may use the same in the prosecution of said work to completion. We hereby further agree, for ourselves, our heirs, executors, and administrators, to accept the vouchers or other evidence of any losses paid by the United States Fidelity & Guaranty Company under the aforesaid obligation, together with vouchers, or other evidence of payment, of all costs and expenses whatever incurred by the said United States Fidelity & Guaranty Company in adjusting such loss or in completing said contract, as conclusive evidence against us and our individual estates of the fact and extent of our liability under said obligation to the said United States Fidelity & Guaranty Company. And we do further agree, in the event of any breach or default on our part of the provisions of the contract hereinbefore mentioned, that the United States Fidelity & Guaranty Company, as surety on the aforesaid bond, shall be subrogated to all our rights and properties as principals in said contract, and that deferred payment and any and all moneys and properties that may be due and payable to us at the time of such breach or default, or that may thereafter become due and payable to us, on account of said contract, shall be credited upon any claim that may be made upon the United States Fidelity & Guaranty Company under the bond above mentioned." The application, with the agreement made by the contractors therein embodied, was under seal and duly signed by the contractors. The application was made on March 24, 1900, and the bond was executed on March 29, 1900. The contractors having defaulted, suit on the bond was brought against the principals and the surety, and on July 1, 1904, judgment was duly rendered against

them, and on February 20, 1905, the surety paid the judgment, amounting to \$5,475.88.

The present suit was brought by the surety against the principals in the bond to recover this sum, together with certain sums paid by the surety for attorney's fees, costs, and other expenses, in connection with the litigation. After setting forth the facts above detailed, the plaintiff alleges that by reason of these facts the defendants are liable, jointly and severally, to indemnify and pay over to the plaintiff the loss, costs, damages, and charges above set forth, all of which, it is averred, resulted from the default of the defendants under the contract, for the faithful performance of which the bond was given and the indemnity contract made. The defendants demurred to the petition, upon the ground that it did not distinctly appear upon what cause of action the plaintiff had declared—whether for money paid for the use of defendants, or upon the judgment rendered against the plaintiff, or upon the bond upon which the plaintiff was surety, or upon the application for the bond, containing the indemnifying agreement on the part of the defendants. It is insisted by the demurrer that, if the suit is based upon the application, the petition should be dismissed, because the application was extinguished when the bond was issued, and could not serve as a cause of action against the defendant, having been merged in the bond; that, if the action is based upon the bond, it fails, because the bond was merged in and extinguished by the judgment; that, if the suit is based upon the judgment, it should be dismissed, because it does not appear that the judgment was ever assigned to the plaintiff, and because the action is barred by the statute of limitations; that, if the cause of action is for money paid for defendants' use, it is likewise barred by the statute of limitations. The demurrer raised the further objection that the contract made by the defendants with the school trustees is not set forth in or attached to the petition. The demurrer was overruled. The defendants answered, admitting the execution of the bond and the application, copies of which were exhibited with the petition. The answer also admitted the recovery of a judgment in the state of Florida and contained the special defense that on May 28, 1901, the defendants filed their petition in bankruptcy and were duly adjudged bankrupt, and on October 5, 1901, were discharged in bankruptcy.

The case was submitted to the presiding judge, without the intervention of a jury, upon an agreed statement of facts. The amount of liability was agreed upon, if the defendants were liable at all. It was further agreed that on November 9, 1900, the defendants abandoned their contract with the trustees of the school in Florida for the erection of the schoolhouse referred to in the bond executed by the plaintiff as surety;

that immediately thereafter the trustees took charge of the building, and on April 13, 1901, completed it, and that on May 14, 1901, they gave notice of its completion to the plaintiff and the surety on the bond referred to, and made demand upon the surety for payment of the amount that they had expended upon the building in excess of the contract price; that on May 28, 1901, the defendants filed a voluntary petition in bankruptcy, and on the same day were duly adjudged bankrupt; that in the schedule attached to the petition it was recited that in April, 1900, the defendants entered into a contract for the building of the schoolhouse referred to in the bond; that to guarantee the completion of the contract the bond was executed, with the plaintiff as surety thereon; and that the school board terminated the contract by taking charge of the building and completing it. It was further recited in the bankrupts' schedule that: "Whether or not there will be any liability on said bond petitioner is unable to say, as the matters involved in said contract and said building and the termination thereof have not been adjusted." In the schedule of creditors whose claims were unsecured appeared the name of the plaintiff, with the statement that the petitioner's liability to the surety company was fully described in another schedule, referred to above. On July 31, 1901, the trustees of the school proved their claim in the bankrupt court for \$8,876.08, for money expended in building in excess of the contract price. No dividend was paid to creditors, the assets (amounting to about \$301) being consumed in the administration of the estate. On September 20, 1901, the defendants filed their petition for discharge in bankruptcy, and on October 5, 1901, an order of discharge was duly granted. Upon this agreed statement of facts a judgment was entered against defendants for the amount which had been agreed upon as the amount of their liability if they were liable. Defendants have excepted to the overruling of the demurrer, and to the final judgment.

Green, Tilson & McKinney, of Atlanta, for plaintiffs in error. Smith, Hammond & Smith, of Atlanta, for defendant in error.

POTTLE, J. [1] 1. There is no merit in the demurrer. The cause of action declared upon is clearly for the breach of the indemnity agreement embodied in the application for the bond. This agreement and the payment of the premium mentioned in the application constituted the consideration for the execution of the bond. The agreement was certainly not extinguished by the execution of the bond, for upon its face it was to have no force and effect unless the surety company became liable on its undertaking. It is true that the principals in the bond would have been liable over to the surety upon an implied obligation to reimburse it for any

loss it might have sustained, even though no express agreement to this effect had been made; but there was certainly no legal objection to the execution of an express agreement, in consideration of the execution of the bond, to do that which the law would have compelled the principals to do without an agreement. The petition set forth a cause of action of the nature above indicated, as it was not barred by the statute of limitations, nor was it subject to any of the grounds of demurrer filed by the defendant.

[2] 2. The only remaining question is whether or not the defense of discharge in bankruptcy was good, and this question depends upon whether the plaintiff's claim was a debt provable in bankruptcy, within the meaning of the bankrupt act. Debts which are provable in bankruptcy are classified in section 63 of the bankrupt act (Act July 1, 1898, c. 541, 30 Stat. 562 [U. S. Comp. St. 1901, p. 3447]), which is as follows: "Debts of the bankrupt may be proved and allowed against his estate which are (1) a fixed liability, as evidenced by a judgment or an instrument in writing, absolutely owing at the time of the filing of the petition against him, whether then payable or not, with any interest thereon which would have been recoverable at that date or with a rebate of interest upon such as were not then payable and did not bear interest; (2) due as costs taxable against an involuntary bankrupt who was at the time of the filing of the petition against him plaintiff in a cause of action which would pass to the trustee and which the trustee declines to prosecute after notice; (3) founded upon a claim for taxable costs incurred in good faith by a creditor before the filing of the petition in an action to recover a provable debt; (4) founded upon an open account, or upon a contract express or implied; and (5) founded upon provable debts reduced to judgments after the filing of the petition and before the consideration of the bankrupt's application for a discharge, less costs incurred and interests accrued after the filing of the petition and up to the time of the entry of such judgments. Unliquidated claims against the bankrupt may, pursuant to application to the court, be liquidated in such manner as it shall direct, and may thereafter be proved and allowed against his estate." Collier, Bankruptcy (9th Ed.) p. 1355. Unless a debt is an obligation susceptible of being presented in such form as to come within some one or more of the classes of debts designated in section 63, supra, as "provable" debts, whether actually presented or not, it is not defeated by the discharge in bankruptcy. Remington, Bankruptcy, § 628. "And the question whether or not a debt is provable turns upon its status at the time of the filing of the petition." Remington, Bankruptcy, § 629; In re Pettingill & Co. (D. C.) 14 Am. Bankr. Rep. 728, 137 Fed. 143; Id., 137 Fed. 840, 70 C. C. A. 338.

[3] There is a distinction between provable debts and allowable debts. A debt is, of course, not allowable unless it is provable; but it may be provable without being allowable. Allowability implies, not only provability, but also validity. If for any reason the claim is improper, or if there be a good defense to it, it is not allowable, although it may be provable as a debt. Remington, Bankruptcy, § 632. Generally, contingent claims are not provable, although some classes of unliquidated demands may be proved in bankruptcy. Mr. Remington thus states the rule: "The test as to whether a claim is really contingent, or is simply unliquidated or unascertained by legal proceedings, would seem to be this: Have all the facts necessary to be proved to fasten liability already occurred? If so, the claim is not contingent, although the liability and the extent of damages may not yet have been ascertained by the consideration of a court as evidenced by judgment or decree, nor even the full extent of damages arising been already suffered. The contingency, in other words, is a contingency of facts necessary to fasten liability at all, not a contingency of the court's judgment on the facts, nor a contingency as to the extent of the damages resulting from the injury. Again, so long as it remains uncertain whether a contract or liability will ever give rise to an actual duty or liability, and there is no means of removing the uncertainty by calculation, it is too contingent to be a provable debt." Remington, Bankruptcy, § 641.

A distinction must be drawn between a contract of indemnity and a contract whereby one person obligates himself to pay another's debt. In the case of a mere contract of indemnity, no action can be maintained for a breach until actual payment by the obligee. The distinction has thus been stated by our Supreme Court in a case where a partner retired and the partner remaining obligated himself to pay the debts of the firm. Upon this point the court said: "The contract entered into between the plaintiff and the defendant at the time the firm dissolved was one by which the defendant obligated himself to pay the debts of the firm, and in such a case there is a breach of the contract whenever the partner agreeing to pay the debts fails to do so, and the outgoing partner can maintain a suit without having paid anything himself. The rule is otherwise when the contract is simply one of indemnity, or to hold the partner harmless, in which case no right of action arises in favor of the outgoing partner until he has either paid voluntarily or been compelled to pay debts against the payment of which he has been indemnified." Tucker v. Murphey, 114 Ga. 662, 663, 40 S. E. 836. See, also, to the same effect, Harvey v. Daniel, 36 Ga. 562, where it is distinctly ruled that, when a mere indemnity bond is given against the payment of money,

the plaintiff, in order to recover for a breach, must show loss or damage sustained by the actual payment of the money, or that which the law considers equivalent to an actual payment; the existence of a mere legal liability to pay not being sufficient. This distinction has received well-nigh universal recognition. See 16 Am. Eng. Encyc. of Law (2d Ed.) 178; 22 Cyc. 79. In *Wicker v. Hoppock*, 6 Wall. 94, 18 L. Ed. 752, the Supreme Court of the United States drew the distinction very clearly between the two classes of contracts, and said that in a contract of indemnity the obligee could not recover until he had been actually damaged, and then only to the extent of the injury he had sustained up to the time of the institution of the suit; but, in the case of an agreement to pay, recovery might be had as soon as there was a breach of the contract and the measure of the damages should be the full amount agreed to be paid. See, also, *Sapp v. Faircloth*, 70 Ga. 690, 693, and *Thomas v. Richards*, 124 Ga. 942, 53 S. E. 400. If at the time of the filing of the petition the liability of the bankrupt is fixed, so that upon the happening of a contingency the amount could be ascertained by computation, it is a provable claim, if the contingency happens in time to prove the claim under the act, and such a claim may be liquidated, if necessary in the bankrupt court. *Loveland, Bankruptcy*, 598.

The decisions are not entirely in harmony in reference to the provability of claims of a somewhat similar nature to the one involved in the present case. In *Insley v. Gar-side*, 10 Am. Bankr. Rep. 52, 121 Fed. 699, 58 C. C. A. 119, the court declined to allow the surety on a bankrupt's bond to prove his claim. In *Wood v. U. S. (D. C.)* 16 Am. Bankr. Rep. 21, 143 Fed. 424, the court expressed the opinion that the claim of a surety might be proved and liquidated in the bankrupt court, because at the time of the filing of the petition the liability to the surety had been incurred. In *Clemmons v. Brinn*, 7 Am. Bankr. Rep. 714, 36 Misc. Rep. 157, 72 N. Y. Supp. 1066, it was held that the liability of the defendant upon a replevy bond given to a sheriff was too contingent to be provable against the defendant's estate in bankruptcy. In *Re Roth & Appel*, 181 Fed. 667, 104 C. C. A. 649, 31 L. R. A. (N. S.) 270, the Court of Appeals for the Second Circuit held that a lease which provided that in case the lessee should be declared bankrupt the lease should terminate, and the lessor should have the right to re-enter, and that in such case the lessees should indemnify the lessor for any loss of rents during the remainder of the term, does not create a fixed liability absolutely owing at the time of the filing of the petition, and that the liability is altogether too contingent to be provable in bankruptcy. The plaintiff in error relies upon *Loeser v. Alexander*, 24 Am. Bankr. Rep. 75, 176 Fed. 265, 100 C. C. A. 89, de-

cided by the Circuit Court of Appeals, Sixth Circuit. In that case it was held that, where a deputy collector of taxes executed to the treasurer a bond to faithfully discharge all the duties required of him by law and honestly and faithfully pay over to the treasurer all moneys collected by him, the bond was a personal bond to the county treasurer, who had a right to proceed thereon in his own name, and the liability of the bankrupt upon the bond was not contingent nor unliquidated, but a fixed liability under the bankrupt act, absolutely owing at the time of the filing of the petition against him; the liability having become fixed upon the failure of the deputy to make payment of the money collected. The distinction between that case and the one now in hand seems to be obvious. The obligation of the deputy was to pay, and the amount he was to pay was absolutely fixed and determined at the time the petition in bankruptcy was filed. Reliance is also placed upon the decision in *Re Lyons Sugar Co. (D. C.)* 27 Am. Bankr. Rep. 610, 192 Fed. 445. In that case, however, it appeared that the liability was absolutely fixed and definitely ascertained at the time the petition in bankruptcy was filed, although the surety was not compelled to pay the amount stipulated in the bond until some time after the filing of the petition. The obligation in that case was to pay costs of an appeal. It was held that by the affirmation of the judgment appealed from the claim became "liquidated by litigation," within the meaning of the bankrupt act.

[4] The question whether the contract is strictly one of indemnity, or an absolute obligation to pay the debt of another, depends upon the construction of the contract. "Indemnity" has been defined as the "obligation or duty resting on one person to make good any loss or damage another has incurred while acting at his request or for his benefit." 22 Cyc. 79. Here the obligation was to indemnify the plaintiff "against all loss, costs, damages, charges, and expenses whatever, resulting from any act, default, or neglect" of the principals in the bond, that the surety "may sustain or incur" by reason of the execution of the bond. It is insisted that the word "incur" should be given its ordinary meaning, "to become liable for." See *Bank of Indian Territory v. Eckles*, 19 Okl. 159, 91 Pac. 695. Several authorities are relied on by the plaintiff in error to sustain this view. Most of them are clearly distinguishable from the present case. For instance, in *Jarvis v. Sewall*, 40 Barb. (N. Y.) 449, the obligation was to pay any sum which the surety "might incur and become bound to pay by reason of having executed the appeal bond." It was held that, in order to recover upon the indemnity bond, it was not necessary to show that the surety had actually paid the costs incurred on the appeal in reference to which

the bond was given. The case turned upon the construction of the words "become bound," and they were held to be synonymous with "become liable for," or "liable to pay." So in *McBeth v. McIntyre*, 57 Cal. 49, where a similar ruling was made, the obligation of the indemnity bond was against all damages, expenses, costs, and charges, and against all loss and liability which the surety might incur. That case turned upon the meaning of the word "liability." The case of *Jones v. Childs*, 8 Nev. 121, is very similar. The construction contended for by the plaintiff in error does find support in the case of *Smith v. Howell*, 6 Exch. 730, 86 Rev. Rep. 452, and *Mewburn v. Mackelcan*, 19 Ont. App. 738.

We do not think that, under a proper construction of the indemnity contract, the principals in the bond became liable to the surety until the surety had actually sustained a loss by payment of some sum of money which it had been compelled to pay on account of the neglect or default of the contractors. At the time the petition in bankruptcy was filed the surety had not sustained or incurred any loss or damage on account of the contractors' default. It is true the default had taken place, and it is also true that the building had been completed by the trustees, and they were probably in a position to ascertain the exact amount of the contractors' liability, but no judgment fixing the amount of the contractors' liability had been obtained. The only information that the surety could have had

on the subject was the claim made by the trustees of the school; and, it could not know but that the contractors might have a good defense to the claim, or some part of it, and no judgment was rendered fixing the liability of the contractors until nearly three years after they were discharged in bankruptcy. But the question to be considered is as to the nature of the surety's claim against the bankrupt. The bankrupt owed the surety nothing at the time the petition in bankruptcy was filed, because the surety had paid nothing for their benefit, and the relation of debtor and creditor did not exist between them until after actual payment by the surety. The only thing the surety could have done would have been to file in the name of the trustees its claim against the bankrupt, in order to have reduced its own liability by whatever might have been recovered out of the bankrupt's estate. The surety had no claim against the bankrupt which it could file in its own name, and the trustees did file their claim, although no dividends were received; the assets being insufficient for this purpose. The liability to the surety by the bankrupt was altogether contingent and might never have arisen. Indeed, we hold that at the time the petition in bankruptcy was filed the surety had no claim or debt against the bankrupt which could have been proved in the bankrupt court under section 63 of the bankrupt act.

The result of this conclusion is that the judgment of the trial court in the plaintiff's favor must be affirmed.

(159 N. C. 641)

BYRD et al. v. COLLINS et al.

(Supreme Court of North Carolina. Oct. 23, 1912.)

EVIDENCE (§ 183*)—PAROL EVIDENCE—ADMISSIBILITY—CONTENTS OF LOST WILL.

Parol evidence of the contents of an alleged lost will is properly excluded where it appears that the will may still be in existence, and there is no showing of any search of testatrix's premises or effects or other places where the will might be found.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 605-637; Dec. Dig. § 183.*]

Appeal from Superior Court, Robeson County; Peebles, Judge.

Proceeding by R. P. Byrd and others against Mary Collins and others to probate an alleged lost will of Effie Ann Stone. From a judgment denying probate, proponents appeal. Affirmed.

This was a proceeding for the partition of certain lands; the petitioners claiming an interest as heirs of Effie Ann Stone. The defendants pleaded sole seisin, alleging that the said Effie Ann Stone made a will devising the land to the defendant J. H. Byrd, and that this will had been lost or destroyed by some one other than the testatrix. By consent of all parties the trial of the partition proceedings was suspended until the defendant could go before the clerk and probate the alleged will. The clerk refused to admit the alleged lost will to probate, and the propounder appealed to the superior court, where issues were submitted to the jury as to the execution of the alleged will and its contents, and as to whether it had been revoked by the testatrix. It was in evidence by one of the subscribing witnesses to the will that it had been duly executed as prescribed by law. The other subscribing witness did not testify, and his absence was not accounted for. The same witness who testified as to the execution of the will also testified as to its contents, and there was no other proof as to the contents. There was no evidence that any search had been made for the will since the death of the testatrix.

The evidence as to the loss of the will was as follows: "After that she told me that the will was stolen. I was going by her house and she called to me, and she was right near the road, and told me that her will was stolen, and I asked her when it was stolen, and she started to tell me, and one of her nieces who was with her, a girl, came up, and she stopped talking to me, and she said she didn't want everybody to hear her business, and she said she would come to my house and see me. This might have been six or eight months or a year before she died. She came to my house, and told me that her will was taken out of the meatroom. She said she put it in there, in an old coffee pot. She said the reason she put it in the coffee pot in her meatroom was because they like to broke in

her trunk when she was about to die, and she said after then she put it in her coffee pot, where she thought nobody would get it, and she said she had John Bams, J. W. Bullock, and Will Bullock to kill her hogs, and said they salted the meat down and put it in her meatroom, and right away she missed her will. After that meat was put in there, she said, a night or two before the will was taken, there was a mighty lampering around the house. Somebody around there was making a noise and all those things, and she said she told them about it, and they told her it was her sister Betsy had come back, and she said, when they got the will, she heard no more of her sister Betsy, and I asked her who she thought got her will, and she said she thought it was Jim Byrd got it, the one she give her property to. That was what she said. She told him that she had put that will in that room, so if she died that he would know where it was. That was just what she said when she told me these things. She said she didn't know what to do about it. I told her she could make another will or deed to give it to whoever she wanted to. She said, if she made another will, somebody would take it, and she said she believed her old will would come up, because she said it was when these men put this meat in there she missed her will."

There was other evidence on behalf of the propounders of declarations of Effie Ann Stone, to the effect that she had made a will and it had been stolen. There was no evidence of any inquiry being made of any one for the will.

At the conclusion of the evidence, his honor withdrew all of the evidence as to the contents of the will, because, in his opinion, there was not sufficient evidence of its loss, and the propounders excepted. The jury answered the issues in favor of the caveators, and from the judgment rendered thereon the propounders appealed.

McNeill & McNeill, of Lumberton, for appellants. E. J. Britt and McIntyre, Lawrence & Proctor, all of Lumberton, for appellees.

ALLEN, J. There are several exceptions in the record, but all of them are immaterial, if his honor ruled correctly in excluding the evidence as to the contents of the lost will, as we think he did.

The testatrix may have been mistaken as to the place where she deposited the will, or if she was not, and it was taken on the day of the hog killing by one of the three persons who went in the meatroom, it may still be in existence, and there was no evidence of any search of her premises or among her effects, or of the premises or effects of either of the three persons, nor was John Bams or J. W. Bullock, two of them, examined as a witness. The authorities are all to the effect that, before parol evidence can be of-

ferred to prove the contents of a paper, it must be shown that the most diligent search has been made for the alleged missing instrument.

In *Eure v. Pittman*, 10 N. C. 371, it was said: "To entitle a party to give parol evidence of the contents of a will alleged to be destroyed, where there is not sufficient evidence to warrant the conclusion of its absolute destruction, the party must show that he has made diligent search and inquiry after the will in those places where it would most probably be found if in existence." To the same effect *Scoggins v. Turner*, 98 N. C. 135, 3 S. E. 719. In *3 Redfield on Wills*, p. 15: "But it must in all cases be shown that an exhaustive search has been made for such missing will in all places where there is the remotest possibility that it could be found, before any secondary evidence can be received of its contents." The question here presented was fully considered and the authorities reviewed in *Avery v. Stewart*, 134 N. C. 289, 46 S. E. 520. It was held in that case to be error to admit parol evidence of the contents of a paper when a witness had testified, "It is lost. I cannot find it," which is stronger than the evidence in this case, and the court then applied the rule that: "If the instrument is lost, the party is required to give some evidence that such a paper once existed, though slight evidence is sufficient for this purpose, and that a bona fide diligent search has been unsuccessfully made for it in the place where it was most likely to be found, if the nature of the case admits such proof. What degree of diligence in the search is necessary it is not easy to define, as each case depends much on its peculiar circumstances; and the question whether the loss of the instrument is sufficiently proved to admit secondary evidence of its contents is to be determined by the court and not by the jury. But it seems that in general the party is expected to show that he has in good faith exhausted in a reasonable degree all the sources of information and means of discovery which the nature of the case would naturally suggest and which were accessible to him." 1 *Greenleaf, Ev.* (16th Ed.) § 558, 563b.

We are of opinion, on the whole record, there is no error.

No error.

(180 N. C. 8)

CARTER v. COHARIE LUMBER CO.
(Supreme Court of North Carolina. Oct. 16, 1912.)

RAILROADS (§ 111*)—CONSTRUCTION—LIABILITY FOR WORK, LABOR, AND MATERIALS—"RAILROAD."

A logging railroad which is standard gauged, steel railed, connected by switch with another railroad, operated by steam engines and standard gauged cars, and has branches extending for convenience into the woods, over which

the same engines and cars are used, which branches are sometimes taken up and relaid elsewhere, is a railroad within Revisal 1905, § 2018, relative to the liability of railroad companies for labor performed in constructing a railroad for a contractor, although in 1872, when that section was first enacted, there were no logging railroads in existence, since legislative enactments, in general and comprehensive terms, prospective in operation apply alike to all persons, subjects and business within their general scope coming into existence subsequent to their passage.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 342-350; Dec. Dig. § 111.*

For other definitions, see *Words and Phrases*, vol. 7, pp. 5899-5908; vol. 8, pp. 7777, 7778.]

Walker and Allen, JJ., dissenting.

Appeal from Superior Court, Sampson County; Carter, Judge.

Action by Nathaniel Carter against the Coharie Lumber Company. From a nonsuit, plaintiff appeals. Reversed, and new trial granted.

The plaintiff sued to recover of defendant \$83.50 for work done in constructing railroad for defendant. The plaintiff bases his right to recover under section 2018 of the Revisal of 1905. It is admitted that the notice required by the act was properly given and served, and that the action was commenced in apt time. A motion to nonsuit was allowed, and the plaintiff appealed.

Faison & Wright, of Clinton, for appellant. H. A. Grady and Geo. E. Butler, both of Clinton, for appellee.

BROWN, J. The defendant owned and operated a lumber mill and also a standard gauge railroad in connection therewith to Parkersburg on the Atlantic Coast Line, a distance of three miles. This road was connected with branch railroads extending into the woods. The same engine and cars were used over the main stem and its branches. Sometimes a branch is taken up and relaid elsewhere. The defendant entered into a written contract with one Buhman on February 24, 1911, by which Buhman was to operate its railroad and lumber business. The plaintiff was foreman of the railroad construction crew, kept the time, and worked in constructing the branch railroads, laying down cross-ties, spiking rails, and doing other construction work. The defendant claims that Buhman was an independent contractor, and solely liable to the plaintiff, and that section 2018 has no application to defendant. His honor so ruled, and the plaintiff excepted.

The plaintiff testified that he was building the railroad for the defendant under a contractor. Assuming that Buhman was an independent contractor, if defendant's railroad comes within the meaning and spirit of section 2018, the defendant is liable, as it appears that the requirements of the statute have been strictly followed. The defendant's plant constitutes what is called a "log-

ging railroad." It is standard gauged, steel railed, connected by switch with the Coast Line, operated by steam engines and standard gauge cars, and has branches extending for convenience into the woods over which the same engines and cars are used. The description of this road brings it within the definitions of a railroad as given by Rapalje and Bouvier in their law dictionaries. The language of this statute defining a railroad is the same as in the Fellow Servant Act (Rev. § 2646).

In construing that act and its similar phraseology we held that logging roads are railroads within the meaning of the act, and that the term "railroad" embraced any road operated by steam or electricity on rails. *Hemphill v. Lumber Co.*, 141 N. C. 489, 54 S. E. 420; *Witsell v. Railroad*, 120 N. C. 557, 27 S. E. 125; *Schus v. Powers Co.*, 85 Minn. 447, 89 N. W. 68, 69 L. R. A. 887. We have also held that the law as applied to other railroads in respect to negligently causing fires on their rights of way shall be extended to railroads constructed solely for logging purposes. *Craft v. Timber Co.*, 132 N. C. 158, 43 S. E. 597; *Simpson v. Lumber Co.*, 133 N. C. 96, 45 S. E. 469. We apply to both classes of railroads the same rule in regard to defective spark arresters. *Simpson v. Lumber Co.*, 133 N. C. 96, 45 S. E. 469. For these reasons, we see no reason why this defendant should not be classified as a railroad within the meaning of section 2018.

It is contended, however, that this section was first enacted in 1872, and that there were no logging roads in existence then, and that, therefore, they could not have been in contemplation of the Legislature. We are not informed as to that, but we assume the correctness of the statement. The mere fact that "logging railroads" came into more general use since the passage of the act does not alter the case. They are nevertheless "railroads," although used principally for transporting logs. It is a general rule of statutory construction that legislative enactments in general and comprehensive terms, prospective in operation, apply alike to all persons, subjects, and business within their general scope coming into existence subsequent to their passage. *McAunich v. M. & M. Ry.*, 20 Iowa, 338; *Schus v. Powers Co.*, *supra*.

New trial.

WALKER and ALLEN, JJ., dissenting.

(180 N. C. 150)

JONES v. SANDLIN.

(Supreme Court of North Carolina. Oct. 16, 1912.)

1. CANCELLATION OF INSTRUMENTS (§§ 58, 59*) — RELIEF — RENTS — IMPROVEMENTS — "DONE."

Under a deed conveying land in consideration that the grantee would cultivate it and

give the proceeds to the grantor during her life, and, if the grantee failed to do this and the grantor became dissatisfied, the deed to be null and void and the grantee to have pay "for what she has done," where the grantee failed to perform the agreement, and the grantor thereupon became dissatisfied and brought suit for a cancellation, the grantor was entitled to recover the land and its rental value during the grantee's occupancy, and the grantee was entitled to the enhancement in value of the land from improvements made by her and to the value of her work, labor, and services, but only so far as they were of benefit to the grantor, since the work could not be said to have been "done" for the grantor if of no benefit to her.

[Ed. Note.—For other cases, see Cancellation of Instruments, Cent. Dig. §§ 118-125; Dec. Dig. §§ 58, 59.*]

For other definitions, see Words and Phrases, vol. 3, pp. 2182, 2183.]

2. DEEDS (§ 141*)—CONSTRUCTION AND OPERATION—ESTATE CONVEYED.

A deed conveying land in consideration of the grantor's support for life, and providing that it would be null and void upon the grantee's failure to perform the agreement, and containing at the end of the warranty clause, the words "I except my lifetime interest," when construed as a whole, reserved a life estate to the grantor.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. § 463; Dec. Dig. § 141.*]

3. CANCELLATION OF INSTRUMENTS (§ 60*)—LIEN—NATURE OF CAUSE OF ACTION CREATING LIEN.

Where a deed in consideration of the grantor's support for life provided that, upon the grantee's failure to perform the agreement, it would become null and void, and the grantee should have pay for what she had done, the amount of recovery by the grantee for improvements, enhancing the value of the land, will be a charge thereon, while the judgment for work and labor performed under the agreement will be merely a personal charge, and the grantor will be entitled to possession on paying the lien for improvements.

[Ed. Note.—For other cases, see Cancellation of Instruments, Cent. Dig. §§ 127-129; Dec. Dig. § 60.*]

Appeal from Superior Court, Sampson County; Cline, Judge.

Action by Annie E. Jones against Mary F. Sandlin. From the judgment, plaintiff appeals. Reversed, and new trial granted.

This action was brought to cancel a deed for 42 acres of land, which was executed by plaintiff to defendant, and is alleged to have been placed in the possession of a third party, to be delivered upon compliance with its conditions. It contained this clause: "That said Annie E. Jones, in consideration of one dollar, and a further consideration that the said Mary F. Sandlin keep up and cultivate my house field and give me what is made on said land where I now live, and as long as I live, and if she fails to do this and I become dissatisfied, then this deed is null and void; and she, the said Mary F. Sandlin, to have pay for what she has done out of my property." Then follows a conveyance of the land, with the following words at the end of the warranty clause: "I, Annie E. Jones, except my lifetime interest." The court sub-

mitted issues to the jury, which, with the answers thereto, are as follows:

"(1) Did plaintiff and defendants contract and agree that defendants were to keep up and cultivate plaintiff's house field and give her what was made thereon as long as she lives, and to take care of plaintiff during her life, and attend to all her wants and pay her rents on all the other land which was cleared on the 42-acre tract on January 12, 1901? Answer: Yes.

"(2) Does the paper writing, called the deed of plaintiff, dated January 12, 1901, contain all of the contract and agreement between the parties to this suit? Answer: ———.

"(3) Have the defendants failed and refused to perform and carry out their agreement and obligations in the contract? Answer: Yes.

"(4) Was there a mutual abandonment of this contract by both plaintiff and defendants? Answer: ———.

"(4½) Did plaintiff and defendants leave it to J. R. Westbrook and R. W. Jones to determine what amount was to be paid by plaintiff to defendants in satisfaction of what they had done, and, if so, what was the amount fixed by them? Answer: No.

"(5) What is the worth of the buildings placed by the defendants on the land? Answer: \$560.

"(6) What is the worth of the other labors, such as clearing, ditching, grubbing and fencing, performed by defendants on said land? Answer: Nothing.

"(7) What is the value of the work done by the defendants on the seven-acre house field? Answer: \$315.

"(8) What is the value of the services rendered by defendants in getting wood for plaintiff, going to store and mill, waiting on her, and doing any other things of a similar and personal character? Answer: \$325.

"(9) What is a fair rental value of the land, other than the house field, which was cleared on January 12, 1901? Answer: \$100." Plaintiff tendered two issues, but it seems to us that they are embraced by the sixth issue submitted. He also tendered a third issue: "What is the fair rental value of the 42 acres of land, outside the house field of 7 acres?" This issue was refused. He then excepted to the sixth, seventh, and eighth issues. The court gave judgment to plaintiff for the land, and to defendant for \$1,100, and the plaintiff appealed.

Falson & Wright, of Clinton, for appellant. Geo. E. Butler, H. A. Grady, J. D. Kerr, and C. M. Faircloth, all of Clinton, for appellee.

WALKER, J. (after stating the facts as above). [1] As the defendant failed to perform the contract, as appears by the verdict, plaintiff is entitled to recover the land, and must pay to the defendant the value of any improvements the latter has put upon the

same. This is what the deed provides, for it says that, upon defendant's default and plaintiff's dissatisfaction, the defendant is "to have pay for what she has done out of the property" of the plaintiff. The first issue seems to have been submitted without objection, and the answer of the jury thereto ascertains the contract of the parties, without reference to the particular words of the deed. But this contract was not complied with by the defendant, and it follows that plaintiff is entitled to recover, in addition to the land, a fair and reasonable rental for the land while in defendant's possession, and the defendant is entitled to the value of the improvements, to the extent that they have enhanced the value of the land, in analogy to cases in which the doctrine of betterments applies (*Kelly v. Johnson*, 135 N. C. 647, 47 S. E. 674), and, in addition, the reasonable value of any work and labor done or of any services rendered the plaintiff during the period, when she was under defendant's care and defendant occupied the land. If defendant has paid anything to the plaintiff, in part performance of the contract, she will be entitled to a credit therefor. It would not be right, nor is it the law, as we think, that plaintiff should be charged with the value of work done upon the land, except to the extent that she has received a benefit therefrom. If the contract provided specifically that defendant should receive back exactly what she had paid out, or the value of the work and labor and of the improvements, without regard to the enhancement in value of the land, the case would be different. But the deed says that she should have pay for all she has done for the plaintiff; that is, the value of the service rendered to her in work, labor and improvements. *Gorman v. Bellamy*, 82 N. C. 497; *Tussey v. Owen*, 139 N. C. 457, 52 S. E. 128; *Chamblee v. Baker*, 95 N. C. 100; *Parker v. Brown*, 136 N. C. 280, 48 S. E. 657. It could not properly be said to have been done for her in a legal sense if of no benefit to her. If she had contracted for the particular work and a wage or price was stated, she would be liable for it, but, if none was expressed, the law will imply a promise to pay the reasonable value of the work and labor; that being the measure of recovery, as upon a quantum meruit. It follows, therefore, that in adjusting the difference between the parties the plaintiff will recover the land and its rental value during the occupancy of defendant, and the latter will recover the value of all services rendered, including any increase in value of the land by reason of the improvements placed thereon by her. This is the fair and equitable rule, and the more so as the deed was not annulled by the sole act of the plaintiff, but by the concurrence of both. The defendant failed to perform her part of the agreement, and the plaintiff thereupon became dissatisfied. This is the very condition in the deed,

expressed conjunctively, upon which it was to be "null and void." The work to be done and the improvements to be made were not specified in the contract, and therefore we have a case bearing a close resemblance to one where the doctrine of betterments applies, so far as the land is concerned, and, as no price for the labor was fixed, the defendant must fall back upon the promise of plaintiff to pay the reasonable worth of the same, which the law implies. The defendant entered upon the land lawfully and improved the same by consent. It is not equitable, nor according to the contract, that she should lose all she has done in making the improvements, nor, on the other hand, is it right that plaintiff should pay more than she has received in benefit from the same. The general rule is that if one is induced to improve land under a promise to convey the same to him, which promise is void or voidable, and after the improvements are made, he refuses to convey, the party thus disappointed shall have the benefit of the improvements to the extent that they increased the value of the land. *Kelly v. Johnson*, 135 N. C. 647, 47 S. E. 674; *Reed v. Exum*, 84 N. C. 430; *Luton v. Badham*, 127 N. C. 96, 37 S. E. 143, 53 L. R. A. 337, 80 Am. St. Rep. 783; *Albea v. Griffin*, 22 N. C. 9; *Hedgepeth v. Rose*, 95 N. C. 41; *Pitt v. Moore*, 99 N. C. 85, 5 S. E. 389, 6 Am. St. Rep. 489. The cases on this point are very numerous, many of them being cited in *Luton v. Badham*, supra, and 1 *Pell's Revisal*, pp. 652, 653, and notes. The recovery is based, not upon the cost of the improvements, but upon the enhanced value of the property. *Wetherell v. Gorman*, 74 N. C. 603, in which Justice Reade says: "The value of the improvements to the premises is undoubtedly the correct rule; for very expensive repairs might injure rather than improve them." In our case it was evidently contemplated by the parties that if the contract was terminated by the dissatisfaction of the plaintiff, upon default of defendant in performing her part of it, the account between them should be stated upon equitable principles, and that defendant should not lose the benefit of her work and labor, but receive a fair and reasonable compensation therefor.

The verdict upon the first and third issues, and on the issue numbered 4½, will be retained, and the second and fourth issues, not having been answered, are eliminated. The other issues are set aside, and the court will submit new issues in accordance with the views of the law herein expressed, so as to ascertain the legal rights of the parties, unless there is a reference by consent, to find the facts with the conclusions of law thereon, and state the account, which, perhaps, would facilitate the trial of the case.

We have not failed to notice that, by the verdict on the seventh issue, the plaintiff is made to pay the full value of the work done

by the defendant on the seven acres, or home tract of land, without any finding as to the rental value of that tract or of what was made thereon. If plaintiff is required to pay for the work and labor on that tract, she should have the fruits thereof or the rental value of the land. This would of itself, regardless of other questions, necessitate a new trial, which should be extended, under the circumstances, to the last five issues, and not merely to the seventh, but, as our decision of other matters produces the same result, we need make no further comment on this question.

[2] Our opinion is that by the deed *Annie E. Jones* reserved a life estate. The deed must be construed as a whole, and the true intent of the parties thereby ascertained. *Gudger v. White*, 141 N. C. 507, 54 S. E. 386; *Featherstone v. Merrimon*, 148 N. C. 205, 61 S. E. 675; *Triplett v. Williams*, 149 N. C. 396, 63 S. E. 79, 24 L. R. A. (N. S.) 514; *Real Estate Co. v. Bland*, 152 N. C. 231, 67 S. E. 483; *Thomas v. Bunch*, 158 N. C. 175, 73 S. E. 899. In *Midgett v. Meekins*, at this term, 75 S. E. 728, we held that, where clauses of a deed are apparently in conflict, the courts will construe the instrument, notwithstanding the repugnancy, according to its context, and for the purpose of ascertaining the intention of the parties, which will be enforced accordingly. But we do not see that this can in any way affect the merits of the case. The entire fee has reverted to the plaintiff, under the facts, and she is entitled to the possession, subject to the equitable rights of defendant.

[3] The amount by which any improvements have enhanced the value of the land will be a charge thereon. *Taylor v. Brinkley*, 131 N. C. 8, 42 S. E. 336. In other respects the judgment will be only a personal charge. When plaintiff has paid off the lien on the land for improvements, she will be entitled to be let into possession.

New trial.

(160 N. C. 161)

STONE CO. v. RICH et al.

(Supreme Court of North Carolina. Oct. 16, 1912.)

1. PAYMENT (§ 38*)—APPLICATION—RIGHT OF DEBTOR.

A debtor owing two or more debts to the same creditor and making a payment may, at the time, direct its application to any one of the debts, but this right is lost if such direction is not made at the time of payment.

[Ed. Note.—For other cases, see *Payment*, Cent. Dig. §§ 99-103; Dec. Dig. § 88.*]

2. PAYMENT (§ 39*)—APPLICATION—RIGHT OF CREDITOR.

If a debtor, owing two or more debts to the same creditor at the time of making a payment, fails to direct its application, the right to apply it belongs to the creditor.

[Ed. Note.—For other cases, see *Payment*, Cent. Dig. §§ 104-114; Dec. Dig. § 39.*]

3. PAYMENT (§ 46*)—APPLICATION—APPLICATION IN ABSENCE OF APPROPRIATION BY PARTIES.

Where a debtor, owing two or more debts to the same creditor, makes a payment and neither the debtor nor creditor applies it to a particular debt, the law will apply it to the unsecured debt or the one for which the creditor's security is most precarious, or according to its own view of the intrinsic justice and equity of the case.

[Ed. Note.—For other cases, see Payment, Cent. Dig. §§ 125, 126; Dec. Dig. § 46.*]

4. PAYMENT (§ 38*) — APPLICATION—APPROPRIATION BY DEBTOR—SUFFICIENCY.

A direction by a debtor as to the application of payments may be shown by an express agreement, by the declaration of the debtor, or implied from circumstances showing the debtor's intention at the time of payment, and the direction need not be expressed in writing nor in any technical or formal words, nor delivered in any particular manner, but will be sufficient if the intention is manifest, and it comes to the knowledge of the other party at the proper time.

[Ed. Note.—For other cases, see Payment, Cent. Dig. §§ 99-103; Dec. Dig. § 38.*]

5. PAYMENT (§ 68*)—APPLICATION BY DEBTOR—BURDEN OF PROOF.

A party indebted to another on more than one account and making a partial payment has the burden of proving that at or before the time of such payment he directed its application to the particular debt, and that this direction was made known to the creditor.

[Ed. Note.—For other cases, see Payment, Cent. Dig. §§ 195, 202; Dec. Dig. § 68.*]

6. PAYMENT (§ 38*) — APPLICATION—APPROPRIATION BY DEBTOR—SUFFICIENCY.

Entries in a debtor's books without the knowledge of a creditor are insufficient in law to show an appropriation of payments by the debtor to any particular debt.

[Ed. Note.—For other cases, see Payment, Cent. Dig. §§ 99-103; Dec. Dig. § 38.*]

Appeal from Superior Court, Sampson County; Allen, Judge.

Action by the Stone Company against A. D. Rich and others. From a judgment, the defendant named appeals. Judgment appealed from set aside, final judgment affirmed, and action dismissed.

Faison & Wright, of Clinton, for appellant. H. A. Grady, of Clinton, for appellee.

WALKER, J. This case was before us at a former term, under the title of Stone Company v. McLamb & Co., A. D. Rich, and Others, 153 N. C. 378, 69 S. E. 281. We then held that Mrs. M. M. Vann, a feme covert, was liable for the debts of the firm of McLamb & Co. under the statute (Revisal, § 2118), and that the order appointing a receiver of the partnership effects was erroneous and should be vacated, and the property, which was under mortgage to A. D. Rich, should be restored to him. The case was remanded for the settlement of the other matters involved. The parties thereupon agreed that an issue be submitted to a jury to ascertain if a payment of \$333, made by McLamb & Co. to Rich, should be applied

to the debt of the firm, amounting to \$1,650, which is secured by his mortgage, or to an unsecured debt of \$300, held by him against McLamb & Co. The jury returned the following verdict: "Should the \$333 credited to A. D. Rich on page 453 of the ledger be applied to the mortgage debt of McLamb & Co. to A. D. Rich? Answer: Yes." The court adjudged upon the verdict that the payment be so applied. The defendant's exception raises the question whether there was any evidence to show that he had been instructed by the firm to so apply the payment; he having requested the court to charge substantially that there was none. We have examined the testimony carefully, and have failed to find any evidence to sustain the charge of the court or the verdict of the jury. The most that can be made of it, when considered favorably to McLamb & Co. and the other interested parties, is that the firm made some payments at different times aggregating \$333, and entered them upon its books as credits on the mortgage notes, but did not direct Rich how to apply them, and Rich did not know of the entries until some time after they were made, when he promptly objected to them. It was then agreed that they should be applied to the unsecured debt. It is admitted that Rich did not apply the payments to either of the debts.

[1-3] There is no rule in the law better settled than the one in regard to the application of payments. (1) A debtor owing two or more debts to the same creditor, and making a payment, may, at the time, direct its application to any one of the debts. The right is lost if the particular application is not directed at the time of the payment. (2) If the debtor fails to make the application at the time of the payment, the right to apply it belongs to the creditor. (3) If neither debtor nor creditor makes it, the law will apply it to the unsecured debt or the one for which the creditor's security is most precarious, or, as sometimes expressed, according to its own view of the intrinsic justice and equity of the case. Sprinkle v. Martin, 72 N. C. 92, and cases cited; Vick v. Smith, 83 N. C. 80; Moss v. Adams, 39 N. C. 42 (Anno. Ed.); Jenkins v. Beal, 70 N. C. 440; Ramsour v. Thomas, 32 N. C. 165; Wittkowski v. Reid, 84 N. C. 21; Long v. Miller, 93 N. C. 233; Lester v. Houston, 101 N. C. 605, 8 S. E. 366; Pearce v. Walker, 103 Ala. 250, 15 South. 568. The weight of authority is that the debtor must direct the application at or before the time of his payment, and that he cannot do so afterwards. 30 Cyc. p. 1230, and cases in note.

[4] A direction by the debtor as to the application of payments may be shown by an express agreement with the creditor, by the declaration of the debtor, or it may be im-

piled from circumstances showing the debtor's intention at the time of payment. 30 Cyc. p. 1230. Again: The communication need not be expressed in writing, nor in any technical or formal words, nor the instruction delivered in any particular manner. It will be sufficient if the intention is manifest, and that it comes to the knowledge of the other party at the proper time. 2 Am. & Eng. Enc. of Law (2d Ed.) p. 448. "It is certainly too late for either party to claim a right to make an appropriation after the controversy has arisen, and, a fortiori, at the time of the trial." *U. S. v. Kirkpatrick*, 9 Wheat. 721, 737, 6 L. Ed. 199.

[5] When a party indebted to another on more than one account makes a partial payment, the burden of proving that at or before the time of such payment he directed its application to a particular debt, as pleaded by him, and that this direction was made known to his creditor, is upon the debtor. *Pearce v. Walker*, supra. Coming to the special facts of this case, it is said in *Parsons on Contracts* (6th Ed.) § 630: "It is not necessary that the appropriation of the payment should be made by an express declaration of the debtor; for, if his intention and purpose can be clearly gathered from the circumstances of the case, the creditor is bound by it. If the debtor, at the time of making a payment makes also an entry in his own book, stating the payment to be on a particular account, and shows the entry to the creditor, this is sufficient appropriation by the debtor. But the right of election of appropriation is not conclusively exercised by entries in the books of either party until those entries are communicated to the other party." But the cases nearest to the present in matters of fact are the following: *Manning v. Western*, 2 Vernon, Ch. 606, 23 Eng. Reprint, 996, where it appeared that defendant, being indebted to plaintiff on specialty and also by simple contract, or a running account, made several payments of sums in gross, and entered them in his own book, as paid upon the specialty. It was better for the debtor that the payment should go to the simple contract, which did not bear interest. The Lord Chancellor said: "Although the rule of law is that *quicquid solvitur, solvitur secundum modum solventis*, yet that is to be understood when at the time of payment he that pays the money declares upon what account he pays it; but, if the payment is general, the application is in the party who receives the money, and the entries in the defendant's books are not sufficient to make the application." So in *Frazer v. Bunn*, 8 Carr. & P. 704 (34 E. C. L. 592), where a performer at a theater had arrears of salary due to him, and a payment was made to him without any direction at the time as to its application, it was held that an entry by the debtor in his books was not a sufficient direction unless brought to the creditor's

knowledge at the time; otherwise, if he had stated for what specific portion of the indebtedness it was intended or had the entry been made known to the creditor, in which case it would have been evidence of such an appropriation as would be binding on the creditor. Lord Abinger said: "If Mr. Jones had expressly paid this for what was due to the plaintiff between February and June, the plaintiff would have been out of court, but, so far from that, he states that he did not tell the plaintiff on what account he paid it, neither did he show him the book. If he had shown the plaintiff the book in which he had entered it as for a particular period, that would be evidence of appropriation, but that was not so; and I think that the plaintiff is at liberty to apply those payments to the other parts of what had been due to him, and that, therefore, he may recover for the rest of his claim, which is within the dates stated in the particulars." In a case with substantially the same facts (*Terhune v. Colton*, 12 N. J. Eq. 232) the court, after stating the general rule as to the appropriation of payments, held that, while the intention of the debtor to apply the payment to a particular debt or part of a debt may be shown by circumstances attending the act of payment, they must be known to the creditor, or the intention to do so must be signified to him in some way, and that an entry in his own books of account by the debtor is insufficient to determine the application in his favor, as he had not, by showing the entry to the creditor, or otherwise, indicated his intention as to how the money should be applied. The result of the cases is that an undisclosed intention to apply the payment will not do. The right of the creditor to apply the payment, when the debtor by his silence has lost control of it, is stated more in detail by Justice Rodman, in *Jenkins v. Beal*, supra: "The rule is that, where a debtor owes several debts to a creditor and makes payments, he may appropriate the payments to any of the debts he may please; but, if he fails to do so at the time, the creditor may appropriate them as he pleases (subject to some exceptions not material here) at any time before he brings suit for the balance." And in another case the court held: "Although as between the immediate parties the creditor has a right to appropriate when the debtor has failed to do so, yet this right must be exercised within, at the furthest, a reasonable time after the payment, and by the performance of some act which indicates an intention to appropriate. It is too late to attempt it at the trial." *Harker v. Conrad*, 12 Serg. & R. (Pa.) 301, 14 Am. Dec. 691; *Reiss v. Scherner*, 87 Ill. App. 84. Where neither party has exercised his right of appropriation, and a dispute subsequently arises, the court will make the application, as we have seen, and in doing so will, as a general rule, apply the payment to the debt

which is unsecured or the least secured, upon the assumption that the debtor would desire to pay all his debts, and this disposition of the credit most nearly accomplishes that result, or, in other words, the law pursues this course, as it intends that all men shall be honest and fully perform their just obligations, and adopts this method as the one which an honest man would unselfishly choose, if left to himself to act in the premises. It simply does what the debtor should have done if prompted by just motives. *Leeds v. Gifford*, 41 N. J. Eq. 464, 5 Atl. 795; *Turner v. Hill*, 56 N. J. Eq. 293, 39 Atl. 137; *Terhune v. Colton*, 12 N. J. Eq. 238, in which cases the law upon this subject is clearly stated with peculiar reference to the same state of facts as are presented in this case.

[6] As the burden was upon McLamb & Co. to show that they had directed how the payment should be applied, at the time it was made, and as the mere entries, without the knowledge of A. D. Rich, were, in law, insufficient to show such an appropriation of the money, the court should have instructed the jury that there was no evidence of an appropriation by the debtor, McLamb & Co., and to answer the issue, "No," as the law applied the payment to the unsecured debt or open account. For this error the verdict and judgment thereon are set aside.

It appears that while the issue was found against the defendant A. D. Rich, and judgment entered thereon that the payment, \$333, be applied to the mortgage debt, the court has given a final judgment in favor of A. D. Rich by dismissing the action as to him and taxing the plaintiff with the costs of said defendant. As our decision disposes of the principal question in the case, and is given upon facts virtually admitted, or at least uncontroverted—that is, the book of McLamb & Co. and the oral testimony, which the parties agreed should be decisive of their rights, so far as the application of the payment is concerned—the defendant A. D. Rich would seem to be entitled to the final judgment. It will therefore be allowed to stand, and the action is dismissed as to him. The plaintiffs have called our attention to the anomaly presented in this case of a verdict against Rich and judgment on the same, and then a final judgment in his favor. With this before him, he expresses a doubt as to Rich's right of appeal and some wonder at the course of the proceeding. We have decided the question as to the payment to prevent any prejudice to the defendant A. D. Rich likely to grow out of the verdict and judgment thereon, which he should have the right to review by appeal, and by holding that our decision disposes of the merits of the case, in so far as Rich is affected. We thus sustain the final judgment, as consistent with our decision upon the payment, and thus reconcile what was done with orderly procedure.

Appellees will pay the costs of this court.

Action dismissed.

(159 N. C. 553)

PARTIN v. PRINCE.

(Supreme Court of North Carolina. Oct. 16, 1912.)

1. FRAUDS, STATUTE OF (§ 21*)—ORIGINAL OR COLLATERAL PROMISE.

Where a person orally promised another that, if she would put money in his hands for investment, he would guarantee its safety, this was not a promise to answer for the debt of another within the statute of frauds; there being no other debt contracted or contract made except the contract of guaranty.

[Ed. Note.—For other cases, see *Frauds, Statute of*, Cent. Dig. § 33; Dec. Dig. § 21.*]

2. GUARANTY (§ 16*)—CONSIDERATION—SUFFICIENCY.

Where money was placed in a person's hands for investment, and he was given absolute control over it in reliance on his promise to guarantee its safety, there was a sufficient consideration to support the guaranty if any consideration was needed.

[Ed. Note.—For other cases, see *Guaranty*, Cent. Dig. §§ 14-17; Dec. Dig. § 16.*]

3. GUARANTY (§ 16*)—CONSIDERATION—NECESSITY.

Where a contract of guaranty is contemporaneous with the principal debt, no other consideration is necessary; the contract being founded on the consideration existing between the parties, but, if the guaranty is made afterwards, a new consideration is necessary.

[Ed. Note.—For other cases, see *Guaranty*, Cent. Dig. §§ 14-17; Dec. Dig. § 16.*]

4. GUARANTY (§ 16*)—CONSIDERATION—SUFFICIENCY.

Where a person receiving money for investment and guarantying its safety invested it in a concern for which he was agent or representative, his pecuniary interest in the transaction was a sufficient consideration for the guaranty if a consideration was necessary.

[Ed. Note.—For other cases, see *Guaranty*, Cent. Dig. §§ 14-17; Dec. Dig. § 16.*]

Appeal from Superior Court, Wake County; Bragaw, Judge.

Action by Mrs. G. W. Partin (Lorenza Partin) against R. E. Prince. From a nonsuit, plaintiff appeals. Reversed, and new trial granted.

W. B. Snow and J. W. Bunn, both of Raleigh, for appellant.

BROWN, J. The plaintiff sued to recover \$500 which the defendant procured from the plaintiff for the purpose of investing the same. The plaintiff claimed that the defendant promised to guarantee the investment at the time the money was placed in his hands at his request, that the defendant had the use and control of the money without any direction from the plaintiff, and that this formed a consideration which supported the guaranty. The defendant claimed that the transaction, upon the plaintiff's own showing, was a promise to answer for the payment of the debt of another, and, not

being in writing, it comes within the statute of frauds and is void. His honor, being of opinion with the defendant, sustained the motion to nonsuit.

The plaintiff supports her alleged cause of action with a written guaranty contained in a letter of the defendant to the plaintiff, dated November 8, 1906. The plaintiff testified that the defendant came to see her, and told her that he heard that she had some money, and he desired to know if she wanted to lend it out, saying that he could invest it better out of the state, as then she would not have to pay taxes on it. The plaintiff testified the defendant went to see her several times, and each time endeavored to persuade her to let him invest the money. She at first refused because she did not want it invested away from home. The last time the defendant came he said, if she would let him have it, "he would guarantee it to be safe, and that she could look to him for the amount, and not to these other men." It appears that upon the faith of that guaranty the plaintiff let the defendant have \$500. The statements of the plaintiff are fortified and corroborated by the letter of November 8, 1906. The defendant offered no evidence.

[1] In our view, his honor erred in supposing that this transaction, if the evidence is taken to be true, presents the ordinary case of a promise to answer for the debt of another. At the time of this transaction there was no other debt contracted. The only contract that had been made was between the plaintiff and the defendant, and that contract is a guaranty; that is to say, an obligation of the guarantor and separate and distinct from the obligation of a principal debtor. *Carpenter v. Wall*, 20 N. C. 279; *Coleman v. Fuller*, 105 N. C. 328, 11 S. E. 173, 8 L. R. A. 380; *Tell on Guaranties*, 1; *Smith on Mercantile Law*, 277.

[2, 3] We think that the fact that this money was placed in the hands of the defendant at his request, and that he was given absolute control over it upon the faith of his promise to guarantee its safety, is a sufficient consideration to support the contract, but we doubt if any consideration is necessary, for, where the contract of guaranty is contemporaneous with the principal debt, no other consideration is necessary, because the contract is founded upon the consideration existing between the parties. It is otherwise, if the guaranty be made afterwards without any new consideration. *Green v. Thornton*, 49 N. C. 231.

[4] It appears further in the evidence that the defendant invested this money in a New Jersey concern without consultation with the plaintiff who evidently relied entirely upon his guaranty, which concern was doing business in Raleigh and the defendant was its agent or representative.

If a consideration is necessary, the pecu-

niary interest of the defendant in the transaction is a sufficient consideration to support the guaranty. *Whitehurst v. Hyman*, 90 N. C. 487; *Dale v. Lumber Company*, 152 N. C. 651, 68 S. E. 134, 23 L. R. A. (N. S.) 407; *Peele v. Powell*, 156 N. C. 558, 73 S. E. 234; *Whitehurst v. Padgett*, 157 N. C. 424, 73 S. E. 240.

We think his honor erred in sustaining the motion to nonsuit.

New trial.

(160 N. C. 260)

McKAY v. ATLANTIC COAST LINE R. CO.
(Supreme Court of North Carolina. Oct. 16, 1912.)

DEATH (§ 103*)—FIRES—CONTRIBUTORY NEGLIGENCE.

Where the evidence tended to show that plaintiff's intestate was burned to death while trying to beat back a fire started on defendant's right of way through its negligence, and protect her land and dwelling, and that it subsequently reached her land, and the dwelling was only saved by the efforts of her neighbors, the court erred in holding, as a matter of law, that she was guilty of contributory negligence, since, while a distinction is made between risks allowable when human life is at stake and those allowable when the destruction of property is threatened, it is the right and duty of an owner to make every reasonable endeavor to save his property from destruction; and in passing on his conduct full allowance should be made for the natural impulse prompting the effort, and for the emergency under which he acted.

[Ed. Note.—For other cases, see *Death*, Cent. Dig. § 141; Dec. Dig. § 103.*]

Appeal from Superior Court, Cumberland County; Peebles, Judge.

Action by Norvella McKay, administratrix of Kate Howell, deceased, against the Atlantic Coast Line Railroad Company. From the judgment plaintiff appeals. Reversed, and new trial granted.

"The plaintiff alleged that the defendant was a corporation, doing and carrying on the business of a railroad and a common carrier, and that on the 30th day of March, 1910, it ran its locomotive on its right of way and negligently permitted coals and sparks of fire to be emitted from its locomotive, and that said sparks and fire ignited combustible matter which it had allowed to accumulate on its right of way, and that the fire communicated to the lands and premises of one Kate Howell, who, while prudently and carefully attempting to stay the progress of the fire and prevent the destruction of her property and dwelling, caught on fire and was burned to death, and the plaintiff alleges damages in the sum of \$25,000. The defendant, answering the complaint, denied that it was guilty of any negligence as alleged in the complaint, and alleged that if plaintiff's intestate was injured she was injured by her own negligence in attempting to put out fire not upon her own land,

where no property in which she was interested or owned was in danger, and her own negligence attributed to and was the approximate cause of injury."

The following issues were prepared for submission to the jury:

"(1) Was the injury and death of the intestate of the plaintiff caused by the negligence of the defendant, as alleged in the complaint? Answer.

"(2) Did the intestate by her own negligence contribute to her death? Answer.

"(3) What damage is the plaintiff entitled to recover, if any? Answer."

At the close of plaintiff's evidence, the court stated to plaintiff that he would charge the jury, if they were satisfied by the greater weight of the evidence that the fire started on the defendant's right of way, to answer first issue "Yes"; otherwise "No." If they believed the evidence, to answer second issue "Yes." In defense to this intimation, plaintiff, having duly excepted, submitted to a nonsuit and appealed.

H. L. Cook, of Fayetteville, for appellant. Rose & Rose, of Fayetteville, for appellee.

HOKE, J. (after stating the facts as above). There was evidence tending to show: That intestate lived alone in a cabin on a wooded tract of land, in which there was a small clearing or two, and that on March 20, 1910, said to be Wednesday, a fire, originating on defendant's right of way and negligently started from one of the company's trains, burned over the intervening lands towards the intestate's property and partly over her own land. That it proved to be an extensive fire, and several of the neighbors, at different places, were engaged in trying to extinguish it. One of them heard the intestate cry out on Thursday morning, but was unable to go to her, because engaged in endeavoring to save his own property. That on Friday or Saturday morning the dead body of the intestate was found on a path about the dividing line where the fire was approaching her own from Col. Broadfoot's adjoining tract. That all the clothing was burned off, except the shoes, and a pine top lying near, half beaten or worn out, and her tracks along the path, and some burning shreds of her clothing along the edge of the fire, gave indication that she had caught fire while engaged in the effort to beat back the fire and protect it from making further progress towards her land and dwelling. On these the facts, chiefly relevant to the second issue, we think there was error in the ruling of the court. While our decisions would seem to make some distinction between the risks allowable when human life is at stake and those when the destruction of property is presently threatened, all of the authorities, here and elsewhere, are to the effect that it is both the right and duty of an owner to make

every reasonable endeavor to save his property from destruction; and that in passing upon his conduct full allowance shall be made for the natural impulse prompting the effort, and for the emergency under which he acts. *Norris v. Railroad*, 152 N. C. 515, 67 S. E. 1017, 27 L. R. A. (N. S.) 1069; *Burnett v. Railroad*, 132 N. C. 261, 43 S. E. 797; *Rexter v. Starin*, 73 N. Y. 601; 29 Cyc. p. 524. *Pegram v. Railroad*, 139 N. C. 303, 51 S. E. 975, 111 Am. St. Rep. 818, 4 Ann. Cas. 797, cited, and to some extent relied upon by defendant, does not contravene, but is in full recognition of the general principle as stated; the case only deciding on this question that, where an employe, who had escaped from a burning building and was in a place of safety, voluntarily returned to same in an effort to recover his employer's property, an instruction that imposed only one limitation upon his right to recover—that he must not act recklessly—was erroneous."

Applying the controlling position as sustained by the authorities cited, the court below was clearly not justified in holding, as a matter of law, that the intestate was guilty of contributory negligence; the facts in evidence tending as they do to prove that she was burned in the effort to beat back a fire which threatened her property, and even her home. And to show that this last apprehension was not groundless, it further appears that the same fire, though delayed for a time, probably by a small clearing which intervened, did subsequently reach her yard, and the dwelling was only saved by the efforts of her neighbors.

For the error indicated, plaintiff is entitled to a new trial; and it is so ordered.

New trial.

(161 N. C. 226)

STATE v. ALLEN.

(Supreme Court of North Carolina. Oct. 16, 1912.)

1. CRIMINAL LAW (§ 882*)—SPECIAL VERDICT—EFFECT—INDICTMENT.

A count of an indictment charging that an express agent did unlawfully solicit orders and proposals to purchase intoxicating liquors from a certain person and other persons whose names are to the jurors unknown was repudiated by a special jury finding that defendant did not solicit orders for whisky from any person or persons.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2092; Dec. Dig. § 882.*]

2. INTOXICATING LIQUORS (§ 169*)—CRIMINAL OFFENSE—INTERSTATE ORDER.

Where an express agent received from a buyer a certain sum which he sent with an order for whisky to a firm in another state, and the next day received and delivered whisky to the buyer, and where he acted merely as the agent of such buyer and for his accommodation, he was not in view of the commerce clause of the federal Constitution, guilty of a criminal offense under Revisal 1905, § 3534, providing that any one who shall unlawfully procure and deliver whisky to another shall be deemed in

law the agent of the vendor and be guilty of a misdemeanor.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. §§ 187, 188; Dec. Dig. § 169.*]

3. COMMERCE (§ 41*)—INTERSTATE SHIPMENTS.

Where a sale of whisky is consummated in another state by order of one who as agent for a buyer sends the order from a place in the state where a sale is prohibited, the commerce clause of the federal Constitution will protect such agent from indictment under the state laws for his acts, though he receives the particular parcel of whisky inclosed in a general package of whisky addressed to different parties, all of which he delivers.

[Ed. Note.—For other cases, see *Commerce*, Cent. Dig. §§ 30, 31; Dec. Dig. § 41.*]

4. COMMERCE (§ 41*)—INTERSTATE SHIPMENT—INTOXICATING LIQUORS—WILSON ACT.

The Wilson Act (Act Aug. 8, 1890, c. 728, 26 Stat. 313 [U. S. Comp. St. 1901, p. 3177]), providing that intoxicating liquors transported into prohibition territory shall be subject to the operation of the laws of the state or territory, does not take away the force of the commerce clause of the federal Constitution to protect from indictment one who as agent for a buyer orders an interstate shipment of whisky.

[Ed. Note.—For other cases, see *Commerce*, Cent. Dig. §§ 30, 31; Dec. Dig. § 41.*]

5. COMMERCE (§ 60*)—PLACE OF SALE—INTERSTATE COMMERCE.

Revisal 1905, § 2080, making the place of delivery of intoxicating liquors the place of sale, does not apply to a sale fully consummated in another state and where the subject-matter of the transaction is properly regarded as interstate commerce.

[Ed. Note.—For other cases, see *Commerce*, Cent. Dig. §§ 91-95; Dec. Dig. § 60.*]

6. INTOXICATING LIQUORS (§ 223*)—CRIMINAL OFFENSE—ALLEGATION AND PROOF—SUFFICIENCY.

A person cannot be successfully prosecuted under a charge of engaging generally in the unlawful business of selling whisky, but there must be allegation and proof of the specific conduct which constitutes a breach of the criminal law.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. §§ 263-274; Dec. Dig. § 223.*]

Appeal from Superior Court, Wake County; Ferguson, Judge.

J. L. Allen was acquitted of unlawfully selling intoxicating liquors and ordered discharged, and the State appeals. No error.

The bill of indictment was as follows:

"The jurors for the state upon their oath present that J. L. Allen, late of the county of Wake, on the 15th day of May, in the year of our Lord one thousand nine hundred and twelve, with force and arms, at and in the county aforesaid, did unlawfully and willfully sell for gain one-half gallon intoxicating liquor (corn whisky) to B. M. Green, he, the said J. L. Allen, not then and there having a license to sell intoxicating liquor, against the form of the statute in such case made and provided, and against the peace and dignity of the state. And the jurors for the state, upon their oath, do further present that said J. L. Allen, of the county and state aforesaid, on the 15th day of May, in

the year of our Lord one thousand nine hundred and twelve, with force and arms at and in the county aforesaid, did unlawfully and willfully, for himself and as agent for persons, firms and corporations, whose names are to the jurors unknown, solicit orders and proposals of purchase by the jug and bottle of intoxicating liquors of and from one B. M. Green, and other persons whose names are to the jurors unknown, against the form of the statute in such case made and provided, against the peace and dignity of the state."

The jury rendered the following special verdict: "The defendant, J. L. Allen, resides at Wake Forest in said county, and has been for many years the agent of the Seaboard Road and of the Southern Express Company at that place. On the 17th day of June, 1912, between 2 and 3 o'clock in the evening, one B. M. Green applied to the defendant at Wake Forest to have shipped to him a half gallon of corn whisky from Petersburg, in the state of Virginia, the cost of the whisky being \$1.05. The defendant, Allen, at Wake Forest received the money, \$1.05, and sent it to the said firm in Petersburg, state of Virginia. The defendant did not know the price of the whisky, but left it to the firm in Petersburg, Va., to send such corn whisky as they could for the money inclosed. That the said money was sent by mail that evening, leaving Wake Forest about 5:45 p. m. June 17, 1912, and the whisky came by express over the Seaboard Air Line Railway the next day, reaching Wake Forest between 3 and 4 o'clock p. m. That the said half gallon of corn whisky came along with whisky shipped to other parties, to whom it was addressed, and bore the name of B. M. Green on the package. That about half past 4 o'clock on the evening of the 18th of June, 1912, the said Green came to the express office and asked for his whisky. The defendant, Allen, handed him the original package of whisky, upon which was written the name B. M. Green. That the said whisky came along with other packages addressed to other persons, and also bearing the name of B. M. Green, in order to save the express charges. That the said Allen had previous to this on a number of occasions sent money for whisky for various persons, at their request, to different firms at Petersburg, Richmond, and Norfolk, in the state of Virginia. That the said Allen was not the agent of any of the said firms, and has no interest whatsoever in the transaction, but his purpose was merely to accommodate the said persons, and he received nothing whatsoever from the said persons or the said firms as compensation in these transactions. That he, the said Allen, did not solicit orders for whisky from any person or persons, and did not order any whisky for any minor or any of the students at Wake Forest. That he did order for every-

body else who applied to him. That the said defendant Allen's compensation as express agent at Wake Forest was 10 per cent. on the net receipts at that point on all business of every character done at Wake Forest, and he received no other compensation from the said express company other than the 10 per cent. upon the said receipts from all sources on the said express company's earnings at Wake Forest. That the shipments of whisky to Wake Forest by express was increased only in proportion to the increase of other express freight with the last few years. That there is a large quantity of whisky shipped by freight and also by express, other than that shipped to the persons aforesaid. That the said whisky is shipped to Wake Forest addressed to persons living at various distances from Wake Forest and in other townships and counties. It is shipped in such quantities to Wake Forest because of the fact that the persons doing their trading at Wake Forest find it more convenient for them to have it shipped there. That the said whisky was in the original package in which it was shipped, and was sealed up when received, and was delivered to the said Green in the same condition in which it was received, and was not at any time intermingled with other property in the said state. That since the first of the year 1912 shipments by express have averaged about \$50 per month, shipped in the manner aforesaid from the points aforesaid in the state of Virginia, on account of the money sent as aforesaid in the manner aforesaid by the defendant, and for the month of June, 1912, the amount may have reached \$100. The jury for their special verdict say: 'We find the foregoing facts; and, if on the said facts the court is of the opinion that the defendant is guilty, then we find the defendant guilty as charged in the bill, and, if the court is of the opinion that the defendant is not guilty upon such findings, then we find the defendant not guilty.' Upon the foregoing special verdict the court is of the opinion that the defendant is not guilty. And thereupon the jury for their verdict say that the defendant, the said J. L. Allen, is not guilty."

Motion for new trial and to set aside verdict overruled and state excepting. From judgment discharging defendant state again excepted and appealed.

T. W. Bickett, Atty. Gen., T. H. Calvert, Asst. Atty. Gen., and Jones & Bailey, of Raleigh, for the State. A. Jones & Son and Douglass, Lyon & Douglass, all of Raleigh, for appellee.

HOKE, J. The defendant was tried on a bill of indictment containing two counts: (1) An unlawful sale of whisky to one B. M. Green "at or in said county"; (2) that he "unlawfully for himself and as agent for persons, firms, and corporations whose names are to the jurors unknown did solicit orders

and proposals to purchase by the jug and bottle of intoxicating liquors from one B. M. Green and other persons whose names are to the jurors unknown," etc.

[1] The second count in the bill, if it be considered as embodying a criminal accusation, can only amount to a charge of attempting to effect an unlawful sale to B. M. Green or other persons to the jurors unknown by unlawfully for himself and as agent for persons, firms, and corporations soliciting orders for whisky. Apart from any legal considerations which might arise as to the substance of this charge, the prosecution must fall here for the very sufficient reason that the basic facts upon which it is made to rest are expressly repudiated by the special findings of the jury as follows: That the said Allen was not the agent of any of the said firms, and has no interest whatsoever in the transaction, but his purpose was merely to accommodate the said persons, and he received nothing whatsoever from the said persons or the said firms as compensation in these transactions. "That he, the said Allen, did not solicit orders for whisky from any person or persons, and did not order any whisky for any minor or any of the students at Wake Forest. That he did order for everybody else who applied to him."

[2] The question then recurs as to the guilt or innocence of defendant under the 1st count in the bill, that of making an unlawful sale to B. M. Green at or in said county, etc. On this charge the special verdict by correct interpretation finds that defendant, who was depot and express agent at Wake Forest, N. C., at the request of B. M. Green, received from him \$1.05 and sent same with an order for whisky for said Green to that amount to a firm in Petersburg, Va.; that the whisky came the next day by express over Seaboard Railroad in a package containing half gallon corn whisky, addressed to said Green, and was delivered to him as purchaser; that defendant received no profit for the transaction, and acted throughout as agent of the buyer and for his accommodation. There is a statute in North Carolina (Rev. § 3534) which provides that, if any one shall unlawfully procure and deliver whisky for another, he shall be deemed in law the agent of the vendor, and be guilty of a misdemeanor. Interpreting the act in *State v. Burchfield*, 149 N. C. 537, 63 S. E. 89, it was held that the same applied to the case of procuring whisky by purchase from an illicit dealer in prohibited territory and delivering it to another; Associate Justice Walker in the opinion saying: "The meaning of the section is not very aptly expressed, but the Legislature has sufficiently declared the intention to make it criminal for any person to procure liquor from an illicit dealer by purchase and deliver to another when both the purchase and delivery are made in a place where the sale of liquor is prohibited by law." And in another case at the same term (*State v.*

Whisenant, 149 N. C. 515, 63 S. E. 91), referring to this and other sections of the prohibition statutes, it was held: "(1) Revisal, § 3534, making it criminal for one to procure whisky for another by reason of an unlawful sale, has no application when the sale is not illegal or when our state legislation on the subject cannot apply to and affect the transaction by reason of the commerce clause in the federal Constitution. (2) When one acts entirely as the agent of the buyer in ordering whisky to be sent from another state, and has no interest in the whisky, and has no part in the sale as vendor, or his agent or employé, he is not indictable under Revisal 3534. (3) A sale of whisky consummated in another state by order of one as agent for the buyer sent from a place in the state where the sale is prohibited is not indictable under the commerce clause of the federal Constitution, and state legislation cannot affect the transaction in respect to its criminality until and after there had been a delivery within the state."

In that case the facts were, as ascertained and acted on by the jury, that the prosecuting witness had given defendant the money and requested him to make an order for some whisky with one that defendant was sending for himself to a wholesale grocery house at Knoxville, Tenn. The money and order were sent as requested, and the whisky delivered to the witness as in its receipt by defendant. In our opinion this authority is decisive, and fully supports the ruling of his honor on the facts as presented in the special verdict.

[3] It was contended for the state that the commerce clause of the federal Constitution should not afford protection in this case, for the reason that there were other parcels of whisky for other persons in the same general package which contained that for Green, and that defendant made himself guilty in delivering the different parcels to the parties, Green among others, to whom they were, respectively, addressed. This position was presented and rejected by this court in *State v. Trotman*, 142 N. C. 662, 55 S. E. 599, a ruling made in deference to a decision of the Supreme Court of the United States, the final arbiter on these questions, in *Caldwell v. State of North Carolina*, 187 U. S. 622, 23 Sup. Ct. 229, 47 L. Ed. 336, and in which it was held: "An ordinance under which a license fee may be required from an agent of a nonresident portrait company, who receives from such company pictures and frames manufactured by it to fill orders previously obtained, and, after breaking bulk and placing each picture in the frame designed for it, delivers them to the respective purchasers, is invalid as an attempt to interfere with and regulate interstate commerce." The facts and the decision in the *Trotman* Case referred to appearing in the headnote as follows: "In an indictment for selling

patent medicine, etc., without license contrary to Rev. §§ 5150, 5151, where the jury by a special verdict found that certain citizens of this state gave orders for the medicines on a drug company in another state, which were forwarded to, received, and accepted by the company in that state, and the goods shipped from that state to the defendant, the drug company's agent in this state; that each package was wrapped in a separate parcel with the name of the purchaser marked thereon, and then packed in one crate and shipped to defendant, who distributed same in the original form to the purchaser—held, that the defendant was not guilty, as he was at the time engaged in interstate commerce."

[4] The principle recognized and applied in these cases is in no wise affected by the federal statute, sometimes called the "Wilson Act," which provides: "That all fermented, distilled, or other intoxicating liquors or liquids transported into any state or territory or remaining therein for use, consumption, sale, or storage therein, shall upon arrival in such state or territory be subject to the operation and effect of the laws of such state or territory enacted in the exercise of its police powers to the same extent and in the same manner as though such liquids or liquors had been produced in such state or territory, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise." Chapter 728, 26 Statute L. 313, 3 Fed. Statutes Annotated, p. 853. That legislation was enacted to minimize or remove the effects of a decision of the Supreme Court of the United States theretofore recently rendered. *Leisy v. Hardin*, 135 U. S. 100, 10 Sup. Ct. 681, 34 L. Ed. 128, to the effect that, under the commerce clause of the federal Constitution, a vendor could not only import whisky from one state to another, notwithstanding the prohibition laws of the latter state, but could sell it there in the original package. The statute has been declared a constitutional enactment with the limitation that it does not operate to restrain or affect a continuous shipment of whisky from a vendor in one state to a vendee in another, and there delivered to such vendee in the original package; this being the case now presented for consideration. *Wilkinson v. Rahrer*, 140 U. S. 545, 11 Sup. Ct. 865, 35 L. Ed. 572; *Rhodes v. Iowa*, 170 U. S. 412, 18 Sup. Ct. 664, 42 L. Ed. 1088.

[5] We were referred, also, to the North Carolina statute (Rev. § 2080), by which in the case of intoxicating liquors the place of delivery is made the place of sale. The validity of this statute has been approved by this court as to sales within the state. *State v. Herring*, 145 N. C. 418, 58 S. E. 1007, 122 Am. St. Rep. 461; *State v. Patterson*, 134 N. C. 612, 47 S. E. 808. But this statute may not be held to apply to a sale fully consummated in another state, and where the subject-matter of the transaction is proper-

ly regarded as interstate commerce, and, as such, protected from interfering state regulations. On the facts, this sale was consummated in the state of Virginia, and the shipment as we have just shown must be considered and dealt with as interstate commerce till delivery in the original package to the purchaser. *Caldwell v. State*, supra; *State v. Trotman*, *Rhodes v. Iowa*, supra.

[6] It was further urged for the state that, while the facts referred to might, when standing alone, have the effect of exculpating defendant, there are other facts embodied in the special verdict tending to establish that defendant was engaged generally in the unlawful business of procuring whisky for others in prohibited territory, and this sale to Green should be held criminal as an instance and incident of the general unlawful business, especially the finding which says "that he did not solicit orders from any one nor order for any minor or any student of Wake Forest College, but did order for everybody else who applied to him." This position assumes the very question which is in debate, and proceeds upon a theory not contained in either count of the bill of indictment, and which could not be made the basis of a valid indictment. A citizen cannot be successfully prosecuted under a charge of engaging generally in the unlawful business of selling whisky. For various and altogether sufficient reasons, in a charge of that character, there must be allegation and proof of specific conduct constituting a breach of the criminal law (*State v. Tisdale*, 145 N. C. 422, 58 S. E. 998, 13 Ann. Cas. 125)—a requirement guaranteed by our Constitution and necessary in common fairness to enable a defendant to properly prepare his defense and to protect him from a second prosecution on the same state of facts. Accordingly the bill of indictment, in this case, as stated, charges on the first count an unlawful sale to B. M. Green at and in Wake county; second, an unlawful attempt to make such a sale by soliciting purchases, on his part, in behalf of persons, firms, and corporations to jurors unknown.

Unless guilty by reason of the conduct referred to and described in one or the other of these counts, there has been no crime against him either charged or proved, and for the reasons stated neither charge can be successfully maintained on the facts established by the verdict.

No error.

(161 N. C. 211)

Ex parte WILSON.

(Supreme Court of North Carolina. Oct. 16, 1912.)

PARTITION (§ 107*)—DECREE—CONCLUSIVE-NESS.

One who was a party to ex parte partition proceedings, was present at the sale, and received her share of the purchase money, could

not thereafter have the judgment and sale set aside for division as to her.

[Ed. Note.—For other cases, see *Partition*, Cent. Dig. §§ 362-374; Dec. Dig. § 107.*]

Appeal from Superior Court, Sampson County; Ferguson, Judge.

Ex parte proceeding in the name and on behalf of John E. Wilson for partition. From a judgment dismissing a petition of Mrs. Colin Lee to set aside the judgment and sale entered, she appeals. Affirmed.

J. D. Kerr, Sr., for Mrs. Colin Lee. Geo. E. Butler and Cyrus M. Faircloth, both of Clinton, for Bryant Timber Co. Faison & Wright, of Clinton, for appellee John E. Wilson.

PER CURIAM. This cause was before the court at a former term (148 N. C. 439, 62 S. E. 520). Mrs. Colin Lee now moves in the original cause to set aside the judgment and sale for division as to her. Her own deposition proves she was made a party to the partition proceeding, was present at the sale, and received her share of the purchase money. His honor properly dismissed her petition.

Affirmed.

(160 N. C. 23)

FIRST NAT. BANK OF LUMBERTON v. BROWN.

(Supreme Court of North Carolina. Oct. 16, 1912.)

1. BILLS AND NOTES (§ 497*)—INDORSEMENT—BONA FIDES OF INDORSEE—BURDEN OF PROOF.

Under Revisal 1905, § 2205, which provides that to charge an indorsee of a note with notice of infirmity in it he must have had actual knowledge thereof, or his action in taking it must have amounted to bad faith, the burden was on the maker of a note, in a suit thereon by a purchaser for value before maturity from one to whom the maker gave the note, to show that plaintiff knew of the infirmity relied on by the maker, or acted in bad faith.

[Ed. Note.—For other cases, see *Bills and Notes*, Cent. Dig. §§ 1675-1687; Dec. Dig. § 497.*]

2. BILLS AND NOTES (§ 525*)—ACTION BY INDORSEE—BONA FIDES—EVIDENCE—SUFFICIENCY.

In an action on a note by an indorsee, evidence held insufficient to charge plaintiff with knowledge of any fraud in its inducement.

[Ed. Note.—For other cases, see *Bills and Notes*, Cent. Dig. §§ 1832-1839; Dec. Dig. § 525.*]

Appeal from Superior Court, Robeson County; Peebles, Judge.

Action by the First National Bank of Lumberton against J. P. Brown. Judgment for plaintiff, and defendant appeals. Affirmed.

Civil action upon certain issues, of which the following is the first: "Did the plaintiff purchase the note described in the complaint for a valuable consideration and before maturity, in good faith, and without

any knowledge of any fraud in its execution? Answer: Yes."

McIntyre, Lawrence & Proctor, of Lumberton, for appellant. McLean, Varner & McLean, of Lumberton, for appellee.

BROWN, J. Plaintiff seeks to recover upon a promissory note for \$750, dated July 3, 1908, interest from date due December 10, 1908, signed by defendant, payable to and indorsed by himself.

The defendant pleads that said note was given for stock in the Seminole Security Company; that the stock was worthless; and that he was induced to subscribe to said stock by the false and fraudulent representations of H. M. McAllister, cashier of plaintiff.

There are 41 assignments of error, 38 of which relate to the rejection and admission of evidence. We have examined them all, and find no error of sufficient importance to necessitate another trial. Very many of the exceptions are taken to rulings which, if erroneous, constitute only harmless error at best.

[1] It is contended that the judge erred in instructing the jury, if they believed the evidence, to answer the first issue "Yes." Taking any view of the evidence, the plaintiff is a holder in due course. Revisal, § 2208; Bank v. Hatcher, 151 N. C. 359, 66 S. E. 308, 134 Am. St. Rep. 989. The defendant gave the note to Shaw, who discounted it before maturity to the plaintiff, for value. Plaintiff issued its certificate of deposit to Shaw for the net sum and paid it. The burden is then cast upon the defendant to show infirmity in the paper and knowledge upon the part of the plaintiff at time the note was discounted of such facts as will make out a case of bad faith upon the part of the plaintiff in taking the paper. Revisal, § 2205; Bank v. Fountain, 148 N. C. 590, 62 S. E. 738; Bank v. Burgwyn, 108 N. C. 62, 12 S. E. 952; Manufacturing Co. v. Summers, 143 N. C. 102, 55 S. E. 522.

[2] Assuming, for argument's sake, that the bank is bound by the acts of its cashier, McAllister, we find no evidence of fraud or bad faith on his part. According to defendant's testimony, he purchased the stock from Edwards & Shaw, the Seminole Company's agents, and gave his note for it. Their representations were of a very glowing, promissory character (Williamson v. Holt, 147 N. C. 515, 61 S. E. 384, 17 L. R. A. [N. S.] 240), such as promoters frequently indulge in when "boosting" their enterprises. Cash Register v. Townsend, 137 N. C. 652, 50 S. E. 306, 70 L. R. A. 349. According to his own admission, defendant did not rely upon their statements, but asked McAllister's opinion. The latter gave defendant names of many persons, presidents of banks, cashiers, and others, who had in-

vested in the stock, and stated that he had personally subscribed for some of it himself. There is no evidence whatever that the cashier's statements to defendant were false, much less knowingly so. Even the evidence for defendant shows that they were true. One of the trustees was president of the largest bank in Columbia; another was a bank president and chairman of the state Democratic executive committee; another was ex-president of a large woman's college and president of a large printing establishment. The insurance commissioner of South Carolina, a witness for defendant, said: "The standing of these parties was the very best financially, socially, and religiously." It was shown that over 150 bankers and business men had indorsed the proposition, and that their company had over 1,200 stockholders. The fact that the Seminole Company was wrecked by its officers six months later is no evidence of bad faith or fraud upon the part of McAllister.

The judgment of the superior court is affirmed.

(160 N. C. 47)

HAMILTON v. HINES BROS. LUMBER CO.

(Supreme Court of North Carolina. Oct. 18, 1912.)

1. MASTER AND SERVANT (§ 247*) — NEGLIGENCE—PROXIMATE CAUSE.

Even if a master was negligent in requiring a servant to pass over a skeleton car while in motion, or to use the link and pin coupler, or to lean over between the cars to uncouple, those facts, while evidence of negligence, could not have been the proximate cause of death, where the intestate passed over the car, uncoupled the car in safety, and, after doing so, unnecessarily placed himself in a dangerous position on the bolster, when there was another safe way for him to leave the car.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 795-800; Dec. Dig. § 247.*]

2. NEGLIGENCE (§ 61*)—PROXIMATE CAUSE—CONCURRENT NEGLIGENCE.

Where the plaintiff and defendant are negligent and the negligence of both concur and continue to the time of the injury, the negligence of the defendant is not in the legal sense the proximate cause of plaintiff's injury.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 74, 75; Dec. Dig. § 61.*]

3. MASTER AND SERVANT (§ 297*)—CONTRIBUTORY NEGLIGENCE—PROXIMATE CAUSE.

Contributory negligence presupposes negligence on the part of the defendant but not proximate cause; hence, in an action for death of a servant, a verdict finding that "intestate was not killed by defendant's negligence," and that "plaintiff's intestate contributed to his death by his own negligence," is not inconsistent as supporting a decree either for plaintiff or defendant.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1195-1198; Dec. Dig. § 297.*]

4. APPEAL AND ERROR (§ 843*)—REVIEW—VERDICT.

In an action for death of a servant, where a verdict finds that the intestate was not kill-

ed by defendant's negligence, and that "intestate contributed to his death by his own negligence," the reviewing court need not examine errors as to the first issue, because the second issue is determinative of the case.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 8331-3342; Dec. Dig. § 843.*]

5. APPEAL AND ERROR (§ 1052*)—HARMLESS ERROR—ADMISSION OF EVIDENCE.

Even where the court erroneously permits a witness to state certain things, it is not prejudicial where, on cross-examination, the witness was asked substantially the same question, and gave the same answer.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4171-4177; Dec. Dig. § 1052.*]

6. TRIAL (§ 251*)—INSTRUCTIONS—REQUESTS TO INSTRUCT.

A prayer for instruction was properly denied where it related to something as to which no issue was submitted to the jury.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 587-595; Dec. Dig. § 251.*]

7. TRIAL (§ 252*)—INSTRUCTIONS—REQUESTS FOR INSTRUCTIONS.

In an action for death of a servant, an instruction is objectionable which is predicated upon the theory that the intestate was killed while uncoupling a car, while the contributory negligence alleged and relied on was that the uncoupling had been finished, and that he negligently stood on the bolster when it was unnecessary to do so.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 505, 596-612; Dec. Dig. § 252.*]

Appeal from Superior Court, Lenoir County; Peebles, Judge.

Action by H. K. Hamilton, administrator, against the Hines Bros. Lumber Company. From judgment for defendant, plaintiff appeals. Affirmed.

This is the second appeal by the plaintiff in this cause; the first being from a judgment of nonsuit at the close of the plaintiff's evidence, and is reported in 156 N. C. 519, 72 S. E. 588. This appeal is from the jury's verdict; the usual issues of negligence, contributory negligence, and amount of damage being submitted to the jury without objection.

The defendant lumber company maintains certain logging or tram roads, operated exclusively for the purpose of bringing its logs from its logging woods out to its main line. The tramroad upon which the accident occurred for which this action is brought connects with its main line of road, and runs from it out into the timber woods. The train consisted of 12 or 13 log cars, 2 of which, about midway the train, were loaded with feedstuff for the camp. The object was to place the empties upon the spur, and thus connect all the empties, and then proceed to the camp with the engine and loaded cars alone. The log cars in use by the defendant were such as are in general and common use by lumber companies. They were skeleton log cars, with four stringers, about six

by six, six inches apart, running lengthwise down the middle of the cars, across which there was a bolster at either end of the car about three feet from the coupling. The cars were coupled together with link and pin, and, in addition to the bolsters at either end of the car, there was a beam about four by six inches across the car between the bolster and the coupling. The bolsters are about twelve inches in width, and extend in length over beyond the wheels. The top of the box of the wheel (called the journal box) is of a flat surface (about eight inches square), and is about two feet from the bolster, and could be used in stepping on and off the car.

The plaintiff's intestate was employed by defendant as fireman on Friday before he was killed. It was a part of his duty to couple and uncouple, and to do the switching. The work desired of the intestate upon the day of the injury was to uncouple certain cars while the whole train was backing, then to get off the car after so uncoupling, go to the switch below, getting there in time to change the switch (after the cars he had uncoupled had gone into the switch) before the next cars, which were to be uncoupled, had reached the switch, so that the latter cars cut off by the witness Emmerson would go straight down the track. Then the switch was again to be changed to let the other cars go therein. The two loaded cars, about the middle of the train, were to go straight down the track, and the empties in front of and behind the two loaded cars were to be placed in the spur. There was no standard or arms on the car from which the intestate was to alight. The engineer was backing at a rate of somewhere from five to eight miles per hour, and it was a slight downgrade, and, when the cars were uncoupled, they separated and ran down the track of their own motion. It is undisputed that the plaintiff was ordered to do this work, and it is not denied that the method set out was the method adopted and used by the defendant.

It is admitted that there are two ways that this shifting of cars could be accomplished, one by the method above set out—that is, not stopping the motion of the train—and the other by backing the cars into the spur, stopping, uncoupling, then moving out, backing straight down the track, stopping, uncoupling the cars desired to be left on the main track, then moving up and backing the other cars into the spur, and stopping, uncoupling, and leaving them. Plaintiff's witnesses testify that the loss of time by the use of the latter method is from three to five minutes, while the defendant's witnesses estimate as much as fifteen minutes' loss thereby. It is not disputed that plaintiff had to go out from the engine over the moving skeleton log cars on the stringers, sit down on the beam and pull out the pin, so as to uncouple,

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

then get off the car in order to proceed with his duties and change and rechange the switch. The intestate fell from the car and was killed by the car running over him. The plaintiff contended that he fell while pulling out the pin, and the defendant contended that he had finished uncoupling the cars, and that he unnecessarily stood up on the bolster and fell from that position. Evidence was introduced to sustain both contentions.

The jury returned the following verdict:

"(1) Was the plaintiff's intestate killed by the negligence of the defendant, as alleged in the complaint? Ans.: No.

"(2) Did the plaintiff's intestate contribute to his death by his own negligence, as alleged in the answer? Ans.: Yes.

"(3) What sum is plaintiff entitled to recover? Ans.: (No answer)."

Judgment was rendered upon the verdict in favor of the defendant, and the plaintiff appealed.

Geo. V. Cowper and Y. T. Ormond, both of Kinston, for appellant. Loftin & Dawson and Rouse & Land, all of Kinston, for appellee.

ALLEN, J. Admitting, for the purposes of this appeal, that the defendant was negligent, the controversy on the first issue was reduced to the question of proximate cause, and on the second to the inquiry whether the plaintiff was negligent, and, if so, was this the real cause of death.

[1] If it was dangerous and negligent to require the plaintiff's intestate to pass over a skeleton car while in motion, or to use the link and pin coupler, or to lean over between the cars to uncouple, those facts, while evidence of negligence, were of the past, and could not have been the proximate cause of death, provided the intestate passed over the car, leaned over and completed the uncoupling in safety, and, after doing so, unnecessarily placed himself in a dangerous position on the bolster, when there was another safe way for him to leave the car.

[2] It became then most important to ascertain the position of the plaintiff at the time he fell, and if the defendant was negligent, and the intestate was also negligent in unnecessarily going into a place of danger, both concurring in causing death, the negligence of the plaintiff was proximate, and it was proper to answer the first issue in the negative and the second in the affirmative. *Phnix v. Durham*, 130 N. C. 360, 41 S. E. 932; *Curtis v. Railroad*, 130 N. C. 440, 41 S. E. 929; *Harvell v. Lumber Co.*, 154 N. C. 262, 70 S. E. 389. In the last case cited, the court states the rule as follows: "If, however, the plaintiff was negligent, and this negligence caused him to stumble and fall, he could not recover, although the defendant was also negligent, because this would pre-

sent a case of concurrent negligence, and it is well settled that when the plaintiff and defendant are negligent, and the negligence of both concur and continue to the time of the injury; the negligence of the defendant is not in the legal sense proximate."

[3] This view is not in conflict with the statement that contributory negligence presupposes negligence on the part of the defendant (*Whitley v. Railroad*, 122 N. C. 989, 29 S. E. 783; *Graves v. Railroad*, 136 N. C. 9, 48 S. E. 502), because in the first issue two facts are involved—(1) negligence; (2) proximate cause—and it cannot be said that contributory negligence presupposes proximate cause. If it did so, the second issue would be a vain and useless thing. It follows, therefore, that there was a phase of the evidence which supported the findings of the jury, and that the verdict is not condemned as inconsistent, which rests "upon the ground that there are two responses to different issues, one of which would support a decree for the defendant, while the other would entitle the plaintiff to recover." *Stern v. Benbow*, 151 N. C. 463, 66 S. E. 445. In *Baker v. Railroad*, 118 N. C. 1017, 24 S. E. 415, the jury answered the first and second issues "Yes," and awarded the plaintiff \$1,000, and the court held the finding upon the second issue determinative, and that the defendant was entitled to judgment, and in *Harris v. Railroad*, 132 N. C. 162, 43 S. E. 589, the three issues of negligence, contributory negligence, and last clear chance were answered "Yes," and damages were awarded, and upon these findings a judgment in favor of the plaintiff was sustained.

[4] The jury in the case before us has answered the first issue "No" and the second issue "Yes," and as we have seen that these findings are supported by the evidence, and are not inconsistent, and as the plaintiff cannot recover as long as the answer to the second issue stands, it is not necessary for us to consider the exceptions (about thirty in number) arising upon the first issue, if no error is shown affecting the second issue. *Ginsberg v. Leach*, 111 N. C. 15, 15 S. E. 882; *Allen v. McLendon*, 113 N. C. 325, 18 S. E. 206.

There are several exceptions bearing on the second issue.

[5] The first is to permitting a witness for the defendant to say there was a safer way to get off the car than by walking on the bolster. If this was erroneous, it is not prejudicial because on cross-examination the witness was asked substantially the same question and gave the same answer.

The other exceptions on this issue are to the refusal to give certain prayers for instructions and to parts of the charge as given.

[6] The first prayer for instruction was properly denied, because it relates to assumption of risk, as to which no issue was sub-

mitted to the jury, and it also appears that his honor substantially instructed the jury as to the degree of care required of the intestate, as the plaintiff requested, when he said: "While the law requires an employer to furnish a reasonably safe place for its employé to work, and reasonably safe appliances with which to do his work, it requires of the employé, the servant, to go about his work in a reasonably prudent manner. While he may trust that his employer or master has furnished a reasonably safe place and appliances in which to do the work, provided the danger is not so obvious that a reasonably prudent man would see that in doing the work he was in greater danger of getting hurt than not getting hurt, he may go about the work, but he is required to exercise reasonable caution and prudence himself, because it is his duty to take notice of the conditions which surround him, and he must exercise the care of a reasonably prudent man. This the defendant contends the plaintiff did not do, and that he was careless in getting up and getting on the bolster, and not careful to take care of himself so as to stoop down as he might have stooped down by exercising reasonable care."

[7] The material part of the second prayer is also covered by the above excerpt from the charge, but the instruction is also objectionable, upon the ground that it is predicated upon the theory that the intestate was killed while uncoupling the car, while the contributory negligence alleged and relied on was that the uncoupling had been finished, and that he negligently stood on the bolster when it was unnecessary for him to do so. His honor stated distinctly to the jury that the contention of the defendant was that the intestate was negligent in getting up and standing on the bolster, which was not a method employed by the defendant. In other words, the plaintiff said that his intestate was required to pass across a skeleton car while in motion, to sit on a beam, to lean over and uncouple, and that while performing this duty he fell and was killed, and requested his honor to charge the jury upon this theory he would not be guilty of contributory negligence, unless the danger was so apparent and obvious that a reasonable person would have refused to attempt to do the work, while the defendant did not contend that he was guilty of contributory negligence if injured in this way, but that, after he had uncoupled, he negligently stood on the bolster and was injured. The other exceptions on this issue are to parts of the charge which follow approved precedents.

We have examined the exceptions to the first issue, and do not intimate that any were well taken, but as we find no error on the second issue, which determines the appeal, it is not necessary to discuss them.

No error.

(160 N. C. 54)

WILKINS v. ATLANTIC COAST LINE R. CO.

(Supreme Court of North Carolina. Oct. 16, 1912.)

1. CARRIERS (§ 89*)—CARRIAGE OF GOODS—DAMAGE IN SHIPMENT.

The consignee under an ordinary bill of lading may not as a general rule reject the goods because the same have been wrongfully damaged in the course of shipment, but must receive the goods and hold the company for the injury done, being required, further, to do what good business prudence would dictate in the endeavor to minimize the loss; but, when the entire value of the goods has been destroyed and the injury amounts practically to a total loss, the consignee is justified in refusing them, and may sue for the entire amount.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 324-330; Dec. Dig. § 89.*]

2. CARRIERS (§ 134*)—CARRIAGE OF GOODS—DAMAGES IN SHIPMENT—ENTIRE LOSS.

In an action by a consignee for damages to a keg of syrup which had soured and for a penalty for delay in allowing the claim, evidence held to warrant a finding that there was a total loss, although the keg was probably in good condition and worth about 25 cents, thus relieving the consignee from the duty of accepting the goods, and giving him the right to sue for the entire value of the goods.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 588-593, 607; Dec. Dig. § 134.*]

3. CARRIERS (§ 159*)—DAMAGES TO GOODS—NOTICE.

Where a railroad freight agent by mistake denies to a consignee for several months that the goods have arrived, during which time they spoil, so that the consignee refuses to accept, the time of offering to deliver to the consignee is the time of delivery within the bill of lading requirement that claims for damage must be made within four months after delivery, or a reasonable time therefor in case of failure to deliver.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 669-672, 699-703½, 711-714, 718, 718½; Dec. Dig. § 159.*]

Appeal from Superior Court, Lenoir County; Allen, Judge.

Action by R. E. Wilkins against the Atlantic Coast Line Railroad Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Civil action upon appeal by defendant from the judgment rendered in the justice of peace court. The action was instituted for the recovery of \$4.85 damage to a keg of syrup shipped from Bamburg, S. O., to the plaintiff at Kinston, N. C., and for \$50 penalty for failure to pay the claim within the time allowed by statute. The defendant denied liability, and denied that the claim was ever properly filed, or that claim was filed within the time allowed by the contract or by law.

On the trial plaintiff testified in his own behalf in substance as follows: "I bought 10 gallons of an especially fine grade of syrup for table use in Bamburg, S. C., on March 31, 1910, paying in cash 42½ cents per gallon for the syrup and 75 cents for

the keg. The bill of lading was sent four or five or six days later. This is the bill of lading. [Bill of lading is introduced by the plaintiff.] Bill of lading is dated March 31, 1910, and is made out in plaintiff's proper name. I made inquiry at both depots to know if the syrup had come. I made continuous effort to get the syrup. Some days after I had gotten home—it may have been three weeks—I asked if it had come, and kept it up, inquiring every time I came home. Sometimes I stayed maybe five weeks. I found out it had not been delivered. I went down to see both agents. I went to the A. C. L. depot once or more times. I also asked them many times over the phone, and also went personally. The A. C. L. notified me some time the latter part of August or in September, 1910, by card, that it was there. When I made inquiry to get it out, they said it was not there. I asked what became of it. The agent said it had been delivered. I said, 'Who to?' I said, 'Look again.' He looked and found it, and I went down and examined it, and found it was sour. I refused to take it. It was in bad condition and sour and of no value to me, and I so stated to defendant's agent, and he helped sample it. I filed claim in writing with Mr. Cleary, agent of A. C. L. Railroad Company in Kinston. The exact date I filed the claim in writing is November 22, 1910, being the date the agent gave me receipt for bill of lading. Agent wanted bill of lading to go in the claim filed. He wanted me to give it over to him. I said, 'No,' that the syrup was in his hands. I would not give it to him until he said, 'We would rather you would,' and I said, 'Out of courtesy to you I will do it, but I don't have to do it.' My claim was for damages to the syrup—\$4.85, actual cost of syrup and keg. The claim has not been paid. * * * I filed claim for syrup and keg, which is \$4.85. I paid 75 cents for the keg. I don't know that keg was in good order, and keg soured with the contents. So far as I know, the keg was intact, and the trouble was the sour liquid. Syrup was of absolutely no value. I don't know that it would make vinegar. It was syrup I bought. I didn't want it otherwise. It was August or September. It must have been September. It was the latter part of August or September. I would not know the date, except for this receipt [witness holding receipt for bill of lading in his hand]. I presented claim for \$4.85—\$4.10 for the syrup, and 75 cents for the keg. The bill of lading was not the claim. I presented written claim. I remember presenting separate written claim, other than bill of lading. It was the bill of cost of the syrup, and I presented the claim with the bill of lading. * * * I refused to take it. I refused to take the keg. It would not have paid me to take it. A sweet keg, I suppose is worth 75 cents and

a vinegar keg 25 cents. * * * Bamburg is 150 or 200 miles on the Southern from Kinston; the Southern being a connecting carrier on the A. C. L. Railroad Company." Defendant offered in evidence bill of lading, and the station agent at time of trial testified that he was unable to say from records in the office that the keg of syrup had arrived at Kinston on April 12, 1910, and on the waybill was consigned to A. E. Williams, and showed a delivery from Southern to A. C. L. at Columbia, S. C.

The court, among other things, charged the jury: "If the keg could have been utilized in any way, so as to save anything to the company, it was his duty to do it, but if the whole thing was worthless, so there would have been no saving to the railroad company, then he would not be responsible for not taking it out. The burden is upon the plaintiff to show by the greater weight of the evidence that he has been damaged, and to what extent, and to what amount. So, if you find by the greater weight that they did receive this syrup and retained it till it was worthless—the claim is that it was there from April to August—and during the summer it soured and became worthless, and if you find that it is so, and the syrup was worthless, then you will say that the value is \$4.10 and 75 cents, making \$4.85 or a less amount. Whatever you find to be the amount of his damages, so answer it in figures, whatever you find that amount to be." Defendant excepted to the charge, and, after verdict, entered motion as follows: "Upon the admission of the plaintiff that a reasonable time for the arrival of the shipment in controversy was 10 or 15 days from March 31, 1910, and the evidence of the plaintiff being that the shipment did arrive at Kinston on April 12, 1910, and the plaintiff further admitting that he filed the claim sued on with the defendant on the 22d day of November, 1910, the defendant moved the court to adjudge that the plaintiff was not entitled to recover the penalty demanded in this action."

Rouse & Land, of Kinston, for appellant. W. D. Pollock and G. V. Cowper, both of Kinston, for appellee.

HOKE, J. Section 2634, Revisal, in effect provides that every claim for loss or damage to property in shipment by a common carrier shall be adjusted as to intrastate shipments within 60 days from time of filing same with the company's agent and within 90 days in case of shipments from without the state under a penalty of \$50 for "each and every such failure," and with proviso that the penalty is not enforceable unless the party aggrieved in his action shall recover the full amount of the claim. Defendant resists recovery (1) because the amount of the claim should be reduced by the value of the keg; (2) by reason of a clause in the

bill of lading in terms as follows: "Claims for loss, damage or delay must be made in writing to the carrier at the point of delivery or at the point of origin within four months after delivery of the property, or, in case of failure to make delivery, then within four months after a reasonable time for delivery has elapsed. Unless claims are so made the carrier shall not be liable." But on the facts in evidence we are of opinion that neither position can be sustained.

[1] In contracts of affreightment, the consignee under an ordinary bill of lading may not as a general rule reject the goods because the same have been wrongfully damaged in the course of shipment. Under usual conditions, he must receive the goods and hold the company for the injury done, and he is required further to do what good business prudence would dictate in the endeavor to minimize the loss. The principle, however, does not obtain when the "entire value of the goods has been destroyed and the injury amounts practically to a total loss." In such case the consignee is justified in refusing the goods, and may sue for the entire amount. *Hutchinson on Carriers* (3d Ed.) § 1365; *Manufacturing Co. v. Railway*, 62 Wis. 642, 22 N. W. 827, 51 Am. Rep. 725; *Brand v. Weir*, 27 Misc. Rep. 212, 57 N. Y. Supp. 731; 5 A. & E. (2d Ed.) p. 384.

[2] And so it is here. This was a shipment of syrup, and the evidence justified a verdict for the entire loss. The keg was only an incident, too small to be regarded, 25 cents at the most, and the claimant testified that it would not pay him to try and utilize it.

[3] And we do not think on the facts as presented that the restrictive stipulations in the bill of lading afford protection for defendant. There is authority to the effect that on these facts, when the goods are in evidence, rejected on account of their damaged condition and all the facts and circumstances fully known to the company's agent, the provision relied upon should be held to have no application whatever (*Kime v. Railroad*, 156 N. C. 451, 72 S. E. 485; 6 Cyc. p. 507; *Moore on Carriers*, p. 337), and in any event we are of opinion that the time which elapsed while the goods were in the defendant's depot and when the consignee was misled as to their placing by assurances to the contrary on the part of defendant's agents should not be counted to the claimant's prejudice. Under these circumstances, the offer to deliver in August should be held as the time of delivery under the first clause of the bill of lading if the same applies, and to waive or displace the requirement contained in the second clause that the "claim be filed within four months after a reasonable time for delivery has elapsed." *Hutchinson on Carriers*, § 444; *Moore on Carriers*, pp. 335, 336.

In any aspect of the matter, therefore, we are of opinion that the stipulations of the bill of lading do not affect the result, and the objections urged to the validity of plaintiff's recovery must be overruled. There is no error and on the record the judgment is affirmed.

No error.

(159 N. C. 581)

HENDERSON v. ATLANTIC COAST LINE R. CO.

(Supreme Court of North Carolina. Oct. 16, 1912.)

1. APPEAL AND ERROR (§ 866*) — REVIEW — NONSUIT.

On appeal from a judgment of nonsuit, the Supreme Court cannot weigh the evidence to determine the existence of the material facts, or which theory arising under the evidence shall be adopted; its duty being to decide merely whether there is any evidence worthy of consideration by the jury.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3467-3475; Dec. Dig. § 866.*]

2. APPEAL AND ERROR (§ 866*)—REVIEW ON NONSUIT.

In reviewing a judgment of nonsuit, the Supreme Court must give to the evidence the interpretation most favorable to plaintiff.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3467-3475; Dec. Dig. § 866.*]

3. NEGLIGENCE (§ 136*)—JURY QUESTION.

If the evidence merely raises a possibility or conjecture of existence of negligence, a nonsuit should be ordered; but if the more reasonable probability is in favor of plaintiff's claim of negligence the question should be submitted to the jury.

[Ed. Note.—For other cases, see *Negligence*, Cent. Dig. §§ 277-353; Dec. Dig. § 136.*]

4. NEGLIGENCE (§ 121*)—BURDEN OF PROOF.

The burden is on plaintiff in a negligence action to prove the allegation of negligence.

[Ed. Note.—For other cases, see *Negligence*, Cent. Dig. §§ 217-220, 224-228, 271; Dec. Dig. § 121.*]

5. RAILROADS (§ 398*)—INJURIES ON TRACK— NEGLIGENCE—DISCOVERED PERIL.

In order to recover for death on a railroad track, on the ground of discovered peril, while decedent was in a helpless condition, plaintiff must prove that decedent was on the track in an apparently helpless condition, and that the engineer could have discovered him by ordinary care in time to stop the train before striking him, and that decedent was killed as the result of the failure to exercise such care.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1356-1363; Dec. Dig. § 398.*]

6. RAILROADS (§ 400*)—INJURY ON TRACK— JURY QUESTION.

Evidence in an action for decedent's death on a railroad track, in which it was claimed that the engineer could have discovered his presence on the track in a helpless condition by exercising due care, held to justify nonsuit, it not raising a reasonable probability of negligence.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1365-1381; Dec. Dig. § 400.*]

7. EVIDENCE (§ 577½*)—TESTIMONY BEFORE CORONER.

In an action for decedent's death on a railroad track, a statement by the engineer,

made before the coroner, that he saw a man lying on his left side with his hat on his head, so he could not tell whether he was white or black, was properly excluded.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2410; Dec. Dig. § 577½.*]

Appeal from Superior Court, Onslow County; Carter, Judge.

Action by Charles Henderson, administrator, against the Atlantic Coast Line Railroad Company. From a judgment for defendant, plaintiff appeals. Reversed.

This is an action to recover damages for the alleged negligent killing of the intestate of the plaintiff. The defendant denied negligence, and alleged that the death of the intestate was caused by his own contributory negligence. At the conclusion of the evidence for the plaintiff, his honor rendered a judgment of nonsuit, and the plaintiff excepted and appealed.

D. E. Henderson and D. L. Ward, both of New Bern, for appellant. Frank Thompson, of Jacksonville, and Moore & Dunn, of New Bern, for appellee.

ALLEN, J. [1] The only question presented by this appeal is whether there is any evidence fit to be submitted to the jury, and in considering it we cannot weigh the evidence for the purpose of seeing if it satisfies us of the ultimate fact sought to be proved; nor can we exercise the power, committed by the law to the jury, of saying which theory arising upon the evidence shall be adopted.

[2] Our duty is performed when we determine whether there is any evidence worthy of consideration, and in its performance we are not permitted to accept a view of the evidence favorable to the defendant, as a jury would have the right to do, if one is presented which sustains the contention of the plaintiff; the law requiring us, on a motion to nonsuit, to give to the evidence the interpretation most favorable to the plaintiff.

[3] If, so considered, the evidence does no more than "raise a possibility or conjecture of a fact," a judgment of nonsuit ought to be sustained (*Cobb v. Fogalman*, 23 N. C. 440; *Lewis v. Steamboat Co.*, 132 N. C. 909, 44 S. E. 666); but if the "more reasonable probability" is in favor of the plaintiff's contention the question ought to be submitted to the jury. *Fitzgerald v. Railroad*, 141 N. C. 535, 54 S. E. 391, 6 L. R. A. (N. S.) 337.

The statement of the law in this last case is pertinent. "It is very generally held that direct evidence of negligence is not required, but the same may be inferred from facts and attendant circumstances; and it is well established that if the facts proved establish the more reasonable probability that the defendant has been guilty of actionable negligence the case cannot be withdrawn from the jury, though the possibility of accident

may arise on the evidence. Thus, in *Shearman and Redfield on Negligence*, § 58, it is said: 'The plaintiff is not bound to prove more than enough to raise a fair presumption of negligence on the part of the defendant and of resulting injury to himself. Having done this, he is entitled to recover, unless the defendant produces evidence to rebut the presumption. It has sometimes been held not sufficient for the plaintiff to establish a probability of the defendant's default; but this is going too far. If the facts proved render it probable that the defendant violated its duty, it is for the jury to decide whether it did so or not. To hold otherwise would be to deny the value of circumstantial evidence. As already stated, the plaintiff is not required to prove his case beyond a reasonable doubt, though the facts shown must be more consistent with the negligence of the defendant than the absence of it. It has never been suggested that evidence of negligence should be direct and positive. In the nature of the case, the plaintiff must labor under difficulties in proving the fact of negligence; and, as that fact is always a relative one, it is susceptible of proof by evidence of circumstances bearing more or less directly on the fact of negligence—a kind of evidence which might not be satisfactory in other classes of cases open to clear proof. This is on the general principle of the law of evidence which holds that to be sufficient and satisfactory evidence which satisfies an unprejudiced mind.'"

The allegation of negligence in the complaint is that the deceased was down on the track in an apparently helpless condition, and that the engineer of the defendant could have discovered him, in time to stop the train before reaching him, by the exercise of ordinary care.

[4, 5] The burden was on the plaintiff to prove the truth of this allegation, and to establish in the minds of the jury: (1) That the deceased was down on the track in an apparently helpless condition; (2) that the engineer could have discovered him, in time to stop the train before reaching him, by the exercise of ordinary care; (3) that he failed to exercise such care, and as a direct result the deceased was killed. *Olegg v. Railroad*, 132 N. C. 294, 43 S. E. 836.

[6] Applying these principles, we are of opinion that there was error in entering the judgment of nonsuit, and we forbear from discussing the evidence at length for fear we may present arguments in behalf of the plaintiff, without giving those favorable to the defendant. It was in evidence: That about two hours before the deceased was killed he was asleep in a path near the crossings. That he was awakened, and went to Sabiston's store near by. That he remained at the store a short time, and went back to the railroad at Sabiston's crossing. That he

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

was walking, and went up the railroad in the direction his body was afterwards found. That he was drunk and staggering; one witness saying "both sides of the road was his." That about two hours after leaving Sabiston's crossing his body was found near a trestle of the defendant across Cary's branch, which was about two miles from the crossing. That the head was severed from the body, and was on one side of the track, and the body, according to one witness, on the other side, and, according to another, between the rails; and an arm under the trestle. That the body was mangled, or, as one witness expressed it, "badly chewed up," "badly mashed up." That there was evidence of blood on the rail; a witness testifying: "Q. Did you see any blood, and where did you see it? A. That was on the north side of the trestle, and a bundle on this side—a bundle of overalls. Q. What did you see on the roadbed? A. I didn't see anything unusual, except where the man was cut to pieces on the trestle. Q. Where was that? A. On the northeast side of the trestle. Q. Right on the side of it? A. You may say the first tie; right on the roadbed between the first and second tie. Q. With reference to the T iron, where was it? A. It must have been right over the T iron on the east side. Q. How far did you see the evidence on the track from where you first observed the condition? A. Over there south, it was about half a dozen or eight ties, as far as it was. He was cut right alongside of the trestle after we crossed. Q. Where was the head? A. When I first observed the head, it was down in the ditch. Q. How far was that from the other edge of the trestle? A. The head was north side of the trestle, eight or ten cross-ties from the trestle. Q. Where was the body? A. Right on the other side, just clear of the T iron. Q. With reference to the railroad track? A. Right side of the track, just clear of the track on the edge of the cross-ties, on this end. Q. (the Court). Was any part of the body between the rails or outside the rails? A. To the best of my recollection, the head was on one side of the railroad in the ditch, and the body was on the other side of the track, and the arm was down under the trestle. I believe the other arm was badly mangled. That the deceased was killed by a passenger train, which stopped a short distance beyond the body. That no whistle was sounded. That it was a clear day. That an object down on the track, about the place the defendant was killed, the size of a man, could be seen from the direction the train was running 1,065 yards, and that it was a man, if one was on the track, a distance of 265 yards. There is other evidence tending to establish the contention of the defendant.

[7] His honor properly excluded the statement of the engineer, made before the coro-

ner, that he saw a man lying on his left side with his hat on his head, so he could not tell whether he was white or black. *Southerland v. Railroad*, 106 N. C. 100, 11 S. E. 189.

We are of opinion the plaintiff is entitled to have the evidence considered by a jury. Reversed.

(160 N. C. 3)

HOLDER v. NORTH CAROLINA R. CO.
et al.

(Supreme Court of North Carolina. Oct. 16, 1912.)

1. RAILROADS (§ 396*)—INJURIES ON TRACK—BURDEN OF PROOF—NEGLIGENCE.

The burden was on plaintiff, suing for intestate's death on a railroad track, to prove that intestate's appearance while sitting on the cross-tie was such as to lead one of ordinary prudence to believe that he was helpless; plaintiff seeking to recover on that theory.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1341-1343, 1357; Dec. Dig. § 396.*]

2. RAILROADS (§ 398*)—INJURIES ON TRACK—SUFFICIENCY OF EVIDENCE—NEGLIGENCE.

Evidence, in an action for intestate's death by being struck by a railroad train, *held* not to show negligence by the company resulting in decedent's death, so that a nonsuit was properly entered.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1356-1363; Dec. Dig. § 398.*]

3. APPEAL AND ERROR (§ 1050*)—HARMLESS ERROR—ADMISSION OF EVIDENCE.

A ruling admitting a part of the answer in evidence is immaterial, in an action for intestate's death by being struck by a train while sitting on a cross-tie in an apparently helpless condition, where it did not tend to prove that decedent was in an apparently helpless condition, but merely that he was sitting on the tie.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4153-4160, 4166; Dec. Dig. § 1050.*]

Appeal from Superior Court, Wake County; Cline, Judge.

Action by James Holder, administrator, against the North Carolina Railroad Company and another. From a judgment for defendants, plaintiff appeals. Affirmed.

This is an action to recover damages for the alleged negligent killing of the plaintiff's intestate. The defendant denied that it killed the deceased, or that it was negligent, and pleaded contributory negligence. There was no eyewitness to the killing; the plaintiff relying on circumstantial evidence.

The deceased was going from the railroad about sunset, and he was then staggering, and acted like a drunken man. About dark he was going to the railroad, and this is the last time he was seen alive, as far as the evidence discloses. His body was found the next morning, about 7 o'clock, in a sitting position on the end of a cross-tie, and while in that position several trains passed and did not touch him. There was no sign of the body being dragged or mangled; and

there were no wounds, except two in the back of his head. There was evidence that he could have been seen sitting on the cross-tie in time to stop the train. There was no evidence of failure to sound the whistle or ring the bell.

The position of the body, and other circumstances, are described by a witness for the plaintiff, as follows: "I went to the place where the man was found dead on the Southern Railroad track on the 3d day of April, 1910. I was there early Sunday morning, somewhere around 7 o'clock. This spot is near my house. Back beyond where this man was found, there was a curve in the track where it goes into a cut; that is, coming back this way from where the man was found in the cut. In going from here to Clayton, he was found on the left-hand side of the track. There is a grade this way; but from where the engine emerges from the cut it is almost level. There is a public road that crosses the railroad. There is a public road that crosses the railroad a little beyond where the man was found. I think it was about 80 feet. The crossing was west from where he was found. I do not know the distance it is from the point where the man was found to the edge of the cut. I did not step it, because it had been surveyed by both parties. It was in my field where the body was found. There was no one there at all when I got there. I looked at the man, and all around the track, to see what I could learn. No one else was there until I left. I will describe to the jury how I found him, as best I can. You all know how cross-ties are. As well as I remember, the man was sitting with his left foot extended and right foot under him. He was in his shirt sleeves. He had his coat on his right arm, and part was across it, and the right arm was between the two cross-ties, and his head was resting on right arm between the cross-ties, and still his body was higher. He was sitting on the end of the cross-ties. I did not touch his body. I saw a wound on the back of his head that I judged was the cause of his death. I did not see any blood. I looked down the side of his face to see if I could see any blood, and there was very little. I saw no blood anywhere else. On that morning I went up about as far in the direction of Raleigh as that crossing, about 80 feet. Only saw a little blood on his face. My recollection is not distinct as to how his coat was cut. I simply remember he was in his shirt sleeves, and his coat was on his arm, and a part across the iron. The man's head was bending towards the east. I do not have any recollection of any train passing along there that night. Of course, I know when the regular trains pass; but on that particular night I did not pay any attention to it. I know along about that time, just a few days before and a few days after this man was found there, that the trains

on the Southern Railway customarily passed that point at night. *I know the regular schedule immediately before and immediately after. The first train that would pass after sundown would be the midnight train that is due at Clayton at 12 o'clock, which is the mixed train coming west. There is a freight train going east that passes that point about 10 o'clock. That would be the next train after sundown. There is a passenger train that leaves here about 7:30 that passes there about 8. I think at that time that it passed a little before dark. The schedule has been changed. After the midnight train the next train would be the one that leaves here at 4:30 and passes there something after 5. The next one is the one that passes Clayton at 7:30, and that would bring you up to next morning. I was not present or near the body when the west-bound passenger train comes along. I saw it after coroner came and moved it. When I first went up there, of course, I had curiosity to see what killed the man; but the wound on the back of the head seemed a little indistinct. I did not look at it very closely. Did not examine it when I went back. When I saw the body the second time, they had taken it off the track, and were preparing to move it away. I did not look for any blood at that time."*

At the conclusion of the evidence, judgment of nonsuit was entered, and the plaintiff excepted and appealed.

Douglass, Lyon & Douglass and R. N. Simms, all of Raleigh, for appellant. W. B. Snow, of Raleigh, for appellees.

ALLEN, J. The evidence in *Clegg v. Railroad*, 132 N. C. 293, 43 S. E. 837, in which a judgment of nonsuit was sustained, was "that plaintiff's intestate was seen going in the direction of defendant's track, and was later found dead, lying by the side of the track where a dirt road ran parallel with it, but not at a crossing, and with bruises from which it might be reasonably inferred that he had been knocked off the track and killed by defendant's engine. The track was straight at that point for half a mile, possibly more. Part of the back of intestate's head was knocked off. There was no eye-witness to the death, whether he was killed by the engine, or, if so, whether he was on the track or close by it when struck, or whether he was walking or sitting down or lying down on the track. There was no sign of the intestate having been dragged; nor had he been run over by the engine. The killing was at night. There was evidence by plaintiff's witnesses that there was no sign of blood on the cross-ties and some evidence to the contrary," and the court, speaking through the present Chief Justice, said: "If the deceased was either walking or sitting or lying down on the track, this was evidence of contributory negligence. *Hord v.*

Railroad, 129 N. C. 305 [40 S. E. 69]. If walking or sitting down, the engineer (nothing else appearing) had a right to presume he would get off before the train struck him, and there would have been no negligence on the part of the defendant, inferable from the mere fact, without further evidence, that the deceased was killed while on the track, for the engine had the right of way. If deceased had been helpless, lying down on the track, and the engineer, with proper outlook, could have seen him in time to avoid killing him, and did not do so, this would have been negligence rendering the defendant liable, notwithstanding the previous contributory negligence of deceased; and that the track was straight for half a mile or more was evidence to go to the jury that if he had been lying down the engineer, with proper outlook, could have seen him. But there was no evidence tending to show that he was lying down (*McArver v. Railroad*, 129 N. C. 380 [40 S. E. 94]), and the burden of showing that the deceased was helpless on the track was upon the plaintiff. *Hord v. Railroad*, 129 N. C. 305 [40 S. E. 69]. The evidence of some blood on the track (though contradicted by plaintiff's other witnesses) was equally consonant with deceased having been struck while walking or sitting down."

The evidence in this case is much more favorable to the defendant than was the evidence in the case cited, because here the plaintiff has shown that his intestate was sitting on the end of the cross-tie at the time he was struck by the train of the defendant, if it struck him, and is in all material aspects like that in *Upton v. Railroad*, 128 N. C. 173, 38 S. E. 736.

[1] As no presumption of negligence arises from the killing of the deceased, and as the engineer had the right to presume, up to the last moment, he would get off the cross-tie, if he was sitting up, the burden was on the plaintiff to prove that his appearance while on the cross-tie was such as to lead a man of ordinary prudence, in charge of the train, to believe he was unconscious or helpless; and we find nothing in the evidence that amounts to more than conjecture or speculation as to this fact.

The circumstance that the head was bent over at the time the body was found, chiefly relied on by the plaintiff, is explained by the strong probability that a blow causing death could not have been received without making some change in the position of the body; and when death ensued it was natural for the head to drop.

It also appears that several trains passed the body while on the cross-tie without touching it, which would indicate a change in the position of the body after it was struck, if the deceased was killed by a train of the defendant.

[2] We are therefore of opinion that the

evidence is not of such character as to justify submitting it to the jury.

There is a marked distinction between this case and that of *Henderson v. Railroad*, 75 S. E. 1002, at this term. In the *Henderson* Case the killing was admitted, and it was in the daytime. There was evidence that no whistle was sounded; that the deceased was found asleep by the side of the track about two hours before his death; that when aroused he walked up the track in the direction his body was afterwards found, staggering; that when found the body was on one side of the track, the head on the other, one arm under the trestle, and the other badly mangled; that there was blood on the rail; and none of these circumstances appear in this.

[3] The ruling on the admission of a part of the answer is immaterial, as it has no tendency to prove that the deceased was in an apparently helpless condition, but simply that he was sitting on the end of a cross-tie. Affirmed.

(159 N. C. 585)

CULBRETH v. HALL et al.

(Supreme Court of North Carolina. Oct. 16, 1912.)

1. MORTGAGES (§ 39*)—ABSOLUTE DEED AS MORTGAGE—FRAUD—EVIDENCE.

In an action to convert a deed into a mortgage for fraud, evidence held sufficient to go to the jury on the character of the instrument.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. §§ 112, 113; Dec. Dig. § 39.*]

2. MORTGAGES (§ 608½*)—ABSOLUTE DEED AS MORTGAGE—FRAUD—INSTRUCTIONS.

Where, in an action to have an absolute deed declared a mortgage, the gravamen of the action was the fraud of the grantee, and not mutual mistake, a charge that the plaintiff must sustain her allegation, not only by the greater weight of evidence, but by evidence, clear, strong, cogent and convincing, was not erroneous as to defendant, though the court failed to charge that there must be evidence dehors the deed before it could be set aside.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. § 1815; Dec. Dig. § 608½.*]

3. MORTGAGES (§ 608½*)—ABSOLUTE DEED AS MORTGAGE—FRAUD—INSTRUCTIONS.

The failure to charge on the necessity of evidence dehors the deed was not erroneous, where there were facts in evidence inconsistent with the claim of absolute ownership on the part of the defendant, such as gross inadequacy of price, possession retained by plaintiff, and no demand for rent.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. § 1815; Dec. Dig. § 608½.*]

4. LIS PENDENS (§ 24*)—NOTICE OF PENDENCY OF ACTION—EFFECT OF SUMMONS AND COMPLAINT.

Where, in an action to convert a deed into a mortgage for fraud, the complaint contains the names of the parties, the object of the action, and a description of the land to be affected, it has all the requisites of a *lis pendens* notice, and, though no separate and formal notice was filed, a defendant to whom a transfer was made, and who had the deed probated and registered after the issuance of the summons

and the filing of a duly verified complaint, had legal notice of the plaintiff's equity.

[Ed. Note.—For other cases, see *Lis Pendens*, Cent. Dig. §§ 38-46; Dec. Dig. § 24.*]

5. JUSTICES OF THE PEACE (§ 130*)—JURISDICTION.

Where a mortgagor remains in possession, he is not a tenant, and the mortgagee has no right under the landlord and tenant act to a summary proceeding, so that, where in ejectment before a justice against one who claimed as mortgagor in an action previously commenced to have a deed declared a mortgage for the fraud of the mortgagee, such mortgagor pleaded that the justice had no jurisdiction on the ground that the title relied on is in controversy, and averred her title as set out in her complaint, and there was no evidence that she had attorned to the plaintiffs, the justice's judgment which did not pass on the subject of her tenancy, but simply directed her removal, was void, and would not operate as an estoppel in the previously commenced suit.

[Ed. Note.—For other cases, see *Justices of the Peace*, Dec. Dig. § 130.*]

6. MORTGAGES (§ 608½*)—DEED ABSOLUTE IN FORM—OUSTER FROM REALTY—DAMAGES.

Where, in an action to have a deed declared a mortgage, the plaintiff recovered her entire estate in the property subject to the mortgage lien, she was not also entitled to have the value of her equity of redemption, but merely the rents from the date when she was ousted from the property by summary proceedings until the time when it was restored to her, together with such other actual damages as she may have sustained by reason of her wrongful ouster.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. § 1815; Dec. Dig. § 608½.*]

Appeal from Superior Court, Sampson County; Carter, Judge.

Action by Jane Culbreth against M. M. Hall and another. From a judgment for plaintiff, defendants appeal. Modified and affirmed.

These issues were submitted:

"(1) Was Jane Culbreth induced to sign the deed to M. M. Hall, instead of a mortgage, by the fraud of defendant M. M. Hall, as alleged in the complaint? Answer: Yes.

"(2) What amount did defendant Hall pay Melvin at the time the deed was executed by Melvin to the plaintiff, Jane Culbreth? Answer: \$319.

"(3) Did the defendant Wilson have legal notice of plaintiff's cause of action by her complaint on file as a *lis pendens*, prior to the registration of his said deed for said lands? Answer: Yes.

"(4) Is plaintiff estopped by the proceedings and judgment of R. H. Hubbard, J. P.? Answer: No.

"(5) What damages has plaintiff sustained by reason of the defendant Hall failing to permit the plaintiff to redeem said land and wrongfully conveying same to his codefendant, Wilson? Answer: \$361.17."

From the judgment rendered the defendants appealed.

Faison & Wright, of Clinton, for appellants. George E. Butler, of Clinton, for appellee.

BROWN, J. This action is brought to convert a deed into a mortgage, upon the ground of fraud, the plaintiff averring that she was induced by the fraud of the draughtsman to sign the instrument, thinking it was a mortgage, instead of an absolute deed. We have examined the 18 assignments of error, and find nothing in the record that justifies us in directing another trial.

[1] 1. It is contended that his honor should have sustained the motion to nonsuit. The plaintiff's evidence tends to prove that she purchased a dwelling house and lot from one Melvin, and owed him a balance of \$319 on it; that the property was worth about \$700; that she applied to defendant Hall for a loan of \$319; that, after some "chaffering," defendant agreed to lend plaintiff \$319 on two years' credit at interest, and that Hall paid said sum to Melvin for her, and Melvin executed a deed to plaintiff. The deed from plaintiff to Hall was written by his son, James Hall, a notary public, who also probated it. The plaintiff testifies positively that the transaction was a loan, and not a sale, and that the notary fraudulently substituted an absolute deed for a mortgage. There is abundant evidence to support the plaintiff's own testimony. It is in evidence that she is an illiterate, ignorant colored woman of excellent character, and the "washer-woman" for Hall's family; that she had purchased the property from Melvin and made payments on it; that the exact sum she obtained from Hall was the sum she owed Melvin; that Hall agreed to lend it to her for two years; that plaintiff remained in possession for twelve months, without any demand for rent; that she listed the property for taxes, and claimed it as her own. The motion to nonsuit was properly denied.

[2] 2. It is contended his honor erred in not charging the jury that there must be evidence "dehors the deed" before it can be set aside. His honor charged the jury that the plaintiff must sustain her allegations, not only by the greater weight of evidence, but by evidence clear, strong, cogent, and convincing. The theory upon which this case was tried was that the defendant Hall fraudulently and falsely substituted an absolute deed for a mortgage and took advantage of plaintiff's ignorance. The gravamen of the action is a pure fraud, and not mutual mistake. In view of this, it may be open to doubt as to whether his honor did not err on the side of the defendants as to the quantum of proof. In *Harding v. Long*, 103 N. C. 1, 9 S. E. 445, 14 Am. St. Rep. 775, the subject is elaborately discussed by Justice Avery, and it is held that, where it is sought to have a deed declared void because its execution was obtained by false and fraudulent representations of the grantee, the degree of proof, as stated by his honor in the case at bar, is not required. We think his honor's charge under the facts of this case is not

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

justly open to exception by the defendants. *Cobb v. Edwards*, 117 N. C. 245, 23 S. E. 241; *Avery v. Stewart*, 136 N. C. 426, 48 S. E. 775, 68 L. R. A. 776; *Ely v. Early*, 94 N. C. 1; *Wilson v. Land Co.*, 77 N. C. 447.

[3] Besides, there are facts in evidence dehors the deed, and inconsistent with the claim of absolute ownership upon the part of Hall, such as gross inadequacy of price; possession retained by plaintiff, and no demand for rent. *Kelly v. Bryan*, 41 N. C. 287.

[4] 3. It is contended that his honor erred in holding that the defendant Wilson had legal notice of the plaintiff's equity. His honor correctly directed the jury upon the record evidence to answer the third issue, "Yes." The summons was issued and a duly verified complaint filed on January 13, 1911. The deed from Hall to Wilson was not probated or registered, nor is there any proof of its delivery until January 16, 1911. The complaint has all the requisites of a *lis pendens*, and contains the names of the parties, the object of the action, and a description of the land to be affected. It was therefore unnecessary to file a separate and formal notice. *Arrington v. Arrington*, 114 N. C. 151, 19 S. E. 351; *Collingwood v. Brown*, 106 N. C. 362, 10 S. E. 868.

[5] 4. It is contended, further, that a summary proceeding in ejectment before a justice of the peace operates as an estoppel, and precludes the plaintiff from prosecuting this action. The record shows that the proceeding aforesaid was commenced on the 20th of February, 1911, and this action was commenced and the complaint filed on the 13th of January, 1911. In the summary, proceeding the defendant, Jane Culbreth, pleaded that the justice of the peace had no jurisdiction, for that the title to real estate is brought into controversy, and she set out in her answer the pendency of this suit in the superior court of Sampson county, averring all of the several facts which are alleged in her complaint in this action. There is no evidence that she ever attorned to Hall, and no claim by Wilson that she ever attorned to him. On the contrary, she stoutly denied any tenancy, but averred that she went into possession as a purchaser from Melvin, and has never surrendered that possession to any one. It is to be observed that the justice of the peace did not find it a fact that Jane was a tenant of either Hall or Wilson, but, without any such adjudication, simply ordered that she be removed from the premises.

It is contended by the counsel for the plaintiff that this summary proceeding was a part of the fraudulent scheme to "oust" the plaintiff from her property, and there is color for such allegation, but in our view the whole proceeding was void on its face, in view of the plea of title set up by the defendant in the said proceeding, and in the ab-

sence of any adjudication of tenancy by the justice of the peace. It appears from that record that the justice did not pass on that question, but simply directed the removal of Jane from her property. The superior court had prior to this assumed jurisdiction over the whole subject-matter, as well as over the persons interested, and its judgment is necessarily final. In speaking of estoppel arising from the possession of landlord and tenant, Mr. Justice Hoke says: "It is incident to the tenure and the enjoyment of the right, after the relationship has ended and the enjoyment has ceased in the one case, or the possession has been surrendered in the other, the question is then at large, and it is open to the tenant to show the truth of the matter." *Tise v. Whitaker-Harvey Co.*, 144 N. C. 514, 57 S. E. 212. It is settled that the Landlord and Tenant Act does not apply to a mortgagor who is allowed to remain in possession, and on demand after default refuses to surrender possession; and the provisions of that act cannot be extended by any contrivance so as to give to the mortgagee the benefit of having summary proceedings. *Greer v. Wilbar*, 72 N. C. 593; *McCombs v. Wallace*, 66 N. C. 481.

[6] 5. There are some exceptions relating to the fifth issue in respect to the measure of damage which it is not necessary to consider. We think his honor applied the proper rule of damage in the event that the plaintiff had lost her equity of redemption by the fraudulent conduct of Hall, but that is not the case, for she has recovered her entire estate in the property as against both of these defendants, subject to the lien of \$319 and interest. Therefore she is not entitled to recover the value of her equity of redemption as assessed under the fifth issue, but she is entitled to recover of these defendants the rents of the property from the date when she was "ousted" up to the time when it shall be restored to her, together with such other actual damages as she may have sustained by reason of her wrongful "ouster," which sum will be credited upon the \$319.

At the next term of the superior court the presiding judge will submit an issue in order that such damages and rents may be ascertained.

The judgment of the superior court is modified and affirmed. The costs will be taxed against the defendants.

Affirmed.

(160 N. C. 205)

BERGER v. SMITH et al.

(Supreme Court of North Carolina. Oct. 16, 1912.)

1. NUISANCE (§§ 65, 72*) — INJUNCTION — PROOF.

The court will not enjoin the erection of a sawmill which is not a nuisance per se, but is of special benefit to the public, even though its

erection be prohibited by a city ordinance, where plaintiff does not offer tangible, and not mere speculative, proof that it will be a nuisance in fact, and show special injury peculiar to himself, especially where it strongly appears that the object of the suit as well as of the ordinance whose passage plaintiff secured was to prevent the defendant becoming a local business rival of plaintiff.

[Ed. Note.—For other cases, see Nuisance, Cent. Dig. §§ 158-160, 170, 171, 164-169; Dec. Dig. §§ 65, 72.*]

2. MUNICIPAL CORPORATIONS (§ 63*) — ORDINANCES—NUISANCE—POWER OF COURT.

The power to declare by a city ordinance what shall constitute a nuisance is not so absolute as to deprive the court of its power to determine whether such an ordinance is reasonable in its application to any particular case.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 155, 1378, 1379; Dec. Dig. § 63.*]

3. MUNICIPAL CORPORATIONS (§ 63*) — ORDINANCES—VALIDITY.

Any city ordinance may be declared void if in itself or because of the peculiar facts and circumstances which give rise to its adoption, or with reference to which it must be enforced, it will be unreasonable and oppressive in its operation.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 155, 1378, 1379; Dec. Dig. § 63.*]

4. NUISANCE (§ 59*)—DEFINITION.

A "nuisance" is confined to such matters of annoyance as the law recognizes, and for which it gives a remedy by way of redress or abatement, or in a proper case, by restraining process.

[Ed. Note.—For other cases, see Nuisance, Cent. Dig. §§ 135, 136; Dec. Dig. § 59.*]

For other definitions, see Words and Phrases, vol. 5, pp. 4855-4864; vol. 8, p. 7734.]

Appeal from Superior Court, Wayne County; Peebles, Judge.

Action by N. B. Berger against R. H. Smith and another. From a nonsuit ordered, plaintiff appeals. No error.

M. T. Dickinson, of Goldsboro, and Winston & Biggs, of Raleigh, for appellant. Langston & Allen, of Goldsboro, for appellees.

WALKER, J. This case was before us at a former term, and is reported in 156 N. C. 323, 72 S. E. 376. We then held that the sawmill which it was alleged the defendant was about to erect in violation of the ordinance was not a nuisance per se, and we remanded the case in order that it might be submitted to a jury to ascertain if it was a nuisance in fact. At the trial, the court, upon plaintiff's evidence, ordered a nonsuit, and plaintiff appealed.

[1] It appeared by the evidence that the mill had not been built, but that defendant only intended to build it, and plaintiff testified that its operation, if it was built, "would be annoying to his family by reason of noise, smoke and flying trash, and would expose his property to fire." He also stated that it would depreciate the value of his property and other property in the same

block. There was more evidence to the same effect. There are some things which, in their nature, are nuisances and which the law recognizes as such. There are others which may or may not be so; their character, in this respect, depending on circumstances. This case would seem to fall directly within the principle as applied in *Dorsey v. Allen*, 85 N. C. 358, 39 Am. Rep. 704. The facts of the two cases are almost identical, and, in substance, they are sufficiently alike to make that case a controlling authority. In the *Dorsey* Case plaintiff sought to enjoin the erection of a planing mill and cotton gin, which had already been begun, and he alleged, as does the plaintiff in this case, that the operation of the mill and gin, when finished, would render their dwellings not only uncomfortable, but unfit for habitation, by reason of the noise of the machinery, that they would be exposed to increased perils from fire, and that their property would be greatly impaired in value. The court, approving the order of the judge refusing an injunction to stop the progress of the work in its early stages, as being unnecessary for the protection of the plaintiff, said: "Before operations were commenced, there was no increased danger from fire, and no disturbing noise made requiring judicial interference, and the relief could be obtained after the results were definitely ascertained, if the plaintiffs should be found entitled to it. The nuisance, if incidental and not necessary to the proper conduct of the business, or inherent and inseparable from it, could then be abated, and the defendant's knowledge of the pending suit would take from him all just cause of complaint when it should be so adjudged. But it would be an unwise exercise of power upon such uncertainty as to the practical working of an undertaken enterprise and its consequent effects, for the court to interpose and prevent its being carried out, with its promises of substantial and lasting benefits to a community, because of the discomfort and inconvenience a single family or a small number of persons may experience from its presence in their vicinity, so inconsiderable when weighed in the scale with the public interests. While it is true that a business lawful in itself may become so obnoxious to neighboring dwellings as to render their enjoyment uncomfortable, whether by smoke, noxious and offensive odors, noises, or otherwise, as to justify the protecting arm of the law, yet there must be the ascertained and not probable effects apprehended. When the anticipated injury is contingent and possible only, or the public benefit preponderates over the private inconvenience, the court will refrain from interfering." The following authorities support the same view: "Where an injunction is asked to restrain the construction of works of such a nature that it is impossible for

the court to know, until they are completed and in operation, whether they will or will not constitute a nuisance, the writ will be refused in the first instance. Nor in such a case will the motion for an interlocutory injunction be allowed to stand over until the work is so far executed that its character may be determined. It is proper, however, under such circumstances to dismiss the bill without prejudice to any further application which plaintiffs may think themselves entitled to make." 1 High on Injunctions (4th Ed.) § 743. "A court of equity will grant injunctions to prevent undoubted and irreparable mischief; and it may thus act on the application of individuals, not only in the case of a private nuisance, but where the individuals suffer special injury, in the case of public nuisances also. But the courts will only exercise this power in a case of necessity, where the evil sought to be remedied is not merely probable, but undoubted. And it will be particularly cautious thus to interfere where the apprehended mischief is to follow from such establishments and erections (as, for instance, a public mill) as have a tendency to promote the public convenience." Per Gaston, J., in *Barnes v. Calhoun*, 37 N. C. 199. This was said by the learned judge after confessing that the strong leaning of the court's opinion was with those who thought that the apprehensions of the plaintiff were not without foundation. *Ellison v. Commissioners*, 58 N. C. 57, 75 Am. Dec. 430, furnishes another illustration of the principle. The plaintiff there sought to enjoin the laying off of his land for a cemetery. The court strongly intimated that a cemetery was not a nuisance *per se*, and would not be either a public or private nuisance, in fact, if it was properly arranged and sufficiently drained and in other respects carefully supervised. If it threatened or proved to be actually deleterious to the health of the people of the vicinity, the case would be different. The word "nuisance" was held, in its legal sense, to be confined to such matters of annoyance as the law recognizes and for which it gives a remedy by way of redress or abatement, or in a proper case, by restraining process. "The unpleasant reflections," said Judge Manly, "suggested by having before one's eyes constantly recurring memorials of death is not one of these nuisances. Mankind would, by no means, agree upon a point of that sort, but many would insist that suggestions thus occasioned would, in the end, be of salutary influence. The deathhead is kept in the cell of the anchorite, perpetually before his eyes as a needful and salutary monitor. The nuisance which the law takes cognizance of is such matter as, admitting it to exist, all men, having ordinary senses and instincts, will decide to be injurious." "The subject of nuisances, private as well as public, has undergone much discussion in the

courts during the past few years. Amongst other principles established is one which we think definitive of the rights of the parties now before the court. It is settled in respect to private nuisances, that where the nuisance apprehended is dubious or contingent, equity will not interfere, but will leave complainant to his remedy at law"—citing *Drewry on Injunctions*, 242; *Barnes v. Calhoun*, *supra*; *Atty. Gen. v. Lea*, 38 N. C. 301; *Simpson v. Justice*, 43 N. C. 115. In *Atty. Gen. v. Lea*, *supra*, the court held: "A court of equity will refuse to interfere by injunction in the case of the erection of a mill dam, unless it is shown that it will be a public nuisance, or, if it will be a private nuisance only to an individual, unless it manifestly appears that so great a difference will exist between the injury to the individual and the public convenience, as will bear no comparison, or that the erection of the dam will be followed by irreparable mischief." The court refused an injunction against the erection of a turpentine distillery in *Simpson v. Justice*, *supra*, because the nuisance was not certain, but only contingent, and required the fact of nuisance to be first established. It was said therein that the jurisdiction of the court to enjoin in the case of private nuisance is of recent origin, and is always exercised sparingly and with great caution, because, if, in fact, there be a nuisance, there may be an adequate remedy at law, depending somewhat, of course, upon the nature of the nuisance, citing *Atty. Gen. v. Nichols*, 1 Ves. 338, and an anonymous case before Lord Thurlow in 1 Vesey, Jr., 140. There is an obvious difference, said Judge Pearson, between a thing which is a nuisance in itself and one which may or may not be a nuisance, according to the manner in which it is used; a turpentine distillery and like structures being of the latter class. If they make noises or generate "smoke, blacks, and soot," or tend to diminish property values, those facts must appear by proof, and not be left to mere conjecture. No one should be prevented by a resort to this extraordinary process of the court on the part of his neighbor, with nothing more than a supposed grievance, from engaging in an enterprise which is not only lawful, but beneficial to the public, because of the unfounded fear or apprehension of the plaintiff that the value of his property may be impaired or that he may suffer some inconvenience from smoke and noise. His appeal for the intervention of the "strong and omnipotent arm of the court" is answered by Chief Justice Pearson in *Hyatt v. Myers*, 73 N. C. 232: "If a man, instead of contenting himself with the quiet and comfort of a country residence, chooses to live in a town, he must take the inconvenience of noise, dust, flies, rats, smoke, soot, and cinders, etc., and he cannot in law complain of the owner of an adjoining lot, by reason of

smoke, soot, and cinders, caused in the use and enjoyment of his property; provided the use of it is for a reasonable purpose, and the manner of using it such as not to cause any unnecessary damage or annoyance, and he takes all prudent precautions to avoid annoying his neighbors, and even then neither a court of law nor a court of equity will treat it as a nuisance unless the damage is material, so as to exceed what the owner of property ought to be allowed to put upon the owner of property adjoining, in the reasonable enjoyment of his own property, under the maxim, 'Sic utere tuo ut alienum non laedas,' which depends upon the circumstances of the case. 'Does the nuisance arise from an establishment made for personal gratification or mere private profit? Or does it promote the convenience of the public?' What is the extent of the damages? If slight, the courts of law may treat it as a nuisance, and give a remedy in damages. If great and irreparable, so that compensation cannot be made, then a court of equity will interfere by injunction. These general principles are announced and discussed in *Dargan v. Waddill*, 31 N. C. 244, 49 Am. Dec. 421, a case showing when courts of law give relief, and in *Eason v. Perkins*, 17 N. C. 38, a case showing when courts of equity will interfere by the extraordinary writ of injunction." A good legal definition of an actionable nuisance will be found in *Dargan v. Waddill*, supra: "A stable in a town lot is not, like a slaughter pen or a hog sty, necessarily or prima facie a nuisance. But if it be so built, so kept, or so used as to destroy the comfort of persons owning and occupying premises and impairing their value as places of habitation, it does thereby become a nuisance. If the adjacent proprietors be annoyed by it in any manner which could be avoided, it becomes an actionable nuisance, though a stable in itself be a convenient and lawful erection." See, also, *Wilder v. Strickland*, 55 N. C. 386; *Privett v. Whitaker*, 73 N. C. 554, in which Justice Rodman classifies nuisances. Joyce in his treatise on Nuisances, § 102, states the same general rule: "The fact that a business which is lawful may become a nuisance after it has been commenced is not a sufficient ground for enjoining the same. It must clearly appear to the satisfaction of the court that it will become a nuisance. So it has been said in this connection: 'Before a court of equity will restrain a lawful work from which merely threatened evils are apprehended, the court must be satisfied that the evils anticipated are imminent and certain to occur. An injunction will not issue to prevent supposed or barely possible injuries.'" All the authorities tend to the conclusion that plaintiff must offer tangible proof of the fact of nuisance, when there is no nuisance per se, before the court will interfere to stop the erection of a building or the prosecution of a lawful business,

especially if it will be beneficial to the public, and in the latter case not unless the private injury is greater in proportion than the public benefit. The court will not act upon speculative proof, or such as furnishes ground only for a conjecture.

The plaintiff has not brought his case within these principles, so as to induce the court to interfere in his behalf. We have said in this case at the former term that the mill in question is not a nuisance per se, and the authorities, as we have shown, sustain that view. We also held that he must prove that it would be, in fact, a nuisance. This he had not done. It is evident that plaintiff, when testifying, was merely giving his opinion or conjecture as to what might occur should the mill be erected. In other words, he is simply declaring that to be a nuisance per se which the law says is not such a nuisance. How can be know, at this time, whether the mill, if properly built and carefully operated, will injure him in such a way as to be a legal nuisance? His fears and apprehensions of injury may be purely imaginary and utterly groundless, for it is possible, or even probable, that the defendant can so construct and operate it as to avoid any substantial injury to the plaintiff. It appears, also, that plaintiff has built and operated a cotton gin since the dwellings were erected within 50 yards of them, which is nearer than the mill will be, and yet no complaint has been made against it. There is also strong proof that the ordinance was procured at the instance of the plaintiff for the purpose of destroying the competition of defendant, his business rival, with him, and we may add that it also tends strongly, if not conclusively, to show that the ordinance was adopted, not to protect the public or individuals against a threatened nuisance, but in furtherance of plaintiff's scheme to thwart the efforts of his business competitor and thus cripple him. Although this is not to be taken as conclusive against plaintiff's supposed equity, it is matter which might be considered and turn the scale in a doubtful case, and tends, certainly, to show that his apprehensions of injury are either not entertained at all, or are greatly exaggerated. *Ellison v. Commissioners*, supra. As we said in *Durham v. Eno Cotton Mills*, 141 N. C. 615, 54 S. E. 453, 7 L. R. A. (N. S.) 821: "When an injunction is sought to restrain that which it is apprehended will create a nuisance, the proof must show that the apprehension of material and irreparable injury is well grounded upon a state of facts from which it appears that the danger is real and imminent." There is no proof in this case which amounts to more than a mere guess that the mill stack will emit an unusual quantity of smoke or cinders or that the mill will be so constructed as to produce disagreeable noises, or that it will seriously impair the

value of adjacent property. It did not occur to the plaintiff while operating his own gin, under like circumstances, that such a result would follow, and his fear only arose, as suggested, with his apprehension of a dangerous rivalry in business quickened him into activity, and he became suddenly alarmed about the consequences of something which he had been substantially doing himself for about ten years. If the fears, real or assumed, of the plaintiff, as to the effects of the proposed mill upon the comfort of his family and the value of his property, be realized, he will not be without redress. The courts of law will be open to him, and he will go into them with more grace, having by these proceedings put the defendant on his guard. *Wilder v. Strickland*, supra.

[2] We have not made any special reference to the ordinance, as we hold that there is no sufficient evidence in law of any nuisance in fact, and this is the question we ordered to be tried below. As in harmony with the view then taken of the case by this court, we may add these authorities. Judge Dillon says, with reference to the power of a municipal corporation to pass ordinances for the suppression or abatement of nuisances: "Such powers, conferred in general terms, cannot be taken to authorize the extrajudicial condemnation and destruction of that as a nuisance which, in its nature, situation or use, is not such." 1 Mill. Mun. Corp. (4th Ed.) §§ 95, 374. And in *River Rendering Co. v. Behr*, 77 Mo. 91, 46 Am. Rep. 6, we find the following safe and conservative rule stated: "We do not deny that the General Assembly may confer upon municipal authorities the power to abate nuisances, and to declare what shall be deemed nuisances, but the latter power cannot be so absolute as to be beyond the cognizance of the courts to determine whether it has been reasonably exercised in a given case or not"—citing *Yates v. Milwaukee*, 10 Wall. 497, 19 L. Ed. 984, in which the Supreme Court of the United States, through Mr. Justice Miller, said: "But the mere declaration by the city council of Milwaukee that a certain structure was an encroachment or obstruction did not make it so, nor could such declaration make it a nuisance, unless it in fact had that character." The ordinance in this case was manifestly directed against this particular building, and had the effect, if not intended, to prevent the defendant, by the erection of his mill, from injuring the business of his local rival; but, even if intended to promote the public welfare and safety, it has not been shown to be a nuisance, and this sustains the nonsuit and the order dissolving the injunction, whatever the ground of his honor's decision may have been. This was not an effort of the commissioners to establish fire

limits, conceding that they have the power, under the town charter, or inherently, to do so, but to declare that to be a nuisance which is not one per se, nor, in fact, so far as the proof tends to show. We do not question the power of the municipal board to enact ordinances prohibiting the erection of dangerous buildings in proper cases.

[3] But any ordinance may be declared void if, in itself, or because of the peculiar facts and circumstances which gave rise to its adoption, or with reference to which it must be enforced, it will be unreasonable and oppressive in its operation. That is what, in substance, we formerly decided in this case. 156 N. C. 823, 72 S. E. 376. Plaintiff cannot maintain an action against defendant for committing a public nuisance, unless he shows special injury peculiar to himself, and this he has not done. High on Injunctions (4th Ed.) §§ 757, 761, 762, 764, 828. We have not overlooked the fact that defendant has built his gin and mill on an adjoining lot about the same distance from plaintiff's lot as the other mill, if erected, would have been, and there has been no word of protest against it, so far as appears.

This case is distinguishable from *Raleigh v. Hunter*, 16 N. C. 12, *Vickers v. Durham*, 132 N. C. 880, 44 S. E. 685, and *Cherry v. Williams*, 147 N. C. 452, 61 S. E. 267, 125 Am. St. Rep. 566, 15 Ann. Cas. 715, in which the public health was threatened by the building of a milldam, or a sewage disposal plant, or a hospital for the treatment of tuberculosis, where the evidence was of a satisfactory and tangible character, and created strong probability that the act proposed to be enjoined would, if committed, constitute a nuisance, and the injury was imminent. Our case belongs to a class quite different and represented by *Simpson v. Justice*, 43 N. C. 115, *Hyatt v. Myers*, 71 N. C. 271, s. c., 73 N. C. 232, *Dorsey v. Allen*, supra, *Hickory v. Railroad*, 143 N. C. 451, 55 S. E. 840, and others to be found in our reports, in which the injunction was prayed against buildings or enterprises of great public utility or benefit. The distinction between the two classes is clearly shown by *Justice Hoke in Cherry v. Williams*, supra.

The record discloses no error in the case. No error.

(160 N. C. 286)

WOMACK v. CARTER.

(Supreme Court of North Carolina. Oct. 23, 1912.)

1. ACTION (§ 38*)—SINGLE CAUSE OF ACTION.

A complaint, in an action for the recovery of money, which alleges in one count that defendant's testator took possession of the land of plaintiff, leased the same and collected the rents for the use of plaintiff to the amount demanded, now held by defendant for his own use, and which alleges in another count that the

land of plaintiff was leased by defendant's testator to tenants, and that he wrongfully converted to his own use the rents collected by him, and which alleges in another count that defendant's testator wrongfully took possession of the land by his tenants, and unlawfully withheld the same from plaintiff, a reasonable rental value for the land being the sum demanded, states but one cause of action in several ways, based on one and the same transaction, and seeking in the end the recovery of the sum demanded, and is good as against a demurrer.

[Ed. Note.—For other cases, see Action, Cent. Dig. § 549; Dec. Dig. § 38.*]

2. TRESPASS (§ 40*)—COMPLAINT—SUFFICIENCY—DESCRIPTION OF PROPERTY.

A complaint, in an action for the recovery of money, which alleges that defendant's testator took possession of plaintiff's land, situated in a designated township and county, and leased the same and collected the rents, and failed to account for them, but converted them to his own use, etc., sufficiently describes the land as against a demurrer.

[Ed. Note.—For other cases, see Trespass, Cent. Dig. §§ 80-88; Dec. Dig. § 40.*]

3. TRESPASS (§ 40*) — HILARY RULES OF PLEADING—APPLICABILITY.

The Hilary rules of pleading have never been in force in North Carolina.

[Ed. Note.—For other cases, see Trespass, Cent. Dig. §§ 80-88; Dec. Dig. § 40.*]

4. PLEADING (§ 367*)—UNCERTAINTY—REMEDY—MOTION.

Where the complaint in an action for the recovery of money alleged to have been collected by defendant's testator, who took possession of plaintiff's land, leased it, and detained the rent or converted the same to his own use, is uncertain in the description of the land, the remedy of the defendant is by motion for a more definite and certain statement under Revision 1905, § 496.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1173-1193; Dec. Dig. § 367.*]

5. PLEADING (§ 193*) — COMPLAINT — SUFFICIENCY AS AGAINST DEMURRER.

A complaint cannot be overthrown by a demurrer unless it is wholly insufficient, and it must be fatally defective before it will be rejected on demurrer.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 428-443; Dec. Dig. § 193.*]

6. MONEY RECEIVED (§ 17*) — COMPLAINT — SUFFICIENCY.

A complaint in an action for the recovery of money, which alleges that defendant's testator wrongfully took possession of plaintiff's land by tenants, and unlawfully withheld the same from plaintiff, a reasonable rental for the land being a specified sum, states a cause of action for money had and received to the use of plaintiff as against a demurrer.

[Ed. Note.—For other cases, see Money Received, Cent. Dig. §§ 54-68; Dec. Dig. § 17.*]

7. PLEADING (§ 367*)—UNCERTAIN PLEADINGS—MOTION TO MAKE SAME MORE DEFINITE AND CERTAIN—DISCRETION OF COURT.

A motion to make a pleading more definite and certain is addressed to the discretion of the court.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1173-1193; Dec. Dig. § 367.*]

Appeal from Superior Court, Lee County; Peebles, Judge.

Action by Winder C. Womack against A. G. Carter, administrator. From a judgment

sustaining a demurrer to the complaint, plaintiff appeals. Reversed.

Hoyle & Hoyle and J. W. Ruark, all of Sanford, for appellant. McIver & Williams, of Sanford, for appellee.

WALKER, J. Plaintiff brought this action to recover the sum of \$1,140, and in his complaint he states his cause of action in three different ways: (1) That defendant's testator took possession of certain land situated in Sanford township, Moore county (now Lee county), the property of the plaintiff, leased the same to tenants, and collected the rents for the use of the plaintiff, to the amount of \$1,140. That said amount has never been paid to plaintiff, but is now held by defendant for his use. (2) In the next count, if it may be so called, it is alleged, in substantially the same words, that the land of plaintiff was leased by defendant's testator to tenants, and the rents collected by him; the only difference between the two counts, if there be a difference, being that it is alleged in the second count that the said real estate belonged to plaintiff and the rents were payable to him, but instead of paying them to plaintiff, the defendant's testator collected the same, to the amount of \$1,140, and wrongfully converted them to his own use. (3) The third count alleges, in substance, that defendant's testator wrongfully took possession of the land by his tenants, and unlawfully withheld the same from plaintiff; a reasonable rental for the land being \$1,140.

[1] The defendant demurred upon the ground that, while the complaint alleges a wrongful possession of the land by defendant's testator and demands the rents and damages, it does not describe the premises with sufficient certainty, so that they may be identified by the defendant and he may intelligently answer the complaint. Plaintiff moved for judgment on what he calls the first and second causes of action. This motion was denied, and properly so, as the complaint states but one cause of action in three several ways. It is all one and the same transaction, and plaintiff seeks, in the end, to recover \$1,140, which was received by the defendant as rent for his lands. *Simpson v. Lumber Co.*, 133 N. C. 95, 45 S. E. 469. Whether it was received under a contract of lease between plaintiff and defendant's testator, or whether the testator entered upon the land wrongfully and received its rental value, can make no difference. Plaintiff would be entitled to recover the \$1,140 in either view; in the last, because he could waive the tort and recover in contract for money had and received. For the same reason the court should not have sustained the demurrer, as it did. In the first place, the entire complaint showed clearly and beyond any possibility of doubt, and de-

defendant could surely not have been misled thereby, that plaintiff was seeking to recover the rental value of the land, which had been collected from his tenants by defendant's testator.

[2, 3] But the demurrer is based upon the specific ground that the land is not sufficiently described, and is bad if there is a sufficient description, even if that kind of objection can be taken by demurrer. The land is described as belonging to plaintiff, and situated in Sanford township, Lee county, and the same which defendant's testator took into his possession and leased to tenants, and for which he collected the rents in the month of May, 1910. This would seem to be sufficiently definite in an action of this nature. In *Whitaker v. Forbes*, 68 N. C. 228, it was alleged that the defendant unlawfully and forcibly entered upon a tract of land in Enfield, Halifax county, the property of plaintiff, and did then and there pull down and destroy a frame house of great value, for which damages for the tort were prayed. Defendant demurred upon the ground "that the complaint does not sufficiently describe the lot and premises on which the trespass were done." With reference to the ruling by which the demurrer was sustained, this court, by Justice Boyden, said: "The sole question in the cause is as to description of the land and premises in an action of trespass. It is not necessary to decide how this would be in an action for the recovery of the land; but we think the authorities are abundant that the description is all that is required in an action for trespass *quare clausum fregit*. It is true that by the rules of pleading in England adopted at Hilary term, 4 Wm. IV, in trespass *quare clausum fregit*, the name of the close or abutments must be stated, or a special demurrer will be sustainable; but those rules have never been in force in our state, having been adopted since our separation from the mother country. We presume that it was an omission to notice the fact that these rules were not in force here, which misled the defendant in filing a demurrer in this case, as it is clear that previous to the adoption of this rule it was entirely unnecessary to describe the locus by name or abutments. See 1 *Lan.* 847, note 1, where it is expressly said 'that it is sufficient for the plaintiff to allege the trespass to have been done in a ville or parish only, without mentioning any place, for it is not material; and if the plaintiff does mention a place, the defendant may justify in another place without a traverse, and the plaintiff must ascertain a place in a new assignment.' In *Buller's Nisi Prius*, page 92, it is said that, 'if in trespass *quare clausum fregit* a man declare generally in such a ville, the defendant may plead *liberum tenementum*, and, if the plaintiff traverse it, it is at his peril; for the defendant, if he have any part of the land in the whole town, he shall justify it there, and therefore

the better way for the plaintiff is to make a new assignment.' * * * If in an action *quare clausum* the plaintiff set out the abutments of his close, he must on the trial prove every part thereof. *Buller's Nisi Prius*, 98. This makes it hazardous to attempt such description. It has been the unvarying practice in our state for the last 50 years to declare as in the case before us, and in such action it has never been deemed necessary to describe the close by name or by the abutments."

[4] We do not think the defendant could well be misled to his prejudice by the description; but, if he was uncertain as to the nature of the particular charge against him, he should have moved the court for a more definite and certain statement of the cause of action, under *Revisal*, § 496. *Allen v. Railroad*, 120 N. C. 550, 27 S. E. 78. The court no doubt would have granted the application, if made in good faith.

[5, 6] Again: The demurrer was evidently directed against the last statement in the complaint, which we may, for the sake of argument, call a count, and the court erred in sustaining the demurrer as to that detached portion, as upon the whole complaint it could be seen that a sufficient cause of action was alleged. A complaint cannot be overthrown by a demurrer, unless it is wholly insufficient. It must be fatally defective before it will be rejected as bad. *Blackmore v. Winders*, 144 N. C. 216, 56 S. E. 874, and cases cited; *Bank v. Duffy*, 156 N. C. 87, 72 S. E. 96; 4 *Enc. of Pl. & Pr.*, 74. Plaintiff has stated a good cause of action for money had and received to his use (27 *Cyc.* 878), and also for its conversion (*Paalzow v. Estate Co.*, 104 N. C. 439, 10 S. E. 527; *Womble v. Leach*, 88 N. C. 86). The demurrer should have been overruled. If defendant, when the case goes back, still entertains, in good faith, a doubt as to what land is meant, the court may require a more specific description for his enlightenment. We do not know but that the court should be liberal in requiring more definite statement in a pleading, where the application for a better one is made, not vexatiously, but for the sake of being better informed as to exact nature of the allegation, so that the party who seeks more light may the better answer the charge.

[7] This motion, of course, is addressed to the discretion of the court. *Allen v. Railroad*, 120 N. C. 548, 27 S. E. 76; *Smith v. Summerfield*, 108 N. C. 284, 12 S. E. 897; *Conley v. Railroad*, 109 N. C. 692, 14 S. E. 303. Without expressly commending or approving the form in which plaintiff has stated his cause of action in the complaint, good though it may be, we are of the opinion that the defendant's remedy, if he had any just ground to ask for a better pleading, was by motion, and not by demurrer. The case is remanded, in order that the parties may proceed as they may be advised. We reverse

the judgment sustaining the demurrer, but without prejudice to the right of plaintiff to plead de novo, if so minded, or of defendant to move for a more definite statement of the cause of action, even if it lacks in certainty or fullness. We leave the matter of amendment to the discretion of the judge.

Reversed.

(150 N. C. 536)

CAMPBELL v. RALEIGH & C. R. CO.

(Supreme Court of North Carolina. Oct. 23, 1912.)

LIMITATION OF ACTIONS (§ 55*)—DAMAGES TO LAND—ACCRUAL OF CAUSE.

Where a railroad embankment, alleged to have caused damage to plaintiff's land, was constructed in 1901, and at the time of its erection produced the same physical conditions necessarily causing the same substantial injury and interference on plaintiff's land that ever since existed, a suit for damages, not instituted until September 17, 1908, was barred by Revisal 1905, § 394, subsec. 2, limiting suits for damages caused by the construction of a railroad, or repairs thereto, to five years after the cause of action accrued.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 299-306; Dec. Dig. § 55.*]

Appeal from Superior Court, Robeson County; Peebles, Judge.

Action by Pink Campbell against the Raleigh & Charleston Railroad Company to recover damages to plaintiff's land caused by the building of a railroad embankment. Plaintiff submitted to a nonsuit and appeal. Affirmed.

McNeill & McNeill and Britt & Britt, all of Lumberton, for appellant. McLean, Varner & McLean and McIntyre, Lawrence & Proctor, all of Lumberton, for appellee.

HOKE, J. Our statute (Revisal, § 394, subsec. 2) provides as follows: "No suit, action or proceeding shall be brought or maintained against any railroad company by any person for damages caused by the construction of said road, or the repairs thereto, unless such suit, action or proceeding shall be commenced within five years after the cause of action accrues, and the jury shall assess the entire amount of damages which the party aggrieved is entitled to recover by reason of the trespass on his property." The summons in this action was first issued on September 17, 1908, and on a perusal of the entire testimony, that of plaintiff and others, it clearly appears that the embankment complained of was constructed by the Carolina Northern Railroad Company in 1901 and has been since maintained; that the rights and interests of said company have been duly conveyed to the present defendant, the Raleigh & Charleston Railroad Company. It further appears that the embankment, at the time of its erection, produced the same physical conditions, necessarily causing the same or sub-

stantial injury and interference on plaintiff's land, that have existed since.

Upon the admitted facts, therefore, and in any aspect of the matter, plaintiff's cause of action is barred by the statute of limitations above quoted. *Pickett v. Railroad*, 153 N. C. 150, 69 S. E. 8; *Stack v. Railroad*, 139 N. C. 366, 51 S. E. 1024; *Ridley v. Railroad*, 124 N. C. 84, 32 S. E. 325. This being true, and the statute having been properly pleaded, it would serve no good purpose to consider and pass upon the other questions presented in the record, and the judgment of nonsuit will be affirmed. *Oldham v. Rieger*, 145 N. C. 258, 58 S. E. 1091; *Cherry v. Canal Co.*, 140 N. C. 422, 53 S. E. 188, 111 Am. St. Rep. 850, 6 Ann. Cas. 143.

Affirmed.

(150 N. C. 638)

WATSON et al. v. NORTH CAROLINA HOME INS. CO.

(Supreme Court of North Carolina. Oct. 28, 1912.)

INSURANCE (§ 328*)—FIRE POLICY—FORFEITURE—CHANGE OF INTEREST.

The owner of certain insured property placed two mortgages thereon, and then for a recited consideration of \$2,260 executed a deed in fee to the holder of the second mortgage, which deed, though absolute on its face, was claimed to have been given to secure the landowner's indebtedness. *Held*, that such instrument constituted a change in the interest or title of the insured, and, having been executed without the consent of the insurer, increased the risk and avoided the policy.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 794-822, 825; Dec. Dig. § 328.*]

Appeal from Superior Court, Cumberland County; Whedbee, Judge.

Action by J. A. Watson and another against the North Carolina Home Insurance Company. Judgment for plaintiffs, and defendant appeals. Reversed.

Winston & Biggs, of Raleigh, for appellant. Lockhart & Dunlap, of Wadesboro, for appellees.

BROWN, J. Plaintiffs sue to recover upon a standard policy of insurance on the house of plaintiff Ivey, issued March 19, 1908; the same having been destroyed by fire September 28, 1910. The defendant pleads such a change in the interest and title of the insured in the property subsequent to the policy as avoids it.

It is admitted that Ivey executed a mortgage to a certain bank for \$1,500 on this property on February 2, 1909, and another mortgage thereon June 12, 1909, to plaintiff Watson, and on February 23, 1910, for a recited consideration of \$2,260, he executed a deed in fee to Watson. It is stated in the case that, while the mortgages are yet uncanceled, nothing is now due on them, and that the deed, although absolute on its face, was in effect given as security for the in-

debtedness then due by Ivey to Watson. The policy sued on is standard in form (Rev. § 4760), and contains the usual provision forfeiting the policy in case of a change in the interest or title of the insured in the property without the consent of the company.

We do not think this case is governed by *Jordan v. Insurance Co.*, 151 N. C. 343, 66 S. E. 208. In that case we passed on the title of the insured at the date of the contract, and held that an equitable ownership, such as a vendee in possession, constituted sole ownership, and fulfilled the terms of the policy. In this case the title of the insured at date of the contract is not in question; but it is the subsequent change in such title and interests that, it is contended, avoids the policy according to its terms. It must be admitted that the execution of mortgages upon the property for \$2,280, subsequent to the policy, greatly decreased the interest of the insured in it, and increased the hazard to the insurer. That such a change in the interest and title of the insured forfeits the policy has been repeatedly and consistently held by this court. This was first held in *Sossaman v. Insurance Co.*, 78 N. C. 147, in which, after referring to the adverse view in other states, Judge Rodman says: "A different view has been commonly taken in this and in other states. But we were referred to no case in which it was held that giving a mortgage did not work forfeiture, where the terms of the condition were as comprehensive as they are in this case." That policy contained a provision similar to the one in the case at bar.

At the same term at which the *Jordan* Case was decided we said in *Modlin v. Insurance Co.*, 151 N. C. 41, 65 S. E. 608, that "It is well settled by the decisions of this court—differing from the courts of some of the states—that the giving of a mortgage effects such a change of title and interest of the assured as avoids the policy, when not assented to by the assured in the manner prescribed by the policy." Many other cases hold that, in this as well as other states, the common law prevails, and a mortgage deed passes the legal title at once, defeasible by the subsequent performance of its conditions. *Briggs v. Insurance Co.*, 88 N. C. 141; *Gerlinger v. Insurance Co.*, 133 N. C. 407, 45 S. E. 773; *Hayes v. Insurance Co.*, 132 N. C. 702, 44 S. E. 404; *Mordecai's Law Lectures*, 534. In referring to this principle of law in *Weddington v. Insurance Co.*, 141 N. C. 234, 54 S. E. 271, 8 Ann. Cas. 497, Mr. Justice Walker says: "The validity of a provision in a policy of insurance against the creating of incumbrances without the consent of the insurer can hardly be contested at this late day. It has now become the settled doctrine of the courts that the facts in regard to title, ownership, incumbrances, and possession of the insured property are all important to be known by the insurer, as the

character of the hazard is often affected by these circumstances." It is useless to multiply authorities upon this subject.

The judgment of the superior court is reversed, and, upon the case agreed, judgment will be entered for the defendant.

Reversed.

HOKE, J., took no part in the decision of this case.

(161 N. C. 210)

CHADWICK et al. v. LEWIS.

(Supreme Court of North Carolina. Sept. 25, 1912.)

Appeal from Superior Court, Carteret County; Whedbee, Judge.

Processioning proceeding by W. S. Chadwick and others against John H. Lewis. From a decree fixing a dividing line between the lands of plaintiffs and defendant, plaintiffs appeal. Affirmed.

The following issue was submitted: "What is the true dividing line between the lands of plaintiffs and defendant?" Answer: "B, C, K, and J, as shown on map."

J. F. Duncan, of Beaufort, and Guion & Guion, of New Bern, for appellants. Moore & Dunn, of New Bern, E. H. Gorham, of Morehead City, and Abernethy & Davis, of Beaufort, for appellees.

PER CURIAM. The issue involved is almost entirely one of fact. In submitting it to the jury we find no error in the rulings of the court.

No error.

(93 S. C. 30)

FIRST NAT. BANK OF CHILLICOTHE v. H. L. & L. F. McSWAIN.

(Supreme Court of South Carolina. Oct. 17, 1912.)

1. ATTACHMENT (§ 364*)—RIGHTS OF THIRD PARTIES.

Under Code Civ. Proc. 1902, § 255a, authorizing a third party to assert title to attached property, the owner of property attached and sold as the property of defendant is not precluded from recovering against plaintiff by having notified or failed to notify the sheriff and plaintiff that he owned the property, or by having accepted the proceeds of the sale.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. § 1327; Dec. Dig. § 364.*]

2. CARRIERS (§ 70*)—TITLE TO GOODS—CONDITIONAL SALES—BILLS OF LADING.

Possession by a bank of a draft with bill of lading attached as transferee thereof, the bill of lading containing the recital, "Order Notify F. M. & J. B. Pinson," a buyer from the consignor's vendee of the corn shipped, is only prima facie evidence of the consigning seller's intention to retain title until payment of the draft.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 240-242; Dec. Dig. § 70.*]

3. CARRIERS (§ 58*)—BILLS OF LADING—ASSIGNMENT—EFFECT.

Assignment of a bill of lading by the owner thereof carries the title to the goods covered by it.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 179-190; Dec. Dig. § 58.*]

4. CARRIERS (§ 58*)—BILLS OF LADING—ASSIGNMENT.

A bill of lading is a negotiable or quasi negotiable instrument, and on transfer thereof, with draft attached, covering a shipment intended for a buyer from the consignor's vendee, nothing said or done by the vendee nor by the buyer or anybody else could affect the transferee's title.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 179-190; Dec. Dig. § 58.*]

5. ATTACHMENT (§ 374*)—WRONGFUL ATTACHMENT—VALUE OF GOODS—EVIDENCE—SUFFICIENCY.

In an action for wrongfully attaching plaintiff's corn as that of another, evidence held insufficient to raise an issue as to value.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. §§ 1363-1372; Dec. Dig. § 374.*]

6. ATTACHMENT (§ 376*)—WRONGFUL ATTACHMENT—ATTORNEY'S FEES—RIGHT TO RECOVER.

One suing for wrongful attachment of his property as that of another is not entitled to an attorney's fee paid to obtain release of the attachment.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. § 1386; Dec. Dig. § 376.*]

Watts, J., dissenting in part.

Appeal from Common Pleas Circuit Court of Laurens County; Geo. W. Gage, Judge.

"To be officially reported."

Action by First National Bank of Chillicothe against H. L. & L. F. McSwain. From the judgment, both parties appeal. Affirmed.

The following are defendants' exceptions and grounds of appeal:

"(1) That the presiding judge erred in refusing defendants' motion for nonsuit on the ground that it appeared that plaintiff had intervened in another action wherein H. L. & L. F. McSwain are plaintiffs and Adams Grain & Provision Company is defendant by filing notice of a claim to the proceeds of the sale of the corn, which claim was denied, thus making in said action the issue of such proceeds, and, having accepted such proceeds in such other action, plaintiff is estopped to say it did not consent to such conversion, and that such intervention into said other action is an election of remedies barring the present action raising the same issue, and, having so intervened, plaintiff here is bound by all proceedings in the other action, such as the sale of the corn and its price at said sale, and that the present action is barred by appearance in the other pending action, and the order of nonsuit on this ground should have been allowed and made.

"(2) The bill of lading, being attached to draft on consignee, Adams Grain & Provision Company, was only prima facie evidence of an intention by Standard Cereal Company to reserve title, and the only evidence as to the contract and real intention of Standard Cereal Company and Adams Grain & Provision Company being the testimony of Mr. Selden, who testifies that, upon receipt of notice that the corn had been accepted by

his customer at Cross Hill, his company was to take up the draft and forward bill of lading to Cross Hill, and it appearing that notice of such acceptance of corn at Cross Hill was telegraphed to Adams Grain & Provision Company on February 28th, and it not appearing that said Adams Grain & Provision Company had any notice of any attachment till March 7, 1911, and said Adams Grain & Provision Company having exercised full control and dominion over said car of corn, such as allowing full inspection, the court should leave it to the jury to say what was the contract between Standard Cereal Company and Adams Grain & Provision Company, and to say whether or not it was complete on acceptance of corn by customer, and whether or not title to said corn then vested in the Adams Grain & Provision Company, and the court erred in solving all such questions of fact against defendants.

"(3) Reservation of title by shipper being a question of intention of seller and purchaser, the plaintiff bank claiming only to have bought the draft and to hold bill of lading only as collateral security, Adams Grain & Provision Company being consignee in this bill of lading, the court erred in not holding that the bank dealt in the bill of lading as collateral subject to agreement, contract, and intention of consignor and consignee, and the court erred in not leaving these issues of fact under the testimony to the jury.

"(4) That the presiding judge erred in directing a verdict, thus violating the constitutional provision against charging on the facts, when the amount of damage and the value of the corn was in dispute, since a fair sale in a town of 12 or 15 stores, after due advertisement, is as good if not higher evidence of value, as a mere recollection of an opinion as to the prevailing contract price at the time, and it was error to take this issue of fact from the jury, when under such conflict of parol testimony more than one inference as to the value of the corn might reasonably be drawn.

"(5) That the presiding judge erred in taking from the jury the issue of estoppel, when it appeared from the testimony that plaintiff knew on March 6, 1911, that the car of corn had been attached, and on said March 6, 1911, telegraphed their attorneys, Ferguson, Featherstone & Knight, to protect the interests of plaintiff, and that said attorneys knew said corn had been ordered sold as perishable property, and lived in same town with the sheriff, who after 24 hours' advertisement sold same on March 8, 1911, and nevertheless plaintiff's said attorneys failed to give said sheriff or the defendants herein, or their attorneys, any notice whatever, and allowed said corn to be sold as the property of Adams Grain & Provision Company, and, having stood silent and having thus consented to a conversion of the corn into cash, plaintiff

should be estopped to say that said corn was worth more than the price brought at such public sale, and this issue should have been submitted to the jury.

"(6) It is respectfully submitted that the presiding judge erred in not leaving to the jury the issue under proper instructions as to whether or not the plaintiff bank by appearing and intervening in the former suit in attachment, and by accepting and receipting for the proceeds of the sale of the corn attached and sold as perishable property, elected as its proper remedy, its relief in such former action, and whether or not plaintiff bank is now estopped to prosecute this action for trespass on the case. In other words, to claim and receipt for the money representing the corn is inconsistent with a subsequent claim, as set up in this action, that the corn of plaintiff bank was attached and sold unlawfully. Plaintiff bank is not entitled to both the proceeds of its corn, and also to an action for damages for converting its corn.

"(7) It is further respectfully contended that the presiding judge erred in not holding that the sale of perishable property in judicial proceeding is for the benefit of all persons interested in the property, and that the price for which such perishable property is sold is the true measure of its value. And it was error for the presiding judge to refuse nonsuit which was made upon the ground that since the plaintiff bank knew that the car of corn in question had been attached, and knew that the corn had been ordered to be sold by the court, and instructed its attorneys to protect its interests and since said attorneys knew that the said car of corn was to be sold, and since it was sold without any objection or protest by the plaintiff bank, or their attorneys, and since the plaintiff bank, by their attorneys, did appear in said action, and did claim the proceeds of the corn, to wit, the money into which the corn had been converted by order of court, and the court and the plaintiff bank having receipted for this money, and the claim of plaintiff bank to the money having been traversed by the defendants in this case, the plaintiff bank was estopped to seek another remedy for its alleged wrong, and should have been held to have elected its remedy by intervening in the suit in which attachment was issued, and having so intervened, and, an issue of title having been made up, plaintiff bank was bound by the record of the case as it found it, and was bound by all prior proceedings, and a motion for nonsuit upon this ground should have been sustained, and an order of nonsuit passed."

F. P. McGowan, of Laurens, and J. J. McSwain, of Greenville, for appellants. Ferguson, Featherstone & Knight, of Laurens, for respondent.

WATTS, J. In February, 1911, F. M. & J. B. Pinson, merchants doing business at Cross

Hill, S. C., ordered from Adams Grain & Provision Company, a corporation, located at Richmond, Va., a car load of corn. The Virginia corporation bought the corn from Standard Cereal Company, grain dealers at Chillicothe, Ohio, which company shipped the same to Adams Grain & Provision Company, at Cross Hill, S. C., "Order Notify F. M. & J. B. Pinson." The Standard Cereal Company drew a draft on Adams Grain & Provision Company for \$389.20, the amount due for the purchase money of the corn, which draft, with the bill of lading attached, was sold to First National Bank of Chillicothe, the plaintiff. When the car of corn arrived at Cross Hill, and before the draft was paid, the defendants brought suit against the Adams Grain & Provision Company and had the corn attached as the property of said company. The said company entered a special appearance in said suit, and sought to have the attachment dissolved, upon the ground that the corn was not its property, but that of the plaintiff herein, and also to set aside the service of process in said action. See case of H. L. & L. F. McSwain against Adams Grain & Provision Company, now before this court. Under an order passed in said cause, to which the plaintiff herein was not a party, the car of corn was sold, as perishable property, and brought 58 cents per bushel, the original sale to the Pinsons having been at 75 cents per bushel. The sale by the sheriff, under the order of the court, was made on March 8, 1911. On March 18, 1911, the plaintiff bank, which was the owner of the draft, with bill of lading attached, notified the sheriff and the attorneys for the McSwains that it was the owner of the corn, and that it demanded the possession thereof. The McSwains, the plaintiffs in the attachment proceedings, failed to give the bond required by the statute, and on April 8, 1911, the sheriff paid to the attorneys for the bank, \$238.49, which amount represented the proceeds of the sale of the corn. The receipt given to the sheriff sets out: "This receipt is simply on account, and is not accepted in full of the amount due it." After the service of the notice of claim of ownership by the bank upon the attorneys for the McSwains, the attorneys for the McSwains served upon the bank's attorneys what they designated as a "notice of contest," in which notice was given that they contested the claim of the bank as to the ownership of the corn, that they would give the bond required by law, and that the bank would be required to file security for costs, etc. But, as before stated, the bond was not given. Thereafter the plaintiff bank brought this action, setting forth, in substance, the foregoing facts, alleging that the defendants illegally and unlawfully took possession of and sold its property; that the defendants acted wantonly and willfully

in so doing; that it was forced to employ counsel to vacate the attachment, and to secure the proceeds of sale from the sheriff and demanding judgment against the defendants for the sum of \$500. The cause was heard before Judge Gage and a jury, at the November term of the court of common pleas for Laurens county. At the commencement of the trial, the plaintiff notified the court that it would withdraw the allegations of the complaint, upon which it sought to recover punitive damages, and would only ask for actual damages. The trial resulted in verdict against the defendants (directed by the court) for \$142.25, the difference between 58 cents per bushel, which the corn brought at sheriff's sale, and 75 cents per bushel, the actual value. From judgment for said amount, duly entered, both plaintiff and defendants appeal to this court.

The plaintiff appeals upon one ground, viz., that the circuit judge erred in not including in the judgment the sum of \$20, paid by the plaintiff to attorneys for professional services, in vacating the attachment on the proceeds of sale and in securing said amount from the sheriff. The defendants appeal upon various grounds set out in the record, which will be hereafter considered.

We will first consider plaintiff's exception. The defendants, through the sheriff, as their agent, seized and took possession of plaintiff's property. Because of such seizure, which the court holds herein to have been illegal and unlawful, the plaintiff was forced to employ counsel to procure a dissolution of the attachment and get possession of its property in the hands of the sheriff. For the services thus rendered, the attorneys charged and the plaintiff paid the sum of \$20. It must be borne in mind that these services were not rendered in defending the suit upon its merits, but solely in freeing plaintiff's property from the lien of the attachment illegally put there by the defendants. Under these circumstances, we hold that the amount paid to the attorneys was a proper element of damage sustained by the plaintiff and recoverable in this action. In an exhaustive note to *Tisdale v. Major*, 68 Am. St. Rep. 273, Mr. Freeman goes into the question very thoroughly, and shows that the great weight of authority is in accord with the above holding. In *Livingston v. Exum*, 19 S. C. 229, it was held that attorneys' fees paid in procuring a dissolution of an injunction could be recovered from the plaintiff. In *Hill v. Thomas*, 19 S. C. 230, the same doctrine was laid down. See, also, *Moorer v. Andrews*, 39 S. C. 427, 17 S. E. 948, where the principle laid down in these cases was approved and followed. True, in these cases, the fees were allowed as damages for procuring the dissolution of injunctions; but in principle, there is no difference. In the one case a plaintiff illegally ties up defendant's property by injunction; in the other, by at-

tachment. It must be borne in mind, however, that we hold that such fees are only allowable, not for procuring a dissolution of injunction or attachment by a fight on the merits, but by motion, or otherwise, before a trial on the merits is had. The plaintiff's exception is sustained.

We will now consider the exceptions of the defendants.

[1] The first exception complains that the court below erred in refusing the motion for nonsuit, upon the ground that plaintiff's notice to the sheriff, claiming the property attached in effect made the plaintiff a party to the attachment suit; that plaintiff thereby consented to the sale of the corn, is now estopped to say that it did not consent, and that, when the plaintiff accepted the sheriff for the proceeds of sale on account, such payment precludes and estops plaintiff from bringing this action. In other words, defendant's position in effect is that if A. levies upon and sells the property of B. in a suit against C., and B. notifies the sheriff and A. that he claims the property, and A. concedes that he has had sold the property of the wrong person, and B. accepts the proceeds of sale in part payment, that he is precluded from holding A. accountable for the damages which he has sustained by reason of the illegal levy and sale. We cannot hold any such doctrine. The contrary is the law. See *Dudley & Caston v. Green*, 46 S. C. 202, 24 S. E. 188. Again, the statute (section 255a of the Code 1902) relied upon by the defendants, when correctly construed, is against the view contended for by defendants. It expressly provides that, when the property of some person other than the defendant is attached, such person can come in, and give notice and assert his title. If the plaintiff contests the rights of such third person, and, within the time therein prescribed, executes to such third person a bond to indemnify him against loss, in case the plaintiff loses, an issue shall then be made up to try the title to the property. If the plaintiff fails to give the bond, he concedes the right of such third person to the property. *Ford v. Calhoun*, 53 S. C. 110, 30 S. E. 830. There was never any intervention on the part of the plaintiff in the attachment suit, and the plaintiff was not bound by any of the orders passed therein.

In this connection defendant's fifth, sixth, and seventh exceptions will be considered.

The fifth complains that the circuit judge erred in not submitting the issue of estoppel to the jury, when it appeared that plaintiff knew on March 6th that the corn had been attached, and on said day telegraphed its attorneys to protect its interest; that said attorneys knew that the corn had been ordered sold, as perishable property; that the attorneys lived in same town with sheriff, who after 24 hours advertisement sold same on March 8th; that the attorneys failed to

give sheriff or defendants notice of plaintiff's claim, and that, having stood by and thus consented to a conversion of the corn into cash, plaintiff should be estopped to say that the corn was worth more than it brought at the sale, and from recovering more than the proceeds of sale. The record shows that the order of sale was passed on March 4th; that plaintiff's attorneys consented to the sale as attorneys for Adams Grain & Provision Company; that the attorneys did not at that time represent the plaintiff; that they were first wired to by the plaintiff to look after its interest on March 6th. The sale was made on March 8th. We cannot very well see how, under these circumstances, there was any issue of estoppel to submit to the jury. Admitting all these facts, what was there in the conduct of plaintiff, or its attorneys, to create an estoppel? We confess that we can see nothing. If the plaintiff has the sheriff, as his agent, to seize the property of a third person, not a party to the suit, the plaintiff assumes the risk, and must abide by the consequences. We know of no rule of law which makes it obligatory upon such third person to hunt the sheriff up and give him notice that he claims the property upon penalty (if he does not do so) of losing his property, or being forced to accept what the property brings, in lieu of all damages. If the property should bring its full value, and there should be no basis for punitive damages, such third person, if he obtained the proceeds of sale, probably could not complain for the reason that he would have sustained no injury. In the case at bar the plaintiff might very well have thought that the property would bring its value, and that obtaining the proceeds of sale would make him whole. But, if it brought less than its true value, he has his action for the difference, notwithstanding the fact that he accepted the proceeds of sale in part payment. This exception is overruled.

What has been said with reference to the fifth and first exceptions applies to and disposes of the sixth and seventh exceptions, which are also overruled.

[2] We must also overrule the second and third exceptions. These exceptions, to state them in substance, raise the question that there was some issue of fact as to the ownership of the car of corn, at the time it was attached, which issue of fact ought to have been submitted to the jury. It may be true, and doubtless is, that the possession of the draft and bill of lading by the plaintiff was only prima facie evidence of an intention on the part of Standard Cereal Company to retain the title to the corn until the draft was paid. But there is nothing in the testimony to rebut such prima facie evidence. The draft and bill of lading were put in evidence. They show on their face that the corn was shipped to Adams Grain & Pro-

vision Company, "order notify F. M. & J. B. Pinson." The agent of the provision company, whose testimony is uncontradicted, shows that the corn was owned by the holder of the draft and bill of lading; that his company had no interest in it except \$10 commissions, in case the sale had been completed and the car delivered and paid for. The cashier of the plaintiff testified positively that the plaintiff was the owner and holder of the draft and bill of lading and that they came to it, for value, in the due course of business, from Standard Cereal Company, the shipper.

[3] The cereal company was the owner of the bill of lading and when it assigned it to the plaintiff it carried the title. *Bank v. R. R. Co.*, 25 S. C. 222; *American Nat. Bank v. Henderson*, 123 Ala. 612, 26 South. 498, 82 Am. St. Rep. 147; *Greenwood Grocery Co. v. Canadian County Mill & Elevator Co.*, 72 S. C. 454, 52 S. E. 191, 2 L. R. A. (N. S.) 79, 110 Am. St. Rep. 627, 5 Ann. Cas. 261; *McMeekin v. Southern Ry.*, 82 S. C. 471, 64 S. E. 413; 38 Am. Dec. 409, note. The defendants' attorneys seem to have the idea that there was some evidence to go to the jury as to the ownership of the corn, because of inferences which they think might be drawn from certain communications had by the Adams Grain & Provision Company with its alleged agent at Cross Hill and the Pinsons, to whom the corn had been bargained, after the corn arrived there. We do not see that any inferences of benefit to the defendants can be drawn from such testimony. But such inferences, if they could be drawn from the testimony, could not avail the defendants.

[4] A bill of lading is a negotiable or quasi negotiable instrument, and when the shipper, who was the owner, transferred it, for value, to the plaintiff, nothing that might have been said or done by Adams Grain & Provision Company, the Pinsons, or anybody else could affect the title of the plaintiff thereto. A quotation from *Bank v. Railroad Co.*, supra, is in point. On page 225 of 25 S. C., Judge McIver said: "As to the third subdivision of the first exception, we think it is too plain for argument that, if there was any understanding or agreement between McCauley & Co. (the shippers) and the Lawrence Manufacturing Company that the cotton should be delivered to that company without the production of the bills of lading, it would be a palpable fraud upon the bank, unless the bank knew of such arrangement at the time it discounted the drafts, and acquiesced therein. * * * The remarks just made show that the first subdivision of exception second cannot be sustained; for, even if the jury did believe that there was such a contract as that mentioned, the right of the plaintiff to recover would not thereby be defeated, inasmuch as to produce such result the jury must also believe that such con-

tract was known to and acquiesced in by the bank."

[5] This brings us to the only remaining exception, to wit, the fourth. This exception alleges error in directing the verdict, for the reason, as alleged, that there was some testimony from which the jury might have inferred that the corn brought all it was worth at the sale. The undisputed testimony shows that the corn was worth 75 cents per bushel at the time of the sale. Mr. Owings, the sheriff, so testified. Defendant's witness, Mr. Ropp, testified to the same thing. The defendants themselves went on the stand, and were silent as to its value. But in addition to all this, and what is absolutely conclusive, it appears that the Pinsons, who had originally bought the corn, stood ready to take it at 75 cents, and would have done so, had not the defendants had it attached and sold. We do not see in the testimony any issue as to the value of the corn which should have been sent to the jury. The exceptions, in full, should be included in the report of this case.

The judgment of this court is that the judgment of the circuit court be modified by adding to the judgment of plaintiff the sum of \$20 paid by it as attorney's fees, and that the clerk of the circuit court do so correct the said judgment. In all other respects the judgment is affirmed.

HYDRICK, J. [6] We concur in the opinion of Mr. Justice WATTS, except in the conclusion that plaintiff is entitled to recover the fee paid its attorneys for obtaining the release of its property from the attachment under which it was levied upon as the property of Adams Grain & Provision Company. In ordinary actions at common law for damages for breach of contract or for tort, in the absence of malice, or circumstances which warrant the infliction of vindictive damages, the decisions of this court have been against the recovery of attorney's fees as damages. *Brown v. Spann*, 3 Hill, 324; *Ferguson v. De Hay*, 2 McMul. 228; *Jeter v. Glenn*, 9 Rich, 380; *Welch v. Railroad Co.*, 12 Rich. 292; *Loeb v. Mann*, 39 S. C. 470, 18 S. E. 1. In the case last cited, which was an action of claim and delivery and for damages for the unlawful seizure of the plaintiffs' property as the property of one Perry, by the defendant, as sheriff, under a chattel mortgage given by Perry to one Bleman, this court held that plaintiffs could not recover the fee paid their attorneys, and quoted with approval from the opinion of the Supreme Court of the United States in *Oelrichs v. Spain*, 15 Wall. 211, 21 L. Ed. 43, as follows: "In actions of trespass, where there is no circumstance of aggravation, only compensatory damage can be recovered, and they do not include the fees of counsel. The

plaintiff is no more entitled to them, if he succeed, than is the defendant if the plaintiff be defeated. Why should a distinction be made between them? In certain actions ex delicto vindictive damages may be given by the jury. In regard to that class of cases, this court has said: 'It is true that damages assessed by way of example may indirectly compensate the plaintiff for money expended in counsel fees, but the amount of these fees is not to be taken as a measure of punishment, or a necessary element in its infliction.'" Following that quotation, this court said at page 471 of 39 S. C., at page 3 of 18 S. E.: "We regard it as well settled in this state, both by decisions here and in the Supreme Court of the United States, that counsel fees are not allowable as part of the plaintiff's damages, for the reason that they cannot be said to be the necessary result of the act done by the defendant." With practical unanimity the courts of other states have reached the same conclusion. In *Bogard v. Tyler*, 78 S. W. 138, 25 Ky. Law Rep., 1416, the syllabus reads: "Where plaintiff claimed certain property attached as the property of another, and was successful in maintaining his claim against the attaching creditors, he was not thereafter entitled to recover attorney's fees expended in defending his right to the property in an action against the attaching creditors." To the same effect are *Worthington v. Morris*, 98 Ky. 54, 32 S. W. 269; *McGill v. Fuller*, 45 Wash. 615, 88 Pac. 1038; *Strauss v. Dundon* (Tex. Civ. App.) 27 S. W. 503. In *Livingston v. Exum*, 19 S. C. 223, Hill v. Thomas, 19 S. C. 230, and *Moorer v. Andrews*, 39 S. C. 427, 17 S. E. 948, it was held that a party enjoined might recover a reasonable attorney's fee paid for procuring a dissolution of the injunction; but in each of those cases an injunction bond had been given, as required by statute, wherein plaintiff agreed to pay to the defendant enjoined such damages as he should sustain by reason of the injunction, if the court should finally decide that plaintiff was not entitled to it, and the fee was allowed under that provision in the bond. But this is not an action on such a bond; but it is an action at common law to recover damages for the unlawful seizure of the plaintiff's property as the property of another. We do not see upon what principle it can be distinguished from any other action at common law to recover damages for the unlawful seizure of the property of another, either under legal process, such as execution, or in actions in claim and delivery, or under distress for rent, or a past-due chattel mortgage, or for any other cause.

A majority of the court concurring in this view, the judgment below is affirmed.

GARY, C. J., and WOODS and FRASER, JJ., concur.

(31 S. C. 500)

TURNER v. MARTIN.

(Supreme Court of South Carolina. July 5, 1912.)

Appeal from Common Pleas Circuit Court of Spartanburg County; R. C. Watts, Judge.

Action by B. L. Turner against J. E. Martin. From a judgment for plaintiff, defendant appeals. Dismissed.

Stanyarne Wilson, of Spartanburg, for appellant. L. A. Phifer, of Spartanburg, for respondent.

GARY, C. J. This is an action upon an account. There was an order of reference to the master, to take the testimony and report upon all issues involved, both law and fact. In his report he recommended that the plaintiff have judgment against the defendant for a certain sum, and the defendant filed exceptions to said report.

After hearing argument, his honor, the circuit judge, overruled the exceptions, and confirmed the master's report, whereupon the defendant appealed upon a single exception, assigning error on the part of the circuit judge in ruling that the damages alleged in the fourth paragraph of the defendant's answer were too remote.

It is only necessary to refer to the exceptions and the master's findings of fact to show that the exception assumes the existence of facts found against the defendant by the circuit judge.

The exception is therefore overruled, and the appeal dismissed.

WOODS, HYDRICK, and FRASER, JJ., concur. **WATTS, J.,** disqualified.

(138 Ga. 577)

SHEFFIELD et al. v. CHANCEY et al.

(Supreme Court of Georgia. Oct. 2, 1912.)

*(Syllabus by the Court.)***COUNTIES (§ 192*)—ASSESSMENT—RECOMMENDATION OF GRAND JURY—NECESSITY.**

Inasmuch as the injunction granted in the present case may have the effect of preventing the county authorities from levying a tax necessary to discharge the legal indebtedness of the county, and as the judgment granting the injunction was based upon an erroneous construction of the law appertaining to the controlling question involved in the case, the judgment is reversed, and the case remanded for another hearing, in order that the judge below may modify the injunction, so that it will not prevent the enforcement of item 1 of the tax levy to an extent necessary to discharge the accumulated debts of the county legally incurred within the limitation prescribed in section 507 of the Civil Code of 1910.

[Ed. Note.—For other cases, see Counties, Cent. Dig. §§ 800-802; Dec. Dig. § 192.*]

Error from Superior Court, Early County; W. O. Worrill, Judge.

Suit by John C. Chancey and others against O. H. Sheffield and others to restrain the collection of certain items of the tax levy of 1911. From a decree granting the writ, defendants bring error. Reversed and remanded, with direction.

John C. Chancey, C. S. Middleton, and R. H. Sheffield, citizens and taxpayers of Early

county, brought their petition against the board of commissioners of roads and revenues for said county, consisting of Sheffield and others, and against J. J. Smith, treasurer, and J. C. Loyless, tax collector, and prayed for an injunction against the collection of certain items of the tax levy for the year 1911, alleged to be illegal and exorbitant. The tax levy attacked is as follows:

"1. To pay indebtedness due, or to become due, during the year, or past due, 2 mills. 2. To build or repair courthouse or jail, bridges or ferries, or other public improvement, according to contract, 2 mills. 3. To pay sheriffs, jailers, or other officers fees they may be legally entitled to, out of county, $\frac{2}{10}$ mills. 4. To pay coroners all fees that may be due them by the courts, $\frac{1}{10}$ mills. 5. To pay the expenses of the county for bailiffs at court, nonresident witnesses in criminal cases, fuel, servants' hire, stationery and the like, $\frac{1}{10}$ mills. 6. To pay jurors a per diem compensation, $\frac{15}{100}$ mills. 7. To pay expenses incurred in supporting the poor of the county, as otherwise prescribed by the Code, 1 mill. 8. To pay any lawful charge against the county, $\frac{25}{100}$ mills. 9. To open up, improve, and maintain the public roads, 4 mills.

"In addition to the above assessment, it is hereby ordered that the tax collector shall collect from the respective school districts herein named the amount opposite the name of each district, for the purpose of supplementing the state school funds in support of the public schools in each district, where such tax is levied: Rock Hill district, $1\frac{1}{2}$ mills; Sowhatchee district, 3 mills; Cedar Springs district, 3 mills; Springfield district, 5 mills; Centerville district, 3 mills; Kestler district, $2\frac{1}{2}$ mills."

It is alleged that the amount of taxes levied, exclusive of the tax for public roads, for the support of paupers, and for public bridges and buildings, is 4 mills, which is $1\frac{1}{2}$ mills in excess of 50 per cent. upon the state tax of 5 mills; that a tax of $\frac{5}{10}$ of 1 mill upon the taxable property of the county would raise a sum sufficient to discharge the liabilities of the county for the current year for its poor, and an equal amount will be sufficient to build, repair, and maintain the public buildings and bridges; that it is the intention of the tax collector to collect the amounts raised under the levy and turn the same over to the county treasurer; and that it is the intention of the treasurer to mingle all the sums collected for the various purposes set forth in the levy into one common fund, and to pay county warrants out of the common fund, without keeping the fund separate and paying the sums collected for a specific purpose only upon the obligations contracted for the specific purpose.

The defendants answered that the county of Early was indebted, on January 1, 1911, "exclusive of about \$3,000 to the First Na-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

tional Bank of Arlington," in the sum of \$12,921.55, as follows:

To Dr. J. H. Crozier, borrowed money	\$ 2,080 00
To Mrs. R. A. Chipstead, borrowed money	1,000 00
To bonds and interest due January 1, 1911.....	3,250 00
To Good Roads Machine Company (contract)	2,000 00
To Disinfectant Company (open account 1910)	1,046 00
To Bank of Arlington.....	3,081 00
	<u>\$15,632 95</u>

It was further answered that the revenues for public buildings, bridges, etc., under the levy for the year 1911, would be \$9,257.80; that the commissioners expended in that year, in the erection of bridges, \$2,030, according to an itemized statement attached, for repairing the courthouse \$325, in repairs on bridges \$1,000, none of which building and repairing items exceeded \$300, said building and repairing having been done with the material and labor furnished by the defendants; that there are certain other bridges over named streams and designated places which in the aggregate will cost \$9,600, which must be erected as soon as funds are collected for that purpose and in the early part of 1912; that there were no funds on hand for the purpose of meeting the expenses incurred for maintaining the poor of the county on January 1, 1911; that the levy for 1910 for paupers was \$534.18 less than the amount expended for said purpose, and that the commissioners borrowed \$1,945.35 with which to maintain the poor of the county for the year 1911; that there is now outstanding against the county this obligation and \$339 in unpaid warrants issued to the parties themselves, an itemized statement of which warrants is attached to the answer; that the rate of increase in the expenses of maintaining the paupers of said county for the last three years has been 40 per cent. per annum; that the amount raised in the present levy is not enough to meet the monthly payments to the paupers of the county as they become due between now and the next tax levy for this specific purpose. It is admitted that the tax collector intends to collect the taxes as levied, under the law, and turn the same over to the treasurer of the county; but it is denied that it is the intention of the treasurer to mingle the funds collected for specific purposes into one general fund, as charged in the petition.

The plaintiffs offered evidence showing that the grand jury of the county, during the spring term, 1911, made no recommendation with regard to the levying of any taxes for the year 1911, nor had any prior or subsequent grand jury convening in said county during the year 1911 made any recommendation in regard to the levying of taxes. The defendants introduced affidavits of J. J. Smith, treasurer of the county, show-

ing that there was an indebtedness against the county, on January 1, 1911, for debts incurred by the county during the year 1910 and becoming due during the year 1911, aggregating \$15,512; that at the beginning of the year 1911 there was nothing to the credit of the pauper fund of the county; that the county commissioners had to borrow money with which to meet the current expenses of the year; that the expense of maintaining the poor was a part of the current expenses; that this money was borrowed of Mrs. Chipstead and Dr. Crozier; that of this borrowed money there was used enough to pay off the warrants issued to the paupers, which amount represents all moneys paid to paupers for the year 1911, and the balance of \$339 is now outstanding, unpaid by the treasurer; that the amount of said money borrowed for the current expenses from the above-named parties, spent or used in paying warrants to the county paupers, was \$1,945.35, which sum has not been paid to the parties from whom it was borrowed, and is now outstanding against the county; "that the sums of money borrowed the present year by the county of Early through its board of commissioners of roads and revenues from Mrs. R. A. Chipstead and J. H. Crozier was not paid out for the special purpose of supporting paupers, and it was not deposited with deponent to be paid out for the specific purpose of supporting the paupers, but was held as a general fund and was paid out on the county's warrants as they were presented to deponent, first presented being first paid, without regard to the nature of the liability which the warrant was given to discharge, some being paid out generally for the expenses of the county as they arose, and all done by order of said county commissioners."

The court rendered the following judgment: "It appears affirmatively from the pleadings and the evidence in this case that the board of commissioners of roads and revenues of Early county, in making the assessment of taxes for that county for the year 1911, not only made assessments of taxes for public buildings and bridges, and also for the support of the poor, authorized to be collected as extra taxes, and taxes for improving and maintaining the public roads, and also for educational purposes, but also, in addition thereto and over and above the assessment, made other assessments of taxes for the purposes enumerated under subsections 1, 3, 4, 5, 6, and 9 of section 513 of the Civil Code of 1910, which last-mentioned assessments amounted in the aggregate to 4 mills, and to 1½ mills in excess of 50 per cent. upon the state tax of 5 mills. It also affirmatively appears that such assessment was made by the board of commissioners without the recommendation of the grand jury. This being true, I conclude that under the provision of section

508 of the Civil Code, and the ruling of the Supreme Court in *Waller v. Perkins*, 52 Ga. 238, 239, and *Sullivan v. Yow*, 125 Ga. 327, 54 S. E. 173, the commissioners of roads and revenues of Early county, in the absence of a recommendation by the grand jury authorizing it, were without authority to assess said sum of 4 mills on the amount of the state tax, and that said excess of $1\frac{1}{2}$ mills over and above the sum of 50 per cent. on the amount of state tax is unauthorized and illegal. It is therefore ordered, considered, and adjudged that J. C. Loyless, the tax collector of Early county, be and he is hereby enjoined and restrained from collecting as county taxes for the present year, exclusive of said extra and special taxes so assessed, and which are not interfered with, any sum so assessed by said commissioners for said county taxes for Early for the present year in excess of $2\frac{1}{2}$ mills, or 50 per cent. upon the state tax."

B. R. Collins and Glessner & Park, all of Blakely, and Little & Powell, of Atlanta, for plaintiffs in error. R. H. Sheffield, of Blakely, for defendants in error.

BECK, J. (after stating the facts as above). The important and controlling question involved in this case is whether the levying of a tax to pay accumulated debts is one of those included in the provision for recommendation by the grand jury, or whether the ordinary or county commissioners can levy it, without regard to any recommendation of the grand jury. This question involves the determination of whether section 507 of the Civil Code of 1910 is to be construed in connection with and as affected by sections 508 and 510. Without going back of the Code of 1863 to determine the origin of the legislation involving these sections, their status and history from that time may be considered with a view to reaching a proper construction of them.

In the original Code the levy of taxes for certain specified purposes, such as the erection of courthouses, jails, etc., was authorized without recommendation of the grand jury. By section 481 of that Code it was declared: "Justices of the inferior court have power to raise a tax for county purposes, over and above the tax they are herebefore empowered to levy, and not to exceed fifty per cent. upon the amount of the state tax for the year it is levied, provided two-thirds of the grand jury at the first or spring term of their respective counties recommend such tax." By section 483 it was declared: "If from any cause such grand jury is not impaneled, or they adjourn without taking any action thereon, or they refuse to make such recommendation sufficient to discharge any judgment that may have been obtained against the county, or any debt for the payment whereof there is a mandamus, or the necessary current expenses of the

year, such justices may levy the necessary tax without such recommendation." By section 485 provision was made for a creditor to compel a tax to be levied or for a taxpayer to resist it. Section 486 stated the purposes for which county taxes should be assessed: One of them was: "To pay the legal indebtedness of the county, due or to become due during the year, or past due." After this followed the section upon which the present controversy mainly rests. It reads as follows: "When debts have accumulated against the county so that one hundred per cent. on the state tax, or the amount specially allowed by local law, cannot pay the current expenses of the county and the debt in one year, they shall be paid off as rapidly as possible, at least twenty-five per cent. every year."

It will be seen at a glance that these sections are far from clear, and are difficult, if not impossible, to reconcile with each other in all respects. The authority to levy a tax of 50 per cent. upon recommendation of the grand jury, over and above the special tax already authorized, is followed by a provision, in case they fail or refuse to make the recommendation, which mentions the payment of any debts in judgment or for which there is a mandamus, as well as current expenses of the year. This apparently contemplates primarily a recommendation of the grand jury to levy a tax to pay such debts, and the action of the justices of the inferior court only in the event they failed to make recommendation. Here, also, only a particular class of debts is mentioned. On the face of it, the second section above quoted contains no express limitation as to amount. But this court held that the two should be construed together, and that the authority of the justices, or their successors, the ordinary or county commissioners, to levy without recommendation, was not more extensive than the power to levy with a recommendation. *Waller v. Perkins*, 52 Ga. 234. The next section, in stating the purposes for which county taxes may be levied, refers to the "legal indebtedness of the county," and does not confine it to a debt which may have been reduced to judgment or in regard to which a mandamus may have been obtained. Then follows the provision already quoted, which no longer adheres to the 50 per cent. limitation, but provides that, if debts have accumulated against the county, so that "one hundred per cent. of the state tax" cannot pay the current expenses and the debts in one year, they shall be paid off as rapidly as possible, at least 25 per cent. each year.

The inferior court having been abolished, in later Codes the ordinary or county commissioners took their place in regard to county taxation. These provisions were contained in the Code of 1868 and in those of 1873 and 1882 in the same order in which they occurred in the Code of 1863. In 1881 the

Legislature passed an act providing for cases where the spring term of the court might adjourn before the grand jury had made their general presentments. In the Code of 1882 this act was incorporated as a part of the section already existing for cases where a grand jury was not impaneled or failed to act. Thus at the close of that section appears the proviso: "Such tax shall not exceed the levy last recommended by a grand jury for such county." In this form it was incorporated into the Code of 1895, and again in that of 1910, and each time was adopted by the Legislature. As, however, the limitation upon the power of a previous grand jury was the same as that upon the grand jury for that term, this did not materially affect such limitation, as already construed by this court.

In *Arnett v. Griffin*, 60 Ga. 349, a county tax of 199 $\frac{1}{2}$ per cent. upon the state tax was levied and resisted. This court upheld the levy. In doing so it determined what item could be levied without recommendation of the grand jury, and that their aggregate was more than 99 $\frac{1}{2}$ per cent., thus leaving approximately 100 per cent. over and above such special items. Referring to the decision in 52 Ga. 233, *supra*, *Jackson*, Judge, said that it was there held that the ordinary could levy a tax for county buildings without recommendation of the grand jury; that besides this he could levy to pay judgments, etc., not exceeding 50 per cent.; and that as to accumulated debts, where 50 per cent. would not pay them, the grand jury may go to the extent of 100 per cent. to pay them, and in such cases creditors have the right to 25 per cent. of this sum, if there be not enough to pay the current expenses and the debt. It was accordingly held that, the grand jury having recommended 100 per cent., and the special items which could be levied without recommendation covering 99 $\frac{1}{2}$ per cent., the whole levy was legal. This recognized the fact that a levy to pay indebtedness fell within the purview of the grand jury to recommend, subject to the right and duty to make the levy if they failed or refused to act. The same rule is recognized in the case of *Sullivan v. Yow*, 125 Ga. 326, 54 S. E. 173. In that case 50 per cent. was mentioned as the limit, but no accumulated debts were involved, so that the 100 per cent. limit could apply.

The codifiers of the Code of 1895 took the section with reference to accumulated debts from the position which it had occupied since the adoption of the Code of 1863, and placed it along with sections touching special and extra taxes, in advance of the section authorizing the ordinaries to raise a tax for county purposes, "over and above the tax they are hereinbefore empowered to levy, not exceeding fifty per cent. upon the amount of the state tax for the year it is levied," upon recommendation of the grand jury; and

in that position it was adopted in the Code of 1895 and that of 1910. Perhaps the reason for the transposition arose from the radical change made by the Constitution of 1877 in regard to the incurring of indebtedness by counties and municipalities. Prior to that time debts had been incurred with great freedom, and sometimes unwisely and disastrously. The constitutional convention determined to put a check upon extravagance or the incurring of indebtedness by such political bodies. They therefore provided that no county or municipal corporation should incur any new debt except for a temporary loan to supply casual deficiencies of revenue, not to exceed one-fifth of 1 per cent. of the assessed value of the property therein, without the assent of two-thirds of the qualified voters thereof at an election for that purpose. It was also declared that at or before incurring any bonded indebtedness the county or municipality should provide for the assessment and collection of an annual tax, sufficient in amount to pay the principal and interest of said debt within 30 years from the date of the incurring of said indebtedness. Civil Code 1910, § 6564. As the Constitution thus required a permanent provision for the collection of a tax to pay bonded indebtedness, as to such indebtedness it superseded and rendered unnecessary any recommendation of a grand jury in regard to it. As to indebtedness other than bonded indebtedness, this was also prohibited, except upon an election, and excepting a loan to meet casual deficiencies. It being thus provided that debts could not be incurred merely at the will of the ordinary or commissioners, but required the sanction of a popular vote, it is probable that the codifiers, therefore, thought that a complete change had been made in the status of debts which could be legally incurred by the county, and that they thereafter occupied a fixed position. By section 440 et seq. of the Code of 1910 provision is made in regard to election for the purpose of incurring bonded indebtedness. In the notice to be given it must be specified what amount of bonds are to be issued, for what purpose, what interest they are to bear, and how much principal and interest is to be paid annually, and when the bonds are to be paid off. By the act of 1904 (Civil Code 1910, § 463 et seq.) a similar provision is made in regard to incurring indebtedness other than bonded indebtedness; and in this it is also declared that the notice shall specify the amount of the debt to be incurred, for what purpose, what amount of the debt is to be paid annually or at stated periods, and the terms of the contract under which the debt is to be incurred.

Thus by the Constitution counties are prohibited from incurring any indebtedness except in the manner therein pointed out, and they are required to make provision in ad-

vance in regard to the payment by taxation of bonded indebtedness. And by the acts of the Legislature similar provision as to specifying the times of payment of debts other than bonded indebtedness is required. This works so radical a change in the old system of creating debts that it would be useless to say that the county was bound to provide in advance how and when the debt should be paid and the people should ratify that declaration, and yet the payment should depend upon a recommendation of a grand jury. And, as said above in the case of *Sullivan v. Yow*, supra, there were no accumulated debts, and what was said in that case had no application to the section of the Code now under consideration. We are of the opinion, therefore, that under the present status of the law, if there is a legal indebtedness of a county incurred in a manner authorized by law, it is contemplated that it shall be paid in the manner previously fixed, and that the tax levy of the difference between the current expenses and 100 per cent. upon the state tax can be made without recommendation of the grand jury. This is reinforced by the requirement that at least 25 per cent. shall be paid in each year, and the fact that the creditor may bring mandamus to compel the levy of the tax and any taxpayer may contest the proceeding. With a legal indebtedness and the terms of payment fixed upon a county in a manner prescribed by the Constitution, with the right in the creditor to proceed by mandamus to compel the levy of a tax for the purpose of its payment, with a provision for the levy of the difference between the amount of the current expenses and the amount of the state tax, and a requirement for the payment of at least 25 per cent. per annum, the recommendation of the grand jury could neither prevent nor assist in the carrying out of the law in this regard, and it would be more ornamental than substantial. If the indebtedness is a contractual one, and is legal under the Constitution and law, it requires no recommendation of the grand jury to levy a tax for the difference between current expenses and 100 per cent. on the state tax to pay it. We are dealing here with the question of contractual debts, and not with liabilities arising from the breach of a contract, or the like. No question of such liability is raised in this case, or as to taxation to pay it, and it is unnecessary now to discuss their status. If a debt is legal and legally incurred, and is not paid at the time when it falls due, it remains a legal debt and ranks as an accumulated debt.

It is evident that the presiding judge placed a different construction upon section 507 of the Civil Code from that above indicated as the proper one. It is clear that the amount necessary to pay the bonded indebtedness falling due (alleged to be \$3,250)

is a proper item of the tax levy. As to other matters which are claimed to be debts of the county, and which are not covered by specific items of the tax levy, such as for the support of paupers, maintenance of public buildings, etc., it does not appear with sufficient clearness whether they are in fact legal debts of the county, so that this court may give direction in regard to them. We deem it best to reverse the judgment and remand the case to the court below, with direction that he rehear it and determine what part of the tax which it is proposed to levy and collect under item 1 of the tax levy may properly be enforced and what cannot.

Judgment reversed, with direction. All the Justices concur.

(123 Ga. 734)

**SOUTHERN COLLEGE OF MEDICINE
AND SURGERY et al. v. NOLAN
et al.**

(Supreme Court of Georgia. Sept. 24, 1912.)

(Syllabus by the Court.)

APPEAL AND ERROR (§ 776*)—DISMISSAL—ASSIGNMENTS OF ERROR.

Where, upon an application for mandamus, a general demurrer to the answer of the respondents and a motion to strike the answer are overruled, and this ruling of the court below is brought to this court by writ of error, and the bill of exceptions contains no assignment of error upon a final ruling of the court, this court is without jurisdiction to entertain the writ of error; and in the present case the writ of error is dismissed, but leave is given to the plaintiffs in error to withdraw the copy of the bill of exceptions on file in the court below and file the same as a pendent lite bill of exceptions.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3115-3119; Dec. Dig. § 776.*]

Error from Superior Court, Cobb County; N. A. Morris, Judge.

Petition by the Southern College of Medicine and Surgery and others for a writ of mandamus against C. T. Nolan and others. Judgment for defendants, and plaintiffs bring error. Dismissed.

Clay & Morris, of Marietta, and J. W. & J. D. Humphries and Jno. L. Hopkins & Sons, all of Atlanta, for plaintiffs in error. D. W. Blair, of Marietta, and T. S. Felder, Atty. Gen., for defendants in error.

BECK, J. The Southern College of Medicine and Surgery, a corporation under the laws of Georgia, F. E. Gibson, and others, filed their petition for mandamus against C. T. Nolan and others, composing the State Board of Medical Examiners for the Regular School of Medicine.

"The defendants filed an answer to said petition, and to this answer petitioners filed a demurrer, and likewise a motion to strike said answer and to make the mandamus absolute. Upon hearing said demurrer to said

answer and the motion to strike said answer, the court, on the 8th day of June, 1912, overruled said demurrer, and also overruled and denied the motion to strike said answer. Said judgment overruling said demurrer was made on June 8, 1912. The judgment overruling the motion to strike said answer, and denying said motion, was made on June 8, 1912. Petitioners except to the judgment overruling said demurrer to the answer, and assign the same as error, and say that the court erred in not sustaining said demurrer and striking said answer, upon each and every ground named in said demurrer. Petitioners except to the judgment of the court overruling their motion to strike the answer of the defendants, and assign said judgment as error, and say that said motion to strike said answer should have been sustained by the court upon each and every ground named in said motion."

The quotation just set forth states all the motions that were made by the parties on the hearing of the application for mandamus, and all the exceptions made to the ruling of the court upon motion of the parties. While no formal motion was made to dismiss the bill of exceptions, suggestion is made in the brief of counsel for defendants in error that the writ of error is prematurely brought to this court, as the case is still pending in the court below, and that this court is without jurisdiction to entertain the writ of error. We are of the opinion that the contention of the defendants in error is clearly correct. Undoubtedly the case is still pending in the court below. No ruling was made by the court which finally disposes of the cause, and no exception is taken to any decision or judgment of the court, which, if it had been rendered as claimed by the plaintiffs in error, would have been a final disposition of the cause as to them. The exceptions are, as is disclosed in the statement of facts, to the overruling of the general demurrer to the defendants' answer and the refusal to strike the same. Had the plaintiffs in error excepted to the refusal of the court to make the mandamus absolute, then, although the court had overruled the motion to strike the answer and the plea, it would have been competent for plaintiffs in error to bring the cause to this court by writ of error, and have the decision upon the motion to make the mandamus absolute reviewed here, under the rulings in the cases of *Southern Ry. Co. v. Atlanta Stove Works*, 128 Ga. 207, 57 S. E. 429, and *Tarver v. Mayor of Dalton*, 134 Ga. 462, 67 S. E. 929, 29 L. R. A. (N. S.) 183, 20 Ann. Cas. 281. But in the present case, while the plaintiffs in error made a motion to have the mandamus made absolute, it is not recited in the bill of exceptions that the court made an express ruling upon that motion, though it may be in-

ferred that the court denied it. Such a ruling, as we have stated above, would have been a final disposition of the case; but no exception is taken to that ruling.

We therefore hold that the case is prematurely brought to this court, and that the court cannot at this time entertain jurisdiction thereof. But direction is given that counsel for plaintiffs in error be permitted to withdraw the copy of the bill of exceptions on file in the court below, and file the same as a *pendente lite* bill of exceptions.

Writ of error dismissed, with direction. All the justices concur, except ATKINSON, J., disqualified.

(128 Ga. 719)

BRYAN v. JONES.

(Supreme Court of Georgia. Sept. 24, 1912.)

(*Syllabus by the Court.*)

JUDGMENT (§ 951*)—FORMER RECOVERY—EVIDENCE.

Under the pleadings and evidence in the case, the court did not err in directing the jury to return a verdict sustaining the plea of former recovery and of *res judicata*.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1809-1812; Dec. Dig. § 951.*]

Error from Superior Court, Lumpkin County; J. B. Jones, Judge.

Action by Martin Bryan against W. H. Jones, as administrator. Judgment for defendant, and plaintiff brings error. Affirmed.

O. J. Lilly, of Dahlonega, for plaintiff in error. H. H. Perry and W. B. Sloan, both of Gainesville, and R. H. Baker, of Dahlonega, for defendant in error.

BECK, J. Martin Bryan brought suit against W. H. Jones, administrator of the estate of G. W. Bruce, deceased, to recover the value of services rendered to the deceased during the closing days of his life, covering a period of several months, and consisting in the plaintiff's remaining with, and nursing and caring for, Mr. Bruce, and looking after his household and business affairs. The administrator answered generally, and filed a special plea of former recovery and of *res judicata*. Upon the trial of the issue made by this special plea the court directed the jury to return a verdict in favor of the plea and against the plaintiff. The evidence introduced by the administrator in support of his plea of *res judicata* was the record in a former suit between the said Jones, administrator, as plaintiff, and the said Bryan, as defendant, in which suit the administrator sought to recover from Bryan certain furniture and certain money, consisting of gold coin and currency, which it was alleged belonged to the estate of Bruce and was wrongfully carried off and retained by Bryan. In his answer to that suit Bryan denied that he had

in his possession any money or property belonging to the estate of Bruce, and averred that all money and property taken possession of by him was so held by virtue of a gift from Bruce, and was paid to him on account of services rendered the latter. Upon the issues thus made the jury returned a verdict in favor of Bryan as to the currency and in favor of the administrator as to the gold and the furniture. The judgment in that case was relied upon by the defendant in the present case to establish the plea of former recovery.

We are of the opinion that under the facts of this case the verdict finding that the plea of former recovery and of res judicata had been established was properly directed by the court. The record of the former suit, containing the pleadings in that suit, the evidence introduced by the plaintiff and defendant in the same, and the judgment of the court, shows affirmatively that a certain amount of currency and of gold coin, amounting to \$440, had been turned over by G. W. Bruce, the intestate of the administrator, who is the defendant in the present suit and the plaintiff in the former suit, to Bryan, the plaintiff in the present suit. Bryan, in his plea filed to the former suit, alleged, among other things: "G. W. Bruce gave the defendant the remainder of said money, together with said gold watch referred to in said petition, and said household and kitchen furniture, stating to defendant then and there that said money, watch, and household and kitchen furniture was given to him on account of his services rendered to the said G. W. Bruce and wife. The defendant took and carried away from said house only such money, property, and furniture as was given him by the said G. W. Bruce, and nothing more. The allegations in paragraph 7 [that is, of the petition in the former case, which charged that Bryan admitted having in his possession certain furniture, a watch, \$500 in gold coin, and other moneys, and claimed that they had been given to him by G. W. Bruce] are substantially true; but defendant says that he has and holds possession of said furniture, watch, and money by virtue of a gift from the said G. W. Bruce to the said defendant, as is set forth in answer to paragraph 6 of said petition." While the defendant, in his plea in the former suit, does call the money and property turned over to him a "gift," he also shows that it was given to him on account of his services rendered to the said Bruce and his wife. The jury trying the former case found for the plaintiff "as to the gold and the furniture and watch, and for the defendant as to the currency and that pertaining to the currency." On the trial of the former case evidence was introduced tending to show that the defendant admitted getting some currency and also about \$500 in gold coin. The defendant also introduced in that case one witness, P. L.

Lee, who testified that on one occasion, just a few days before the death of Bruce, the latter "talked to Martin, told him something. I could not tell what he was telling, and he asked Uncle Jack, he told him, 'Nothing,' that he had just come there to wait on him, and didn't want nothing. I never heard him tell Martin; Uncle Winse talked low. Martin [Bryan] then got the money out from Uncle Winse's head, and gave Babe \$100, gave me \$50, and my wife \$50, and Uncle Jack \$50. He told Martin he could have the rest, or balance—one. Martin never done anything, only just hung up the pants; told Uncle Winse there was nothing in the pockets. That was about five days before he died. * * * During the time that I had known them, Uncle Winse had been pretty feeble most of the time. Martin Bryan looked after their affairs, by getting their wood, looking after them, and when they needed anything they always sent for Martin. He also looked after the fencing and repairs of any kind. Uncle Winse said that night that he was glad he had lived long enough to give the money to his friends who had waited on him. He said this after the distribution. * * * Martin Bryan was to have that, and what was in the house. Uncle Winse told him that what was in the house was his. That was the night he gave the money out, just after. If there was any money left after the distribution, I never saw it. Martin Bryan made this distribution. I don't know whether there was any left in his hands or not. Uncle Winse told him the balance of it was his. I never heard Uncle Winse say how much money he had there—always told me he had enough to do him and Aunt Nancy. The night the money was distributed, I was sitting out on the porch when he first called us. I went in, but could not tell what he told Martin when he went to get the money. He pulled Martin down over him and said something to him. I saw Martin get the pants from under the pillow. The money was in a little tobacco sack. I mean to say that I saw only \$250 in that pocket. I did not count it. I saw it after it was counted. I counted mine and my wife's. I do not know how much there was in the pocket altogether. I do not know how much there was left. I heard Uncle Winse say that Martin could have the balance. I don't know how much there was. I never saw it to count. All I saw was what was counted out. Uncle Winse did not have the money in hand at all. He had it under his head. Martin Bryan paid out the money. Babe and Uncle Jack were asked by Uncle Winse how much he owed them. The best I remember, he says to Bryan that 'the balance or rest is yours, and that will pay you for waiting on me.' That money was in greenbacks."

While the plaintiff in this case, the defendant in the former suit, did not pray for any affirmative relief, or for further recovery, it

is clear, under the evidence and the pleadings in the former suit, that the distinct issue was made and litigated as to whether the defendant was entitled to the currency and gold for his services; and that necessarily involved the question as to whether or not the administrator's intestate had settled with the plaintiff in the instant case for his services. And when the jury returned in the former case a verdict in favor of the administrator for the amount of gold which was in the defendant's possession, and in favor of the defendant, the plaintiff in the present case, for the currency, it was the equivalent of finding that there had been a settlement between the administrator's intestate and the defendant in that case for the latter's services. While Bryan, the plaintiff in error, in his pleadings referred to the gold coin and the other moneys which he had in his possession, and which came from the administrator's intestate, as a gift, he also alleges that it was given him on account of his services. The expressions thus used in the pleadings, "gift" and "given him on account of his services," may create an ambiguity; but the pleader cannot himself take advantage of this ambiguity. It is manifest, from the pleadings and the evidence introduced on the former trial, that the plaintiff in the present case submitted to the court and jury the contention that all the money which he had received from Bruce had been gotten by virtue of the latter's obligation to pay for the services rendered him; and the jury having found that a part of the money—that is, the part which was in gold coin—should be returned to Bruce's administrator, thus finding to that extent against the defendant, the plaintiff in the present suit, upon the issue made in the former suit as to whether that money had been delivered to him in payment for his services, he will not be permitted to set up his contention that the money which he had been permitted to hold by the former verdict of the jury was not in full payment of his claim for services.

Judgment affirmed. All the Justices concur.

(138 Ga. 737)

GILLESPIE et al. v. EWING.

(Supreme Court of Georgia. Sept. 27, 1912.)

(Syllabus by the Court.)

1. REVIEW ON APPEAL.

None of the exceptions taken to the instructions given to the jury, when considered in connection with the entire charge, require the grant of a new trial.

2. VERDICT AUTHORIZED.

The evidence, though conflicting, authorized the verdict and the refusal of a new trial will not be disturbed.

Error from Superior Court, Gordon County; A. W. Fite, Judge.

Action between W. J. Gillespie and others

and R. A. Ewing. From the judgment, Gillespie and others bring error. Affirmed.

F. A. Cantrell, of Calhoun, and Maddox, McCamy & Shumate, of Dalton, for plaintiffs in error. O. N. Starr, of Calhoun, for defendant in error.

FISH, C. J. Judgment affirmed. All the Justices concur.

(138 Ga. 726)

OUTCAULT ADVERTISING CO. v. CLARY-HARPER CO.

(Supreme Court of Georgia. Sept. 25, 1912.)

(Syllabus by the Court.)

EXECUTION (§ 194*)—ADVERSE CLAIM—EVIDENCE.

On the trial of a claim case before the judge, by consent, without a jury, upon an agreed statement of facts, the evidence authorized a finding that the defendant had never had title to the property, and accordingly there was no error in finding the property not subject.

[Ed. Note.—For other cases, see Execution, Cent. Dig. §§ 571-574; Dec. Dig. § 194.*]

Error from Superior Court, Warren County; B. F. Walker, Judge.

Action by the Outcault Advertising Company against the Clary-Harper Company. Judgment for defendant, and plaintiff brings error. Affirmed.

M. E. Evans, of Warrenton, for plaintiff in error. M. L. Felts, of Warrenton, for defendant in error.

ATKINSON, J. Judgment affirmed. All the Justices concur.

(138 Ga. 735)

BISHOP v. BROWN.

(Supreme Court of Georgia. Sept. 27, 1912.)

(Syllabus by the Court.)

APPEAL AND ERROR (§ 588*)—REVIEW—BRIEF OF EVIDENCE.

There being no bona fide effort to brief the evidence in the case, the so-called brief of evidence being largely composed of objections to evidence and the argument of counsel thereon, colloquies between counsel and between counsel and the court, and various statements of the court in ruling on the admissibility of evidence, such document will not be considered as a brief of evidence. Accordingly, this court will not review the evidence; and, as no question is presented by the bill of exceptions which can be intelligently considered and passed upon without reference to the evidence, the judgment below must be affirmed. *Anderson v. Daniel*, 137 Ga. 635, 73 S. E. 1051; *Roberts v. City of Cairo*, 133 Ga. 642, 66 S. E. 938; *American Standard Jewelry Co. v. Goodman*, 127 Ga. 543, 56 S. E. 642.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2607-2610; Dec. Dig. § 588.*]

Error from Superior Court, Murray County; A. W. Fite, Judge.

Action between L. L. Bishop and S. A.

Brown. From the judgment, Bishop brings error. Affirmed.

F. K. McCutchen and Maddox, McCamy & Shumate, all of Dalton, for plaintiff in error. C. N. King, of Spring Place, and W. E. Mann, of Dalton, for defendant in error.

FISH, C. J. Judgment affirmed. All the Justices concur.

(128 Ga. 768)

WILSON & TOOMER FERTILIZER CO. v. VIRGINIA-CAROLINA CHEMICAL CO.

(Supreme Court of Georgia. Oct. 5, 1912.)

(Syllabus by the Court.)

APPEAL AND ERROR (§ 979*)—REVIEW—REFUSAL OF NEW TRIAL.

Error was assigned upon the judgment overruling a motion for new trial. The motion contained the general grounds, and numerous special grounds by amendment. Most of the latter were based upon rulings upon the admissibility of evidence, some upon the charge of the court, and one upon an omission to charge, without a written request. A careful consideration of each ground fails to show any error of law requiring the grant of a new trial; and, the evidence being sufficient to support the verdict, the discretion of the trial judge will not be disturbed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 8871-8873; Dec. Dig. § 979.*]

Error from Superior Court, Ware County; T. A. Parker, Judge.

Action between the Wilson & Toomer Fertilizer Company against the Virginia-Carolina Chemical Company. From the judgment, the Wilson & Toomer Fertilizer Company brings error. Affirmed.

J. L. Sweat, of Waycross, and Jos. W. Bennett, of Brunswick, for plaintiff in error. Wilson, Bennett & Lambdin, of Waycross, and Toomer & Reynolds, of Jacksonville, Fla.,

ATKINSON, J. Judgment affirmed. All the Justices concur.

(128 Ga. 773)

HAYGOOD v. BROWN et al.

(Supreme Court of Georgia. Oct. 15, 1912.)

(Syllabus by the Court.)

1. APPEAL AND ERROR (§ 648*)—REVIEW—BRIEF OF EVIDENCE.

When a bill of exceptions assigning error upon the refusal of an interlocutory injunction was certified by the judge and filed in the office of the clerk of the superior court, a document purporting to be an agreed brief of the oral and documentary evidence, which was presented to the judge and approved by him as a correct brief of the evidence submitted on the hearing, and which was so presented and approved subsequently to the certification and filing of the bill of exceptions, cannot be considered by this court as a brief of evidence. See Eubank v. Mayor, etc., of Eastman, 120 Ga. 1048, 48 S. E. 426; Glover v. State, 128 Ga. 1,

57 S. E. 101; Jackson v. Georgia, etc., R. Co., 132 Ga. 127, 134, 63 S. E. 841.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2803-2806; Dec. Dig. § 648.*]

2. APPEAL AND ERROR (§ 954*)—REVIEW—REFUSAL OF INTERLOCUTORY INJUNCTION.

It appears that the material allegations of fact in the verified petition were denied on oath in the answer of the defendants, and the parties were at issue; and therefore this court cannot adjudge that the trial judge abused his discretion in refusing an interlocutory injunction. See St. Amand v. Lehman, 120 Ga. 253, 47 S. E. 949.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3818-3821; Dec. Dig. § 954.*]

Error from Superior Court, Jackson County; C. H. Brand, Judge.

Action by Morris Haygood against A. C. Brown and others. From the judgment, Brown and others bring error. Affirmed.

C. L. Bryson and Pemberton Cooley, both of Jefferson, for plaintiffs in error. Lucian L. Ray, of Jefferson, for defendant in error.

FISH, C. J. Judgment affirmed. All the Justices concur.

(128 Ga. 789)

GREENBERG-MILLER CO. v. EVERETT SHOE CO.

(Supreme Court of Georgia. Sept. 26, 1912.)

(Syllabus by the Court.)

CORPORATIONS (§ 30*)—PURCHASE OF PARTNERSHIP PROPERTY—LIABILITY FOR PARTNERSHIP DEBTS.

A corporation, which legally acquires all the property of a partnership, does not thereby become responsible for the partnership debts.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 97-100; Dec. Dig. § 30.*]

Error from Superior Court, Bibb County; W. H. Felton, Judge.

Action by the Greenberg-Miller Company against the Everett Shoe Company. Judgment for defendant, and plaintiff brings error. Affirmed.

Error was assigned upon a judgment dismissing the plaintiff's case on general demurrer. According to the allegations of the petition, as amended, the plaintiff sold a bill of merchandise to the firm of Parks & Everett, composed of J. J. Parks and S. A. C. Everett. Parks sold out his interest to Everett, and the latter organized the defendant corporation, which "took over the stock and assets of the old firm." Parks had no other property than that transferred to Everett. Everett "put all his stock of merchandise * * * into the new corporation, receiving therefor stock" in the corporation. There was no actual sale, but the partnership was merely absorbed by the corporation, and the pretended sale was in fraud of creditors of the partnership, and the transaction made the partnership insolvent. Everett died,

leaving no estate, except the stock in the corporation, and that was hypothecated to his personal creditors. A judgment was prayed against the corporation on account of the alleged debt contracted by Parks and Everett.

West & Dasher, of Macon, for plaintiff in error. J. R. L. Smith and W. A. Thompson, both of Macon, for defendant in error.

ATKINSON, J. The petition is to be construed most strongly against the pleader. The general allegations as to fraud, insolvency, and absorption of the copartnership by the corporation are mere conclusions of the pleader. The substantive allegations of fact show a sale by Everett to the corporation and receipt of a consideration, the value and sufficiency of which is not questioned. The sale, therefore, must be regarded as lawful. The corporation was a different entity from the firm, and there was no promise by the firm to the latter, or to its creditors, to pay the debts of the firm. The attempt, therefore, is to hold the corporation liable merely because it lawfully acquired the property of the partnership. It has been previously ruled by this court that under the circumstances enumerated the corporation will not incur liability. *Culberson v. Alabama Construction Co.*, 127 Ga. 599, 56 S. E. 765, 9 L. R. A. (N. S.) 411, 9 Ann. Cas. 507.

Judgment affirmed. All the Justices concur.

(138 Ga. 723)

CORKER v. NEELY.

(Supreme Court of Georgia. Sept. 26, 1912.)

(Syllabus by the Court.)

REVIEW ON APPEAL.

The assignments of error upon the excerpts from the charge are not meritorious. In view of the charge given, it was not error to refuse the requested instructions. The evidence authorized the verdict, and the court did not err in refusing a new trial.

Error from Superior Court, Burke County; H. C. Hammond, Judge.

Action between P. L. Corker and L. W. Neely. From the judgment, Corker brings error. Affirmed.

F. S. Burney and C. B. Garlick, both of Waynesboro, for plaintiff in error. H. J. Fullbright, of Waynesboro, for defendant in error.

FISH, C. J. Judgment affirmed. All the Justices concur.

(138 Ga. 723)

AKIN v. COMER MERCANTILE CO. et al.
(Supreme Court of Georgia. Sept. 26, 1912.)

(Syllabus by the Court.)

MORTGAGES (§ 151*)—PRIORITY OF LIEN.

Under the provisions of Civ. Code 1910, §§ 8349, 8350, a mortgage given to secure the pur-

chase price of supplies furnished to aid in making a crop of a given year is superior to the lien thereon of an older common-law judgment, though the mortgage was executed after such supplies were furnished, and subsequently to the levy of the execution issued upon such common-law judgment. *Franklin v. Callaway*, 120 Ga. 382, 47 S. E. 970.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. §§ 307-329, 332-336, 358-370; Dec. Dig. § 151.*]

Error from Superior Court, Madison County; D. W. Meadow, Judge.

Action by the Comer Mercantile Company and others against W. B. Akin. Judgment for plaintiffs, and defendant brings error. Affirmed.

J. F. L. Bond, of Danielsville, for plaintiff in error. Berry T. Moseley, of Danielsville, for defendants in error.

ATKINSON, J. Judgment affirmed. All the Justices concur.

(138 Ga. 734)

STURTEVANT v. ROBINSON et al.

(Supreme Court of Georgia. Sept. 27, 1912.)

(Syllabus by the Court.)

1. COURTS (§ 90*)—SUPREME COURT—FORMER DECISIONS—BINDING EFFECT.

This case is controlled by *Hood v. Perry*, 73 Ga. 319, and *Byrom v. Gunn*, 102 Ga. 565, 31 S. E. 560. The decisions in those cases on the point involved in the present case were not obiter dicta, and are binding until overruled or modified in the manner pointed out in the statute. Civ. Code, § 6207.

[Ed. Note.—For other cases, see *Courts*, Cent. Dig. §§ 313-321, 351; Dec. Dig. § 90.*]

2. MARRIED WOMEN AS GUARDIANS.

As those decisions have stood for many years, as to the appointment of married women as guardians, without reference to what might have been held as an original proposition, enough members of the court are not in favor of overruling them to accomplish that result, and they must stand.

3. SAME.

While the reasoning in *Wilson v. Wood*, 127 Ga. 316, 56 S. E. 457, is not in harmony with what was said in *Hood v. Perry* and *Byrom v. Gunn*, supra, the first-mentioned case dealt with the question of administration, and not of guardianship, and in it the two last-mentioned decisions were not formally overruled, and stand unreversed on the question of guardianship.

Error from Superior Court, Chatham County; W. G. Charlton, Judge.

Action by A. E. Robinson, by next friend, and others, against E. S. Sturtevant. From the judgment, E. S. Sturtevant brings error. Reversed.

E. S. Elliott, of Savannah, for plaintiff in error. Saussy & Saussy, of Savannah, for defendants in error.

PER CURIAM. Judgment reversed. All the Justices concur.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes 75 S.E.—71

(133 Ga. 634)

BECKER et al. v. DONALSON et al.
(Supreme Court of Georgia. Aug. 15, 1912.
Rehearing Denied Sept. 24, 1912.)

(Syllabus by the Court.)

1. EVIDENCE (§ 352*)—DOCUMENTARY EVIDENCE—ADMISSIBILITY.

E. C. Becker paid the purchase price of land, and a deed was taken in his name. It was an issue as to whether this was his individual transaction, or was one for the Donalson Lumber Company (a corporation); the deed being taken in his name merely as security, and the purchase money paid as an advancement, the corporation thereby becoming his debtor. Relatively to such an issue it was not erroneous to admit in evidence from the ledger books of the corporation certain accounts of E. C. Becker, which, among other items, included one purporting to show the corporation to be his debtor for the amount of the purchase money; it appearing from other evidence that E. C. Becker had examined the books and footed up the account, and made no denial that the corporation was his debtor.

(a) The object of the evidence was not to prove the correctness of the account, and the books were not inadmissible because there was no compliance with the statute in regard to preliminary proof of the correctness of the books of account, when offered for such purpose.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1398-1403; Dec. Dig. § 352.*]

2. PRINCIPAL AND AGENT (§ 122*)—AUTHORITY—ADMISSIONS—ACTS OF AGENT.

Another issue involved the contention of Donalson that, even if the land was not purchased for the corporation, E. C. Becker subsequently authorized Donalson to make sale of all his holdings at the domicile of the corporation, including the land in dispute, and that in pursuance of such authority a sale was made, and the entire purchase price paid, thereby obligating E. C. Becker to convey the land to the purchaser under whom Donalson claimed. In view of this contention, and certain evidence as to the authority of B. A. Becker, which did not appear on the former trial, relative to his agency, and other evidence as to acts upon the part of E. C. Becker, when considered in connection with the evidence as to the consummation of the sale and the acceptance of the purchase price by E. C. Becker, there was no error in the rulings of the court admitting in evidence a certain letter and telegram from B. A. Becker to Donalson in regard to a price that E. C. Becker would accept for his interest in the Donalson Lumber Company, and testimony as to the agency of B. A. Becker, or relative to what Donalson did in advertising and consummating a sale of the property, and other evidence as referred to in the second division of the opinion.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 416-419; Dec. Dig. § 122.*]

3. SPECIFIC PERFORMANCE (§ 120*)—EVIDENCE—ADMISSIBILITY.

In view of the pleadings, and of other evidence by the same witness, there was no error in excluding certain testimony of Donalson to the effect that he was one of the purchasers of the property, and that he and Williams, his joint purchaser, had an agreement that a new company should be organized, after the purchase from Becker, which should take over all the property of the Donalson Lumber Company.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 384-386; Dec. Dig. § 120.*]

4. SPECIFIC PERFORMANCE (§ 120*)—EVIDENCE—ADMISSIBILITY.

The relevancy of certain documents which the judge excluded from evidence was not made to appear.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 384-386; Dec. Dig. § 120.*]

5. TRIAL (§§ 242, 296*)—INSTRUCTIONS—IN-ADVERTENT ERROR—CHARGE AS WHOLE—"PREPONDERANCE OF THE TESTIMONY."

The judge charged: "By a 'preponderance of the testimony' is meant that superior weight of the evidence upon the issues in the case, which, while not enough to wholly free the mind from a reasonable doubt, is yet sufficient to incline the reasonable and impartial minds of the jury to one side of the issue rather than to the other. The burden is upon the defendant in this case to make out his case under the rule of law just given you, and in the cross-bill filed by the defendant the burden is upon him, the defendant, to make out against the plaintiff under the same rule of law the contentions set out therein." *Held*:

(a) It clearly appears from the context that the use of the word "defendant" was a mere slip of the tongue, and that the word "plaintiff" was intended to be used.

(b) The judge elsewhere charged: "A parol contract for land should be so clearly, strongly, and satisfactorily shown and proven as to leave no reasonable doubt as to the agreement or contract." In the light of the entire charge, that portion of it copied above, on which error was assigned, affords no cause for a new trial.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 569-576, 705-713, 715, 716, 718; Dec. Dig. §§ 242, 296.*]

For other definitions, see Words and Phrases, vol. 6, pp. 5516-5518.]

6. APPEAL AND ERROR (§ 1066*)—GROUNDS—HARMLESS ERROR.

The general charge, giving the rule as to the impeachment of witnesses, while not authorized by any evidence in the case, was not cause for a new trial, because under the facts of the case it was not calculated to injure either side.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4220; Dec. Dig. § 1066.*]

7. OTHER ASSIGNMENTS WITHOUT MERIT.

Other assignments of error upon the charge of the court were not meritorious.

8. SUFFICIENCY OF EVIDENCE—NEW TRIAL REFUSED.

The evidence was sufficient to support the verdict, and there was no error in overruling the motion for a new trial.

Error from Superior Court, Decatur County; Frank Park, Judge.

Action by John E. Donalson and another against E. C. Becker and others. Judgment for plaintiffs, and defendants bring error. Affirmed.

M. E. O'Neal, of Bainbridge, and Pope & Bennet, of Albany, for plaintiffs in error. Donalson & Donalson and T. S. Hawes, all of Bainbridge, for defendants in error.

ATKINSON, J. This case was before the Supreme Court on a former occasion. Becker v. Donalson, 133 Ga. 864, 67 S. E. 92. In that instance Donalson had recovered, and Becker excepted to the judgment of the trial court refusing a new trial. On review in the Supreme Court the judgment was re-

versed. On the subsequent trial Donalson again recovered. Becker moved for a new trial, and excepted to the judgment overruling the motion. It is unnecessary to refer to the character of the suit, further than to say that it was one for specific performance and other equitable relief.

[1] 1. E. C. Becker paid the purchase price of the land, and the deed was taken in his name. It was an issue whether this was his individual transaction, or was one for the Donalson Lumber Company (a corporation); the deed being taken in his name merely as security, and the purchase money paid as an advancement, the corporation thereby becoming his debtor. It was contended in the motion for new trial that the court erred in admitting in evidence, over the objection of the defendants, the ledger kept by the Donalson Lumber Company, which contained the account of E. C. Becker with the company. The items thus objected to were as follows: "1897, Apl. 9. By D. purchase of 625 acres of land July 6/94 1,250.75," and "Aug. 24th. To Ledger #4—300 3,726.25." The footing of the column in which the last-quoted item appears amounted to \$3,726.25; such item being the only one in that column. The column in which the first item above quoted appears footed up the same amount, there being two other items in this column. The account and the two items quoted were objected to as being irrelevant, and not competent to bind E. C. Becker, because, as contended by the defendants, he had no knowledge of the entry of such items on the books, and on the further ground that no preliminary proof as to the correctness of the books, as required by statute, had been submitted in order to let the books in as evidence.

In reference to this account John E. Donalson, a witness for the plaintiffs, testified as follows: "There was no complaint by E. C. Becker as to the correctness of this account. This addition and footings on this page were made by B. A. Becker; that includes the \$3,726.25 brought forward from the other page, and also the price of land in question." B. A. Becker, a witness for the defendants, testified: "I kept the books of the Donalson Lumber Company. That is my handwriting; those figures represent the totals of these columns. I added them up, and it makes a balance of \$46,186.55; that entry of August 24th, 'By ledger 3, page 590, \$3,726.25,' is Mr. E. C. Becker's handwriting in 1897. * * * I understand bookkeeping. We would not put those entries in there now; that entry means the balance from the old page—we added at the top instead of these before it. I added it up. It showed the Donalson Lumber Company owed my father \$46,186.55 balance. That is ledger No. 3; that is the account of Ed. C. Becker, 1895; in 1897 it showed a credit balance of \$3,726.25 on these books; that is on page 590 ledger No. 3, account of Edward C. Becker. * * * That part of that account of \$46,

186.55 is based on \$3,726.25 brought forward from this ledger No. 3, page 590; it was brought there as a balance of August 24th."

It appears from this evidence that the item of \$1,250.75, which was the price of the land in question paid by E. C. Becker, constituted one item of the account which footed up \$3,726.25, which footing showed the total indebtedness of the Donalson Company by account to E. C. Becker, and that he himself made the entry of August 24, 1897, showing such total indebtedness by the company by account to him. It is clear that this evidence tended to show that he knew of the entry of \$1,250.75, the price he paid for the land, as it was necessarily included by him in the entry of \$3,726.25 which he made. (This evidence did not appear from the record when this case was formerly before this court, when it was ruled that the entry of \$1,250.75 was not admissible as against E. C. Becker.) The evidence objected to was admissible on the second trial, in the light of the other evidence above referred to, as against E. C. Becker, as tending to support the contention of the plaintiffs that the property was bought for the Donalson Lumber Company, and that E. C. Becker merely advanced the money under a contract that it should be repaid, and that thereafter he should convey the title to the corporation.

The book admitted in evidence, which contained the account of E. C. Becker with the Donalson Lumber Company, in which the items above quoted appeared, was admissible without complying with the provisions of Civil Code, § 5769, relating to preliminary proof for the admission of books of account in proof of the accounts contained therein. The account was not admitted for the purpose merely of proving it, but as tending to show that the Donalson Lumber Company was acting in pursuance of its contention that the land in question was purchased by E. C. Becker for the company, and that the company owed him the purchase price which he had paid for it, and that E. C. Becker had seen the account containing such entries, and had made no objection to the account, but had himself made the entry therein as to the amount of the credit due him in the account, which might have included the price he had paid for the land, all of which tended to show acquiescence on his part as to the above-stated contention of the company.

[2] 2. The plaintiff introduced a letter from E. C. Becker to John E. Donalson, dated August 15, 1898, the substance of which was that Becker would "give no more options, but an offer of \$29,000 for my interest in the company, including all obligations I hold against the company, also including Bontie's [B. A. Becker's] interest, including receipt in full for what obligations the company has against Bontie—it also includes the 600 acres of land in my name—I would accept; and if you should not find party that would give that by end of September, I wish you would

recommend some attorney to me, so that I could get order of sale of property under second mortgage, as you would then have better chance, with company obligations out of way, and clear title, to sell the whole of it for more than \$29,000 and cost of sale. \$29,000 is the lowest I will take, as it would then net me a loss of \$50,000. I hope you will agree with me on my views."

After the introduction of this letter, the witness Donalson was permitted to testify: "Acting under that letter, I commenced trying to find a sale for the Donalson Lumber Company property. Eventually I issued a circular, dated January 20, 1899, and this is the circular. [The circular describing the mill, lands, and numerous other property of the Donalson Lumber Company, and offering all for sale, there being included in the lands offered about 3,000 acres of land, which Donalson testified belonged to him individually, and also the 625 acres now in controversy.] I mailed one of them by due course of mail to E. C. Becker, at St. Louis, Mo., in an envelope properly sealed and stamped, at his address, deposited in the post office, at Donalsonville, Ga. I consulted with Mr. B. A. Becker frequently about this matter; read this to him in manuscript before I had it [the circular] printed. There were a number of those circulars lying on Mr. B. A. Becker's desk. I don't know whether he ever read it afterwards or not. Some time after Mr. W. T. Williams came to me with that identical circular in his hand, and we talked it over. I mailed this circular to all the names I could get of parties who were mill men, trying to find a purchaser. My recollection is that we duplicated that circular, identically the same thing, but dated it a little later, probably March; that it, the same way, was mailed all over the country. After a while Mr. W. T. Williams came to Donalsonville, and had that very circular which we now have in evidence, and wished to buy this property. He went over it—was there several days, and finally offered to give me \$60,000, and that was to include some land that I owned in my name. I do not recall the number of acres, but the amount agreed on for my land was six thousand and odd dollars, and the Donalson Lumber Company land and property was fifty-three thousand and odd dollars; the two making up \$60,000. We went to Savannah, had a conference with Mr. Williams' associates, and the result was we came back to Donalsonville with a promise on the part of one of them that he would come over to Donalsonville soon and close the matter up. It was John Cummings, and he did not get over till about the middle of October [1899]. Mr. Becker went over to Bainbridge and got Mr. A. L. Townsend as his lawyer, and we met on the night of October 18th to close this matter up. They submitted one paper, which was admitted by the defendants in their an-

swer to be correct. The sale to Mr. W. T. Williams was consummated thus."

The defendants objected to the admission of this evidence, on the ground that it was irrelevant, and insisted that the facts shown thereby could not constitute an estoppel as against E. C. Becker, for the reason that his offer, as contained in the letter of August 15th, was expressly limited as to the time intervening since that date and the end of September following; it not being contended by the plaintiffs that any of the circulars were issued, or any of the transactions which finally culminated in the sale to Williams were made, prior to the end of September, and E. C. Becker not having received the circular until after the sale made to Williams, and the sale not embracing any land whatever, but being simply a sale of the mortgage and other obligations held by E. C. Becker and B. A. Becker against the Donalson Lumber Company, including one-fourth of the capital stock of the Donalson Lumber Company. It is now contended that the sale could not amount to an estoppel as to more than a one-fourth interest in the lands in controversy; it appearing from the evidence of Donalson that at the time of the sale to Williams there was an agreement between him and Williams that upon the consummation of the sale he and Williams would reorganize the sawmill of the Donalson Lumber Company as "co-owners," and that the sale to Williams was really a sale to him for the benefit of himself and Donalson, and that the negotiations therefor were conducted by Donalson, acting for Williams and himself, and hence the knowledge of Donalson of the fact that the title to the lands was not in the Donalson Lumber Company would be imputable to Williams, and therefore there could be no estoppel. The court overruled the objections and admitted the evidence, and error was assigned.

The admissibility of this evidence did not depend upon its sufficiency to constitute an estoppel. It would be admissible if upon any theory it tended to elucidate any issue involved in the case. One of the plaintiffs' contentions was that even if, in the first instance, the land was bought by E. C. Becker for himself, and there was no parol contract between Becker and the Donalson Lumber Company by which Becker should convey to that company upon repayment of the purchase price, nevertheless the offer contained in the letter of August 15th was a proposition to sell the land, and that this offer was never withdrawn, but that after its submission Donalson acted upon it, and from time to time had further negotiations with E. C. Becker directly, and with B. A. Becker, who was alleged to be the agent of E. C. Becker, relatively to a sale of the property, until a sale was eventually consummated on October 17, 1908. There was evidence of agency upon the part of B. A. Becker for

E. C. Becker, which was not introduced upon the former trial. B. A. Becker had attained the age of majority before any of these matters testified about occurred; and E. C. Becker testified that while B. A. Becker was a minor he did not have full authority to represent him at Donalsonville, but after his majority he did, and that "I may have written him to sell the land to the best advantage. I believe I did, probably a month or two before the sale of the mortgages." The defendants were contending that the offer of August 15th had expired, and that the sale which eventually took place had no connection with that offer, and consequently did not include the land in dispute. In view of this contention, there were such issues between the parties as, in connection with the other evidence as to the consummation of the sale and the acceptance of the purchase price by E. C. Becker, and as to the right of B. A. Becker to represent him as agent, authorized the admission of the evidence objected to.

For similar reasons it was not error, over the objection that it was mere hearsay, to admit in evidence a letter and telegram from B. A. Becker to J. E. Donalson, dated March 6, 1898, to the effect that B. A. Becker was of the opinion that he could get E. C. Becker to accept a certain sum for his interest in the Donalson Lumber Company, especially as soon thereafter E. C. Becker did submit to J. E. Donalson a proposition to substantially the same effect as that which B. A. Becker thought that he might induce E. C. Becker to make.

Nor was it error, over the objection that it was irrelevant, to permit the witness Donalson to testify concerning the circulars advertising the property of the Donalson Lumber Company for sale, referred to in his evidence hereinabove quoted: "I mailed one of them [the circulars] by due course of mail to Mr. E. C. Becker, at St. Louis, Mo., properly sealed and stamped, and the proper number of two-cent stamps on it, and mailed to Mr. Becker in St. Louis, Mo., with the proper address at which we had been addressing him, and deposited in the post office at Donalsonville, Ga."—notwithstanding E. C. Becker testified that he did not receive the circular until after the sale.

Nor was it error to permit the witness Donalson to testify: "We had them [the circulars] there in the office of the Donalson Lumber Company. I consulted with Mr. B. A. Becker frequently about this matter, and read this [the circular] to him in manuscript before I ever had it printed, and I read it to B. A. Becker in manuscript, and there was a number of them lying on his desk. I don't know whether he ever read it afterwards or not"—the objection to the evidence being that it was irrelevant, and that no notice to or conduct of B. A. Becker could bind or affect the rights of E. C. Becker by estoppel or otherwise, and that

the rights of E. C. Becker were the only ones insisted on by the defendants.

Nor was it error to admit the testimony of John E. Donalson, as follows: "I told B. A. Becker that Williams would buy the properties, but did not wish to pay more than \$15,000 in cash, and would give his notes for the remainder, and he (B. A. Becker) asked me what he was to get, and I told him: 'You get the offer your father made of \$29,000.' He said: 'That has been some time ago.' I replied: 'Yes; but we are willing to pay the interest. Make it up, and give us a memorandum of the amount, so we can arrange it.' He went to his desk and began to write. The train was approaching, and about the time he finished what he had written the train blew, and I came by and asked him for the paper, and he handed me this paper. Mr. Williams and myself were going to Savannah to get the money to complete the arrangements, and we were going to take that train." The objection to this testimony was "that it was irrelevant, because no notice to or acts of B. A. Becker could bind or affect the rights of E. C. Becker, or raise any estoppel against him; the defendants relying solely on the rights of E. C. Becker."

Nor was it error to admit the testimony of John E. Donalson, as follows: "During that time that the timber was being cut off of that land [the land in controversy] B. A. Becker was there at Donalsonville. We cut the timber, but there was no entry made on the books about it, because we treated it as our own. B. A. Becker was also superintendent, about that time, of the logging teams. The timber was hauled to a place called Rillaville, about two miles from Donalsonville, which was the terminus of the tramroad, and there put on the log train and brought to the mill. Mr. B. A. Becker was down that tramroad nearly every day, and made up the pay rolls, and he knew as much about the business as I did. He was right there, and knew all about it, and knew that the timber was being cut. We cut that timber during 1894 and 1895; and in the fall of '96 we turpentine it. B. A. Becker was there at Donalsonville then and all during the two years and a half that we were timbering it, and during the years 1896, 1897, and 1899, while we were turpentine it. He was bookkeeper and superintendent, and looked after the physical properties. Those lands were located about three miles from the mill, and not over one-fourth of a mile from the tramroad. Mr. B. A. Becker was superintendent of the mill, and had charge of the logging and everything else, and his duties frequently called him into the woods; in fact, as often as he could leave his books he was there. He was constantly in the woods, probably two or three times a week, on the road looking after things. In 1898 and 1899, at the time we had gone

beyond Rillaville, I could stand on the car and see those white boxes in the fall of the year one-fourth of a mile, and down at the corner where we crossed 143, one-half of the lot next to it, 142, was turpentine, and there was an open field between that lot and a portion of this timber."

The objection urged to its admissibility was that the evidence was irrelevant, and that no notice to or conduct of B. A. Becker could bind or affect the rights of E. C. Becker; it being contended that B. A. Becker was not the agent of E. C. Becker, or otherwise in privity with him, so as to bind him by knowledge or by estoppel, at the time referred to in said testimony. Some of this evidence related to acts tending to show notice to B. A. Becker before he had attained his majority, while other parts of it related to such acts as occurred after his attainment of majority, and of which he must have had knowledge. Even if it would have been improper to admit the evidence as to acts which occurred before his majority, the evidence was objected to as a whole; and, the acts which occurred after the attainment of majority by B. A. Becker being clearly admissible as tending to show notice to him as the agent of E. C. Becker, the testimony as a whole should not be excluded, and it was not error to overrule the objection.

Nor was it error to overrule the objections urged to the admissibility of the evidence set out in the thirteenth ground of the amendment to the motion for new trial, which was alleged to be, but was not, all of the evidence tending to show agency upon the part of B. A. Becker for E. C. Becker.

[3] 3. The fourteenth ground of the amendment to the motion for new trial begins as follows: "Because movant contends, plaintiffs in said case claiming that the defendants were estopped to set up title to the land in controversy, subsequent to the sale by E. C. Becker and B. A. Becker to W. T. Williams of the mortgages and other interests in the Donalson Lumber Company, on October 17, 1899, for the reason that W. T. Williams was led, by the conduct and silence of E. C. Becker and B. A. Becker, to believe that the lands in controversy belonged to the Donalson Lumber Company, when the said W. T. Williams made said purchase," etc. The ground then sets forth that the court erred in excluding from evidence certain testimony of John E. Donalson, which the defendants sought to bring out, to the effect that Williams did not purchase the land in controversy for himself alone, but for himself and Donalson, and that there was an understanding between them that a new company should be organized after the purchase of the land, which should take over all the property of the Donalson Lumber Company, etc. It does not appear anywhere in the record that the plaintiffs made any such claim as to estoppel against

the Beckers, nor does it appear from the records that the plaintiffs claimed that Williams bought the property for himself; but, on the contrary, it was set forth in the petition that Williams and Donalson purchased from the Beckers, for a given sum, all their interest in the Donalson Lumber Company. Moreover, it appears from the brief of evidence that John E. Donalson testified substantially to everything that this ground of the motion complains that the court would not allow him to testify to.

[4] 4. The fifteenth ground of the amendment to the motion complains as follows: Defendants offered in evidence a certain statement of facts made in 1898 by John E. Donalson, relative to the organization of the Donalson Lumber Company, its assets and liabilities, which, among other things, recited that specified portions of the capital stock of the corporation which had been issued to B. A. Becker and E. C. Becker were issued without any consideration having been paid to the corporation therefor. After stating the facts, the question was propounded to an attorney at law: "Would the creditors of the Donalson Lumber Company, in view of the above recitals, have the power to force Mr. E. C. Becker and B. A. Becker to pay into the company the full value of their stock, for which they never paid anything, or to pay so much thereof as would be necessary to liquidate their claim?" The attorney advised that the stockholders named would be liable to the creditors. The statement of facts was offered in evidence alone, and also in connection with the opinion to which it was attached; and, upon objection urged by the plaintiffs that the documents were irrelevant, the court excluded them. This evidence was not admissible, as contended by counsel for plaintiffs in error in their brief filed in this court, for the reason that it "showed that Mr. Donalson, as well as Mr. Becker, had participated in the illegal organization of the corporation, and no rights could grow out of such a transaction." It is not made to appear in what way the organization of the corporation was illegal, or how the question at issue between the parties to the case could be affected by such evidence.

[5] 5. The sixteenth ground complains that the court, after charging the jury, "By a preponderance of the testimony is meant that superior weight of the evidence upon the issues in the case, which, while not enough to wholly free the mind from a reasonable doubt, is yet sufficient to incline the reasonable and impartial minds of the jury to one side of the issues rather than to the other," then charged: "The burden is upon the defendant in this case to make out his case under the rule of law just given you, and in the cross-bill filed by the defendant the burden is upon him, the defendant, to make out against the plaintiff under the same rule of law the contentions set out therein."

The exceptions to the charge were as follows:

"(a) Because the same was confusing to the jury, in that the effect of said charge was to place the burden upon the defendant in all branches of the case; and (b) because, even if the use of the word 'defendant,' where it first occurs in said last-quoted charge, were a mere slip of the tongue, and even if the jury had so understood it, and understood that the court intended to use the word 'plaintiff,' still movant insists that the charge was error, for the reason that, the plaintiffs' case being one for specific performance of an alleged parol contract for the sale of land, movants insist that the plaintiffs should be required to make out their case by evidence so clear and unequivocal as to satisfy the minds of the jury to a reasonable certainty, that the rule as to preponderance of evidence as defined by the court in the charge first quoted in this ground would not apply."

It is evident that the use of the word "defendant" was a mere slip of the tongue, and that the word "plaintiff" was intended to be used by the judge. This clearly appears from the context in which this instruction was given, as well as the full, clear, and implicit instructions elsewhere given on the subject of the burden of proof. The charge as to the preponderance of evidence was not error, in view of the instruction, elsewhere given, that "a parol contract for land should be so clearly, strongly, and satisfactorily shown and proven as to leave no reasonable doubt as to the agreement or contract." This instruction was certainly as strong as the defendants were entitled to. *Warren v. Gay*, 123 Ga. 243, 51 S. E. 302.

[8-] 6-8. The rulings announced in the sixth, seventh, and eighth headnotes do not require elaboration.

Judgment affirmed. All the Justices concur.

(138 Ga. 748)

BUTLER v. SAMS.

(Supreme Court of Georgia. Sept. 28, 1912.)

(Syllabus by the Court.)

1. VERDICT—ERROR IN CHARGE—GROUNDS FOR NEW TRIAL.

Under the pleadings and the evidence, a verdict was demanded for the defendant; and if there was any error in the charge, as complained of, it would not require the grant of a new trial.

2. EVIDENCE (§ 145*)—RELEVANCY—REMOTE-NESS.

The plaintiff tendered in evidence a statement of account rendered by him to the defendant, showing the balance claimed by plaintiff on account of the transactions involved in the suit, together with a letter from the plaintiff, offering to accept the defendant's note therefor. These documents bore date more than two years after the sale, and were properly rejected by the court.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. § 434; Dec. Dig. § 145.*]

(Additional Syllabus by Editorial Staff.)

3. EXCHANGE OF PROPERTY (§ 8*)—ACTION ON CONTRACT.

Where a contract for the purchase of land provided for the delivery of 9,000 shares of certain mining stock at the price of 40 cents a share cash value in settlement of the balance of the price, the vendor, in case of the vendee's refusal to deliver the stock, could not recover the balance of the price in cash.

[Ed. Note.—For other cases, see *Exchange of Property*, Cent. Dig. §§ 14-18; Dec. Dig. § 8.*]

4. EXCHANGE OF PROPERTY (§ 8*)—CONTRACT—BREACH.

Where a contract for the sale of land provided for the payment of the balance of the price in mining stock, the vendor, on the purchaser's refusal to deliver the stock, could not recover the value of the stock at the time it was delivered, in the absence of evidence showing its market value at that time.

[Ed. Note.—For other cases, see *Exchange of Property*, Cent. Dig. §§ 14-18; Dec. Dig. § 8.*]

Error from Superior Court, Cobb County; *W. A. Morris*, Judge.

Action by R. E. Butler against W. A. Sams. Judgment for defendant, and plaintiff brings error. Affirmed.

In an action by R. E. Butler against W. A. Sams the petition alleged that the defendant was indebted to the plaintiff in the sum of \$3,600 principal, and interest, by reason of the following facts: On September 20, 1907, petitioner sold to defendant described land for \$10,000, \$6,400 of which was to be paid in cash on January 1, 1908, the balance to be paid on the date last mentioned in "9,000 shares of Los Colorado mining stock, par value \$1 per share, at the price of 40 cents per share, cash value." The contract of sale was evidenced by a bond for title. On January 2, 1908, the defendant paid the amount which had been promised to be paid in money, received from the plaintiff a warranty deed, and promised in a "day or two" to deliver to plaintiff the 9,000 shares of stock. The land was worth \$10,000, and the stock was represented by the defendant to be of the value of 40 cents per share, and was accepted at such value by plaintiff, and in fact at that time it was bringing that price on the market. The defendant failed to deliver the stock, though frequent demands had been made for it, and in the meantime it depreciated in value, and was worthless at the time of the institution of the suit. After alleging in substance as above set forth, the petition further alleged that, defendant "having failed and refused to turn over said stock according to his contract, and said stock having become worthless, petitioner brings this suit for the balance purchase money of said land, to wit, \$3,600, with interest from January 1, 1908, at 7 per cent. per annum," and prayed for process, and that "plaintiff have a verdict and judgment for said principal sum, with interest as above set out." The petition

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

contained a second count, which was in substance as above indicated, except that, instead of suing "for the balance purchase money," it was alleged that the suit was "for the value of said stock at the time the same should have been delivered to petitioner." On the trial the plaintiff abandoned the second count, and relied solely on the first. The jury returned a verdict in favor of the defendant. The plaintiff filed a motion for new trial, which was overruled, and he excepted.

Mozley & Moss, of Marietta, for plaintiff in error. D. W. Blair and Clay & Morris, all of Marietta, for defendant in error.

ATKINSON, J. [1-4] Properly construed, the first count was an action on the contract for money, being the balance of the purchase price alleged to be due for the land. By the record before us there was no agreement to pay the balance of the alleged purchase price otherwise than in stock; and hence there could be no recovery by the plaintiff under the first count. There was no evidence to show the market value of the stock at the time it was contracted to be delivered; and hence there could be no recovery under the second count. Under these circumstances, a general verdict in favor of the defendant was demanded by the evidence; and if there was any error in the charge of the court, as complained of, it would not require a new trial.

Judgment affirmed. All the Justices concur.

(138 Ga. 726)

CLARK v. RAMSEY et al.

(Supreme Court of Georgia. Sept. 26, 1912.)

(Syllabus by the Court.)

JUDGMENT (§ 460*)—PETITION TO SET ASIDE—SUFFICIENCY.

The petition to set aside the judgment was not subject to general demurrer.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 879-891; Dec. Dig. § 460.*]

Error from Superior Court, Richmond County; H. C. Hammond, Judge.

Action by L. C. Clark against W. W. Ramsey and others. Judgment for defendants, and plaintiff brings error. Reversed.

R. N. Hardeman, of Louisville, for plaintiff in error. M. C. Barwick, of Augusta, for defendants in error.

FISH, C. J. The petition of the plaintiff in error, which was to set aside a judgment, was dismissed on demurrer. She alleged that an ejectment suit was brought against her by W. W. Ramsey to the October term, 1909, of Burke superior court. When served with the pleadings in the case, she employed counsel and surrendered all her papers to him. Counsel prepared her defense, but did

not file it. He was ill at that term of court, and had a leave of absence. At the trial term the attorney was still ill, and had a leave of absence for that term of the court. The client was an old and infirm woman, unable to attend court on account of her age and feeble health, and relied upon her counsel to protect her rights. She was under the impression that her counsel had filed her defense, and made inquiry about her case at each term, and was informed of her counsel's illness and his leave of absence. At the trial term Ramsey's attorney knew of the employment of her attorney, of his illness, and leave of absence, and took undue advantage of her condition and the illness of her counsel in pressing the case to judgment. By amendment she alleged a good defense against the ejectment suit.

The petition was equitable in its nature, and prayed equitable relief. "Equity will interfere to set aside a judgment of a court having jurisdiction only when the party had a good defense of which he was entirely ignorant, or where he was prevented from making it by fraud or accident, or the act of the adverse party, unmixed with fraud or negligence on his part." Civil Code, § 4585. Sudden illness of counsel has been treated as an accident or misfortune, and judgments have been vacated in cases where counsel was stricken with serious illness incapacitating him from filing a defense or representing his client, where the client was ignorant of counsel's illness. *Howell v. Ware*, 133 Ga. 674, 66 S. E. 884; *Robinson v. Carmichael*, 134 Ga. 654, 68 S. E. 582. There can be no question that at the trial term neither counsel nor client was in laches. The former had a leave of absence, which was an assurance to the latter that her case would not be tried. Besides, it is alleged that opposing counsel was aware that counsel represented the client in the particular case and had a leave of absence for that term of the court. Good faith would have required him to disclose this information to the court; and it is not to be presumed that with this knowledge the court would have allowed the case pressed to trial.

As to the case being in default at the appearance term, and whether that default should be opened, depends upon the conclusion, under the facts alleged, whether counsel or client was negligent. The allegation is that counsel was sick, and on account of such sickness a leave of absence had been granted to him. While the time of his employment is not definitely alleged, it does appear that counsel was retained immediately after the service of the suit upon the client. That he was not ill at the time of his employment is inferable from the fact that he advised with his client, accepted her papers, and prepared her defense. From these facts, as against a general demurrer, we may conclude that counsel was stricken with illness,

and was prevented from filing the defense on that account.

Was the client negligent? She was an old and infirm lady, residing some distance from the county seat. Because of her old age and feeble health, she was unable to attend that session of the court. She was under the impression that her defense had been filed. She made inquiry about her case, and was informed of her counsel's illness, and that a leave of absence had been granted him by the court. Under such circumstances, we do not think the client was guilty of laches.

A motion to set aside and vacate a judgment cannot be determined by any fixed rule, but depends upon the circumstances of the case. *Storey v. Weaver*, 66 Ga. 296. We think that, under the allegations of the petition, admitted to be true on demurrer, the petition should not have been dismissed on general demurrer.

Judgment reversed. All the Justices concur.

(128 Ga. 780)

JONES v. JONES et al.

(Supreme Court of Georgia. Sept. 26, 1912.)

(Syllabus by the Court.)

1. PLEADING (§ 362*)—PAROL EVIDENCE—EXPRESS TRUST.

It was erroneous to overrule an appropriate motion to strike certain portions of the plea of the defendants, which, in effect, sought by parol to ingraft an express trust upon a deed to land, and subsequently to permit witnesses to testify in support of such portions of the plea, over the objection that the testimony sought by parol to establish an express trust to land, and was irrelevant.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1147-1155; Dec. Dig. § 362.*]

2. PAROL EVIDENCE.

The ruling above announced has no application to so much of the defendant's plea as related to the personal property involved in the suit, concerning which there was no effort to declare a trust.

3. PARTITION (§ 46*)—PARTIES DEFENDANT.

There was no error in the ruling of the court permitting certain persons to be made parties defendant.

[Ed. Note.—For other cases, see Partition, Cent. Dig. § 114; Dec. Dig. § 46.*]

Error from Superior Court, Taliaferro County; D. W. Meadow, Judge.

Action by Wesley P. Jones against Edward P. Jones and others. Verdict for defendants. From an order denying a new trial, plaintiff brings error. Reversed.

Wesley P. Jones instituted an action against Edward P. Jones, alleging that plaintiff and defendant, as tenants in common, owned described land, which had been conveyed to them by John F. Holden, and certain farm tools and other personal property, which they had purchased and used on the farm, and that the defendant had been in exclusive possession of the property, and refused to recognize the plaintiff as a part

owner in the property, or account to him for certain rents derived from the same. There were prayers: (a) For receiver; (b) for an accounting for rents, etc.; (c) for partition and general relief and process.

The defendant in his answer admitted that the land had been conveyed to plaintiff and defendant, as alleged; but in paragraphs 5 to 19, inclusive, of his answer, he set up a parol contract, alleged to have been entered into prior to the conveyance, among the family of the father of plaintiff and defendant, including them, to the effect that the land should be purchased and paid for by all of them, and upon the purchase price being fully paid the title should be taken in the name of the plaintiff and the defendant, but that their father and mother should live on the land and have it as their own for a home as long as either one of them should live, and any one or more of the children who remained unmarried and wished to live there with their mother and father should have the right to do so, and upon the death of both the father and mother the place should then belong absolutely to plaintiff and defendant. By virtue of this family arrangement all of the several members of the family, including plaintiff and defendant, contributed to the payment of the purchase money and succeeded in making full payment, which was followed by execution of a deed conveying the property to plaintiff and defendant, as above stated. After the property had been so conveyed, the entire family, including plaintiff and defendant, continued to reside on it and carry out the terms of the parol agreement for several years; and plaintiff never repudiated the contract until shortly before the institution of the suit, and none of the others ever repudiated it. The personal property referred to in the suit was purchased by the use of the "common fund" produced by all the members of the family in conducting the farm, and by common consent it was understood that all of it should be the property of their mother and father. By reason of the foregoing facts the mother and father have a life interest in the land, and ought to be made parties. It would be inequitable and unjust, and a fraud against the other members of the family, if the plaintiff were allowed to have the land partitioned, and irreparable damages would result from a breach by plaintiff of the family agreement. Whereupon it was prayed: (a) That the father and mother should be made parties; (b) that the interest of all parties in the described real and personal property be fully protected by decree; (c) that specific performance be decreed; (d) that injunction issue; and (e) that the court frame such decree as would meet the exigencies of the case.

By order of court the father and mother were made parties defendant, and allowed

given time in which to answer. Within the time provided answer was filed by them, in which they adopted the answer filed by the original defendant. The plaintiff moved to strike each and all of paragraphs 5 to 19, inclusive, of the original defendant's answer, on the ground that no defense was set up therein. He also moved to strike the answer of the defendants who were made parties by amendment, on the grounds: (a) That they were not proper parties; (b) that the answer set forth no defense. The court overruled the motion to strike, and the plaintiff excepted *pendente lite*. On the trial the plaintiff objected to certain evidence, submitted by the defendants, which tended to prove the parol agreement among the family, which was set up in the portion of their answer which plaintiff had moved to strike; the objection being, in substance, that such evidence was irrelevant, and its purpose was to set up an express trust by parol evidence. The court admitted the evidence. A verdict was rendered in favor of the defendants. The plaintiff made a motion for a new trial, in which complaint was made of the admission of the evidence above referred to. The motion was overruled. A bill of exceptions was subsequently certified, in which error was assigned on the exceptions *pendente lite*, and also on the order overruling the motion for a new trial.

J. A. Beazley, of Crawfordsville, and Noel P. Park, of Greensboro, for plaintiff in error. A. G. Golucke, of Crawfordsville, and Sam H. Sibley, of Union Point, for defendants in error.

ATKINSON, J. [1] 1. The facts of this case in substance are similar to those involved in the case of *Wilder v. Wilder*, 138 Ga. 573, 75 S. E. 854. In that case the property involved was bought with money belonging to the defendant, her sister, and her son, under a parol agreement that the title should be made to the son, and that the property should be held for the defendant, subject to the right of the sister and son to live in the house as long as the defendant occupied it as a home; and it was held that the effort was to create an express trust by parol, which, under our statute, cannot be done. That ruling, when applied to the facts of the present case, is controlling. Accordingly, the court erred in refusing, on motion, to strike so much of the answer of the defendants as sought to set up the parol contract in reference to the land. Counsel for defendants in error strongly rely upon the ruling in the case of *Holmes v. Holmes*, 106 Ga. 858, 33 S. E. 216. That case, however, is distinguishable from the case of *Wilder v. Wilder*, *supra*, and the present, in that the ruling there made was based upon the holding that the grantee in

the deed to the property in which the trust was sought to be set up paid no part of the purchase money for the property. The opinion laid stress upon the point that the grantee named in the deed paid no part of the purchase money, and thereby indirectly recognized the principle ruled in the case of *Wilder v. Wilder*.

[2] 2. The ruling above announced does not apply to the personal property involved in the suit. According to the allegations of the plea, the personal property was paid for with funds common to all the family, and title to it was not placed exclusively in the plaintiff and the original defendant, as was done in regard to the land. Under such circumstances it was competent for the defendants to set up, and, upon proof, enforce, the alleged parol agreement relatively to the personal property.

[3] 3. The plaintiff's mother and father, by the terms of the plea, were alleged to have such an interest in the personal property as to render them proper parties to the suit.

Judgment reversed. All the Justices concur.

(138 Ga. 750)

HILL v. CHASTAIN.

(Supreme Court of Georgia. Sept. 28, 1912.)

(Syllabus by the Court.)

1. APPEAL AND ERROR (§ 302*)—MOTION FOR NEW TRIAL—SUFFICIENCY—ADMISSION OF EVIDENCE.

A ground of a motion for a new trial based upon the admission of evidence should state what objection was made thereto when it was offered at the trial, and should affirmatively show that the objection was then urged; otherwise, no question is raised for determination by the court. *McFarland v. Darien, etc., R. Co.*, 127 Ga. 97, 56 S. E. 74. Under this rule the assignments of error based on the grounds of the motion for new trial complaining of rulings in admitting certain evidence cannot be considered.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1744-1752; Dec. Dig. § 302.*]

2. INSTRUCTIONS.

The excerpt from the charge on which error was assigned contains no error requiring a new trial.

3. SUFFICIENCY OF EVIDENCE.

The evidence was sufficient to support the verdict, and the discretion of the trial court in refusing a new trial will not be disturbed.

Error from Superior Court, Whitfield County; A. W. Fite, Judge.

Action between R. B. Hill and Mrs. M. R. Chastain. From an order refusing a new trial, Hill brings error. Affirmed.

Robt. L. Rodgers, of Atlanta, for plaintiff in error. George G. Glenn, of Dalton, for defendant in error.

ATKINSON, J. Judgment affirmed. All the Justices concur.

(138 Ga. 719)

SOUTHERN RY. CO. v. PRUETT.

(Supreme Court of Georgia. Sept. 24, 1912.)

*(Syllabus by the Court.)***SUFFICIENCY OF EVIDENCE—JUDGMENT AFFIRMED.**

No question other than that of the sufficiency of the evidence to support the verdict is raised in the record; and, it appearing upon consideration of the evidence that it was sufficient to authorize the finding of the jury, the judgment of the court below is affirmed.

Error from Superior Court, Gwinnett County; C. H. Brand, Judge.

Action between the Southern Railway Company and J. G. Pruett. From the judgment, the Southern Railway Company brings error. Affirmed.

E. O. Dobbs, of Buford, and F. M. Byrd and Jno. J. & Roy M. Strickland, all of Athens, for plaintiff in error. C. L. Harris, of Cumming, and O. A. Nix, of Lawrenceville, for defendant in error.

BECK, J. Judgment affirmed. All the Justices concur.

(138 Ga. 750)

ROGERS v. BROWN, Governor.

(Supreme Court of Georgia. Sept. 28, 1912.)

*(Syllabus by the Court.)***1. BAIL (§ 58*)—RECOGNIZANCE—REQUISITES.**

It is essential, to the validity of a recognizance for the personal appearance for trial of a person charged with a penal offense, that the bond show on its face the cause of the arrest. *Nicholson v. State*, 2 Ga. 363.

[Ed. Note.—For other cases, see *Bail*, Cent. Dig. §§ 263-277; Dec. Dig. § 58.*]

2. BAIL (§ 58*)—RECOGNIZANCE FOR APPEARANCE—REQUISITES.

But it is not necessary that the offense be stated with the same degree of particularity as is required in an indictment; and it is sufficient if the offense be named generally as "accessory after the fact," which under Penal Code, § 48, if nothing more appeared, would be equivalent to a charge as for a misdemeanor. See *Rich v. Colquitt*, 61 Ga. 197; *Vinson v. Northen*, 94 Ga. 698, 19 S. E. 991.

[Ed. Note.—For other cases, see *Bail*, Cent. Dig. §§ 263-277; Dec. Dig. § 58.*]

3. BAIL (§ 90*)—FORFEITED RECOGNIZANCE—REQUISITES—FORFEITURE.

But in a proceeding to forfeit a recognizance of the character described in the first headnote, where the evidence relied on to support the action shows that the only charge preferred against the principal was an indictment as accessory after the fact by receiving stolen goods, knowing them to be stolen, and the indictment failed to allege that the principal thief had been convicted (Penal Code, § 168), or that the principal thief could not be taken so as to be prosecuted and convicted (Penal Code, § 169), the indictment for these reasons being fatally defective (*Jordan v. State*, 56 Ga. 92), the evidence did not support a judgment of forfeiture, although it was shown by extrinsic evidence, which was admitted over appropriate objection, that the principal thief had been convicted (*McDaniel v. Campbell*, 78 Ga. 188; *Candler v. Kirksey*, 113 Ga. 309, 38 S. E. 825,

84 Am. St. Rep. 247; *Salter v. State*, 125 Ga. 760, 54 S. E. 685).

[Ed. Note.—For other cases, see *Bail*, Cent. Dig. §§ 401-406; Dec. Dig. § 90.*]

Error from Superior Court, Cobb County; N. A. Morris, Judge.

Action by J. M. Brown, Governor, against F. P. Rogers. On the forfeited recognizance. Judgment for plaintiff, and defendant brings error. Reversed.

Mozley & Moss, of Marietta, for plaintiff in error. J. P. Brooke, Sol. Gen., of Alpharetta, for defendant in error.

ATKINSON, J. Judgment reversed. All the Justices concur.

(138 Ga. 783)

FARMERS' UNION WAREHOUSE, STORAGE & MFG. CO. v. STEWART.

(Supreme Court of Georgia. Sept. 27, 1912.)

*(Syllabus by the Court.)***NEW TRIAL (§ 38*)—GROUNDS—GRANT OF NONSUIT.**

A case was referred to an auditor, who made his report. Exceptions of law and fact were filed thereto. The court overruled all the exceptions of law, and all exceptions of fact, except one, which was sustained. Upon the report and brief of evidence, as amended by the ruling sustaining the exception of fact, the court awarded a nonsuit. The plaintiff moved for a new trial, complaining that the verdict was contrary to the evidence. The motion was amended by the addition of two grounds, the first of which was disapproved and the last approved by reference to the record, which disapproved the recital of fact. *Held* that, inasmuch as the grant of a nonsuit is not reviewable by motion for new trial (*Buchanan v. James*, 134 Ga. 475, 68 S. E. 72), there was no error in refusing a new trial.

[Ed. Note.—For other cases, see *New Trial*, Cent. Dig. § 56; Dec. Dig. § 88.*]

Error from Superior Court, Rockdale County; L. S. Roan, Judge.

Action by the Farmers' Union Warehouse, Storage & Manufacturing Company against W. W. T. Stewart, administrator. Judgment of nonsuit, and plaintiff brings error. Affirmed.

A. C. & J. H. McCalla, of Conyers, for plaintiff in error. J. R. Irwin, of Conyers, and J. E. & L. F. McClelland, of Atlanta, for defendant in error.

ATKINSON, J. Judgment affirmed. All the Justices concur.

(138 Ga. 726)

TURMAN et al. v. WINECOFF et al.

(Supreme Court of Georgia. Sept. 25, 1912.)

*(Syllabus by the Court.)***1. POWERS (§ 12*)—POWERS OF ATTORNEY—DEATH OF GRANTOR.**

In order that a power to sell may survive the death of the grantor, it must be coupled with an interest; and that interest must be,

not in the proceeds alone of the thing to be sold, but in the thing itself. Civ. Code 1910, § 3575 (1); Lathrop v. Brown, 65 Ga. 315; Wilkins v. McGehee, 86 Ga. 764, 13 S. E. 84. Such power will not survive merely because the donee may have paid a valuable consideration for it. Coney v. Sanders, 28 Ga. 511.

[Ed. Note.—For other cases, see Powers, Cent. Dig. §§ 24, 25; Dec. Dig. § 12.*]

2. DEMURRER TO PETITION.

Applying the rule above announced to the contract upon which the petition for intervention in the present case was based, and to the allegations of such petition, the general demurrer to the petition was properly sustained.

Error from Superior Court, Fulton County; J. T. Pendleton, Judge.

Action between S. B. Turman and others and W. F. Winecoff and others. From the judgment, Turman and others bring error. Affirmed.

Moore & Pomeroy, of Atlanta, for plaintiffs in error. King, Spalding & Underwood, Evins & Spence, T. F. Corrigan, A. A. & E. L. Meyer, and J. D. Kilpatrick, all of Atlanta, for defendants in error.

FISH, C. J. Judgment affirmed. All the Justices concur.

(128 Ga. 734)

HALL v. COLEMAN.

(Supreme Court of Georgia. Sept. 27, 1912.)

(Syllabus by the Court.)

1. FINES (§ 1½*)—HUSBAND AND WIFE (§§ 171, 232*)—NATURE OF FINE — CONTRACTS BY WIFE—GUARANTY—"DEBT."

To a suit of foreclosure by a transferee of a note and mortgage on realty the defendant interposed a plea to the effect that she was a married woman at the time of the execution of the note, and that "the note and mortgage" were given for the debt of her husband, and the transferee took them with notice of these facts. On the trial here was evidence to the effect that the defendant's husband, having been convicted of a misdemeanor, was in jail under a sentence to pay a fine. The defendant testified that she called on the agent of the payee to pay the fine, and the latter asked, "Will you give me security for him paying it back and working it out?" The note was given, "so that, if Sam [the husband] did not stay there and work out" the fine, "I would pay it for him." Defendant's husband had been working for the payee, and thereafter continued to do so, "working to pay that debt." There was no evidence that the husband made any promise to the payee to induce him to pay the fine, or that he was consulted in regard to the negotiations which led to the payment of the fine. He was in jail when the note was executed. Defendant further testified: "When I saw Judge Brewton, I got the mortgage fixed up. I signed it. He paid the money in his office to get [defendant's husband] out of jail. * * * I did not get it, and did not pay it."

On the subject of notice, the evidence was to the effect that the plaintiff transferee was an agent of the payee and successor to the agent who paid the fine, and that he knew that the defendant's husband was "working out this debt." In the presence of the defendant the plaintiff was told by another person, in the spring of 1908 before the transfer in August, that she was the wife of the convict whose fine

had been paid, and at the same time she asked the payee, in the presence of the plaintiff, "How long before my note will come back to me?" and was informed, "It won't be very long." Held:

(a) The fine imposed on the husband of plaintiff was not a "debt" due by him to the state.

(b) Under the evidence, the contract to repay the amount paid out in discharge of the fine was the original undertaking of the wife, and in no sense in payment of or as security for a debt due by her husband.

(c) If the debt had been that of the husband, the evidence was insufficient to show notice of such fact to the transferee.

[Ed. Note.—For other cases, see Fines, Cent. Dig. §§ 1, 3; Dec. Dig. § 1½; * Husband and Wife, Cent. Dig. §§ 671-683, 844-848; Dec. Dig. §§ 171, 232.*]

For other definitions, see Words and Phrases, vol. 2, pp. 1864-1886; vol. 8, p. 7628.]

2. APPEAL AND ERROR (§ 1078*)—REVIEW—ABANDONMENT OF ERROR.

Assignments of error, which are not urged in the brief of counsel for the plaintiff in error, will be considered as abandoned.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4256-4261; Dec. Dig. § 1078.*]

3. DIRECTION OF VERDICT—NO ERROR.

Under the pleadings and evidence, there was no error in directing a verdict in favor of the plaintiff.

Error from Superior Court, Liberty County; W. W. Sheppard, Judge.

Action by B. Coleman against Lizzie Hall. Judgment for plaintiff, and defendant brings error. Affirmed.

Shelby Myrick, of Savannah, for plaintiff in error. J. R. Thomas, of Jessup, for defendant in error.

ATKINSON, J. Judgment affirmed. All the Justices concur.

(11 Ga. App. 717)

WILLIS v. CENTRAL OF GEORGIA RY. CO. (No. 4,277.)

(Court of Appeals of Georgia. Oct. 9, 1912. On Motion for Rehearing, Oct. 22, 1912.)

(Syllabus by the Court.)

1. FORMER DECISION CONTROLLING.

This case is controlled by the decisions of the Supreme Court in Southwestern Railroad v. Hankerson, 61 Ga. 115, and Moore v. Southern Ry. Co., 136 Ga. 872, 72 S. E. 403, and is distinguishable from the case of Central of Georgia Ry. Co. v. Pelfry, 11 Ga. App. 119, 74 S. E. 854. The court did not err in directing a verdict in favor of the defendant.

(Additional Syllabus by Editorial Staff.)

2. RAILROADS (§ 376*)—OPERATION—INJURIES TO PERSONS ON OR NEAR TRACK.

Where an intoxicated person fell or lay beside a railroad track, and the engineer of an approaching train supposed him to be a discarded tie, and, having kept a constant lookout, used every means in his power to stop the train on discovering that it was a person, the railroad company is not liable.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1275-1279; Dec. Dig. § 376.*]

3. RAILROADS (§ 356*) — OPERATION — INJURIES TO PERSONS ON OR NEAR TRACK.

That the public had for many years been accustomed to use the railroad track longitudinally as a walkway does not affect the company's liability for causing the death of a person beside the track, where the engineer kept a constant lookout, and used every means in his power to stop the train on discovering the presence of a person near the track.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1228-1234; Dec. Dig. § 356.*]

Error from City Court of Savannah; Davis Freeman, Judge.

Action by Annie Willis against the Central of Georgia Railway Company. Judgment for defendant, and plaintiff brings error. Affirmed.

Osborne & Lawrence and Shelby Myrick, all of Savannah, for plaintiff in error. H. W. Johnson, of Savannah, for defendant in error.

POTTLE, J. The plaintiff in error sued the railway company for the homicide of her husband, and excepts to the direction of a verdict in the defendant's favor. The undisputed evidence shows that the deceased, while in a drunken condition, lay or fell down by the side of the defendant's track in the nighttime, and was struck by the pilot on the engine and killed. The case turns upon the testimony of the engineer, the only eyewitness to the killing, and whose testimony upon material points is undisputed. The point for determination may best be understood from the following quotation from the engineer's testimony: "This track out there is perfectly straight, a level track. After we passed Central Junction, I was looking ahead of my engine. At that time they were laying new rail between the C. & A. crossing and the junction, and there were lots of cross-ties and new iron lying to the side of the track; and I noticed something—as I thought a cross-tie—lying close to the track. I do not mean it was between the two rails. You understand, when they are putting in these new ties, they run them up, throw them to the side of the ties, wherever they find a bad tie there, and when they come to it they put it in. And I thought it was a tie that was lying there, and I got very close to it—I suppose 100 feet possibly—and I saw it raise up that way, and I slammed the brakes on before I shut the engine off, and I shut the steam off after the brakes were on. I did that for the simple fact that I did not have time after I discovered it was a man. That was the first time I discovered that it was a man. Had he not moved or raised his head, the engine would have gone by him without any danger; the train would have gone by him; he would not have been touched at all; but he raised up. He was not between the rails. He was not on the track at all. He appeared to me as though his head must have been

either at the end of a cross-tie, or right between a cross-tie. The engine did not strike him; only the side of the pilot struck him. Just the edge of the pilot struck him in the head, and I slammed the brake on. * * * As to how close I was to him when he first raised his head up, I would say between 100 and 150 feet. I am satisfied it was not any more than that. I could not have stopped my train, within the distance that I saw him, without striking him, before my engine got to him; not when I discovered it was a man, and he raised up."

[1, 2] The case is, in our opinion, absolutely controlled by the decisions of the Supreme Court in *Southwestern Railroad v. Hankerson*, 61 Ga. 115, and *Moore v. Southern Ry. Co.*, 136 Ga. 872, 72 S. E. 403. In the *Hankerson* Case, *supra*, it appeared: That the engineer saw an object lying on the track, just beyond a crossing, which he took to be a hog that had been killed by a freight train just ahead of him. When he got within 100 or 125 yards of this object, he discovered that it was a man, lying between the rails, with his head on a stringer close up to the rail and his body and legs doubled up toward the next stringer and between them. That as soon as he saw this he put on his brakes, reversed his engine, and sounded the whistle. That from the time he discovered it was a man, and not a dead hog, he did everything he possibly could have done to prevent the injury to the person lying on the track. The Supreme Court held: "If one voluntarily becomes drunk, and consequently falls down, or lies down, in a state of insensibility on a railroad track, so that he is injured by a passing train, he cannot recover for injuries so received, even though there may have been contributory negligence on the part of employes of the road." In *Moore's Case*, *supra*, the man injured was sitting upon the end of a cross-tie in the nighttime. There was testimony that the engineer had stated, when at a distance of several hundred yards away, that he saw an object on the track, but thought it was a dog. It was held that a nonsuit was properly granted.

[3] Counsel for the plaintiff contend that, inasmuch as there was testimony for the plaintiff that at the place where the deceased was killed the public had for many years been accustomed to use the track longitudinally as a walkway, it was a question for the jury whether or not the engineer should have been on the lookout for persons on the track, and whether or not he exercised ordinary care and diligence. This evidence does not help the plaintiff's case for two reasons: In the first place, it does not appear that the company knew of this use of its track by the public, or consented to it, either impliedly or expressly. For this reason, the principle announced in *Shaw v. Georgia Railroad*, 127 Ga. 8, 55 S. E. 960, has no ap-

plication. In the second place, the undisputed evidence shows that the engineer was on the lookout; that he saw an object lying near the track which he honestly mistook for a cross-tie; and that, after discovering that it was an animate object, he did everything in his power to stop the train.

Counsel insist that the case is controlled by the decision of this court in *Central of Georgia Ry. Co. v. Pelfry*, 11 Ga. App. 119, 74 S. E. 854; but there are at least three distinguishing features between that case and the present case. In the first place, in that case the engineer was in doubt as to what the object was. It was a suspicious object. He asked his fireman what it was, and the fireman replied that he did not know. He thereupon increased the speed of the train, and, instead of keeping his eyes fastened upon the track, he took them off and looked around again up the track when it was too late to stop the train, after discovering that a man was lying prone upon the track. That case was decided upon its peculiar facts, and this court did not intend to hold (nor could it hold, in view of the decisions of the Supreme Court on the subject) that, where an engineer honestly believes that an object upon or near the track is an inanimate object, and keeps on the lookout, and, as soon as he discovers that the object is a human being, does everything in his power to prevent injury to such person, the company would be liable. Indeed, in the very case relied upon by counsel for the plaintiff, the general rule is thus announced: "If a railway engineer sees a person lying on the track at some distance away, and honestly mistakes him for an inanimate object, failure to check the speed of the train, or take other precautionary measures, will not render the company liable." The present case was within the general rule as announced by the Supreme Court of this state, and not within the exception within which, on account of its peculiar facts, the *Pelfry* Case was held to come. There was no error in directing a verdict in favor of the defendant.

Judgment affirmed.

On Motion for Rehearing.

In the motion for a rehearing, counsel insist that there was such a conflict in the evidence, both in reference to the question whether the deceased was drunk and voluntarily went upon the track in this condition and the question whether the company knew of the prior use of the track as a footway, as to demand the submission to the jury of the question whether the deceased was guilty of such gross negligence as to prevent a recovery. For the purposes of this case it may be conceded that counsel have correctly apprehended the evidence, and that the court

was wrong in stating, in the original opinion, that the evidence was undisputed that the deceased in a drunken condition lay or fell down upon the track, and that there was no evidence that the company knew of the use of the track as a footway. Let it be conceded that the deceased was not drunk. It is utterly immaterial how he came to be upon the track, so long as the company's employes had nothing to do with his presence there, and did not discover him in time to avoid killing him. Let it be admitted that the deceased was not at fault, and that the company was bound to look out for him. His widow must recover, if at all, not because her husband was free from fault, but because the company was negligent. In what does the negligence consist? The engineer was on the lookout. He could have been no more diligent in this respect if he had anticipated the presence of the deceased.

Surely counsel do not mean to contend that the train must creep along at all points on the track where pedestrians have, without the company's permission, previously used the track longitudinally as a footway. The engineer had his eyes open and his vision riveted upon the track. He saw what he thought was a cross-tie. He had no reason to suspect it was anything else. We cannot agree, as counsel contend, that the jury could arbitrarily say the engineer had no right to assume the object was inanimate, but that, in the exercise of ordinary care, he could have known it was a man. He says he was honestly mistaken—that he used his eyesight, and that he had no reason to believe the object was other than he first thought it to be. There is nothing to dispute this testimony. The company was not negligent, and the plaintiff was not entitled to recover, even though her husband was wholly free from fault.

Motion denied.

(11 Ga. App. 755)

GURR v. STATE. (No. 4,318.)

(Court of Appeals of Georgia. Oct. 22, 1912.)

(Syllabus by the Court.)

REVIEW ON APPEAL.

The exceptions to the charge of the court are without merit. The charge as a whole covered every issue in the case. The court ruled correctly on the points raised as to the admissibility of the testimony, and the evidence warranted the verdict.

Error from Superior Court, Early County; W. C. Worrill, Judge.

Sam Gurr was convicted of crime, and brings error. Affirmed.

W. I. Geer, of Colquitt, for plaintiff in error. J. A. Laing, Sol. Gen., of Dawson, and R. R. Arnold, of Atlanta, for the State.

RUSSELL, J. Judgment affirmed.

(11 Ga. App. 759)

WOFFORD v. STATE. (No. 4,341.)

(Court of Appeals of Georgia. Oct. 22, 1912.)

*(Syllabus by the Court.)***SUFFICIENCY OF EVIDENCE.**

The evidence was not sufficient to support the verdict.

Error from City Court of Cartersville; A. M. Foute, Judge.

Lou Wofford was convicted of crime, and he brings error. Reversed.

Wm. T. Townsend, of Cartersville, for plaintiff in error. Watt H. Milner, Sol., of Cartersville, for the State.

POTTLE, J. Judgment reversed.

(11 Ga. App. 722)

HALL v. STATE. (No. 4,002.)

(Court of Appeals of Georgia. Oct. 22, 1912.)

*(Syllabus by the Court.)***REVIEW ON APPEAL.**

No error of law is complained of, and the evidence authorized the conviction of the defendant.

Error from City Court of Dublin; Jas. B. Hicks, Judge.

Arthur Hall was convicted of crime, and brings error. Affirmed.

Burch & Burch, of Dublin, for plaintiff in error. Geo. B. Davis, Sol., of Dublin, for the State.

RUSSELL, J. Judgment affirmed.

(11 Ga. App. 722)

DUNLAP v. STATE. (No. 4,011.)

(Court of Appeals of Georgia. Oct. 22, 1912.)

*(Syllabus by the Court.)***CARRYING WEAPONS.**

The decision in this case is controlled by the ruling of this court in *Cheney v. State*, 10 Ga. App. 451, 73 S. E. 617.

Error from City Court of Ocilla; H. E. Oxford, Judge.

Robert Dunlap was convicted of carrying weapons, and brings error. Affirmed.

Newbern & Meeks, of Ocilla, for plaintiff in error. H. J. Quincey, Sol., of Ocilla, for the State.

RUSSELL, J. Judgment affirmed.

(11 Ga. App. 723)

WILLIAMS v. STATE. (No. 4,014.)

(Court of Appeals of Georgia. Oct. 22, 1912.)

*(Syllabus by the Court.)***REVIEW ON APPEAL.**

The circumstances adduced in evidence by the state were insufficient to authorize the conclusion that the defendant was guilty.

Error from Superior Court, Crawford County; W. H. Felton, Judge.

Fed Williams was convicted of crime, and brings error. Reversed.

H. A. Mathews, of Ft. Valley, and R. H. Culverhouse, of Knoxville, for plaintiff in error. Walter J. Grace, Sol. Gen., of Macon, for the State.

RUSSELL, J. Judgment reversed.

(11 Ga. App. 754)

SEWELL v. STATE. (No. 4,299.)

(Court of Appeals of Georgia. Oct. 22, 1912.)

*(Syllabus by the Court.)***INTOXICATING LIQUORS (§ 131*) — KEEPING LIQUOR IN PLACE OF BUSINESS—EVIDENCE.**

The evidence in this case conclusively showing that the intoxicating liquor found in the place of business of the accused was brought and placed therein without his knowledge or consent, and that he was in no wise connected therewith, and it not appearing that he had any knowledge that the liquor was there, the verdict of conviction was without evidence to support it, and was therefore unauthorized by law.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. § 140; Dec. Dig. § 131.*]

Error from City Court of Carrollton; James Beall, Judge.

J. D. Sewell was convicted of having intoxicating liquors in his place of business, and brings error. Reversed.

Newell & Fielder, of Carrollton, for plaintiff in error. C. E. Roop, Sol., of Carrollton, for the State.

HILL, C. J. Judgment reversed.**DAVIS v. COMMONWEALTH.**

(Supreme Court of Appeals of Virginia. June 13, 1912.)

Error to Corporation Court of City of Newport News.

One Davis was convicted of peddling without a license, in violation of law, and he brings error. Affirmed.

T. J. Christian, of Newport News, for plaintiff in error. The Attorney General, for the Commonwealth.

PER CURIAM. Upon practically the same facts, the questions presented by this record were determined in the case of *Roselle v. Commonwealth*, 110 Va. 235, 65 S. E. 526, adversely to the appellant and in favor of the commonwealth. That decision has since been affirmed by the Supreme Court of the United States; and for the reasons there given the judgment here complained of must be affirmed.

Affirmed.

CARTER v. SOUTHERN RY. CO. (Supreme Court of South Carolina. Dec. 2, 1912.) Order for reargument. For former opinion, see 75 S. E. 952.

PER CURIAM. As only four members of the court heard this case (Mr. Justice WATTS being disqualified), and as the court is equally divided in opinion on an important question, ordered that the case be reargued before a full court during the term allotted for the hearing of appeals from the Sixth circuit.

